

71835-5

71835-5

NO. 71835-5-I

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 E.S. and M.S., minors,

Respondent.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

This appeal arises from the trial of a medical malpractice case against Group Health Cooperative, the Appellant herein, after one of Group Health's providers turned a blind eye to obvious signs of child sexual abuse (including bleeding and vaginal excoriation) in a seven-year-old girl (Respondent E.S.) who had been brought to Group Health's "Urgent Care" facility in Bellevue, Washington. As a result of Group Health's failures, the abuse was not identified or stopped; instead, it continued and escalated. E.S. and her sister, M.S. ("Victims"), were thereafter subjected to several months of severe and entirely preventable rape and sexual assault at the hands of the perpetrator.

The case proceeded to trial in King County Superior Court before the Honorable Dean S. Lum. To support their case, the Victims presented testimony from two exceptionally well-qualified experts in the field of Emergency Medicine, Dr. Richard Cummins from the University of Washington and Dr. Marianne Gausche-Hill from the University of California, Los Angeles. Both are tenured professors of Emergency Medicine, and both practice actively in the field while supervising and teaching medical students and residents. These experts agreed that Group Health's provider (a pediatrician who had been staffing the emergency department) fell well below the standard of care in failing to take steps to

rule out the possibility that sexual abuse had caused E.S.'s genital injuries, and in failing to notify E.S.'s guardian of the possibility of abuse. In contrast, the majority of Group Health's experts were pediatricians who testified that the standard of care did not require any inquiry into the possibility of sexual abuse.

At the close of the trial, counsel for Group Health snuck in a modification to the Victim's proposed WPI jury instruction that changed its meaning entirely and flatly misstated the law on the standard of care. This mutilated instruction, which was given over strenuous objection by the Victim's counsel as Instruction No. 7, misinformed the jury that a special "pediatrician" standard of care applied to Group Health's provider. This had the effect of gutting the Victim's theory of liability and wrongly discrediting their experts, none of whom were pediatricians. The jury deliberated for a day and a half, but ultimately returned a 10-2 verdict in favor of Group Health on the question of negligence. Believing that instructional error had led to the verdict, the Victims moved for a new trial. After review of the instruction, objection thereto, and controlling case law, Judge Lum carefully considered and then granted the motion.

Group Health now appeals. But because the jury instruction it proposed clearly misstated the law on the central question for the jury, and

because the error was properly preserved by the Victims' counsel, this Court should affirm Judge Lum and remand for a new trial.

B. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly ordered a new trial because Instruction No. 7 misstated the law on the applicable standard of care and constituted clear-cut error under *Dinner v. Thorpe* and *Richards v. Overlake Hospital*.

2. Respondents proposed an alternative instruction that properly stated the law, and they clearly objected to the erroneous language in the Court's Instruction No. 7; this is more than sufficient to preserve the error for review under *Washburn v. City of Federal Way*.

C. STATEMENT OF THE CASE

Respondent Group Health operates an Urgent Care center in Bellevue, Washington. The Urgent Care is no different than an Emergency Department, but Group Health cannot call it an Emergency Room for political reasons (due to its proximity to Overlake Medical Center).¹ Although the facility is primarily staffed by physicians who are trained and board-certified in Emergency Medicine, Group Health also uses part-time pediatricians to provide coverage.² However, even when they are seen by a pediatrician, the patient is seen in what appears to be the

¹ Verbatim Report of Proceedings (VRP) 854:19-855:1

² *Id.*

emergency room,³ and the part-time pediatrician signs off on the medical record with the title “EMERGENCY MEDICINE” under their signature block.⁴

On December 22, 2010, Victim E.S. (then age seven) was brought to the Urgent Care after she began complaining of blood in her urine (gross hematuria) and pain while urinating.⁵ She was seen by Dr. Donald Milligan, one of Group Health’s part-time pediatricians who happened to be working that evening.⁶ Dr. Milligan examined E.S. and performed a genital exam. He documented “erythema of the vaginal mucosa at the introitus, including one area which was quite excoriated,”⁷ meaning that there was redness and a raw abrasion at the opening to the young girl’s vagina.⁸ According to the Victim’s experts, these findings constituted a “red flag” that should have alerted the provider that childhood sexual abuse may have been occurring and that further inquiry was needed.⁹

