

NO. 51170-3-II
COURT OF APPEALS
DIVISION II
IN THE STATE OF WASHINGTON

CLARK COUNTY
RESPONDENT/PLAINTIFF

v.

JENNIFER MAPHET
APPELLANT/DEFENDANT.

BRIEF OF APPELLANT

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INTRODUCTION

Plaintiff, Clark County, is a self-insured employer with the primary and independent authority to administer Defendant's, Ms. Maphet, workers compensation claim. Plaintiff has authorized 8 surgeries for Defendant's right knee since the injury occurred in 2009. The dispute is whether Plaintiff is responsible for the March 20, 2015 Fulkerson revision surgery to Defendant's right knee. A Fulkerson procedure moves the attachment of the patella tendon to slide the kneecap left or right.

The dispute originates over Dr. Greenleaf's choices during the authorized January 24, 2013 surgery, surgery number five. During the surgery, he cut some tissue near the kneecap, which he believed was pulling the kneecap out of place. After that surgery, the kneecap started dislocating in the opposite direction. Surgery number six, also authorized by Plaintiff, was the May 14, 2013 Fulkerson procedure, during which Dr. Greenleaf moved the kneecap tendon too far. Authorized surgeries numbered seven and eight also addressed the kneecap.

The disputed March 20, 2015 Fulkerson revision was designed to move the patella tendon back over, but not all the way back to its original position. Plaintiff denied authorization. The Department of Labor & Industries ordered its authorization. The Board of Industrial Insurance Appeals affirmed the Department.

In Clark County Superior Court, motions for partial directed verdict were denied on the basis that Defendant was still required to prove a causal connection back to the original injury, despite the evidence of authorization of kneecap surgeries and even though any mistakes by Dr.

Greenleaf do not break the causal chain. The Superior Court also erred when it failed to accurately and completely instruct the jury on Washington's Compensable Consequences Doctrine. Despite Plaintiff's many concessions the March 20, 2015 Fulkerson revision was medically necessary and proper, the jury returned a verdict that the 2009 industrial injury did not cause the need for that surgery. Defendant and the Department of Labor & Industries appeals.

ASSIGNMENTS OF ERROR

Assignment of Error No. 1.

The Superior Court erred when it twice denied Defendant's Motion for Partial Directed Verdict.

Assignment of Error No. 2.

The Superior Court erred when it failed to accurately and completely instruct the jury on the law by refusing to give Defendant's Proposed Instruction No. 10.

Assignment of Error No. 3.

The Superior Court erred when it failed to accurately and completely instruct the jury on the law by refusing to give Defendant's Proposed Instruction No. 16.

Assignment of Error No. 4.

The Superior Court erred when it inaccurately and incompletely instructed the jury on the law by giving its Instruction No. 14.

Assignment of Error No. 5.

The Superior Court erred when it asked the jury to decide whether or not Defendant's industrial injury was a proximate cause of her March

20, 2015 Fulkerson revision surgery in the Special Verdict Form.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1 Did the Superior Court err in denying Defendant's Motion for Partial Directed verdict on the issue that Defendant's March 20, 2015 knee surgery for kneecap instability was proximately caused by the residuals of authorized treatment when all of the medical testimony agreed the disputed surgery was caused, in part, by the prior four authorized surgeries which also addressed Defendant's kneecap instability?

No. 2 Did the Superior Court err in denying Defendant's Motion for Partial Directed verdict on the issue that Defendant's March 20, 2015 surgery was proximately caused by the residuals of authorized treatment where Plaintiff's only defense was that the attending surgeon made a mistake or committed malpractice during the authorized January 24, 2013 surgery that acted as an intervening cause of Defendant's kneecap instability?

No. 3 Did the Superior Court prejudicially err when it failed to accurately and completely instruct the jury that when Plaintiff authorized the surgeries, they became responsible for consequences of that treatment, which includes providing additional necessary and proper treatment for those consequences, and that such treatment cannot be considered an intervening cause?

No. 4 Did the Superior Court prejudicially err when it gave its Instruction No. 14 that omitted the legal effects of Plaintiff's multiple authorizations and failed to instruct the jury if a physician makes a mistake

or commits malpractice while treating an injured worker for the claim, such mistake or malpractice is not an intervening cause?

No. 5 Did the Superior Court err when it permitted the jury to be asked in its Special Verdict Form whether or not the industrial injury was a proximate cause of the March 20, 2015 Fulkerson revision procedure, despite there being no genuine issue of material fact Plaintiff authorized the May 14, 2013 Fulkerson procedure and there was no evidence of intervening cause external to this workers compensation claim?

STATEMENT OF THE CASE

As Plaintiff is challenging the superior court's denial of directed verdict, the Court must review the evidence to determine whether there are any genuine issues of material fact. There is no dispute, even when viewed in a light most favorable to Plaintiff, that Defendant's March 20, 2015 Fulkerson revision surgery was proximately caused by her prior authorized surgeries, especially the authorized May 13, 2013 Fulkerson procedure. Plaintiff conceded below the disputed March 20, 2015 Fulkerson revision was medically necessary. In the alternative, this Court must examine the record to see whether the superior court's jury instructions did not permit Defendant to argue all of her theories of the case, allowed Plaintiff to argue an erroneous theory of the case, and thereby prejudiced Defendant.

1. Certified Appeal Board Record

On November 8, 2009, Ms. Maphet was working in the Clark County Jail when she slipped on a ledge and fell down a stairwell. She fractured her left wrist and injured her right knee. Between 2009 and 2015

she underwent the eight different surgeries on her right knee. The list of those surgeries is at Appendix A, with the citations referring testimony from Ms. Defrang (Clark County's designated agent on Ms. Maphet's claim). It is the last surgery, the March 20, 2015 Fulkerson revision, that is in dispute in this appeal.

All of the medical testimony presented to the Board was that Ms. Maphet has an unstable patella (kneecap). This is a problem, because when the kneecap shifts sideways, the knee will sometimes collapse and Ms. Maphet will fall. The disagreement is whether or not there is a causal link between the treatment for November 2009 injury and the patellar instability.

Ms. Maphet's kneecap was not dislocating prior to January 24, 2013. On that date, Dr. Greenleaf was authorized to remove scar tissue within Ms. Maphet's knee. While performing the surgery, Dr. Greenleaf noted the kneecap was shifted medially (to the inside). Dr. Greenleaf chose to release (loosen) the lateral retinaculum, which is a piece of gristle that holds the kneecap in place. Afterwards, Ms. Maphet's kneecap started dislocating laterally (to the outside) with activities of daily living and in the clinic.

There was no dispute that the authorized May 14, 2013 surgery, called a Fulkerson procedure, was done to help stabilize the kneecap. The kneecap was dislocating laterally (to the outside). A Fulkerson procedure moves the attachment of the patella tendon on the upper tibia (shin bone) to pull the kneecap sideways. During the authorized May 14, 2013 Fulkerson procedure, Dr. Greenleaf moved the tendon medially to help

prevent the kneecap from shifting laterally.

After the authorized May 14, 2013 Fulkerson procedure, Defendant's kneecap started dislocating medially; the opposite direction from prior to the surgery. Several surgeries were authorized to try to fix this problem, but they were unsuccessful. The March 20, 2015 surgery was a revision of the authorized May 14, 2013 Fulkerson procedure. Dr. Greenleaf moved the attachment of the patella tendon back towards the center, but not all the way back to its original position.

At trial, Plaintiff presented the testimony of two surgeons: Clyde Farris, M.D. and Eugene Toomey, M.D. Dr. Farris testified that Dr. Greenleaf's choice to adjust the position of the patella by releasing the retinaculum on January 24, 2013 was justified. (Dep. Farris p. 39). Dr. Farris opined the original 2009 injury did not damage the patella. (Dep. Farris pp. 20, 24, 29). Dr. Farris opined the March 20, 2015 Fulkerson revision was not medically necessary. (Dep. Farris p. 28). However, Plaintiff conceded it was necessary during opening statements and closing arguments.

After the March 20, 2015 Fulkerson revision, Plaintiff arranged for Dr. Toomey to also do an IME. Dr. Toomey testified that once the May 14, 2013 Fulkerson procedure was performed, which was a reasonable procedure, the patella was moved too far medially. (Dep. Toomey pp. 27-29, 50). Dr. Toomey believed the March 20, 2015 Fulkerson revision was proper for Dr. Greenleaf to have performed. (Dep. Toomey pp. 31-32).

When viewing the sequence of events prospectively, Dr. Toomey agreed each authorized surgery from January 24, 2013 forward was

reasonable. (Dep. Toomey p. 46). He agreed the scar tissue found on the lateral retinaculum was formed from the prior authorized surgeries and it was appropriate for Dr. Greenleaf to have removed it. (Dep. Toomey pp. 46-47). Despite this, Dr. Toomey maintained the patella problems were still not causally related to the 2009 injury, even if each individual authorized surgery was reasonable. (Dep. Toomey p. 52).

