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No. 718355

Court of Appeals, Division I  
of the State of Washington

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**Group Health Cooperative,**  
a Washington Corporation,

Appellant,

v.

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

Respondent.

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

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**Brief of Appellant**  
**Group Health Cooperative**

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## INTRODUCTION

Appellant, Group Health Cooperative (hereinafter “Group Health”) requests that this Court reverse the King County Superior Court’s Order Granting Plaintiff Annette Baughman’s Motion for New Trial.

It is undisputed that this medical malpractice action arises out of care provided to a child (M.S.) by a pediatrician (Dr. Donald Milligan) at a Group Health Urgent Care clinic located in Bellevue, Washington near Overlake Hospital Medical Center and its emergency room. Dr. Milligan treated plaintiff M.S. for a common condition in young girls: a urinary tract infection. Ms. Baughman claimed Dr. Milligan negligently failed to suspect sexual abuse in her daughter (M.S.). Group Health presented substantial evidence demonstrating that Dr. Milligan provided treatment to the child according to the standard of care. The primary issue at trial was simple: whether M.S.’s presentation to Dr. Milligan should have been suspicious for sexual abuse.

At trial, Ms. Baughman produced three expert witnesses who each testified that pediatricians, emergency medicine physicians, and internists (among other fields of practice) are held to *identical* standards of care when there is, or should be, some suspicion that a child has been sexually abused.

Ms. Baughman wanted a degree of care jury instruction that described Dr. Milligan as an emergency medicine physician. Ms. Baughman produced no evidence that Dr. Milligan, a Group Health pediatrician, held himself out as a specialist in emergency medicine. Indeed, Ms. Baughman

did not need to present such evidence because the care was not provided in an emergency room and, there was no difference in the standard of care by the testimony of her own experts.

Following a defense verdict, Ms. Baughman asserted the degree of care instruction (Court's Instruction No. 7), which instructed the jury to hold Dr. Milligan to the standard of care of a reasonably prudent pediatrician practicing in an urgent care/emergency room setting, was a misstatement of the law. Ms. Baughman further asserted it deprived the jury from deciding the "key issue" in the case: whether Dr. Milligan should have been held to the standard of care of a reasonably prudent emergency medicine physician or that of a pediatrician.

Because Instruction No. 7 correctly told the jury that a pediatrician working in an urgent care/emergency room setting must meet the standard of care of a pediatrician working in an urgent care/emergency room setting, it was not a misstatement of the law. Regardless, any alleged error was harmless because (1) Ms. Baughman's experts agreed the standard of care in this setting transcends specialty of practice, and (2) Instruction No. 7 did not deprive Ms. Baughman from arguing her theory of the case. Finally, none of the arguments Ms. Baughman made in her motion for new trial were properly preserved for review by the trial court during exceptions to jury instructions.

This Court should reverse the trial court's order granting Ms. Baughman a new trial and reinstate judgment in favor of Group Health.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred by granting Ms. Baughman's motion for a new trial on the basis that Jury Instruction No. 7 contained a misstatement of law and prevented Ms. Baughman from presenting her theory of the case to the jury.
2. The trial court erred by granting Ms. Baughman's motion for a new trial because Ms. Baughman's CR 51(f) exception to the Court's Instruction failed to preserve the arguments she made on her motion for new trial.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did Jury Instruction No. 7—which instructed the jury that a pediatrician working in an urgent care or emergency setting must meet standard of care of a reasonably prudent pediatrician working in an urgent care or emergency room setting—misstate the law?
2. Was Ms. Baughman entitled to an instruction on a theory that she did not present at trial?
3. If Instruction No. 7 did misstate the law, did it affect the jury's verdict in favor of Group Health where there were not distinct standards of care for the jury to decide between?
4. Did Ms. Baughman properly preserve the arguments contained within her motion for new trial when she failed to assert that her "theory of the case" was that Dr. Milligan held himself out as an emergency medicine physician when taking exceptions to jury instructions?

## STATEMENT OF THE CASE

### **1. Group Health pediatrician Dr. Milligan diagnoses M.S. with a urinary tract infection after she presents to urgent care with signs and symptoms of a urinary tract infection.**

On December 22, 2010, Ms. Baughman's seven year-old daughter, M.S., began complaining that she had to frequently urinate and that her urine was red.<sup>1</sup> She felt a stinging, burning sensation during urination but she did not have abdominal pain.<sup>2</sup> Ms. Baughman took M.S. to the Group Health Urgent Care Center in Bellevue, Washington, where M.S. was treated by Donald Milligan, M.D.—a board-certified pediatrician working in the urgent care clinic.<sup>3</sup>

Dr. Milligan ordered a urinalysis and performed a physical examination of M.S.'s urethral area.<sup>4</sup> The urinalysis showed trace amounts of esterase, evidence of blood, and an abnormal amount of white blood cells—all potentially indicating a urinary tract infection.<sup>5</sup> On physical exam, Dr. Milligan found some redness, including an area which was "quite excoriated."<sup>6</sup>

Based on his findings, Dr. Milligan diagnosed M.S. with a urinary tract infection ("UTI").<sup>7</sup> He prescribed antibiotics and told Ms. Baughman to topically apply Vaseline in the urethral area to reduce irritation.<sup>8</sup> He also

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<sup>1</sup> RP 380:21-382:5.

<sup>2</sup> *Id.*

<sup>3</sup> RP 382:3-15.

<sup>4</sup> RP 886:23-887:24.

<sup>5</sup> *Id.*

<sup>6</sup> RP 802:2-10.

<sup>7</sup> CP 1, 2:1-2.

<sup>8</sup> RP 1148:2-21.

ordered a urine culture to determine if the UTI was viral or bacterial and told Ms. Baughman to bring M.S. back in three days if she did not improve.<sup>9</sup>

On Christmas Day, Dr. Milligan called Ms. Baughman to follow-up and see how M.S. was doing.<sup>10</sup> She reported that M.S. improved, but requested a change in the antibiotic prescription.<sup>11</sup> This urgent care encounter is the basis of Ms. Baughman's lawsuit against Group Health.

**2. Ms. Baughman sues Group Health after learning that her step-son molested her daughters.**

In November 2011, Ms. Baughman learned that her 17-year-old step-son was sexually abusing her daughters, M.S. and E.S.<sup>12</sup> After the disclosure of sexual abuse, Ms. Baughman sued Group Health alleging it failed to implement and follow proper procedures for recognizing and reporting child abuse and that its agent, Dr. Milligan, negligently failed to suspect M.S. was being sexually abused during the December 22, 2010 urgent care visit.<sup>13</sup>

**3. At trial, Ms. Baughman focused on Group Health's policies and training and Dr. Milligan's alleged failure to suspect M.S. was being abused.**

The case proceeded to jury trial with the Honorable Dean Lum presiding. At trial, Ms. Baughman presented liability evidence from three physi-

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<sup>9</sup> RP 1149:21-1151:1.

<sup>10</sup> RP 1152:9-1153:13.

<sup>11</sup> *Id.*

<sup>12</sup> CP 1, 3:13-17.