³ VRP 385:20-22

⁴ CP 102 (Also admitted at trial as Exhibit 1)

⁵ CP 100

⁶ VPR 790:23-791:8

⁷ CP 101

⁸ VRP 68:17-69:14; 64:25-65:6. Merriam Webster's Medical Dictionary defines an excoriation as "a raw irritated lesion as of the skin or a mucosal surface," VRP 925:10-23, while Mosby's Medical Encyclopedia defines it as "an injury to the surface of the skin caused by scraping or scratching." VRP 924:15-925:3 Appellant Group Health and its witnesses provided varying definitions of the term "excoriation" throughout the trial, often trying to downplay its significance. E.g. VRP 802:11-803:1

⁹ VRP 215:22-216:25; 274:6-275:8; 47:18-48:11; 98:15-100:17

Unfortunately, Dr. Milligan was not versed in the signs of sexual abuse, and he took no steps whatsoever to ascertain the cause of E.S.'s genital injuries.¹⁰ He did not ask questions about how the injury had occurred,¹¹ or how long it had been there.¹² He failed to take a proper history,¹³ and he failed to inform E.S.'s guardian of the possibility that she was being abused.¹⁴ Instead, E.S. and her guardian left Group Health feeling assured that this was merely a urinary tract infection,¹⁵ when in fact E.S.'s genital injuries had been caused by a sexual assault perpetrated by her older step brother.¹⁶

At trial, the Victims presented their theory of liability, i.e. that Group Health was at fault for holding Dr. Milligan out as a specialist in Emergency Medicine without proper training.¹⁷ The Victims presented testimony from two Emergency Medicine experts (Drs. Cummins and Gausche-Hill) on the importance of knowing and identifying the "red

¹⁰ VRP 825:6-12

¹¹ VRP 805:21-806:1

¹² VRP 270:11-18

¹³ VRP 266:25-267:13

¹⁴ VRP 100:3-5

¹⁵ VRP 389:13-23

¹⁶ VRP 273:4-11-274:5 The abuse was not uncovered and stopped until November 2011. The perpetrator subsequently pled guilty to multiple counts of Rape of a Child in the First Degree and one Count of Indecent Liberties with Forcible Compulsion. He took the stand during Group Health's case, at which time he admitted to frequently raping both E.S. and her younger sister, M.S. Appellant Group Health has omitted his testimony from the Verbatim Report of Proceedings, but he confirmed that the bulk of the abuse occurred after the urgent care visit.

¹⁷ Supplemental VRP 4:22-5:3; 7:7-9; 9:11-17; 12:25-13:4 (Opening Statement of Plaintiffs' Counsel)

flags” (signs and symptoms) of abuse, as well as the necessity of ruling out the possibility of sexual abuse when any of those red flags are present.¹⁸ Importantly for purposes of this appeal, both of the Victims’ medical standard of care experts testified regarding the particularized use of a “differential diagnosis” in Emergency Medicine.

Dr. Richard Cummins is a tenured professor of Emergency Medicine at the University of Washington, and he also practices and supervises residents at the Emergency Department at the University of Washington Medical Center.¹⁹ Dr. Cummins testified that emergency physicians are required to employ a form of differential diagnosis that considers the most dangerous potential causes of a patient’s symptomatology:

A: ... [Y]ou always lean towards the most serious of the differential when in your decisions about what the management and treatment is going to be.

Q: And is this process, this decision-making process, is this something that you teach to the residents, to the medical students in the -- at the university?