Dr. Greenleaf, Defendant's attending surgeon, testified that she would not have developed the patellar instability, but for the original industrial injury and subsequent surgeries. (Dep. Greenleaf p. 29, ln. 5-6; p. 47, ln. 22-23). Dr. Greenleaf believed the original injury did cause direct trauma to the medial patella. (Dep. Greenleaf p. 23, ln. 6-13; p. 29, ln. 13-16). Dr. Greenleaf clarified the patellar instability was due to a combination of the original injury (striking the medial patella), subsequent surgeries, and rehabilitation from those surgeries caused the patellar instability to manifest. (Dep. Greenleaf p. 57, ln. 21 – p. 58, ln. 7).

The final medical witness to testify was Thomas Kelly, D.C. Dr. Kelly examined Ms. Maphet after she fell and struck her head causing the concussion. Dr. Kelly also opined the original injury in November 2009 was a proximate cause of the patellar instability. (6/22/16 Tr. p. 92). Dr. Kelly believed the formation of scar tissue served as the primary pathology leading to the instability. (6/22/16 Tr. pp. 92-93). Dr. Kelly also noted that prior to 2013, Ms. Maphet's right thigh was smaller, which indicates quadriceps weakness and atrophy. (6/22/16 Tr. p. 94). Dr. Kelly explained the quadriceps muscle helps stabilize the patella and a weak quadriceps places Ms. Maphet at risk for patellar instability. (6/22/16 Tr.

pp. 94-95).

In summary, the surgery at issue is the March 20, 2015 revision of the authorized May 14, 2013 Fulkerson procedure. Every surgery performed under the claim, except for the disputed March 20, 2015 Fulkerson revision, was authorized by Plaintiff. From the May 14, 2013 Fulkerson procedure through the March 20, 2015 Fulkerson revision, each surgery attempted to repair Ms. Maphet's dislocating kneecap.

2. Superior Court Verbatim Report of Proceedings

The Verbatim Report of Proceedings provide the Court with the superior court's limited explanation for its denial of directed verdict. The VRP shows Defendant took exception to the Superior Court's decisions on key jury instructions. Next, VRP also contains the many concessions made by Plaintiff during opening statements and closing arguments, which admitted the March 20, 2015 Fulkerson revision was medically necessary, removing that issue from controversy.

a. Directed Verdict and Jury Instructions

Unfortunately, the Superior Court did not explain the rationale behind its initial decision to deny the Motions for Partial Directed Verdict on September 18, 2017. (VRP Vol 1 p. 155). However, Defendant and the Department re-raised the Motion to the Court at the conclusion of the testimony. The Superior Court again denied explaining,

And even though they were authorized surgeries the court in *Hall (sic)* [*Hull v. PeaceHealth*] says that the Thoracic Outlet Syndrome is an allowed occupational disease – if it's allowed as an occupational disease. So that requires a proximate cause determination.

And in this case here we've got medial injuries to the knee

which eventually we find out – and – and I have no idea – the jury is going to tell us whether or not that’s a proximate cause of the injury date – for a patella femoral problem.

(VRP Vol 2 p. 275). The Superior Court then further explained, “Because there is disputed evidence in the record about whether or not that’s – that should be – that the patella femoral is a natural and subsequent consequence of what surgeries she did have.” (VRP Vol 2 p. 277). As will be argued below, the superior court’s reliance on the unreported *Hull* decision was misplaced.

Defendant’s first exception was to the Superior Court’s refusal to give Defendant’s Proposed Instruction No. 10. (VRP Vol 2 pp. 304-306; Appendix B). This instruction informs the jury the legal definition of authorization.

Defendant also joined with the Department’s exceptions to the Superior Court’s refusal to give its two proposed instructions. (VRP Vol 2 pp. 309-312). The first was another definition of the legal effect of authorization of treatment. Appendix C. The second was that self-insured employers are responsible for the consequences of authorized treatment. Appendix D. The second proposed instruction was not formally rejected by the Superior Court until page 360-1, with exceptions noted.

Next, Defendant took exception to the Court’s Instruction No. 14, which was extensively debated by the parties. (VRP Vol 2 p. 312 – Vol 3 p. 370; Appendix E). The Court’s Instruction No. 14 was crafted by it after considering and rejecting Defendant’s Proposed Instruction No. 16. (VRP Vol 2 pp. 312-360). Exceptions were made to the Court’s rejection of Defendant’s Proposed Instruction No. 16. (VRP Vol 2 p. 360;

Appendix F). The Court noted that all parties took exception to its Instruction No. 14. (VRP Vol 3 p. 370, ln. 8-10).

Finally, Defendant joined the Department's exception to the verdict form asking the jury to make a proximate cause determination based upon its directed verdict motions and other arguments. (VRP Vol 3 p. 376; Appendix G).

b. Opening Statement

The Court should review Plaintiff's opening statement for its theories of the case and any factual concessions. This review is important to understand why the Court's denial of directed verdict was in error and the prejudice created by its decisions on jury instructions. Plaintiff used its opening statement to only talk about proximate cause, not the necessity of treatment, "My client is here for one reason – that reason is because the Board of Industrial Insurance Appeals stuck us with a condition in this industrial injury claim that's not our responsibility." (VRP Vol 2 p. 188). Plaintiff continues its focus only on proximate cause:

But with that said you are asked to only address one issue so in spite of all that complex medical testimony - the terms – all the evidence you're going to hear – it boils down to one determination.

That's what the March 20th, 2000 surg – 2015 surgery addressed and you'll be asked to make one factual finding. Only one. It's this: determine whether the right kneecap instability was proximately caused by the November 8th, 2009 industrial injury and/or residuals therefrom.

(VRP Vol 2 pp. 188-89). Plaintiff repeats its request that the jury only focus on proximate cause at the bottom of page 190 and onto 191 of the

VRP. (“the sole factual finding was the patella femoral instability proximately caused by this industrial injury”).

Plaintiff then switches its focus to Dr. Greenleaf’s actions during the authorized January 24, 2013 surgery. This line of argument by Plaintiff was later characterized by the Department as the “Dr. Greenleaf went rogue” theory. (VRP Vol 2 p. 335). Plaintiff tells the jury, at page 193, that Dr. Greenleaf was authorized to go in and clean out scar tissue around the knee. During that surgery, Dr. Greenleaf notes, for the first time, the kneecap was shifted laterally (to the outside). Plaintiff states:

Having no complaints of any laxity or any lateralization of the patella or tracking issues with that kneecap that were visualized by Dr. Greenleaf on that day. And he decides to spontaneously – what’s called spontaneously perform a limited lateral retinacula release.

(VRP Vol 2 p. 193). The retinacula is gristle on either side of the kneecap that helps hold it in place. After this surgery, Ms. Maphet’s kneecap became increasingly unstable.

Plaintiff then goes on to summarize the testimony of the medical experts. Plaintiff only references their opinions on causation. (VRP Vol 2 p. 197). Plaintiff then states its “Dr. Greenleaf went rogue” theory:

Finally there was no reasonable explanation for spontaneously performing this limited lateral retinacula release performed by Dr. Greenleaf. You’ll hear both doctors testify in the absence of symptoms or confirmed examination findings that this lateralized patella – no business going in and doing that serious a procedure. None what so ever.

(VRP Vol 2 p. 198, ln. 4-9). Plaintiff does not explicitly accuse Dr. Greenleaf of malpractice, but walks the jury right up to that line. This is important, because Plaintiff later wrongly asserts to the Court that it’s not

arguing Dr. Greenleaf committed malpractice. (VRP Vol 2 p. 331 ln. 22-25). Plaintiff then returns to its sole focus on the proximate cause of the kneecap instability. (VRP Vol 2 pp. 198-99). Defendant did not find anywhere in Plaintiff's opening statement any discussion of whether or not the March 20, 2015 surgery was necessary.

c. Closing Arguments

Plaintiff's sole focus on proximate cause continued during closing arguments. This exclusive focus is emphasized by Plaintiff's concessions the March 20, 2015 surgery was medically necessary (curative). This continued its themes from its opening statement, "you [w]on't find that the patella femoral instability was proximately related to the industrial injury or residuals therefrom." (VRP Vol 3 p. 392). Plaintiff then tells the jury:

My case – Clark County's case – this record – addresses **primarily** the first question which is proximate cause. Was the Board of Industrial Insurance Appeals correct in concluding that Jennifer Maphet's patella femoral instability was proximately caused by the November 8, 2009 industrial injury and/or residuals therefrom.

Frankly I am not concerned about question two. And **I will concede to you that there is sufficient evidence to say yes to that.** We all know that that surgery that's at issue here helped somewhat – not much – but it did help somewhat to minimize her falls.

So in that sense if you apply the definition of proper and necessary treatment it was. But that doesn't have anything to do with causation. So the first question is one of proximate cause and it's the one I will focus on because that's where the Board got this wrong when you look at the record.