<sup>13</sup> CP 1, 4:2-16.

cians: Dr. Gilbert Kliman, Dr. Richard Cummins, and Dr. Marianne Gausche-Hill.<sup>14</sup>

Ms. Baughman offered Dr. Kliman, a psychiatrist, to testify on Group Health's liability and damages.<sup>15</sup> Dr. Kliman testified Group Health did not meet the standard of care because it had not properly trained its medical staff to recognize child abuse and had not established policies for reporting abuse.<sup>16</sup> The jury rejected these claims and Ms. Baughman has not contested their findings.<sup>17</sup>

Dr. Kliman touched on the duty of medical providers.<sup>18</sup> He testified that the duty to know the signs of, and recognize, child abuse applies to all providers regardless of specialty.<sup>19</sup> He also testified that all medical providers, not just pediatricians, should follow the guidelines established by American Pediatric Association for identifying signs of abuse.<sup>20</sup>

Ms. Baughman offered the testimony of Dr. Cummins, an emergency medicine physician, and Dr. Gausche-Hill, a pediatric emergency physician.<sup>21</sup> Both experts testified Dr. Milligan failed to meet the standard of care.<sup>22</sup>

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<sup>14</sup> RP 5-178; 201-338; 406-590.

<sup>15</sup> RP 421:4-432:5.

<sup>16</sup> RP 422:15-432:5.

<sup>17</sup> CP 119.

<sup>18</sup> RP 422:21-423:2.

<sup>19</sup> RP 422:21-423:2, 426:21-427:15.

<sup>20</sup> RP 427:16-21.

<sup>21</sup> RP 5-178; 201-338.

<sup>22</sup> *Id.*

Dr. Cummins and Dr. Gausche-Hill discussed the universal nature of the standard of care for recognizing and reporting child sexual abuse.<sup>23</sup> They each expressly testified the standard of care for recognizing the signs of child abuse transcended medical specialty and practice environment.<sup>24</sup> Indeed, they both stated that every provider, regardless of specialty or setting, is held to the same standard of care for identifying and reporting suspected child abuse.<sup>25</sup> Dr. Cummins and Dr. Gausche-Hill substantially relied upon pediatric journals and pediatric texts in support of their opinion that M.S.'s presentation to Dr. Milligan was suspicious for sexual abuse.<sup>26</sup>

In response, Dr. Milligan offered the testimony of three nationally recognized experts in the field of child abuse: Dr. Daniel Lindberg, a board-certified emergency medicine physician with fellowship training in child abuse; Dr. Lori Frasier, a board-certified pediatrician with subspecialty certification in child abuse pediatrics; and Dr. Astrid Heger, also a board-certified pediatrician with subspecialty certification in child abuse pediatrics.<sup>27</sup> Each expert testified Dr. Milligan's examination and diagnosis of M.S. met the standard of care and that M.S.'s symptoms and presentation did not warrant an inquiry regarding potential sexual abuse because her symptoms were consistent with a UTI, a common gynecological complaint in pre-pubertal girls.<sup>28</sup> They further testified that they disagreed the stand-

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<sup>23</sup> RP 26:10-27:23; 56:1-57:8; 221:18-222:18; 226:1-227:8; 235:19-237:25.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> CP Exs. 100, 155, 156.

<sup>27</sup> RP 867-956; 968-1065; 1070-1140.

<sup>28</sup> RP 882:20-900:20; 999:19-1013:3; 1101:5-1103:11.

ard of care requires a presumption of “the worst” diagnosis, as advocated by Ms. Baughman’s experts.<sup>29</sup> Rather, Dr. Milligan tested and confirmed the most likely diagnosis (also characterized as the “unifying diagnosis”) and appropriately treated M.S.<sup>30</sup>

**4. Ms. Baughman agreed to removing the “holding out” language in Instruction No. 7, but wanted Dr. Milligan described as an emergency medicine physician.**

The trial court gave a standard of care instruction substantially similar to WPI 105.01. The court’s Instruction No. 7 read:

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 at the time of the care or treatment in question.<sup>31</sup>

Following the defense verdict, in response to a motion by Ms. Baughman, the trial court ruled Instruction No. 7 contained a misstatement of the law, was reversible error, and granted Ms. Baughman’s motion for new trial.<sup>32</sup>

It is necessary to understand the evolution of the trial court’s Instruction No. 7. Toward the end of Group Health’s case, the parties began working with the trial court to create jury instructions.<sup>33</sup> The court went through two sets of proposed instructions and two off-the-record “working

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<sup>29</sup> RP 919:15-920:11; 927:5-929:13; 1030:17-1031:21; 1033:2-15.

<sup>30</sup> RP 882:20-900:20; 999:19-1013:3; 1101:5-1103:11; 1112:17-25; 1115:10-24.

<sup>31</sup> CP 117A, Court’s Instruction No. 7.

<sup>32</sup> RP 1324-1333.

<sup>33</sup> CP 132, 1:19-2:21.

sessions” with counsel before settling on the third and final set of instructions given to the jury.<sup>34</sup>

In the first set of instructions entitled “Version 1.0,” the trial court included Ms. Baughman’s proposed degree-of-care instruction.<sup>35</sup> That instruction read:

A pediatrician who holds himself out as a specialist in Emergency Medicine has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent Emergency Medicine Physician in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.<sup>36</sup>

Group Health generally agreed that degree-of-care language was appropriate, but objected to (1) the language “who holds himself out as a specialist in Emergency Medicine” and, (2) the description of Dr. Milligan’s profession or class as an “Emergency Medicine Physician.”<sup>37</sup>

As to the first issue, Group Health pointed out Ms. Baughman presented no evidence during trial that Dr. Milligan held himself out as an emergency medicine physician.<sup>38</sup>

As to the second issue, Group Health argued the description of Dr. Milligan’s profession or class as an “Emergency Medicine Physician” was inappropriate because Dr. Milligan is board-certified in Pediatrics, not Emergency Medicine, and this would confuse the jury.<sup>39</sup>

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<sup>34</sup> CP 132, 1:19–2:21.

<sup>35</sup> CP 91, Plaintiff’s Proposed Instruction No. 7 (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> CP 132, 2:1–4.

<sup>38</sup> CP 132, 2:5–15.

<sup>39</sup> CP 132, 2:16–19.

Ms. Baughman argued that Dr. Milligan’s class should be that of an emergency medicine physician because the words “Emergency Medicine” were erroneously printed under his name by a transcriptionist on the electronic medical record—a document not given to Ms. Baughman at the time of M.S.’s treatment.<sup>40</sup> In response, Group Health pointed to the only document provided to Ms. Baughman at the time of the urgent care visit: the discharge instructions. That document, written by Dr. Milligan, was signed “Dr. Don Milligan, MD Bellevue Urgent Care/ED – **Pediatrics**.”<sup>41</sup>

After considering the colloquy, the trial court invited Group Health to submit an alternative proposed instruction.<sup>42</sup> Additionally, the court (sua sponte) revised the degree-of-care instruction and provided the parties with Version 2.0 of the instruction:

A pediatrician who works in Emergency Medicine has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent Emergency Medicine Physician in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.<sup>43</sup>

The court removed the “who holds himself out” language in its entirety and inserted “works in” instead. Ms. Baughman made no objection to this revision.<sup>44</sup> However, Group Health renewed its objection to instructing the jury to hold Dr. Milligan—a pediatrician—to the standard of care of an “Emergency Medicine Physician” explaining it would be inherently con-

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<sup>40</sup> CP 132, 2:5–15.