A: Yeah. The development of a differential diagnosis is a core part of almost every encounter that a patient has. And you always wind up after hearing a history, hearing the physical exam, seeing what the labs are, I mean, the question I always ask the residents is, "Okay, so what do you think is

¹⁸ VRP 47:21-47:11; 227:6-228:22 The Victims also presented some standard of care evidence from a psychiatrist, Dr. Gilbert Kliman, although his role was primarily one of assessing damages. VRP 406-590

¹⁹ VRP 6:2-7

going on?" And then they say, "Well, I think this could be, you know, pyelonephritis, a kidney infection." And then I say, "Well, what else could it be? What's the most likely diagnosis?" We always ask, "And what's the most serious diagnosis?" And you want to get them thinking along those lines with virtually every complaint that they get.²⁰

Dr. Marianne Gausche-Hill also testified for the Victims at trial. Dr. Gausche-Hill is the Vice Chair and Chief of the Division of Pediatric Emergency Medicine at Harbor-UCLA Medical Center, where she teaches UCLA medical students.²¹ She has written articles and book chapters on child sexual abuse, and she has lectured extensively on the topic as well.²² Dr. Gausche-Hill largely echoed Dr. Cummins' definition of the standard of care for an emergency room doctor, including the requirement to consider or assume the worst when trying to diagnose the cause of a patient's symptoms.²³ Both also agreed that Group Health's practitioner had violated the standard of care for failing to utilize a proper differential diagnosis—i.e. one which would have considered and attempted to address the worst possible cause (sexual abuse) for M.S.'s presentation.²⁴

Group Health countered the Victim's theory by claiming that pediatricians are trained differently, that they look for a "unifying

²⁰ VRP 36:15-37:8

²¹ VRP 203:3-21

²² VRP 211:8-212:3

²³ VRP 223:10-225:8

²⁴ VRP 281:12-282:4; 88:25-89:24; 100:6-101:2

diagnosis,” and that when they find a “unifying diagnosis” they look no further:

Q: Doctor, as a pediatrician, how are you taught to evaluate a child that has signs and symptoms of vulvovaginitis, and signs and symptoms of a urinary tract infection?

A: So one of the things we're taught in medicine in general is to look for a unifying diagnosis that all your symptoms could be from. If you have five different symptoms of something, it could be from five different diseases, but that's not very likely, unless you're really unlucky. Usually if you present with certain symptoms, even though they might involve different parts of your body, the hope is you have one process that can be treated and that would get better. So that's called "the unifying diagnosis," that you look to the single diagnosis that will treat and cure the problem. In vulvovaginitis and a UTI they have a common root cause, so you look for the unifying diagnosis, you treat that, and if the child gets better, you were right.²⁵

The difference between the Emergency Medicine and Pediatric standards of care was thematic throughout Group Health's case:

Q: Doctor, can you give us a definition of the standard of care for a pediatrician as you've seen it used in your institution?

A: Absolutely. We teach the residents to look at what you're presented with, come to the most logical diagnosis, the most -- what you think is the most likely diagnosis, you pursue that diagnosis before you pursue any of the alternative diagnoses. So we actually teach this publicly, we had a big debate about this actually, interestingly, just last week in which my boss, who is professor -- who is the chairman, reiterated to the residents: I want you to consider the most likely, the most unifying diagnosis first before you move on to the other diagnoses. In other words, when you

²⁵ VRP 992:1-17 (Testimony of Lori Frasier, M.D.)

hear hoof prints in the night, think horse, don't think zebra and check for the horse first.

Q: Unifying diagnosis, tell us a little bit more about what that means in pediatrics.

A: It means that when you're presented with a child with a certain set of symptoms, that you're actually assessing the signs and the symptoms, you're coming up with what's most logical, that you then pursue that first. So in this case it's urinary tract infection, you do a culture, you come up with a diagnosis. That's what the standard of care would be.²⁶

The distinction between these two competing standards of care was not lost on the jurors, who began asking Group Health's Pediatric experts to "compare the standard of care theories for [Emergency Rooms]: 'unifying diagnosis' versus 'assume the worst.'"²⁷

Before the case had gotten underway, counsel for the Victims proposed a WPI 105.02 jury instruction, which read in pertinent part as follows:

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.²⁸

²⁶ VRP 1097:3-1098:1 (Testimony of Astrid Heger, M.D.)