(VRP Vol 3 pp. 393 ln. 14 – p. 394 ln. 4) (emphasis added). Plaintiff concedes there is no genuine issue of material fact that the surgery helped Ms. Maphet's knee. Plaintiff does not concede causation. Plaintiff

continues to “harp” on proximate cause. (VRP Vol 3 pp. 395 ln. 15-18, 396-397).

Plaintiff then argues that to prove causation, there must always be a link from the condition back to the original injury. (VRP Vol 3 p. 397). This asks the jury to consider whether subsequent treatment was an intervening cause. This argument is contrary to the law cited below and is at the heart of the superior court’s prejudicial jury instruction decisions.

Plaintiff starts to complete this circle by arguing its “Dr. Greenleaf went rogue” theory. (VRP Vol 3 pp. 408-413). Next, it notes even Ms. Maphet agreed her kneecap problems started after the January 24, 2013 surgery. (VRP Vol 3 p. 413). Plaintiff then extensively argues why Dr. Greenleaf’s opinions are wrong. (VRP Vol 3 pp. 414-421). However, Plaintiff does not explicitly call out Dr. Greenleaf as a bad actor until its rebuttal argument.

d. Plaintiff’s objection during Defendant’s closing.

The Court should also consider Plaintiff’s arguments to the Court after it made an objection during Defendant’s closing argument. Defendant asked the jury to affirm the Board on the second verdict question in light of Plaintiff’s concession that the surgery was medically necessary and proper. Plaintiff then objected. (VRP Vol 3 p. 428).

Plaintiff asked the Court to find the second question of the verdict form contains an error. (VRP Vol 3 pp. 428-29). Plaintiff asked that the verdict form be clearer, that the second question only address whether the treatment was appropriate, not proximate cause. (VRP Vol 3 p. 429). The Court denied Plaintiff’s objection noting Plaintiff had an opportunity

before the instructions were read to make any last-minute objections. (VRP Vol 3 p. 431-432). Plaintiff's objections and arguments to the court demonstrated its sole focus and theory of the case was proximate cause.

e. Rebuttal Arguments

Moving to Plaintiff's rebuttal arguments, it does not waiver from its focus on proximate cause. Plaintiff started by acknowledging that Dr. Farris testified that the March 20, 2015 surgery didn't help. However, Plaintiff then conceded, "But everyone else said that she did. **So when I looked at proper and necessary and I said I agree with that point I'm agreeing with that.**" (VRP Vol 3 p. 456 ln. 20-22) (emphasis added). Plaintiff could not more clearly remove this issue from controversy.

Plaintiff then moves on to proximate cause:

For it to even be proper and necessary treatment it has to be related to the industrial injury. It has to be work related first. So my whole point is you don't even get to that second question to answer it because you've already answered no based on the evidence to the first question.

(VRP Vol 3 p. 457 ln. 3-7). Plaintiff then reminds the jury it has always disputed proximate cause. (VRP Vol 3 p. 457 ln. 16-24).

Later in its rebuttal, Plaintiff returns to the question of treatment in the context of the second verdict question:

The second question asks was the March 20th surgery – which was done for patella femoral instability – proper and necessary?

Yes it was curative. Was it due to a work related injury? No. It was unrelated because the first question is "no" as well. It's not did we authorize the May, 2013 Fulkerson procedure – and therefore because that has to be corrected in March because Dr. Greenleaf went too far to one side – that we're now on the hook for it.

(VRP Vol 3 p. 460 ln. 22 – p. 461 ln. 5) (emphasis added). This in another concession the March 20, 2015 surgery was appropriate, curative, and not in controversy.

Plaintiff's argument that authorization of surgery does not mean it is responsible for the consequences of the surgery started just before this concession. (VRP Vol 3 p. 459) ("It's not us making a decision to cover or authorize a particular procedure."). The Court declined to instruct the jury on the legal effects of the Self-Insured Employer's authorization. (VRP Vol 2 pp. 304-306). Plaintiff highlighted this point at page 460, lines 16-20 and again on page 461. Plaintiff carries this line of argument so far as to suggest Defendants are arguing jury nullification. (VRP Vol 3 pp. 461-2).

Plaintiff then makes its most explicit "Dr. Greenleaf went rogue" argument at page 464 asking what is the "true" cause of the patella instability:

But the main one here – putting aside the congenital component that had nothing to do with this industrial injury – it's Dr. Greenleaf's decision to go in – without our authorization – remember we authorized removal of scar tissue – and he goes in on January 24, 2013 – in the absence of symptoms and in the absence of clinical findings a patella femoral instability issue.

And he cuts the gristle at the lateral retinacula. And what happens from there? What happens from that one decision? Ms. Maphet confirmed that's when the knee fell apart. That's when it was shifting all over the place – the patella femoral instability onset.

That's the proximate cause. Not the industrial injury. **That action by an individual [Dr. Greenleaf] who Drs. Tomey and Farris said number one you don't do that.** They said you do not do that serious a procedure – you cut the gristle simply when you visualize some lateralization of the patella

unless you have confirmed symptoms beforehand and confirm the examination findings.

He had neither – neither and he did that. And that sparked all this other treatment to address that instability. **There's your proximate cause.** Enough said on that.

(VRP Vol 3 p. 464 ln. 7 – p. 465 ln. 1) (emphasis added).

Plaintiff does not explicitly use the term medical malpractice, but this argument walks right up to that line. Plaintiff argues further on this point:

It has nothing to do with authorization. This has nothing to do with actions of my client – **it has everything to do with Dr. Greenleaf.** No patella femoral instability – no issues – whatsoever leading up to this moment in time.

And then you have Dr. Greenleaf unilaterally decide to cut the gristle at the lateral retinacula without any findings to suggest that that's the case and then the absence of any complaints by Ms. Maphet to do so. **Completely inappropriate.** And not our responsibility.

(VRP Vol 3 p. 465 ln. 12-15, ln. 19-23) (emphasis added).

In summary, Plaintiff's only theory of the case was proximate cause and that Dr. Greenleaf's mistake and/or malpractice during the January 24, 2013 surgery was the intervening, proximate cause of Ms. Maphet's kneecap instability. Plaintiff withdrew from the jury's consideration whether the March 20, 2015 was medically unnecessary.

STANDARD OF REVIEW

“When reviewing the Board proceedings, [the appellate court] only examine[s] ‘the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.’” *Gorre v. City of*

Tacoma, 184 Wn.2d 30, 36, 914 P.2d 67 (2015), quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). “However, statutory interpretation remains a question of law [the appellate court] determine[s] de novo.” *Gorre*, 184 Wn.2d at 36, citing *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

As Defendant sought to have this matter decided below on a Motion for Directed Verdict, this Court should employ the same standards in determining whether there is any genuine issue of material fact presented in this case. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 431, 858 P.2d 503 (1993). When reviewing a directed verdict ruling, this court applies the same standard as the trial court. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013), citing *Hizey v. Carpenter*, 119 Wn.2d 251, 272, 830 P.2d 646 (1992). A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Chaney*, 176 Wn.2d at 732, citing *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004).

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Even if the instructions are misleading, however, the verdict will not be reversed unless prejudice is shown. *Keller*, 146 Wn.2d at 249. An error is prejudicial if it presumably affects the outcome of trial. *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 23, 914 P.2d 67 (1996).

It is well established that it is within the trial court's discretion whether to give a particular jury instruction. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Abuse of discretion means a disregard of "attendant facts and circumstances." *Samantha A. v. Dep't of Social and Health Serv.*, 171 Wn.2d 623, 645, 256 P.3d 1138 (2011). This Court has also summarized this standard as "judgement exercised with regard to what is right under the circumstances." *State Ex Rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Alternatively, the trial court abuses its discretion when it makes a decision contrary to the law. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). The Supreme Court has also held, "Jury instructions are reviewed *de novo*, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party." *Cox v. Spangler*, 141 Wash.2d 431, 442, 5 P.3d 1265 (2000).

ARGUMENT

Where treatment occurs under a workers compensation claim or as the result of a tortious injury, the long-standing law of Washington is,

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner. . . . The rationale of the rule as applied to medical treatment is that negligent or harmful medical treatment is within the scope of the risk created by the original negligent conduct.

Lindquist v. Dengel, 92 Wn.2d 257, 262, 595 P.2d 934, 936-37 (1979) (citations omitted). The superior court erred when it refused to grant partial directed verdict where there is no dispute the March 20, 2015

surgery was caused, in part, by the previously surgeries authorized under the claim. The superior court also erred when it failed to correctly instruct the jury on this long-standing rule. *Clark Cty. v. McManus*, 185 Wn.2d 466, 471, 372 P.3d 764, 766 (2016) (legal error in refusing to give an instruction is an abuse of discretion).