<sup>41</sup> *Id.*, (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> CP 132, 12–13.

<sup>44</sup> CP 132, 12–13.

fusing to direct the jury that a pediatrician working in urgent care must meet the standard of care a reasonably prudent emergency medicine physician.<sup>45</sup>

There was no dispute that M.S. was treated in an urgent care center, not in an emergency room.<sup>46</sup> Further supporting this, no expert testified that there was any difference in the standard of care depending on the setting in which the physician works.<sup>47</sup> All of Ms. Baughman's experts testified that the standard of care for identifying signs of sexual abuse is the same and applies to all providers regardless of their specialty or setting.<sup>48</sup>

Group Health provided the court with its proposed alternative degree-of-care instruction, which became Version 3.0 of the court's instructions.<sup>49</sup> This instruction told the jury that a pediatrician practicing in an urgent care/emergency setting must meet the standard of a reasonably prudent pediatrician practicing in an urgent care/ emergency room setting in Washington.<sup>50</sup>

Ms. Baughman took exceptions to Version 3.0 and objected to the language directing the jury to hold Dr. Milligan to the standard of care of a reasonably prudent *pediatrician* working in an urgent care or emergency room setting.<sup>51</sup> Ms. Baughman wanted the court to replace the word "pedi-

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<sup>45</sup> CP 132, 2:16–19.

<sup>46</sup> CP Ex. 95.

<sup>47</sup> RP 56:1–57:8; RP 237:14–25; 222:9–18.

<sup>48</sup> *Id.*

<sup>49</sup> CP 117; 117A.

<sup>50</sup> CP 117; 117A.

<sup>51</sup> RP 1178:21–1181:17.

atrician” with “physician” in the Court’s Instruction No. 7.<sup>52</sup> Ms. Baughman agreed with the removal of the “holding-himself-out” language and asserted that she believed Version 2.0 was an appropriate instruction.<sup>53</sup>

Counsel for Ms. Baughman stated:

MR. ROBERTS: If the Court looks at Instruction No. 7 –

THE COURT: Seven, hold on.

MR. ROBERTS: This was the holding out instruction, and in Version 2.0 that the Court provided earlier, the Court changed the language from "holds himself out" to "a pediatrician who works in emergency medicine," and then it went on to talk about having to exercise the same degree of care as a reasonably prudent emergency medicine physician.

The No. 7 that's included in this final packet reads, "That the pediatrician practicing in an urgent care/ER setting has a duty to exercise the same degree of care of a reasonably prudent pediatrician in an urgent care emergency room setting."

I think that the word "pediatrician" there should be "physician." That's from the WPI instruction, and the reason that instruction is given, Your Honor, is that when someone from a different specialty fills a role other than they would typically fill, that's when this instruction is given.

So to use a really extreme example, if they decide to staff their emergency department with an allergist, that allergist isn't held to the standard of care of an allergist in the emergency department. He's held to the standard of care of a reasonably prudent emergency room physician.

And so I think this is the defendant's modified language, but it guts the instruction of its intended meaning, by saying that a pediatrician has to perform to the standard of care of a pediatrician. The point of the instruction is to tell the jury that the pediatrician, if

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

he's going to be practicing in an emergency room, has to practice to the same standard as an emergency room physician, and not the same standard as a pediatrician. That doesn't make any sense.

So I think this is the defendant's proposed instruction, and **I thought that the Court's Version 2.0 Instruction 7, which removed the language "who holds himself out" and just said, "A pediatrician who works in emergency medicine." I think that's the correct language based on the practice instruction.** And the current Instruction No. 7, I don't think makes -- well, one, I think it misstates the law and two, I don't think it makes any sense.

THE COURT: Well, your distinction is actually lost on me. So I'm, yeah --

MR. ROBERTS: Maybe I should put them up side by side?

THE COURT: Well, I know there's a difference, but I'm not sure, with the language here that says -- now, I guess you would have a point if you said, "A reasonably prudent pediatrician period." But it says, "Had a duty to the degree of skill, care, and learning expected of a reasonably prudent pediatrician in an urgent care/emergency room setting."

So it's not just any pediatrician, it's a pediatrician who is in the ER or urgent care. So I'm not sure your -- I'm not sure your distinction is a difference, and your distinction is lost on me. I know there is a distinction, I know, I appreciate the distinction. But I'm not sure that there's a difference.

MR. ROBERTS: I think there is, Your Honor, and that's because, with regard to this word --

THE COURT: Right.

MR. ROBERTS: **"Pediatrician," here this instruction as it reads suggests that there is some type of unique standard of care for a pediatrician in an urgent care setting, when in fact the whole purpose of this instruction is to say that without regard to the specialty in which the person is trained, here pediatrician, if they're in an emergency room setting, they have to exercise the same degree of skill, care, and learning expected of**

**a reasonably prudent physician in an emergency room setting.**  
Not another pediatrician.

THE COURT: All right.

MR. ROBERTS: So it's supposed to be physician, generally, but –

THE COURT: All right. Thank you. I understand your argument. I frankly don't see the difference actually. But all right. Thank you. We'll go ahead and instruct the jury.<sup>54</sup>

The court instructed the jury using Version 3.0.<sup>55</sup> The jury returned with a 10-2 verdict in favor of Group Health.<sup>56</sup>

**5. The trial court granted Ms. Baughman's motion for new trial on the ground that Instruction No. 7 contained an error of law.**

After receiving the defense verdict, Ms. Baughman moved for a new trial.<sup>57</sup> She claimed that Instruction No. 7, the degree-of-care instruction, incorrectly stated the law and kept the jury from deciding between two standards of care (emergency medicine physician vs. pediatrician), stating – for the first time – it was the “central issue” of the case.<sup>58</sup> According to Ms. Baughman, her entire case was premised on the theory that Dr. Milligan was holding himself out as a specialist in emergency medicine.<sup>59</sup> This new claim was contrary to Ms. Baughman's counsel agreeing that removal of the “holding out” language was appropriate and stating as much during

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<sup>54</sup> RP 1178:21–1181:17 (emphasis added).

<sup>55</sup> CP 117A.

<sup>56</sup> CP 119.

<sup>57</sup> CP 128.

<sup>58</sup> CP 128, 1–2, 5–6.

<sup>59</sup> CP 128, 2.

exceptions.<sup>60</sup> This new claim also ignored the testimony of her own standard of care experts.