²⁷ VRP 1129:22-1130:2

²⁸ CP 46 (Plaintiffs' Proposed Instruction No. 7)

This instruction was included in Judge Lum's first draft instruction packet ("Version 1.0") provided to counsel toward the close of trial.²⁹ At no time did Appellant Group Health object to the use of WPI 105.02,³⁰ nor did Group Health argue that there was insufficient evidence to warrant the giving of this instruction.³¹ In fact, at Group Health's suggestion, the Court went on to *strengthen* the language of the instruction in its next draft ("Version 2.0") by replacing the phrase "holds himself out as a specialist in" with "works in."³² However, the critical portion of the instruction, i.e. the portion that set the standard of care against which Dr. Milligan's conduct was to be judged, remained unchanged: that of a reasonably prudent "Emergency Medicine Physician."³³ Counsel for the Victims would not have objected to this version of the instruction *had it been given*.

Unfortunately it was not. On the morning of February 12, the same day the jury was to be instructed, counsel for Group Health

²⁹ CP 238

³⁰ VRP 1177:5-1178:12

³¹ VRP 1319:17-1320:2 In response to the Victim's Motion for New Trial, Counsel for Appellant Group Health created a self-serving declaration purporting to document the specifics of the off-the-record discussions that had occurred six weeks earlier. CP 233-235. However, at oral argument on the Motion for New Trial, Judge Lum made clear that the issue of whether sufficient evidence warranted the giving of WPI 105.02 had not been raised by Group Health prior to instruction of the jury. VRP 1319:17-1320:2 ("Of course, we didn't have that discussion at all. At all."). In any event, it is the Verbatim Report of Proceedings, not the post-hoc declaration of counsel, that should control for purposes of CR 51(f) and this appeal.

³² CP 245

³³ *Id.*

submitted its “revised” proposed Instruction No. 10.³⁴ Although counsel for Group Health presented this instruction to the Court as though it were based on WPI 105.02, it had been gutted of its intended meaning and purpose and changed the standard of care against which Dr. Milligan’s conduct was to be judged from that of a reasonably prudent Emergency Room Physician to that of a reasonably prudent pediatrician:

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.³⁵

No discussion of this particular change, or its significance, occurred prior to the formal exceptions being taken later that afternoon. When counsel for the Victims noted the change, they immediately objected and brought the error to the Court’s attention:

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." ...

³⁴ CP 56

³⁵ Id. (emphasis added)

... 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 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, 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.³⁶

Ultimately Judge Lum indicated that he understood the objection, but was going to give the instruction regardless.³⁷ The jury was instructed using this instruction only a few minutes later.³⁸

During closing arguments, counsel for Appellate Group Health capitalized on the erroneous Instruction No. 7, referencing it directly and using it to emphasize the superior qualifications of the pediatrician experts who had testified to the "unifying diagnosis" standard of care:

So let's talk a little bit about plaintiff's witnesses. Again, I'm approaching Abe Lincoln's dog.³⁹ *No pediatricians to*

³⁶ VRP 1178:23-1180:9

³⁷ VRP 1181:15-18

³⁸ CP 67

³⁹ Earlier in his closing argument, counsel for Group Health had mentioned a quote he attributed to Abraham Lincoln: "You don't kick a dead dog." VRP 1216:22-23 This appears to be a variant of the more traditional idiom, "flogging a dead horse."