1. The Compensable Consequences Doctrine is the law.

Within the workers compensation jurisprudence, the rule that self-insured employers (and the Department of Labor & Industries) are responsible for the consequences of its authorized treatment is called the Compensable Consequences Doctrine. This rule starts as far back as 1916 when the Supreme Court said, after presenting a hypothetical where an on-the-job crushed finger leads to an arm amputation due to later medical malpractice:

Counsel reason from a wrong premise. The resultant injury or 'aggravation,' to use the words of the statute, is not an independent injury. It is proximate to the original hurt, and is measured as such. Surgical treatment is an incident to every case of injury or accident, and is covered as a part of the subject treated. . . . When a workman is hurt and removed to a hospital, or is put under the care of a surgeon, he is still, within every intendment of the law, in the course of his employment and a charge upon the industry, and so continues as long as his disability continues. The law is grounded upon the theory of insurance against the consequence of accidents.

Ross v. Erickson Constr. Co., 89 Wash. 634, 647, 155 P. 153, 158 (1916).

Under the *Ross* formulation, Ms. Maphet was in the course of employment during Dr. Greenleaf's January 24, 2013 and May 14, 2013 surgeries, which even Plaintiff concedes were the proximate cause of the contested March 20, 2015 surgery.

The Supreme Court more clearly articulated this rule four years later:

It does not make much difference whether respondent's present condition is the result of the original injury or that injury in connection with its treatment, for the law unquestionably is that if an injured party, in good faith and in the exercise of reasonable care, employs a physician to treat his injury and it is aggravated through the mistake or negligence of his physician, such negligent or mistaken treatment of the physician does not become an intervening cause, and that the injured party may recover damages for the injury he has sustained, including the aggravation thereto resulting from the mistaken or improper treatment.

Yarrough v. Hines, 112 Wash. 310, 313, 192 P. 886, 887 (1920). This decision did not arise out of the Industrial Insurance Act, but it does not depart from the rule enunciated in *Ross*. Again, under Plaintiff's theory, Dr. Greenleaf was mistaken or negligent when he cut the lateral retinaculum on January 24, 2013 and moved the patella tendon too far on May 14, 2013. The *Yarrough* Court holds Dr. Greenleaf's mistake was not an intervening cause and Ms. Maphet can recover "damages" from Plaintiff for that mistake.

The Supreme Court addressed this rule in a workers compensation claim a few decades later. It held, "The aggravation by malpractice of an injury does not become an intervening cause of damages, but is incidental to the original injury." *Anderson v. Allison*, 12 Wn.2d 487, 492, 122 P.2d 484, 486 (1942). This rule is the same one pronounced in *Yarrough*. No reported case has cited *Anderson*, but as will be argued further below, the Board of Industrial Insurance Appeals has a well-established jurisprudence centered on *Anderson*.

It is another two decades before the Supreme Court is again asked

to address this rule of law. “It is settled by *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 140 Pac. 685; *Martin v. Cunningham*, 93 Wash. 517, 161 Pac. 355; and *Yarrough v. Hines*, 112 Wash. 310, 192 Pac. 886, that the original tort-feasor is responsible for any exacerbation of the injuries by negligent treatment.” *Adams v. Allstate Ins. Co.*, 58 Wn.2d 659, 669, 364 P.2d 804, 811 (1961). As applied here under Plaintiff’s theory of the case: Plaintiff is responsible for any new kneecap instability under Ms. Maphet’s workers compensation claim caused by Dr. Greenleaf’s negligent decision to release the lateral retinaculum on January 24, 2013 and move the patella tendon too far on May 14, 2013.

The Court continued its twenty-year pattern in *Lindquist*, whose core holdings are summarized above. This is the last Supreme Court decision arising from *Yarrough* and its progeny. Division Three of the Court of Appeals affirmed this line of case a few years later: “negligent medical treatment is a normal intervening cause, an incident within the scope of the risks created by the original negligent conduct.” *Erdman v. Lower Yakima Valley B.P.O.E. Lodge No. 2112*, 41 Wn. App. 197, 210, 704 P.2d 150, 159 (1985).

The most recent reported decision is *Henderson v. Tyrrell*, also from Division Three, which held the following jury instruction was a correct statement of the law:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

Negligent or harmful medical treatment is within the scope of risk created by the original negligent conduct.

80 Wn. App. 592, 627, 910 P.2d 522, 542 (1996). Defendant's Proposed Instruction No. 16 (Appendix F) accurately transformed this approved instruction for use in a worker's compensation trial.

The Board of Industrial Insurance Appeals has its own jurisprudence based upon the *Ross* and *Anderson* decisions. *In re Arvid Anderson*, BIIA Dec., 65,170 (1986), **Appendix H**; *In re David R. Green*, Dckt. No. 13 11951 (October 6, 2014), **Appendix I**; *In re Jose Rivera*, Dckt. No. 96 6920 (April 27, 1998), **Appendix J**; *In re Willma J. Lee*, Dckt. No. 08 13990 (August 4, 2009), **Appendix K**.¹ In *In re Arvid Anderson*, the Board held the self-insured employers are responsible for the consequences of authorized treatment, citing to the appellate decisions of *Ross* and *Anderson*.

The most recent Board decision applying *Arvid Anderson* is *In re David R. Green*. The Board held a self-insured employer is responsible for the consequences of an authorized surgery. Next, in *In re Jose Rivera*, the Board found the Department responsible for the consequences of an abdominal surgery. Under Plaintiff's theory of this appeal, the *Rivera* facts are very similar to the Ms. Maphet's claim.

Finally, there is *In re Willma J. Lee* where the Department authorized a shoulder surgery, but later tried to argue it was not actually responsible for the underlying shoulder condition for which the surgery was performed. The *Lee* Board held, "Once the Department pays for a

¹ Only *In re Arvid Anderson* has been designated as significant by the Board of Industrial Insurance Appeals per RCW 51.52.160 and WAC 263-12-195. Regardless, they should all be considered persuasive authority by this Court.

surgery, any residuals of the surgery must be found to be industrially related.” Here the Plaintiff authorized and paid for every surgery prior to the March 20, 2015 Fulkerson revision. When Plaintiff authorized surgeries to attempt a fix to Ms. Maphet’s kneecap instability, that kneecap instability is now related to the original industrial injury.

2. The superior court erred in denying Defendants’ Motions for Partial Directed Verdict.

The Department of Labor & Industries and Ms. Maphet both filed Motions for Partial Directed Verdict. (CP at 29, 33). The superior court denied these motions. (CP at 40). The motions were reraised after the testimony was read to the jury and again denied. (CP at 41).

In all appeals to superior court, the jury is reviewing whether the Findings of Fact made by the Board of Industrial Insurance Appeals are correct. RCW 51.52.115. The Board’s Finding of Fact No. 3 states:

As of September 24, 2015, Jennifer Maphet’s patellofemoral instability and concussion conditions were proximately caused by the November 8, 2009 industrial injury and/or residuals therefrom, and required further proper and necessary medical treatment, including the March 20, 2015 surgery by Dr. Greenleaf.

(CABR p. 7). Defendant requested the court find the statement of proximate cause be found correct as a matter of law, with further appropriate instructions given to the jury. (Defendant’s Motion page 9; Sub. 29).

a. The Authorized January 24, 2013 Surgery

Even when the evidence is viewed in a light most favorable to Clark County, there is no genuine issue of material fact that:

[Ms. Maphet's] present condition is the result of the original injury **or that injury in connection with its treatment**, for the law unquestionably is that if [Ms. Maphet], in good faith and in the exercise of reasonable care, employs [Dr. Greenleaf] to treat [her] injury and it is aggravated through the mistake or negligence of [Dr. Greenleaf during surgery], such negligent or mistaken treatment of [Dr. Greenleaf] does not become an intervening cause, and that [Ms. Maphet] may recover damages for the injury [she] has sustained, including the aggravation thereto resulting from the mistaken or improper [surgery].

Yarrough, 112 Wash. at 313 (emphasis added). Defendant's Motion for Directed Verdict must be granted so long as there is no genuine issue of material fact the March 20, 2015 surgery was caused, in part, by treatment performed under the claim. This is true regardless of whether that treatment used reasonable care, was in good faith, was a careless mistake, or was negligent, even if there is some evidence the original injury did not itself cause the kneecap instability. Defendant does not need to prove the original injury and the treatment caused the kneecap instability.

Plaintiff's theory of causation was "Dr. Greenleaf went rogue" and caused the kneecap instability by his own actions during the January 24, 2013 surgery. (VRP Vol 3 pp. 464-65). Plaintiff argued, "It has nothing to do with authorization. This has nothing to do with the actions of my client – it has everything to do with Dr. Greenleaf." (VRP Vol 3 p. 465). Plaintiff asked the jury to find Dr. Greenleaf's mistake was the intervening cause and therefore the March 20, 2015 surgery should not have been covered under this claim.

Plaintiff also made the same arguments to the court when the jury instructions were being reviewed.