Ms. Baughman claimed Instruction No. 7 misstated the law in the same manner as the disputed jury instructions in *Richards v. Overlake Hosp. Med. Ctr.* and *Dinner v. Thorp*.<sup>61</sup> She argued that Instruction No. 7 contained a “flat misstatement of the law” because it and the *Richards* instruction were “identically-worded.”<sup>62</sup> Ms. Baughman also argued that by instructing the jury to hold Dr. Milligan to the standard of “a reasonably prudent pediatrician working in an urgent care/emergency room setting,” the court endorsed Group Health’s theory of the case and signaled to the jury that her experts had not been qualified to criticize Dr. Milligan.<sup>63</sup>

In response, Group Health asserted that (1) the instruction did not misstate the law, (2) Ms. Baughman was not entitled to a “holding out” instruction because she agreed to removal of the “holding out” language and did not present evidence that Dr. Milligan held himself out as an emergency medicine physician, (3) there were not two standards of care for the jury to decide between, only common expert disagreement as to the characterization of the standard of care and, (4) Ms. Baughman expressly waived the “holding out” issue and failed to properly preserve any foundation for a motion for new trial.<sup>64</sup>

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<sup>60</sup> RP 1178:21–1181:17.

<sup>61</sup> CP 128, 4–7; *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 796 P.2d 737 (1990); *Dinner v. Thorp*, 54 Wn.2d 90, 338 P.2d 137 (1959).

<sup>62</sup> CP 128, 5–6.

<sup>63</sup> CP 128, 2.

<sup>64</sup> CP 132.

At the hearing on the motion for new trial, the trial court ruled that Ms. Baughman properly preserved her objection for review when she took exception to Instruction No. 7.<sup>65</sup> Next, the court found that Jury Instruction No. 7 contained legal error.<sup>66</sup> The court stated that it was “difficult for [the court] to distinguish [this case] from the *Richards* and *Dinner* case (sic).”<sup>67</sup> The court did not reference that Group Health submitted a sur-reply which discussed and distinguished *Richards* at length.<sup>68</sup>

The court then considered “whether there’s any factual evidence supporting [Ms. Baughman’s] proposed alternative [Version 2.0] to the Court’s No. 7.”<sup>69</sup> First, it noted that whether Dr. Milligan held himself out as an emergency medicine physician was a “contested factual issue at trial.”<sup>70</sup> It then found Ms. Baughman introduced evidence supporting the conclusion that Dr. Milligan held himself out as a specialist and that an urgent care center is equivalent to an emergency room.<sup>71</sup> That supporting evidence was the electronic medical record of M.S.’s visit in which contained the words “Emergency Medicine” under Dr. Milligan’s electronic signature and that a patient could have access to that record if they request it (although that did not occur in this case).<sup>72</sup> The court added that Ms. Baughman’s decision to take M.S. to an urgent care center after 5:00 pm,

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<sup>65</sup> RP 1327:18–1329:13.

<sup>66</sup> RP 1330:1–23.

<sup>67</sup> RP 1330:5–8.

<sup>68</sup> CP 134.

<sup>69</sup> RP 1331:10–12.

<sup>70</sup> RP 1331:12–13.

<sup>71</sup> RP 1331:13–17.

<sup>72</sup> RP 1331:18–25.

instead of her primary-care pediatrician’s office supported an “inference” that Dr. Milligan held himself out as an emergency medicine physician.<sup>73</sup> The court came to this conclusion after having (in Version 2.0) removed the “holding out” language with the approval of Ms. Baughman’s counsel.<sup>74</sup>

The court then considered whether the instructional error “made a difference, given the testimony that the standard of care ... for emergency room doctors and pediatricians is the same” in the outcome of the trial.<sup>75</sup> The court found that even though “plaintiff’s experts said that it was the same,” the issue was “hotly contested ... by the defense experts.”<sup>76</sup> There had also been “substantial discussion and disagreement about the decision tree, about the differential diagnosis, that the difference between – in approach between [Group Health’s experts] and [Ms. Baughman’s experts].”<sup>77</sup>

Consequently, the trial court ruled that the instructional error contained in Jury Instruction No. 7 affected the outcome of the trial and granted Ms. Baughman’s motion for a new trial.<sup>78</sup> Group Health timely appealed.<sup>79</sup>

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<sup>73</sup> RP 1332:1–7.

<sup>74</sup> RP 1180:2–7.

<sup>75</sup> RP 1332:12–15.

<sup>76</sup> RP 1332:12–18.

<sup>77</sup> RP 1332:24–1333:2.

<sup>78</sup> RP 1332:16–1333:14; CP 135A.

<sup>79</sup> CP 136.

## STANDARD OF REVIEW

If the trial court grants a new trial based on an error of law, “no element of discretion is involved.”<sup>80</sup> A grant of a new trial based on an error of law is reviewed de novo.<sup>81</sup> And, a grant of a new trial based on “claimed errors of law in the giving of jury instructions” is also reviewed de novo.<sup>82</sup>

In this case, Ms. Baughman moved for a new trial on the grounds that Jury Instruction No. 7 contained a “flat misstatement of the law,” and created reversible error.<sup>83</sup> The trial court agreed and ordered a new trial.<sup>84</sup> Accordingly, the trial court’s order—that Jury Instruction No. 7 contained an error of law—is reviewed de novo.

However, for reasons explained in Part B, below, this Court need not reach the merits of the trial court’s order granting Ms. Baughman’s motion for new trial on Instruction No. 7, because Ms. Baughman did not properly preserve the issue for review on a motion for new trial as required by CR 51(f).

## ARGUMENT

### A. It was not error to give Instruction No. 7.

Jury instructions are sufficient if, taken as a whole, they properly inform the jury of the applicable law, do not mislead the jury, and permit the parties to argue their theories of the case.<sup>85</sup> But even if a jury instruction

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<sup>80</sup> *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 158, 776 P.2d 676 (1989)(internal quotations omitted).

<sup>81</sup> *Teter v. Deck*, 174 Wn.2d 207, 215–16, 274 P.3d 336 (2012).

<sup>82</sup> *Hall v. Sacred Heart Med. Ctr.*, 100 Wn.App. 53, 61, 995 P.2d 621 (2000).

<sup>83</sup> CP 128 at 11:2–10.

<sup>84</sup> CP 135A; RP 1324:10–1333:19.

<sup>85</sup> *Rekhter v. Dep’t of Soc. and Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014).

misstates the law, Washington courts will find the error harmless if it had no effect on the jury's verdict *or* did not deprive a party of his or her theory of the case.<sup>86</sup> And, a party is not harmed, and therefore has no complaint, if the court refuses to give an instruction on a theory which the party did not "stress" during trial.<sup>87</sup>

***1. Instruction No. 7 properly informed the jury of the applicable law.***

In Washington, a healthcare provider will be found liable for medical negligence if he "fails to exercise the degree, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs ... in the same or similar circumstances."<sup>88</sup> If the physician is a specialist in a particular field, he has the duty to provide the level of care provided by a reasonably prudent specialist in that field.<sup>89</sup> The pattern jury instructions, WPI 105.01 and 105.02, succinctly state each standard of care.

Here, the court gave an instruction which was a replica of WPI 105.01. WPI 105.01 states in relevant part:

A (type of health care provider) has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent (health care provider) in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.

Instruction No. 7 told the jury:

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<sup>86</sup> *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 796 P.2d 737 (1990).

<sup>87</sup> *Tiderman v. Fleetwood Homes*, 102 Wn.2d 334, 684 P.2d 1302 (1984).

<sup>88</sup> RCW 7.70.040 (emphasis added).

<sup>89</sup> *Dinner v. Thorp*, 54 Wn.2d 90, 97, 338 P.2d 137 (1959).