*support the claim.*⁴⁰

* * *

*Dr. Gausche-Hill, she's a pediatric emergency physician, not a pediatrician. Never went through pediatric residency.*⁴¹

* * *

This [Court's Instruction No. 7] is the standard of care instruction. ... Pediatricians are to be judged based on the way reasonably prudent pediatricians care for patients in this kind of urgent care setting. *The only people we've had who have told you what pediatricians do are-- I mean, the actual people who were pediatricians, every single one of them were defense experts. And they have all told you that what was done was reasonable and appropriate under the circumstances, and in fact, what they would do in their facilities.*⁴²

Counsel for Group Health underscored this argument by using

Powerpoint slides:

	<u>Group Health</u>	<u>Plaintiffs</u>
Pediatricians:	3 of 4	0 of 3
Child abuse specialists:	3 of 4	0 of 3

Superior qualifications and expertise to address the standard of care of a pediatrician

⁴⁰ VRP 1281:10-11

⁴¹ VRP 1282:4-6

⁴² VRP 1286:17-25

This slide, titled “The Experts” recapped the number of pediatric experts called by each side.⁴³ Counsel for Group Health explained the slide:

That's just an overly simplistic graphic. The experts that we have called and had testify and tell you their opinions in this case, three out of four are pediatrician, three out of four are child abuse experts. Plaintiffs' experts: No pediatricians, no child abuse specialists.⁴⁴

Another slide titled “Plaintiffs’ Witnesses” again stressed, in bold and underlined font, that “No pediatrician supports a claim against Dr. Milligan”:⁴⁵



After the jury returned a special verdict answering “no” to the first question of negligence,⁴⁶ the Victims moved for a new trial based on the erroneous statement of law regarding the standard of care in Instruction

⁴³ CP 217

⁴⁴ VRP 1263:17-21

⁴⁵ CP 220

⁴⁶ CP 84-85

No. 7.⁴⁷ Judge Lum held oral argument on the Victims' motion on April 18, 2014, at which time he granted the motion.⁴⁸

Before doing so, he noted that a new trial is “not something that is granted lightly,” given the time and expense involved.⁴⁹ However, Judge Lum found that counsel for the Victims had properly preserved their objection to the Court's Instruction No. 7,⁵⁰ which had contained an error of law.⁵¹ Judge Lum also found that there had been sufficient evidence that Dr. Milligan had “held himself out to be a specialist ER doctor and that the urgent care center was the equivalent of an emergency room.”⁵² The Group Health medical record represented Dr. Milligan as a physician practicing “EMERGENCY MEDICINE,” and E.S.'s trip to the urgent care had been an “emergency-type visit”—not one to her regular pediatrician.⁵³ Finally, Judge Lum noted that the erroneous instruction likely impacted the outcome of the trial, given that which standard of care applied had been a “hotly contested” issue at trial and that both counsel and the expert witnesses for Group Health had “attacked the reliability of the plaintiffs' experts, because they were not pediatricians like the defense experts.”⁵⁴

⁴⁷ CP 86-96

⁴⁸ CP 268-269; VRP 1299-1333

⁴⁹ VRP1324:17-22

⁵⁰ VRP 1329:5-13

⁵¹ VRP 1330:1-23

⁵² VRP 1331:10-16

⁵³ VRP 1331:18-1332:11

⁵⁴ VRP 1332:12-23

Group Health appealed to this Court four days later.⁵⁵

C. SUMMARY OF ARGUMENT

1. Judge Lum did not abuse his discretion in granting the motion for new trial. His correct interpretation of the law is the only aspect of his decision that is reviewed *de novo*.

2. Instruction No. 7 misstated the law and directed the jury that the applicable standard of care was, as a matter of law, that of a reasonably prudent pediatrician; this prevented the jury from deciding the key factual issue of whether Dr. Milligan should have been held to the standard of care of an Emergency Medicine physician.

3. The error in Instruction No. 7 was not harmless because it effectively endorsed the “unifying diagnosis” standard of care advanced by the pediatrician experts called by Group Health, while effectively discrediting the “assume the worst” standard of care advanced by the Victims’ two Emergency Medicine experts.

4. The instructional error was preserved for review because counsel for the Victims proposed a correct instruction and then objected to the erroneous modification proposed by Group Health and incorporated by the trial court in Instruction No. 7.