So in this instance for the March 20th, 2015 surgery is for

patella femoral instability is not the fact that we authorized the May, 2013 Fulkerson procedure that addressed that condition *it's whether or not that patella instability at its origin is proximately related to the industrial injury or treatment provided to address a related condition.*

(VRP Vol 2 p. 314, ln. 1-6) (emphasis added). Plaintiff later argued that the law requires proof of a connection between “downstream consequences” of a surgery and the original injury. (VRP Vol 2 pp. 326-27, 328-29). Defendant is unable to find any reported decision requiring such connection.

The superior court erred in denying directed verdict when it found, “there is disputed evidence in the record about whether or not that’s – that should be – that the patella femoral is a natural and subsequent consequence of what surgeries she did have.” (VRP Vol 2 p. 277). With all due respect, the superior court’s understanding of the evidence is wrong. There is a dispute as to whether the original injury caused a problem with the patella.

There is no dispute, even when viewed in a light most favorable, that the patella problems arose as a natural and subsequent consequence of the authorized surgeries. There is no dispute the March 20, 2015 Fulkerson revision was the natural downstream consequence of the series of authorized surgeries starting with the one on January 24, 2013 where Plaintiff alleges Dr. Greenleaf made his mistake. There is especially no dispute the March 20, 2015 Fulkerson revision was the natural downstream consequence of the original, authorized May 14, 2015 Fulkerson procedure.

Dr. Farris believed the kneecap problems started during the

authorized January 24, 2013 surgery, which led to the authorized May 14, 2013 Fulkerson procedure. (Dep. Farris pp. 39, 23).

Apparently, Dr. Greenleaf was concerned that she was having some lateral subluxation of her patella because he performs what we call a Fulkerson procedure. That's where you basically transplant the patella medially by cutting the - - where it inserts on the tibia, and cut that piece of bone and shift it towards the inner aspect of the knee a few millimeters.

(Dep. Farris p. 23, ln. 9-16). This surgery then led the following surgeries, culminating with the March 20, 2015 Fulkerson revision. (Dep. Farris pp. 23-25).

Well, she didn't do well, so then she was taken back to surgery on March 20, 2015, and Dr. Greenleaf revised the Fulkerson procedure. Once again, he cut the bone and shifted the kneecap back laterally a few millimeters.

(Dep. Farris p. 25, ln. 12-16). No reasonable juror can conclude, based upon this testimony, the March 20, 2015 Fulkerson revision was not proximately caused by the consequences of the authorized January 24, 2013 surgery, which lead to the authorized May 14, 2013 Fulkerson procedure, which lead to each of the following surgeries.

Plaintiff's other medical witness Dr. Toomey, testified, there were no kneecap issues prior to the authorized January 24, 2013 surgery. The kneecap issues were first stated in the post-operative diagnoses in that procedure note. Dr. Toomey testified the kneecap problems started with the authorized January 24, 2013 surgery. (Dep. Toomey pp. 26-29, 35-36).

Dr. Toomey believed, looking at the case prospectively, that the authorized January 24, 2013 surgery was appropriate to perform, even if

he disagreed with the decision to release the lateral retinaculum. (Dep. Toomey pp. 46-49). Dr. Toomey agreed there was scar tissue in the knee. The scar tissue was due to the prior authorized surgeries. The authorized January 24, 2013 surgery was primarily performed to remove that scar tissue. (Dep. Toomey pp. 46-48).

In light of this testimony, any reasonable juror would find the authorized January 24, 2013 surgery was designed to treat her original injury. The prior four authorized surgeries caused scar tissue formation and everyone agreed that Dr. Greenleaf should remove that scar tissue.

Next, any reasonable juror would find the authorized January 24, 2013 surgery caused an aggravation, using the terminology from *Yarrough*, of the original injury. Using modern terminology, any reasonable juror would find the authorized January 24, 2013 surgery caused a new injury to the knee. This is because Drs. Farris and Toomey, plus Plaintiff, agree: the kneecap instability was caused by the authorized January 24, 2013 surgery. Plaintiff did not argue the kneecap instability occurred spontaneously. Under *Yarrough*, *Anderson*, *Adams*, *Lindquist*, *Erdman*, and *Henderson* it was error to deny partial directed verdict in favor of Defendant's.

b. The Authorized May 14, 2013 Fulkerson Procedure and its March 20, 2015 Revision.

Even if the Court finds a genuine issue of material fact regarding the original cause of the January 24, 2013 surgery and its effects on Ms. Maphet's knee, it must then address the effect of the authorized May 14, 2013 Fulkerson Procedure. As a reminder, this is a procedure that moves

the attachment of the patella tendon left or right for purpose of repositioning the kneecap. Under *Yarrough*, once Plaintiff authorized this surgery and Ms. Maphet accepted that surgery in good faith, then Plaintiff is responsible for the consequences of that surgery (e.g. requiring a future revision surgery) as if it were originally caused by the industrial injury. Under the *Ross* formulation of the Compensable Consequences Doctrine, Ms. Maphet is in the course of employment while she is undergoing authorized surgeries.

Dr. Toomey testified that once the authorized 2013 Fulkerson procedure was performed, which was a reasonable procedure to have been performed, the patella had been moved too far medially. (Dep. Toomey pp. 27-29, 50). The subsequent surgeries were done to fix this over-correction, culminating with the March 20, 2015 surgery. (Dep. Toomey pp. 27-29). Dr. Toomey believed the March 20, 2015 Fulkerson revision was proper for Dr. Greenleaf to have performed. (Dep. Toomey pp. 31-32).

The causal connection between the authorized May 14, 2013 Fulkerson procedure and the disputed March 20, 2015 Fulkerson revision should be obvious because they are the same procedure. The first one moved the patella tendon medially (to the inside of the knee). The second one moved it back towards, but not all the way, the center. The March 20, 2015 Fulkerson revision was fixing a mistake made during the authorized May 14, 2013 Fulkerson surgery.

The same *Yarrough* analysis applies, this surgery was caused by treatment for the original surgery: the January 24, 2013 surgery. Also, the

same downstream consequence analysis applies. If Dr. Greenleaf made another mistake during the May 14, 2013 surgery, Plaintiff is still responsible for the consequences of the mistake.

The *Ross* analysis applies too. Ms. Maphet was effectively in the course of employment during each of the eight authorized knee surgeries listed above. This means any further injury caused by those surgeries are compensable as if they occurred at the time she fell down the stairwell in 2009. Plaintiff was wrong when it argued authorization doesn't matter, because from *Ross* to *Henderson* it is the essential undisputed fact tying each of these surgeries to the original injury.

c. The Compensable Consequences Doctrine has been adopted through regulation and has not been overturned by statute.

In addition to the legal responsibilities created by our courts from *Ross* to *Henderson*, this surgery also presents the Court with the question, what does it mean when a self-insured employer authorizes a procedure? What are the legal effects, if any, of that authorization? If the Court does not answer this question through application of long-standing court precedent cited above, then it must examine and interpret WAC 296-20-01002's definition of "Authorization" and "Accepted Conditions." But it must first interpret RCW 51.32.190 because Plaintiff used this statute to argue its authorizations have no legal effect.

i. RCW 51.32.190 addresses a self-insured employer's obligations and rights prior to claim allowance; it does not apply to this appeal.

First, the Court must recognize the role Self-Insured Employer's play in our system of industrial insurance. The Court's Instruction No. 11 accurately summarizes that role. It was originally Defendant's Proposed Instruction No. 8, which cites to a number of statutes (RCW 51.14.080; RCW 51.08.173; RCW 51.32.055(6)-(10); RCW 51.32.190) and two cases. The first is *Taylor v. Nalley Fine Foods*, 119 Wn. App. 919 (2004), which held a self-insured employer's obligation to pay benefits is independent of any Department order. The other was, *Boeing Co. v. Doss*, 183 Wn.2d 54, 58 (2015), which stated, "Self-insured employers are generally responsible for all disability and medical costs associated with their workers' compensation claims."

These statutes and cases should be contrasted by Plaintiff's closing arguments, which are likely to be made again in this appeal. Plaintiff started by stating, "It's not us making a decision to cover or authorize a particular procedure." (VRP Vol 3, p. 459). It then asserted that its own authorization of the May 14, 2013 Fulkerson procedure had no legal effect whatsoever. (VRP Vol 3 p. 460-461). Plaintiff asserted the ultimate legal authority rests with the Department.

This line of argument was explicitly rejected in *Taylor*, 119 Wn. App. at 925-26:

A further indication that the duty to pay is independent of the Department's orders can be found in RCW 51.14.080(3), wherein the Director may withdraw certification of a self-insurer on the ground that the self-insurer "unreasonably makes it necessary for claimants to resort to proceedings against the employer to obtain compensation."

In short, Self-Insured Employers have an independent obligation to

determine and authorize the benefits of injured workers.

What this case asks, as a matter of first impression, is does authorization of the May 14, 2013 Fulkerson procedure equal acceptance of the conditions (kneecap instability) for which the surgery was authorized? It does. If authorization does not equal acceptance, then the relief for injured workers in self-insured claims is neither sure nor certain, and therefore contrary to the Act's purpose. RCW 51.04.010.