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 at the time of the care or treatment in question.<sup>90</sup>

There is no question that this instruction correctly states the law: a physician (in this case a pediatrician working in an urgent care/emergency room setting) must meet the standard of care of a reasonably prudent physician practicing in the same or similar circumstances (a pediatrician working in an urgent care/emergency room setting).

**2. *Richards v. Overlake and Dinner v. Thorp are distinguishable.***

In bringing her motion for new trial, Ms. Baughman relied upon two cases: *Richards v. Overlake Hosp. Med. Ctr.*, and *Dinner v. Thorp*.<sup>91</sup>

In *Richards v. Overlake Hosp. Med. Ctr.*, Linda Richards gave birth to her daughter, Michelle, at Overlake Hospital in 1984.<sup>92</sup> Shortly after birth, the Richards' family physician, Dr. Haeg, noticed possible abnormalities and ordered special care and extra observation at the hospital.<sup>93</sup> At a post-discharge follow-up visit, Dr. Haeg referred Michelle to Children's Hospital because he feared she had neurological complications.<sup>94</sup> The doctors at the Children's Hospital diagnosed her with numerous birth defects and hy-

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<sup>90</sup> CP 117A, Court's Instruction No. 7 (emphasis added).

<sup>91</sup> *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 796 P.2d 737 (1990); *Dinner v. Thorp*, 54 Wn.2d 90, 338 P.2d 137 (1959).

<sup>92</sup> *Richards*, 59 Wn.App. at 268–69.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

perinsulism—all of which the Richards alleged Overlake and Dr. Haeg failed to discover.<sup>95</sup>

The Richards brought suit against Dr. Haeg and several other providers.<sup>96</sup> The jury returned a 10-2 verdict in favor of the defendants.<sup>97</sup> The Richards appealed on the grounds that one of the jurors introduced impermissible expert evidence during deliberations and that the trial court gave several improper jury instructions.<sup>98</sup>

For purposes of this case, the relevant instruction directed the jury that regardless of whether it found that Dr. Haeg held himself out as a pediatrician or assumed the care of a condition ordinarily treated by a pediatrician, he had to exercise the degree of skill, care and learning of a reasonably prudent family practitioner in the State of Washington.<sup>99</sup>

The Court of Appeals held the instruction contained a “flat misstatement of the law.”<sup>100</sup> The instruction improperly kept the jury from deciding whether to hold Dr. Haeg to the standard of care of a family physician or a pediatrician by instructing them to use the family physician standard.<sup>101</sup> Nevertheless, the court found the error harmless and insufficient to warrant a new trial.<sup>102</sup> As more fully explained below, *Richards* is distinguishable from this case.

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<sup>95</sup> *Richards*, 59 Wn.App. at 268–69.

<sup>96</sup> *Id.*, at 269–70.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*, at 275–76.

<sup>100</sup> *Id.*, at 276.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, at 276–77.

Ms. Baughman also relied on *Dinner v. Thorp*—where the Washington Supreme Court ordered a new trial based on instructional error.<sup>103</sup> Dinner sued her gynecologist, Dr. Thorp, for the death of her baby during delivery.<sup>104</sup> At trial, the jury returned a defense verdict and Dinner appealed, assigning error to several jury instructions and the trial court’s limitation of her cross-examination of a defense expert.<sup>105</sup>

With regard to the jury instructions, the Supreme Court did not approve of the standard-of-care instruction.<sup>106</sup> The instruction told the jury that a specialist had the duty to practice at the level of an average physician practicing the same specialty in the same or similar circumstances.<sup>107</sup> The instruction correctly stated the law in 1959: a specialist must meet the standard of care of an average specialist in the same or similar circumstances.<sup>108</sup> The court found the instruction was misleading, however, because the jury could have easily read the instruction to mean that a specialist only has to meet the standard of care for an average physician.<sup>109</sup> No such ambiguity exists within Instruction No. 7 in this case.

Broken down to its elements, the *Richards* instruction said that even if an **A** holds himself out as **B** or takes on care uniquely handled by **B**, the

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<sup>103</sup> *Dinner*, 54 Wn.2d at 97.

<sup>104</sup> *Id.*, at 91–92.

<sup>105</sup> *Id.*, at 92.

<sup>106</sup> *Dinner*, 54 Wn.2d at 97.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

jury still has to hold him to the standard of care of a reasonably prudent A.<sup>110</sup> The instruction plainly got the law wrong.<sup>111</sup>

On the other hand, the *Dinner* instruction said that a physician practicing A must be held to the standard of care of an **average physician** practicing A's specialty in the same or similar circumstances.<sup>112</sup> The instruction got the law (in 1959) right, but it confused the jury with the unnecessary "average-physician" language.<sup>113</sup>

Here, Instruction No. 7 has none of the defects which made the *Richards* and *Dinner* instructions improper. Instruction No. 7 simply tells the jury that a **pediatrician who works in an urgent care center or emergency room** has to practice at the level of a **reasonably prudent pediatrician who works in an urgent care center or emergency room** (i.e. the same or similar circumstances).<sup>114</sup> Unlike the *Richards* instruction, it does not say that a pediatrician who holds himself out as a neurosurgeon is held to the standard of care of a pediatrician. And unlike the *Dinner* instruction, Instruction No. 7 does not say that a pediatrician practicing in an urgent care center has to practice at the level of an average physician practicing as a pediatrician in an urgent care center. Instruction No. 7 was not an error of law.

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<sup>110</sup> *Richards*, 59 Wn.App. at 276.

<sup>111</sup> *Id.*

<sup>112</sup> *Dinner*, 54 Wn.2d at 97.

<sup>113</sup> *Id.*

<sup>114</sup> RCW 7.70.040.

**3. Even if Instruction No. 7 contained an error of law, it was harmless because it was supported by substantial evidence and did not prevent Ms. Baughman from arguing her theory of the case.**

Even if a jury instruction misstates the law, it is well settled that Washington courts will find the error harmless if it had no effect on the jury's verdict *or* did not deprive a party of her theory of the case.<sup>115</sup>

As explained above, the *Richards* instruction incorrectly told the jury that a family physician could only be held to a family-physician standard of care even if he held himself out as a pediatrician.<sup>116</sup> However, the *Richards* Court found the error contained in the instruction was harmless and did not warrant the granting of a new trial.<sup>117</sup> The standard-of-care instruction was harmless for two reasons: (1) it told the jury to use the standard of care which the Richards argued for at trial and (2) the instruction had no effect on the jury's verdict.<sup>118</sup>

In arriving at its holding, the court noted that a party is not entitled to an instruction on a theory of the case unless the theory was supported by substantial evidence at trial.<sup>119</sup> The Richards' entire theory of liability against Dr. Haeg was based on the standard of care of a family practitioner, not a pediatrician: "[t]he Richards did not position or argue the case or

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<sup>115</sup> See, *Tiderman*, 102 Wn.2d at 337–340 (1984); *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); *Fergen v. Sestero* 174 Wn.App. 393, 396–98, 298 P.3d 782 (2013); *Richards*, 59 Wn.App. at 276–77.