⁵⁵ CP 266

D. ARGUMENT

1. Judge Lum did not abuse his discretion in granting the motion for new trial.

“The grant or denial of a new trial is a matter within the trial court's discretion,” and the trial court’s decision should be disturbed “only for a clear abuse of that discretion or when it is predicated on an erroneous interpretation of the law.” *Kuhn v. Schnall*, 155 Wn. App. 560, 570-71, 228 P.3d 828 (2010). “Greater weight is owed the decision to grant a new trial than the decision to deny a new trial.” *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003).

As applied to this case, the only aspect of Judge Lum’s decision that is reviewed *de novo* is his interpretation of the law; all other aspects should be reviewed for abuse of discretion. Since the *Thorpe* and *Richards* cases unambiguously support Judge Lum’s decision (as discussed below), and because Judge Lum did not abuse his discretion in holding that the error was preserved and that it likely impacted the outcome of the trial, this Court should affirm Judge Lum.

2. Instruction No. 7 misstated the law and directed the jury that the applicable standard of care was that of a pediatrician; this prevented the jury from deciding the key factual issue of whether Dr. Milligan should have been held to the standard of care of an Emergency Medicine practitioner.

In this case, the trial court erred by failing to give the version of

WPI 105.02 originally proposed by the Victims and their counsel.⁵⁶ That instruction was taken *directly* from Washington Practice, in compliance with CR 51(d). The practice instruction reads as follows:

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

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 105.02 (6th ed.). The accompanying note on use states as follows:

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.***

This instruction properly states the longstanding law in Washington. See *Atkins v. Clein*, 3 Wn.2d 168, 170-71, 100 P.2d 1 (1940).

When given, WPI 105.02 allows the jury to make the *factual* determination as to the appropriate standard of care under the circumstances. The jury, not the trial court, must decide whether the physician should be held to the standard of care of the specialty in which he or she is trained, or whether the physician should be held to the

⁵⁶ CP 46

standard of care for the specialty in which he or she is practicing (or holding himself out).

Because Dr. Milligan was trained as a pediatrician, but was practicing in the Emergency Department—and because his signature block on M.S.’s chart note contained the title “EMERGENCY MEDICINE,”⁵⁷ Plaintiffs offered WPI 105.02 as their Proposed Instruction No. 7. It read in relevant part as follows:

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.⁵⁸

The Court erred when it declined this instruction and instead gave Defendant’s “Revised” Proposed Instruction No. 10 (Court’s Instruction No. 7 to the jury), which 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.⁵⁹

In contrast to the original version, the trial court’s Instruction No. 7 incorrectly told the jury that Dr. Milligan had an obligation to exercise the

⁵⁷ CP 102

⁵⁸ CP 46

⁵⁹ CP 56; CP 67

same degree of care as a reasonably prudent *pediatrician*, rather than allowing the jury to decide whether he should have instead exercised the same degree of care as a reasonably prudent *emergency physician*.

This Court has previously held that an identically-worded instruction constituted a “flat misstatement of the law.” *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 276, 796 P.2d 737 (1990). The *Richards* case involved a family practitioner, Dr. Haeg, who was providing pediatric care at the time of the alleged malpractice. *Id.* at 268-69. Over objection, the trial court gave an instruction that read in pertinent part as follows:

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 in the State of Washington acting in the same or similar circumstances at the time of the care and treatment in question.

Id. at 276. In confirming that this instruction constituted clear-cut error, this Court noted that the instruction “deprived the jury of the determination of whether Dr. Haeg should be held to the standard of care of a reasonably prudent family physician or to the standard of a reasonably prudent pediatrician, because the instruction as given assumed that regardless of the conclusion of the jury, Dr. Haeg was to be judged by the

standard of care of a family practitioner.” *Id.*

The Supreme Court has also rejected a similar instruction, for the same reason:

Appellants assign error to the court's instruction No. 14, which reads as follows:

By undertaking professional service to a patient, a physician and surgeon specializing in a particular branch of the medical and surgical science impliedly represents that he possesses and will exercise, and the law places upon him the duty to possess and exercise, *that degree of skill and learning ordinarily possessed and exercised by the average physician engaged in the same line of practice and practicing in this or similar communities*. If he fails to possess such skill or knowledge, or, possessing it, fails to exercise it with reasonable care, he is guilty of malpractice and is liable in damages to anyone who may be injured or damaged as a proximate result thereof. (Italics ours.)