Below, Plaintiff relied upon RCW 51.32.190 to assert its own authorizations had no legal effect. Appendix L. There are only five reported decisions citing to RCW 51.32.190. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 453, 932 P.2d 628, 634 (1997), *overturned on other grounds*, *Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887 (2003), simply notes that RCW 51.32.190 governs self-insured employers' claims processing procedures. It is cited by the dissent for the same point in *Johnson v. Tradewell Stores*, 95 Wn.2d 739, 752, 630 P.2d 441, 448 (1981).

The Supreme Court in *Wolf v. Scott Wetzel Servs.*, 113 Wn.2d 665, 673, 782 P.2d 203, 207 (1989) addressed whether an injured worker has a cause of action against a third-party administrator who handles claims on behalf of self-insured employers. At Footnote 21, the Court notes RCW 51.32.190(6) gives the Director authority to adopt rules to ensure fair and prompt handling of claims. Division One makes the same point in *Deeter v. Safeway Stores*, 50 Wn. App. 67, 77, 747 P.2d 1103, 1109 (1987). Neither decision is a substantive analysis of the statute.

The only reported case that interprets RCW 51.32.190 as a whole

is *Taylor, supra*. While primarily focused on a self-insured employer's independent authority, the Court notes that RCW 51.32.190 generally governs what happens in a claim prior to the claim being allowed. 119 Wn. App. at 925. That is the extent of the Court of Appeal's analysis.

Its analysis is accurate. RCW 51.32.190 governs parties' rights and responsibilities for benefits prior to a claim being allowed. This is boldly stated in the first subsection that if a claim is denied, the self-insured employer shall give written notice to the worker and the Department. RCW 51.32.190(1). This sets the plain context for the remainder of the sub-sections.

The statute next provides that, until the Department issues an order on a disputed case (e.g. a request for a denial by the self-insured employer), if a self-insured employer pays and the worker accepts compensation then that is not binding determination upon the parties. RCW 51.32.190(2). The *Taylor* Court read this as meaning a self-insured employer can still pay compensation prior to the Department's decision to reject or allow a claim without those payments being considered an admission. 119 Wn. App. at 925.

At this point, the Court should consider the definition of compensation. That term is not defined in the Industrial Insurance Act itself. The Department has enacted WAC 296-15-340, which defines the "Payment of Compensation" as time loss compensation (per RCW 51.32.090). It is not medical treatment as is in dispute here. This distinction is important because it is anticipated that Plaintiff will argue that RCW 51.32.190 means it can authorize and pay whatever it desires,

but that choice to authorize surgery has no binding legal effect upon itself. It is wrong.

Even if the Court accepts Plaintiff's assertions that RCW 51.32.190 applies to post-allowance benefits, it is limited only to payment of compensation. The statute does say the authorization of treatment and acceptance thereof is binding. Read as a whole, the Act differentiates between compensation payments and treatment. See RCW 51.36.010, RCW 51.04.020, and RCW 51.04.030. This is further seen in RCW 51.32.190(3), because it governs when "income benefits" start after a claim is filed and the frequency by which they must be paid. Treatment authorizations are not income benefits.

RCW 51.32.190(4) is at the center of Plaintiff's theory, but it again uses the term payment of compensation:

If, after the payment of compensation without an award, the self-insurer elects to controvert the right to compensation, the payment of compensation shall not be considered a binding determination of the obligations of the self-insurer as to future compensation payments. The acceptance of compensation by the worker or his or her beneficiaries shall not be considered a binding determination of their rights under this title.

Like the term "compensation", the term "award" is not defined by the Act, although it is used again in the subsequent sections. It is used in conjunction with "decision, order or award," suggesting it is synonymous with an RCW 51.52.050 order.

This section is a companion to RCW 51.32.190(2) and provides that if a self-insured employer starts paying compensation (time loss), prior to an allowance award (order), but then stops paying compensation,

the fact it had paid compensation cannot be considered an admission. RCW 51.32.190(4) governs the parties' rights and responsibilities prior to claim allowance.

When interpreting statutes, the Court must read the entire Act as a whole. *State v. Jimenez*, 200 Wn. App. 48, 52, 401 P.3d 313, 315 (2017). It should look for similar provisions to determine if they help it interpret the plain meaning of RCW 51.32.190. To this end, the Court should start with the companion statute RCW 51.32.210.

By its express provisions, RCW 51.32.210 only applies to State Fund claims. However, it addresses the same issue of prompt action after a claim is filed. It requires the Department to pay benefits every 14 days once a claim is filed. It also has the non-binding language so long as the Department has not yet issued an order.

This statute has also been limitedly cited by our Courts. In *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 545, 379 P.3d 120, 124 (2016) at footnote 3 the Court notes the Department is required to promptly pay benefits after a claim is filed. This suggests that the statute addresses the parties' rights and obligations prior to claim allowance. This means RCW 51.32.190 is also limited to payments made prior to claim allowance.

In *Rhodes v. Dep't of Labor & Indus.*, 103 Wn.2d 895, 897, 700 P.2d 729, 730 (1985) there was a dispute whether the injury was covered under workers compensation or the federal Longshore Act. The Court noted the Department preliminarily paid benefits until the coverage (jurisdiction) issue was resolved. This also suggests RCW 51.32.210

governs pre-claim allowance benefits.

Next, the Court should consider RCW 51.32.240(3). It does not appear this provision has been interpreted by any Court. The statute provides that if the Department rejects a claim and benefits had been paid prior to rejection, pursuant to RCW 51.32.190 or RCW 51.32.210, the recipient of the benefits must pay them back. This also strongly suggests that RCW 51.32.190 governs the rights and obligations of the parties prior to the claim being allowed.

But once the claim is allowed, the Self-Insured Employer's ability to otherwise recoup erroneously paid benefits is governed by the other provisions of RCW 51.32.240. This creates a clear statutory dichotomy between pre-claim allowance and post-claim allowance actions by self-insured employers. If the legislature intended to let self-insured employers authorize treatment after claim allowance, but evade the consequences of that authorization, it would have written RCW 51.32.240(3) differently. It did not.

The plain reading of RCW 51.32.190 should lead this Court to conclude it does not apply to any of the authorized surgeries in this claim. It does not apply because Ms. Maphet's claim is allowed. RCW 51.32.190(4) only applies to compensation payments made prior to claim allowance and only when the claim is ultimately rejected. Plaintiff's decision to authorize these eight surgeries, after claim allowance, were done under its full authority and all of the legal consequences that attach to its authorizations.

ii. If the Court finds RCW 51.32.190 ambiguous, then

**liberal construction should limit the scope of subsections
2 and 4 to benefits paid prior to an allowance order.**

With all that being said, the Court could conclude that RCW 51.32.190 is not clearly worded and its lack of definitions is ambiguous. It could be susceptible to a finding of vagueness. If the Court finds RCW 51.32.190 vague, then it is required to employ the Liberal Construction doctrine of RCW 51.14.010.

“If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). In other words, if “both parties offer reasonable, conflicting interpretations of the text and purpose of the statutory scheme at issue,” then the Court must find the statute ambiguous. *Crabb v. Dep’t of Labor & Indus.*, 181 Wn. App. 648, 657, 326 P.3d 815 (2014), *rev. den.* 181 Wn.2d 1012 (2014).

But the Legislature has already mandated courts to liberally construe the Act in favor of the injured worker. RCW 51.12.010. This means, “All doubts as to the meaning of the Act are to be resolved in favor of the injured worker.” *Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). In the *Crabb* decision, Division Two further explained what this requirement means:

The Supreme Court has commanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker. Because Crabb makes at least a reasonable case for his entitlement to the higher benefit rate, *we must resolve the Department's appeal in his favor,*

despite the canons of construction invoked by the Department.

Crabb, 181 Wn. App. at 658 (emphasis added, citations omitted).

As RCW 51.12.010 reminds us, the purpose of the Act is to reduce to a minimum the economic harm and suffering experienced by injured workers. RCW 51.04.010 also states the purpose of the Act is to provide sure and certain relief to injured workers and their families. The Industrial Insurance Act must be interpreted by the Court to further, not frustrate, this purpose. *Bostain v. Food Express*, 159 Wn. 2d 700, 712, 153 P.3d 846 (2007) (interpreting Title 49 RCW, which has a similar liberal construction requirement).

If this Court reads RCW 51.32.190 in the way proposed by the Self-Insured Employer (e.g. its authorizations are not binding and have no legal consequences) then Ms. Maphet's relief from her injuries become less sure and more uncertain. Plaintiff's position in this appeal is that it can evade responsibility for a March 2015 surgery, by arguing it is not bound by its decision to authorize surgeries in January 2013 and May 2013. Nothing could be more unsure and uncertain for injured workers.