<sup>116</sup> *Richards*, 59 Wn.App. at 276–77.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

submit substantial evidence to warrant giving [their] correct proposed instruction even though it was the properly worded instruction.”<sup>120</sup>

In sum, the Court of Appeals found that the jury instruction did not prejudice the Richards because they failed to support their proposed alternative instruction with substantial evidence.<sup>121</sup> Not only that, the instruction instructed the jury to use the standard of care on which the Richards based their theory of liability: that Dr. Haeg was liable because he violated the family-practitioner standard of care.<sup>122</sup>

***a. The standard of care for recognizing signs of sexual abuse is universal.***

As it relates to the negligence claim against Dr. Milligan, Ms. Baughman’s theory of the case was straightforward: based on M.S.’s presentation, Dr. Milligan should have suspected sexual abuse.<sup>123</sup> Additionally, Ms. Baughman’s theory of the case was premised on the contention that all healthcare providers are held to the same standard of care for identifying signs of sexual abuse in a child.

Ms. Baughman’s standard of care experts, Dr. Cummins and Dr. Gausche-Hill, testified the standard of care for a pediatrician and an emergency room physician, in the setting of suspected sexual abuse, is the same.

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<sup>120</sup> *Richards*, 59 Wn.App. at 276–77.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> RP 1199:10–20.

Dr. Cummins testified during trial on direct examination:

Q. ...Do you feel—are you familiar and do you feel comfortable talking about the standard of care of a reasonably prudent physician in an urgent care setting?

A. Yes, I do.

Q. Is that something you're familiar with?

A. That's correct.

Q. And does that standard change if you go to New York or to California or to Florida?

A. No. I think it's fairly well accepted to be national standards of care for emergency medicine.

Q. Dr. Cummins, does the standard of care, in your opinion, change if the person providing the care is trained as a pediatrician or an internist or in emergency medicine?

A. No. The -- the standard of care is driven by what the problem is, and there are various physicians of various backgrounds that have a standard of care to meet around the problem, as opposed to the setting that they might be working in.<sup>124</sup>

Dr. Gausche-Hill testified during trial on direct examination:

Q. And this standard of care that you're referring to, is this -- all these things, are these what are required of a reasonably prudent urgent care doctor?

A. Yes.

Q. Does it matter or change if the physician in question is trained in pediatrics or trained in emergency medicine or internal medicine?

A. No. Pediatricians, emergency physicians, and pediatric emergency physicians, family physicians all have been trained in signs and symptoms of child abuse and sexual

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<sup>124</sup> RP 56:1-57:8 (legal objection omitted).

abuse and are considered mandated reporters. So if we suspect it, we report it.<sup>125</sup>

In addition, Dr. Cummins and Dr. Gausche-Hill heavily relied upon pediatric journals and texts as the basis for their standard of care opinions. Dr. Cummins relied upon an article from the American Academy of Pediatrics and explained it as the “consensus guideline” of the “red-flags” for sexual abuse.<sup>126</sup> Dr. Cummins testified his opinions were consistent with the article.<sup>127</sup>

Dr. Gausche-Hill spent a large portion of her direct testimony explaining the authority for her opinions relating to the standard of care for suspecting sexual abuse. She testified her opinions were supported by articles from the journal of the American Academy of Pediatrics and the textbook “The Pediatric Patient.”<sup>128</sup> Additionally, Dr. Gausche-Hill was asked by Ms. Baughman’s counsel:

Q. And if we go to the differential diagnosis decision-making process that we talked about a little earlier, could you take us through how you would use a differential diagnosis, given [M.S.’s] presentation, **from the standpoint of a pediatric practitioner?**<sup>129</sup>

In response, Dr. Gausche-Hill went through what, in her opinion, the differential diagnosis should have been from the standpoint of a pediatric practitioner.

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<sup>125</sup> RP 237:14–25; See 222:9–18.

<sup>126</sup> RP 115:8–116:5.

<sup>127</sup> *Id.*

<sup>128</sup> RP 250:6–251:21; CP Exs. 100, 155, 156.

<sup>129</sup> RP 279:9–13 (emphasis added).

Ms. Baughman's expert psychiatrist, Dr. Kliman, testified on direct examination by Ms. Baughman's counsel:

Q. When we're talking about doctors, should that particularly include doctors who deal with children?

A. Yes. The guidelines of the American Pediatric Association are very specific that all physicians should follow their guidelines of a high index of suspicion of child sex abuse if it's included in the potential differential diagnosis.<sup>130</sup>

In questioning Dr. Milligan, counsel for Ms. Baughman asked:

Q. All right. And you agree that **as a pediatrician or as a physician practicing in an urgent care setting**, if you see something in the child's presentation that's concerning for sexual abuse, you have an obligation to pursue that, don't you?<sup>131</sup>

...

Q. When a little girl comes into **an urgent care center or pediatrician's office**, and she has redness and irritation and an excoriation of her vaginal opening, there's no harm in asking the child or her mother how the entrance to her vagina got excoriated and irritated; isn't that true?<sup>132</sup>

Ms. Baughman presented testimony on what the standard of care required of a pediatrician. Ms. Baughman did not present any testimony that the standard of care of a pediatrician somehow differs from the standard of care of an emergency room physician or that this was a key factual issue for the jury to decide. This simply was not Ms. Baughman's theory of the case at trial. Ms. Baughman spent the bulk of her case establishing that the

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<sup>130</sup> RP 427:16-21.

<sup>131</sup> RP 800:23-801:2.

<sup>132</sup> RP 806:11-15.

standard of care is universal. Despite this, Ms. Baughman argued *the exact opposite* in her motion for new trial:

Once the Court incorrectly instructed the jury that Dr. Milligan was to be judged according to the standard of care of a *pediatrician*, Plaintiffs' were left without a leg to stand on. The testimony of Plaintiffs' experts, who applied the standard of care for *emergency physicians*, was rendered irrelevant—leaving Plaintiffs case without sufficient expert support.<sup>133</sup>

Ms. Baughman's post-verdict contentions are contrary to the evidence she presented at trial and inconsistent with the testimony of her experts.

The only difference between Version 2.0 (to which Ms. Baughman took no issue and expressly endorsed during exceptions) and Version 3.0 of the instructions is the *phrasing* of Dr. Milligan's profession or class:

**Version 2.0**

*A pediatrician who works in Emergency Medicine* has a duty to exercise the degree of skill, care, and learning expected of a reasonably prudent *Emergency Medicine Physician* in the State of Washington acting in the same or similar circumstances at the time of the care or treatment in question.<sup>134</sup>

**Version 3.0/Jury Instruction No. 7**

*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 at the time of the care or treatment in question.<sup>135</sup>

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<sup>133</sup> CP 128, 10:15–19 (emphasis in original).

<sup>134</sup> CP 132, 12–13 (emphasis added).

<sup>135</sup> CP 117A, Court's Instruction No. 7 (emphasis added).

Ms. Baughman cannot demonstrate that use of the phrase “pediatrician in an urgent care/emergency room setting” is a misstatement of the law or substantially different from a “physician practicing in an urgent care/emergency room setting” as she argued was the appropriate approach during exceptions to instructions. Indeed, Ms. Baughman’s counsel questioned her experts and Dr. Milligan on the standard of care of a pediatrician or physician practicing in an urgent care setting. The record is very clear that Ms. Baughman presented no testimony that the standard of care of a pediatrician differs from the standard of care of an emergency room physician in this setting.