The instruction correctly states the rule except that it has a tendency to be misleading by the use of the language italicized above. This may be construed to relate to the skill and learning of an average physician, rather than to a physician *specializing* in the same line of practice in the same or similar communities. We do not approve the instruction as given.

Dinner v. Thorp, 54 Wn.2d 90, 97, 338 P.2d 137 (1959) (emphasis in original).

Appellant Group Health does not contest the fact that WPI 105.02

(proposed by the Victims) correctly states the law,⁶⁰ and Group Health readily concedes that the instruction in *Richards* “plainly got the law wrong.”⁶¹ This case is on all fours with *Richards*.

Judge Lum realized this and found that the court’s Instruction No. 7 had misstated the law and improperly invaded the factual province of the jury.⁶² This Court should affirm the order granting the Victims a new trial.

3. The error in Instruction No. 7 was not harmless because it effectively endorsed the “unifying diagnosis” standard of care advanced by Group Health’s experts, while simultaneously discrediting the “assume the worst” standard of care advanced by the Victims’ experts.

Jury instructions must “properly inform the jury of the applicable law” and also “permit each party to argue his or her theory of the case.” *Keller v. City of Spokane*, 104 Wn. App. 545, 557, 17 P.3d 661 (2001). A jury instruction that clearly misstates the law is presumed to be prejudicial and is ordinarily grounds for reversal. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-250, 44 P.3d 845 (2002); *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). It is similarly well-established that the giving of a legally-erroneous instruction is grounds for a new trial. *See Kennett v. Yates*, 41 Wn.2d 558, 565, 250 P.2d 962 (1952); *McClure v.*

⁶⁰ Brief of Appellant, p. 19

⁶¹ *Id.*, p. 23

⁶² VRP 1330:19-24

Wilson, 147 Wash. 119, 265 P. 485 (1928). A new trial is *particularly* appropriate where an instruction misstates the applicable duty of reasonable care. See *Bensen v. S. Kitsap Sch. Dist. No. 402*, 63 Wn.2d 192, 198, 386 P.2d 137 (1963).

Like most medical malpractice cases, this one was a “battle of the experts.” When the trial court wrongly instructed the jury that Dr. Milligan was to be held to the standard of care of a reasonably prudent pediatrician, it essentially bound and gagged the Victims’ Emergency Medicine experts while providing extra ammunition to Group Health’s pediatric experts. The testimony of Group Health’s pediatricians—including the “unifying diagnosis” standard of care they had advocated — was effectively endorsed by Instruction No. 7,⁶³ while the “assume the worst” standard being advanced by the Victims’ Emergency Medicine experts was effectively discredited.⁶⁴

There may be a rare case where the presumption of prejudice can be overcome, but this is not one of them. The error in Instruction No. 7 went to heart of this case: the standard of care. That was the only question answered by the jury, and it was answered in Group Health’s favor. In its briefing to this Court, Appellant Group Health claims that the instruction

⁶³ See VRP 1097:3-1098:1 (Testimony of Astrid Heger, M.D.); VRP 992:1-17 (Testimony of Lori Frasier, M.D.)