The liberal construction of the Act requires the Court to limit RCW 51.32.190 and especially subsections 2 and 4 to payments of compensation prior to claim allowance. As a matter of public policy, it is understandable that Self-Insured Employer should not be inhibited in the provision of benefits for fear that it will be used against them when a dispute arises over claim allowance. Once the claim is allowed, the stated public policy of the legislature is to bind Self-Insured Employers for their own decisions. If they authorize a surgery, then they will always be

responsible for the downstream consequences of that surgery.

iii. The Department's regulations require self-insured employers take responsibility for their authorized treatment.

This brings the Court to the Department's definition of Authorization and Accepted Condition in WAC 296-20-01002:

Authorization: Notification by a qualified representative of the department or self-insurer that specific proper and necessary treatment, services, or equipment provided for the diagnosis and curative or rehabilitative treatment of an accepted condition will be reimbursed by the department or self-insurer.

Acceptance, accepted condition: Determination by a qualified representative of the department or self-insurer that reimbursement for the diagnosis and curative or rehabilitative treatment of a claimant's medical condition is the responsibility of the department or self-insurer.

To paraphrase, when Plaintiff authorized a surgery, it admitted the surgery was curative treatment of an accepted condition. When Plaintiff authorized a surgery to fix a dislocating kneecap, it accepted responsibility for Defendant's dislocating kneecap. When Plaintiff authorized the May 14, 2013 Fulkerson procedure, it admitted that surgery was curative treatment for Defendant's accepted condition of patellar instability.

The superior court struggled with the fact there is no explicit evidence as to what the condition was being accepted by Plaintiff when it authorized each of the surgeries. (VRP Vol 1 p. 12). However, that evidence was not necessary here because there is no dispute what the May 14, 2013 surgery was for: kneecap instability. All of the doctors agreed that a Fulkerson Procedure is designed to move the kneecap to a different

position, so it stops sliding out of position. That is not in dispute.

Returning to WAC 296-20-01002, it is a binding legislative rule, not merely an interpretative one. Legislative rules have the same force and effect as statutes. *Winans v. W.A.S., Inc.*, 112 Wn.2d 529, 538, 772 P.2d 1001 (1989). Legislative rules are defined by Washington's Administrative Procedure Act, which applies to regulations enacted by the Department of Labor & Industries. RCW 34.05.328(5)(a)(i). Significant legislative rules are defined as follows:

a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.

RCW 34.05.328(5)(c)(iii). Under this definition, WAC 296-20-01002 is a legislative rule.

First, the Director of the Department of Labor & Industries was directly tasked with supervising medical aid and treatment under the Act. RCW 51.04.020(4). Also, RCW 51.32.190(6) specifically authorizes the director to "enact rules and regulations providing for procedures to ensure fair and prompt handling by self-insurers of the claims of workers." Therefore, WAC 296-20-01002 was adopted pursuant to specific delegated legislative authority.

Furthermore, RCW 51.48.080 subjects any person or firm to a penalty for failing to follow the rules of the Department of Labor & Industries. Also, RCW 51.48.017 subjects self-insured employers to

penalties for delay in the payment of benefits, which includes payment of medical services. The two definitions cited above, specifically address a Self-Insured Employer's responsibility to pay for medical services.

Second, failure to follow these definitions in WAC 296-20-01002 are grounds for the alteration, suspension or revocation of Plaintiff's license or permit to be a self-insured employer. RCW 51.14.080 and RCW 51.14.095 govern whether and how the Director may place a self-insured employer on probation (corrective action) or terminate its status as a self-insured employer. One of the grounds in RCW 51.14.095(1)(a) is "The employer is not following proper industrial insurance claims procedures." Claims procedures includes the procedure for what it means to authorize treatment under a workers compensation claim.

The superior court erred when it denied directed verdict. It erred by not giving the full force an effect of WAC 296-20-01002 in light of Plaintiff's multiple surgery authorizations. Plaintiff authorized the May 14, 2013 Fulkerson procedure to fix Ms. Maphet's dislocating kneecap. It made things worse. No reasonable juror could conclude the March 20, 2015 Fulkerson revision was not proximately related to the authorized May 14, 2013 Fulkerson revision. No reasonable juror could conclude Plaintiff did not accept responsibility for Ms. Maphet's dislocating kneecap when it authorized three surgeries whose sole purpose was to cure that kneecap. This Court should grant Directed Verdict in favor of Defendant.

d. *Hull v. PeaceHealth* does not support Plaintiff's arguments that authorization is immaterial.

Given the law established by *Ross*, *Yarrough*, *Anderson*, *Adams*, *Lindquist*, *Erdman*, and *Henderson*, it was clear error not to grant directed verdict in favor of Defendant. Furthermore, the court below erred because its denial was based upon the unreported decision of *Hull v. PeaceHealth Med. Group*, No. 74413-5-I, 2016 Wash. App. LEXIS 2264, at *1 (Ct. App. Sep. 26, 2016). However, even *Hull* supports this long-standing rule in Washington, “Proper and necessary treatment encompasses conditions secondary to the occupational disease, such as complications from surgery.” *Hull*, pp. 12-13. Complications include those arising from mistakes or negligent malpractice by the surgeon.

Defendant argued to the Court, during discussions of the jury instructions, that Plaintiff’s case was premised upon a theory of malpractice. (VRP Vol 2 pp. 330-31). Defendant cited to the *Anderson* case that held malpractice does not break the causal chain back to the original injury. The law of Washington is clear: malpractice is not an intervening cause.

In partial response to these arguments, Plaintiff asserted, “there’s no allegations of medical malpractice. All the evidence in the record here is that there was no malpractice. There was suggestions of it but there is no evidence of that. So I am not arguing that.” (VRP Vol 2 p. 331, ln. 22-25). While Plaintiff did not explicitly argue malpractice, it walked right up to that line. During rebuttal, Plaintiff argued Dr. Greenleaf made a “mistake” releasing the lateral retinaculum during the January 24, 2013 surgery. *Supra*.

Plaintiff’s alternate theory, as succinctly stated by the Assistant

Attorney General, is what happens when a doctor “goes rogue” by doing additional procedures during otherwise authorized surgery? (VRP Vol 2 p. 335). Plaintiff argued it should not be bound by the doctor’s decision. Yet, the long line of cases from *Ross* to *Henderson* makes Plaintiff responsible regardless of whether it was malpractice, a mistake, or the doctor acted in good faith.

Plaintiff argued below that the Court’s pronouncement in *Hull* at page eleven is most analogous to this appeal:

And because the Thoracic Outlet Syndrome was proximately caused by Hall’s (*sic*) working conditions the downstream consequences of her surgery are also covered.

(VRP Vol 2 p. 341). Plaintiff asked the superior court to substitute the patellar instability for Thoracic Outlet Syndrome. Somehow, Plaintiff believed this still permitted it to argue original proximate cause to the jury. Plaintiff is mistaken.

The correct factual substitution from this appeal is not the patellar instability. In *Hull* the pivot point in the claim was that self-insured employer authorized a surgery for Thoracic Outlet Syndrome (TOS). What was at issue was whether the conditions arising after the TOS (e.g. depression, *et al*) were related. The Court found they were because they were caused by the TOS.

The correct substitution are the conditions or reasons for which the authorized January 24, 2013 surgery was performed on Ms. Maphet’s knee. It is that surgery where Dr. Greenleaf first observed the patella out of position and performed a reticulum release. This is the surgery where Plaintiff alleges Dr. Greenleaf “went rogue.”

Taking the language from page eleven in *Hull* and performing the correct substitution, it would read:

And because the January 24, 2013 surgery was proximately caused by Ms. Maphet's industrial injury the downstream consequences of her surgery are also covered.

The downstream consequence is the kneecap instability and each of the authorized surgeries up to and including the disputed one on March 20, 2015. The trial court's reliance on *Hull* to deny directed verdict was misplaced.

e. Plaintiff's many concessions remove all remaining questions of substantial evidence.

Plaintiff has conceded the March 20, 2015 Fulkerson revision was medically necessary, in that it was an appropriately performed whose purpose was curative or rehabilitative treatment. This concession was not made just once, it was made many times. Some of the concessions were explicit, "Yes it was curative." (VRP Vol 3 p. 460, ln. 25; see also Vol 3 p. 456). Some were implied by Plaintiff's exclusive focus on causation. (VRP Vol 2 pp. 188-89, 190-1, 198-99; Vol. 3 pp. 393-94, 395, 408-13, 464-65). These concessions have removed all questions whether substantial evidence still supports the jury's verdict.

When the Superior Court erred in denying Defendant's Motion for Partial Directed Verdict, the jury could have still concluded the March 20, 2015 Fulkerson revision was neither curative nor rehabilitative. But Plaintiff conceded that mixed issue of law and fact, leaving causation as the only dispute remaining in the appeal. There is no genuine issue of material fact that the authorized surgeries from May 14, 2013 Fulkerson

procedure to the March 20, 2015 Fulkerson revision were designed to cure Ms. Maphet's kneecap instability.