***b. The disagreement amongst experts did not amount to two different standards of care.***

On her motion for new trial, Ms. Baughman attempted to differentiate between the allegedly different standards of care by arguing that her experts testified all physicians should “assume the worst” while Group Health’s experts testified to a “different” standard of care which is to come to a “unifying diagnosis.”<sup>136</sup> Ms. Baughman’s experts testified the standard of care required Dr. Milligan to assume M.S. was being sexually abused, while Group Health’s experts testified that the standard of care required Dr. Milligan to come to a unifying diagnosis—which he did when he diagnosed M.S. with a UTI.<sup>137</sup> This opposing testimony was nothing more than common differing expert opinion.

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<sup>136</sup> CP 133, 4:9–6:3.

<sup>137</sup> See Sec. A.3.a., above; RP 872:16–873:6, RP 919:23–920:21, RP 940:18–941:18, RP 992:18–25, 1010:24–1011:23, 1088:4–1090:14, 1094:23–1100:13.

It is expected that opposing experts in medical negligence cases will disagree on the approach to, or characterization of, the standard of care. That is exactly what the experts did in this case. The experts did not, however, differentiate between two applicable standards of care based on specialty of physician (i.e., pediatrician vs. emergency room physician).<sup>138</sup> Nor did they testify that one standard of care is to be applied over another depending on whether or not a child presents to a pediatrician's office, an urgent care, or an emergency room.<sup>139</sup>

Group Health called national leaders in the field of sexual abuse to rebut Ms. Baughman's theory of the case: that M.S.'s presentation should have indicated to Dr. Milligan there was a possibility she was being sexually abused. These three experts, unlike Ms. Baughman's experts, are specialists in the field of child sexual abuse and have far more experience in evaluating and addressing the specific issue of when sexual abuse should be suspected.

Dr. Lindberg is a board-certified emergency medicine physician who works at the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect in Denver, Colorado.<sup>140</sup> Dr. Lindberg's practice involves consulting with other physicians regarding whether findings upon examination of children are suspicious for abuse and if so, what the physician should do to investigate further.<sup>141</sup> In other words, he tells physicians

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<sup>138</sup> *Id.*

<sup>139</sup> See Sec. A.3.a., above; RP 872:16–873:6, RP 919:23–920:21, RP 940:18–941:18, RP 992:18–25, 1010:24–1011:23, 1088:4–1090:14, 1094:23–1100:13.

<sup>140</sup> RP 867:22–869:21, 871:8–9.

<sup>141</sup> RP 869:22–870:13.

when abuse should or should not be suspected. Most of his clinical work is in a general emergency department.<sup>142</sup> Dr. Lindberg testified that M.S.’s history and presentation was not suspicious for sexual abuse and was consistent with Dr. Milligan’s diagnosis of a UTI.<sup>143</sup> He further testified that “assuming” the worst (in this case sexual abuse)—as suggested by Ms. Baughman’s experts, Dr. Cummins and Dr. Gausche-Hill—is a lazy approach.<sup>144</sup> Instead, Dr. Lindberg agreed that he would “consider” the worst.<sup>145</sup> His opinion, however, was that M.S.’s presentation did not necessitate a consideration of sexual abuse as it was consistent with a UTI.<sup>146</sup> This does not amount to a competing standard of care.

Drs. Frasier and Heger are pediatricians with subspecialty certifications in child abuse pediatrics.<sup>147</sup> They are involved exclusively in the treatment and evaluation of children where sexual abuse is suspected. Dr. Frasier is the Chief of the Division of Child Abuse and Pediatrics at Penn State Children’s Hospital.<sup>148</sup> Dr. Heger founded The Medical Center Violence Intervention Program for the University of Southern California.<sup>149</sup> Dr. Heger has spent her career researching the medical diagnosis of child sexual abuse in relation to how the diagnosis was made and whether it was accurately diagnosed.<sup>150</sup> Both Dr. Frasier and Dr. Heger testified that

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<sup>142</sup> RP 872:16–873:6.

<sup>143</sup> RP 883:6–18, 896:8–900:20.

<sup>144</sup> RP 919:23–920:21.

<sup>145</sup> *Id.*

<sup>146</sup> RP 940:18–941:18.

<sup>147</sup> RP 969:1–970:3, 1071:2–1073:1.

<sup>148</sup> RP 971:9–973:1.

<sup>149</sup> RP 1073:5–1074:14.

<sup>150</sup> RP 1071:2–1081:23.

M.S.'s presentation was not suspicious for anything more than a common UTI and did not require inquiry into whether M.S. was being abused.<sup>151</sup>

Finally, all three experts for Group Health testified that a UTI associated with erythema and/or excoriation is one of the most common gynecological complaints in female children around the age of seven years old.<sup>152</sup>

By their credentials alone, the Group Health experts are the most qualified to address the issue of when sexual abuse should be suspected. This is in contrast to the credentials of Ms. Baughman's experts. Dr. Cummins is an emergency medicine physician at the University of Washington Medical Center (not Children's Hospital) and rarely treats children.<sup>153</sup> Dr. Kliman is a psychiatrist and does not provide medical care to children in any setting.<sup>154</sup> Finally, Dr. Gausche-Hill, while she sees children as a pediatric emergency physician, does not have specialty training in the assessment of children with suspected abuse or neglect like all three of the experts for Group Health.<sup>155</sup>

***c. Ms. Baughman did not claim a "holding out" issue until after the defense verdict.***

Ms. Baughman produced no evidence that Dr. Milligan held himself out as a specialist in emergency medicine or that it was an issue properly before the jury. Of course, Ms. Baughman did not need to produce such evidence because she spent the entire trial establishing that the standard of

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<sup>151</sup> RP 992:18–25, 1010:24–1011:23, 1088:4–1090:14, 1094:23–1100:13.

<sup>152</sup> RP 896:8–899:16, 992:1–14, 1115:2–1115:9.

<sup>153</sup> RP 6:4–7:4, 39:2–15, 124:11–127:10.

<sup>154</sup> RP 407:19–410:5.

<sup>155</sup> RP 203:1–212:21.

care is universal. Ms. Baughman did not testify that she believed Dr. Milligan to be an emergency medicine physician and none of her experts said that Dr. Milligan had done so either. Ms. Baughman similarly elicited no such testimony from Dr. Milligan (whom she called as a witness) in her case in chief.

There is no dispute that the December 22, 2010 encounter occurred in an urgent care facility at the Bellevue Clinic of Group Health. The visit did not occur in an emergency department of a hospital. It is also undisputed that Dr. Milligan is a board-certified pediatrician—a specialist in the treatment of children. Ms. Baughman made no claim—at any time before her motion for new trial—that the jury must decide whether or not Dr. Milligan held himself out as a specialist in emergency medicine.