⁶⁴ See VRP 223:10-225:8 (Testimony of Marianne Gausche-Hill); VRP 36:15-37:8 (Testimony of Richard O. Cummins, M.D.)

might not have made a difference in the outcome because the standard of care is “universal.” But that is not what its experts, or its counsel, argued at trial.⁶⁵ Indeed, the jurors themselves knew that there were two standards of care (“‘unifying diagnosis’ versus ‘assume the worst’” being proposed by the opposing experts.⁶⁶ Given this, there is no way Group Health can rebut the presumption that the error of Instruction No. 7 impacted the trial. *C.f. Keller*, 146 Wn.2d at 249-250;

Moreover, Instruction No. 7 prevented the Victims from arguing their theory of the case. During opening statements, counsel for the Victims 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.⁶⁷ But once the trial court erroneously instructed the jury, the Victims’ counsel could no longer advance that position. This alone warrants a new trial. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 873, 281 P.3d 289 (2012).

⁶⁵ VRP 1286:17-25; 1097:3-1098:1; 992:1-17

⁶⁶ VRP 1129:22-1130:2

⁶⁷ Supplemental VRP 4:22-5:3; 7:7-9; 9:11-17; 12:25-13:4 (Opening Statement of Plaintiffs’ Counsel)

4. The instructional error was preserved for review when counsel for the Victims proposed a correct instruction and then objected to the erroneous modifications suggested by Group Health.

The Washington Supreme Court recently clarified the standard for preserving instructional error under CR 51(f). *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 746-47, 310 P.3d 1275 (2013). Under *Washburn*, the error is preserved “[s]o long as the trial court understands the reasons a party objects to a jury instruction.” *Id.* at 747.

In this case, there is no question that the Victims’ counsel apprised the trial court of the nature of the objection, or that the court understood it. The instruction originally proposed by the Victims’ counsel was a WPI instruction that correctly stated the law. When it became clear that the trial court was planning to incorporate the last-minute changes suggested by Group Health, so as to alter its meaning entirely, counsel took exception. The argument was started by identifying the specific language that was objectionable:

COUNSEL: From Version 2.0 to 3.0 there was -- this is either a typographical error or intentional change, and either way, I need to call it to the Court's attention.

THE COURT: Sure.

COUNSEL: If the Court looks at Instruction No. 7 --

THE COURT: Seven, hold on.

COUNSEL: 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 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 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.⁶⁸

Shortly thereafter, Judge Lum confirmed that he understood counsel's argument.⁶⁹ It is unclear what more could have been done to bring the issue to the trial court's attention, but in any event nothing more is required under *Washburn*.

E. CONCLUSION

This Court should affirm the trial court's order granting a new trial. Appellant Group Health proposed an erroneous jury instruction, given over clear objection, that went to the central issue in the case: the standard of care. Group Health's "waiver" argument strains credulity; and in light

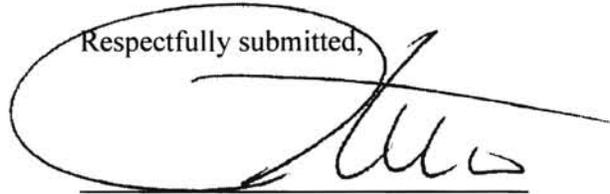
⁶⁸ VRP 1178:17-1180:9

⁶⁹ VRP 1181:15

of the vast evidence and argument regarding the differing standards of care, Group Health cannot overcome the presumption of harm caused by the error it injected into the trial. Judge Lum should be affirmed. Costs on appeal should be awarded to the Victims.

DATED this 6th day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John R. Connelly, Jr.", is written over a horizontal line. The signature is stylized and includes a large, sweeping flourish that extends to the right.

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NO. 71835-5-I

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 E.S. and M.S., minors,

Respondent.

Declaration of Service

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DECLARATION OF SERVICE

I, **Lorraine Kupau**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed by **Connelly Law Offices, PLLC**, and that on today's date, October 6th, 2014, I served the attached **Brief Of Respondents**, in the manner indicated by directing delivery to the following individuals:

- Legal messenger**
- Fax**
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Dated this 6th day of October, 2014

By /s/ Lorraine Kupau
Lorraine Kupau

CONFIDENTIAL
STATE OF WASHINGTON
SUPERIOR COURT
TACOMA COUNTY
FILED
OCT 10 2014
1:10