This Court must affirm the decision of the Board of Industrial Insurance Appeals in its entirety. It must affirm because its Finding of Fact No. 3, which finds the kneecap instability was proximately caused by the residuals of the industrial injury and the March 20, 2015 surgery was medically necessary and proper treatment.

3. The Court also erred when it denied Defendant's Proposed Instructions No. 10 and 16 and the Department's Proposed Instructions No. 1 and 2

Jury instructions must "enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict." *Fergen v. Sestero*, 182 Wn.2d 794, 818, 346 P.3d 708, 720 (2015) (citations omitted). Instructions must be read as a whole and the decision of the court will only be reversed upon a showing of prejudice. *Herring v. DSHS*, 81 Wn. App. 1, 22-23, 914 P.2d 67, 80 (1996).

If the Court finds the superior court did not err in denying directed verdict, the superior court still committed prejudicial error in its instructions. Taken as a whole, they do not accurately instruct the jury of the law of the compensable consequences doctrine of *Yarrough* and its progeny. They do not accurately instruct the jury as to the legal effects of Plaintiff's multiple surgery authorizations. They do not accurately instruct the jury on whether Dr. Greenleaf's actions during the January 24, 2013 surgery constitute an intervening cause of the kneecap instability.

The Court's Instruction No. 14 (Appendix E) is an incomplete and

inaccurate statement of the law. It states:

If you find that Ms. Maphet's right knee patellofemoral instability was proximately caused by her November 8, 2009 industrial injury, and/or was the result of treatment provided to address a condition proximately caused by the November 8, 2009 industrial injury, then the downstream consequences are the responsibility of Clark County.

Defendant took exception to this instruction as noted by the superior court. (VRP Vol 3 p. 370, ln. 8-10). This instruction is flawed in two important respects.

First, it does not advise the jury that if Dr. Greenleaf made a mistake or committed malpractice during any of his surgeries, then that mistake does not constitute an intervening cause. The superior court was advised of this rule as stated in *Anderson*, 12 Wn.2d at 492. The *Anderson* decision is in line with all of the other cases cited above from *Ross* through *Henderson*. The Court was presented with and rejected Defendant's Proposed Instruction No. 10. Appendix B. It accurately advises the jury authorized treatment cannot be considered an intervening cause. Defendant took exception to the rejection of its Proposed Instruction No. 10. (VRP Vol 2 pp. 304-306).

The Court's instructions allowed Plaintiff to argue that Dr. Greenleaf's mistake during the January 24, 2013 surgery was the intervening cause of the kneecap instability. Permitting Plaintiff to argue this theory was prejudicial to Defendant because the jury could have and probably did find Dr. Greenleaf's mistake during the authorized January 24, 2013 surgery was an intervening cause. It is reasonable for the Court to reach that conclusion because the jury found for Plaintiff. This was the

Plaintiff's only theory as to why it was not responsible for the kneecap instability despite authorizing the January 24, 2013 surgery.

Second, the Court's Instruction No. 14 does not advise the jury at all as to the legal effects of the Plaintiff's authorizations of the four surgeries in 2013 and 2014. Defendant's Proposed Instructions No. 10 and 16 would have correctly advised the jury. Appendix B and F. Exception were also take to the Court's rejection of Defendant's Proposed No. 16. (VRP Vol 2 p. 360).

Plaintiff argued against Proposed No. 16 by noting that if it is given, the Court might as well grant directed verdict. Plaintiff is essentially correct because Proposed No. 16 is an accurate statement of the law: if Plaintiff authorizes a surgery, such as the May 14, 2013 Fulkerson procedure, then it must also be responsible for any subsequent surgeries on the kneecap, especially the March 20, 2015 Fulkerson revision. However, just because Plaintiff's analysis of the instruction is correct does not mean it should not have been given to the jury.

Giving Defendant's Proposed Instruction No. 16 would still have permitted Plaintiff to argue a theory of the case. Plaintiff had an alternate theory, even with this instruction, it could have argued: The March 20, 2015 surgery was not curative per Dr. Farris' testimony. Plaintiff, instead, chose to abandon this theory and concede to the jury, starting at its opening statement and continuing through its rebuttal arguments, the March 20, 2015 surgery was curative.

Plaintiff conceded at every opportunity that there was not substantial evidence to find that surgery was not curative. Plaintiff

repeatedly conceded to the jury the Board of Industrial Insurance Appeals was correct when it found that surgery was curative. Defendant's Proposed Instruction No. 16 is an accurate statement of the law and permitted the parties to argue competing theories of the case. It was error not to give it.

Defendant was prejudiced because she was not permitted to argue to the jury the legal effects of authorization. As the Court's Instruction No. 1 correctly provides, statements from the attorneys are argument and cannot be a substitute for the law provided in the jury instructions. An attorney's opinion about the law is not a substitute for the court instructing the jury about the law. *McManus*, 185 Wn.2d at 474-75.

As the Court can see from Defendant's directed verdict briefing and argument, this was the central legal theory of her case. Plaintiff authorized these surgeries, which has legal consequences. Defendant's argument, without these instructions, is puffery to the jury.

This is especially true because the Court's error in instructions also allowed Plaintiff to argue Dr. Greenleaf's mistake was an intervening cause. This is not the law of Washington. It permitted the jury to decide something that is contrary to law. Again, Defendant was prohibited from arguing the law because he had no instruction upon which to base her arguments. These errors were prejudicial.

Finally, the superior court also rejected the Department's Proposed Jury Instructions No. 1 and 2. Appendix C and D. Defendant took exception to the court's rejection. (VRP Vol 2 pp. 309-312). While these instructions are variations of Defendant's Proposed Instructions No. 10

and 16, they are still accurate statements of the law. Defendant's only criticism of these two instructions is neither advise the jury that if it finds Dr. Greenleaf made a mistake or committed malpractice during the January 24, 2013 authorized surgery, such mistake cannot be considered an intervening cause of Ms. Maphet's kneecap instability. Therefore, they are not a perfect substitute for Defendant's Proposed Instruction No. 10.

4. Attorney Fees

If the Court of Appeals finds in favor of Ms. Maphet, she is entitled to reasonable attorney fees and costs pursuant to RCW 51.52.130. RAP 18.1. This case involves a Self-Insured Employer, which means there is no requirement this appeal affect the State's accident fund. *Johnson v. Tradewell Stores*, 95 Wn.2d 739, 630 P.2d 441 (1981). Furthermore, the Brand Court held that it does not matter whether or not the injured worker prevailed on all issues. So long as she prevailed on at least one issue on appeal, all attorney fees are payable. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

In *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 577, 141 P.3d 1 (2006), the Supreme Court awarded attorney fees where an injured worker appealed the trial court's grant of summary judgment. Like the present case, it involved a self-insured employer. Also, it resulted in the appeal being remanded to the trial court for a new trial.

Then there is the case of *Chuynk & Conley/Quad-C v. Bray*, 156 Wn. App. 246, 232 P.3d 564 (2010), where the injured worker appealed over failure to give a jury instruction. This case also involved a self-insured employer. The Court of Appeals agreed the failure to give the

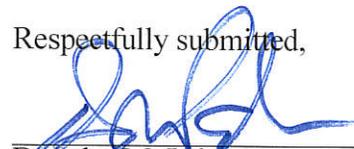
instruction was prejudicial error and remanded the case for a new trial. *Id.* at 248. The Court awarded the injured worker attorney fees, per RCW 51.52.130, for prevailing on appeal. *Id.* at 256.

CONCLUSION

The Court should set aside the jury's verdict. The superior court erred when it denied Defendant's Motion for Partial Summary Judgment and committed prejudicial error in its instructions on the Compensable Consequences Doctrine. The Court should affirm the decision of the Board of Industrial Insurance Appeals because Plaintiff conceded the March 20, 2015 surgery was curative. Therefore, the only issue that remains in dispute was the proximate cause of the March 20, 2015 surgery.

Dated: May 22, 2018.

Respectfully submitted,



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Attorney for Jennifer Maphet
Appellant/Defendant

FILED
COURT OF APPEALS
DIVISION II

2018 MAY 24 PM 1:10
IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON
STATE OF WASHINGTON

BY <u>CLARK COUNTY,</u>)	COA No. 51170-3-II
DEPUTY)	
)	
Appellant,)	
)	PROOF OF SERVICE
v.)	
)	
JENNIFER MAPHET,)	
)	
Respondent.)	
_____)	

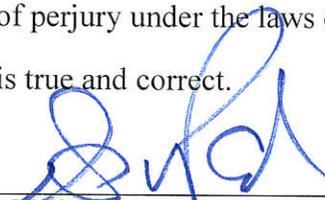
The undersigned states that on May 22, 2018, I served via US Mail, as indicated below, Motion to File a Substituted Appellant's Brief, Declaration of Douglas M. Palmer, and Brief of Appellant, as attached, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: May 22, 2018



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