This is made clear in Ms. Baughman’s endorsement of Version 2.0 of the degree-of-care instruction which expressly removed the “holding out” language. Moreover, the note on use of WPI 105.02 states:

Use this instruction for a claim of negligence involving any healing art, such as that practiced by a physician, surgeon, dentist, chiropractor, or other profession, by filling the blanks with the appropriate words. This instruction is to be used if the practitioner is a specialist, claimed to be a specialist, or provided care or treatment within the exclusive province of a specialist. If the practitioner is not a specialist, use WPI 105.01. **If the jury must decide whether or not the practitioner holds himself or herself out as a specialist, then use both instructions.**

If Ms. Baughman *truly* believed the jury needed to decide whether Dr. Milligan was holding himself out as an emergency medicine physician and

there was some difference in the standard of care for each practice area, she necessarily would have argued (before her motion for new trial) that not one, but *two* degree-of-care instructions (the one proposed by Group Health, in addition to the one proposed by Ms. Baughman) were appropriate.

Otherwise, under Ms. Baughman's theory, the giving of Ms. Baughman's proposed instruction over the proposed instruction of Group Health would have amounted to the same "error" Ms. Baughman alleged in her motion for new trial. Version 2.0 would have deprived the jury of its right to decide the relevant standard of care because it would have forced the jury to use the emergency medicine standard regardless of whether it found Dr. Milligan was acting as a pediatrician or holding himself out as an emergency medicine physician. Ms. Baughman's failure to propose that two instructions should have been given – let alone make any mention of the issue of "holding out" – is telling of the new post-verdict arguments that she was somehow deprived from arguing her theory of the case.

Ultimately Instruction No. 7 correctly informed the jury of the standard of care which Ms. Baughman spent the entire trial establishing and also correctly stated the law. Even if it was error, Instruction No. 7 was supported by substantial evidence and was consistent with both parties' theories of the case.

**B. Ms. Baughman’s CR 51(f) exception to the court’s Instruction No. 7 did not preserve any of the arguments she made on her motion for new trial.**

**1. To obtain a new trial on an instructional error Ms. Baughman must have taken a CR 51(f) exception to the same error which she claimed warranted a new trial.**

Civil Rule 51(f) provides:

**Objections to Instruction.** Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. ***The objector shall state distinctly the matter to which he objects and the grounds of his objection***, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

CR 51(f) has at least two purposes: “to clarify ... ***the exact points of law and reasons*** upon which counsel argues the court is committing error about a particular instruction,”<sup>156</sup> and “to enable the trial court to correct any mistakes in the instructions in time to prevent the unnecessary expense of a second trial.”<sup>157</sup> Appellate courts take CR 51(f) seriously.

The claimed instructional error is not reviewable by the trial court if the exception taken at the time of trial was inadequate.<sup>158</sup> The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.<sup>159</sup> Review of the

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<sup>156</sup> *Walker v. State*, 121 Wn.2d 214, 217, 848 P.2d 721 (1993) (emphasis added, internal citation omitted).

<sup>157</sup> *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993) (internal citations omitted).

<sup>158</sup> *Id.*, (internal citations omitted).

<sup>159</sup> *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn.App. 609, 615, 1

sufficiency of an objection by a higher court involves consideration of “the content of the objection at the time of trial and the context in which it was taken,” but *does not* include consideration of “statements made in the motion for a new trial, on reconsideration, or on appeal.”<sup>160</sup>

**2. Ms. Baughman excepted to the degree of care instruction based on grounds she abandoned in her motion for new trial.**

Here, the issue is whether Ms. Baughman sufficiently apprised the trial court of the claimed “holding out” issue and her subsequent reliance upon *Richards v. Overlake Hosp. Med. Ctr.* and *Dinner v. Thorp.*, in excepting Instruction No. 7. When objecting, Ms. Baughman did not refer to either case or convey in any clear manner that the proposed instruction deprived the jury of making a determination on a purported key factual issue: whether Dr. Milligan was holding himself out as an emergency medicine physician.

Rather, Ms. Baughman’s CR 51(f) exception to the Court’s Instruction No.7 was grounded on the contention that Dr. Milligan should have been described as a “physician” in an urgent care/emergency room setting, rather than a “pediatrician” in an urgent care/emergency room setting because use of the word “pediatrician” would somehow imply there is a unique standard of care, when the purpose of the instruction was to correspond to the evidence at trial that the standard of care was the same. Counsel stated:

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P.3d 579 (2000).

<sup>160</sup> *Treax v. Etnst Home Center, Inc.*, 124 Wn.2d 334, 340, 878 P.2d 1208 (1994).

‘Pediatrician,’ here this instruction as it reads suggests that there is some type of unique standard of care for a pediatrician in an urgent care setting, the whole purpose of this instruction is to say that without regard to the specialty in which the person is trained, here pediatrician, if they're in an emergency room setting, they have to exercise the same degree of skill, care, and learning expected of a reasonably prudent **physician** in an emergency room setting.<sup>161</sup>

Ms. Baughman admits the care was provided in an urgent care, not an emergency room. Ms. Baughman did not object to removal of the “holding out” language. To the contrary, Ms. Baughman expressly endorsed that removal when her counsel stated the removal of that language was appropriate based on the instruction.<sup>162</sup>

***3. Ms. Baughman made new arguments in her motion for new trial which were not included in her exceptions to the court’s Instruction No. 7.***

Only after judgment was entered on the jury’s “no negligence” verdict, did Ms. Baughman argue that it should have been for the jury to decide the new “key issue” of whether Dr. Milligan was subject to the standard of care of a reasonably prudent emergency physician versus whether he was subject to the standard of care of a pediatrician.

The time to preserve a claim of error in the giving of the court’s instructions was no later than when the court took CR 51(f) exceptions, not after the jury returned its verdict. Because none of the grounds upon which Ms. Baughman made her motion for new trial was a ground on which her trial counsel took exception to Instruction No. 7 under CR 51(f),

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<sup>161</sup> RP 1181:3–11 (emphasis added).

<sup>162</sup> RP 1180:2–7.

the trial court's order granting Ms. Baughman's motion for new trial should be reversed and the judgment for Group Health should be reinstated.

### CONCLUSION

Instruction No. 7 was not an error of law. Ms. Baughman presented no evidence that Dr. Milligan held himself out as a specialist in emergency medicine. Ms. Baughman agreed to removal of the "holding out" language in the instruction. Furthermore, Instruction No. 7 did not prevent Ms. Baughman from arguing her theory of the case. The key issue both sides focused on at trial was whether M.S.'s presentation to Dr. Milligan was, or should have been, suspicious for sexual abuse. Finally, Ms. Baughman did not preserve for review through a CR 51(f) exception at trial any of the arguments she made on her motion for new trial concerning the giving of the degree of care instruction. 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 4<sup>th</sup> day of September, 2014.

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*Group Health Cooperative*

No. 718355

Court of Appeals, Division I  
of the State of Washington

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**Group Health Cooperative,**  
a Washington Corporation,

Appellant,

v.

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

Respondent.

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

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**Declaration of Service**

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COURT OF APPEALS  
STATE OF WASHINGTON

## 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, September 4, 2014, I served in the manner indicated by directing delivery to the following individuals:

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**Dated** this 4<sup>th</sup> day of September, 2014.

By Krystle Bonnes  
Krystle Bonnes