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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**STATE OF WASHINGTON, COURT OF APPEALS,
DIVISION III**

COA No. 364691-III

Victor Borst,

Appellant,

v.

**Patrick S. Lynch, Jr. and Northwest Orthopaedic
Specialists, P.S., a Washington Corporation,**

Respondents.

APPELLANT'S OPENING BRIEF

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I. IDENTIFICATION OF PARTIES

A. Appellant is Victor Borst, who was the plaintiff at trial

B. Respondents are Patrick Lynch, MD and Northwest Orthopaedic Specialist, P.S., which was his group practice. Both were defendants at trial

II. DECISION OF TRIAL COURT

This was a health care negligence action tried to a jury. Mr. Borst made objection to instructions given and took exception to a jury instructions given. The jury returned a verdict in favor of the Defendants on the first question of negligence. A motion for a new trial was made and denied. An appeal was timely filed.

III. ASSIGNMENT OF ERRORS

1. The burden of proof Washington Patterned Instruction (Herein “WPI”) 6th 105.03 instruction was an incorrect statement of the law
2. Based upon the evidence of this case it was a comment on the evidence to give a WPI 6th 105.07 instruction.
3. The WPI 6th 105.07 Instruction is prohibited when the burden of proof instruction is an incorrect statement of law
4. It was an error of law to give both the WPI 105.03 Instruction and WPI 105.07 Instruction.

IV. ISSUES PRESENTED FOR REVIEW

1. RCW 7.70.040 does not require a plaintiff patient to prove an “applicable” standard of care, therefore it is an error of law to instruct the jury that the plaintiff’s burden of proof is to prove the “applicable” standard of care.
2. The Court lacks jurisdictional authority to expanded the three required elements of proof of a negligence claim to add proving the “applicable” standard of care.
3. When (a) a Defendant has exclusive control over the means to injury the plaintiff and (b) all parties agree that it was the Defendant’s duty to exercise reasonable care, skill and learning in exercising that control over the instrumentality of injury, and when the Defendant fails to provide any evidence that Plaintiffs’ pre-existing physical state was causing any limitation whatsoever before the negligence is it an error of law to give the WPI 105.07 Instruction?

V. STATEMENT OF THE RECORD

A. Health Care at Issue

The health care at issue involves the positioning of Victor Borst right foot during the knee replacement surgery of September 19, 2011. RP Vol. 1 June 12, 2018, 166-196. Mr. Borst alleged his right Achilles

Tendon was damaged due to negligent positioning during the September 19, 2011, knee replacement surgery. CP 4-6, 12-33.

1. Duty of Care at Issue

On September 19, 2011, Dr. Lynch was to do a right knee replacement on Mr. Borst. RP Vol. 1 June 18, 2018, pp. 25-28. Before the surgery started and during the surgery Dr. Lynch was solely responsible for the positioning of the entire right leg and foot. RP Vol. 1 June 12, 2018, pp. 168-69.

Dr. Lynch had a duty to protect the Achilles Tendon from being stretched or compressed during surgery. RP Vol. 1 June 18, 2018, pp 20-28, 33-36. In the knee replacement surgery, the foot is to be placed in a neutral position of ninety (90) degree right angles of the foot to the leg. RP Vol. 1 June 12, 2018, p. 173; Vol. 1 June 18, 2018. pp. 33, 164.

The physician's duty included, avoiding a foot position that would place the right foot in a dorsal flexion (dorsiflexion) position. RP Vol. 1 June 18, 2018, pp. 25-36, 196-97. A dorsal flexion of the foot is a position where the toes point up towards the head. RP Vol. 1 June 18, 2018, p. 33. When the foot is in dorsal flexion the Achilles Tendon is stretched. RP Vol. 1 June 18, 2018, p. 33.

The physician may use a device known as a “bolster” to position the right foot in a neutral position when the knee is bent during part of the surgery. RP Vol. 1 June 12, 2018, pp. 173-84. During part of the surgery, the right leg is extended (straightened) so the calf is placed over the bolster. RP Vol. 1 June 18, 2018, pp. 25-36. Dr. Lynch provided a schematic to show the patient on a table with a bolster. See Exhibit 110 Y.

The bolster is a metal rod that is mounted on top of the operating table. The bolster slides along the top of the operating table and is locked in place by the physician. The bolster is movable because patients are different sizes. The physician controls where the bolster is locked in place based upon the size of the patient and the length of the leg. RP Vol. 1 June 12, 2018, pp 183-84

2. Failure of Dr. Lynch to Exercise the Expected Skill, Care and Learning

Dr. Roback, who was plaintiff’s expert witness, identified for an orthopedic physician and surgeon the necessary skills, care and learning for positioning the right foot for the knee replacement surgery. Dr. Roback testified Dr. Lynch failed to exercise the expected skill, care and learning expected of orthopedic physician and surgeon during knee replacement surgery. RP Vol. 1 June 18, 2018 p. 20:2-17, p. 25:10 to p. 28:23, p. 33:2 to p. 36:6.

Dr. Roback testified that in performing a knee replacement surgery orthopedic physician must avoid stretching the Achilles Tendon by placing the foot in a dorsal flexion (dorsiflexion) position. RP Vol. 1 June 18, 2018 p. 20:2-17, p. 25:10 to p. 28:23, p. 33:2 to p. 36:6¹, p. 53:7 to p. 58:13 Defendant Dr. Lynch admitted that he placed Mr. Borst foot in a dorsal flexed position for the knee surgery. RP June 12, 2018 Vol. p. p. 241: 4-20.

Supporting Dr. Roback's opinion as to the violation of the standard of care, Dr. Lynch confirmed his documentation as to the position of Mr. Borst right foot during the knee surgery as follows:

Question Ms. Meade: And you examined him, you put down your impression, and your first impression was "Status Post" that means after, "right total knee replacement" is that correct?

Answer Dr. Lynch: Correct.

Q: That's what you dictated and typed Correct.

A: Correct.

Q: And then you plan said, "I have told him that his foot is in a dorsal flex position during the surgery" and then you have parens "Lay term used." With [Exhibit] P1, can you show us what you mean that the foot is in a dorsal flexed position?

A: This about the angle.

¹ Dr. Roback, further, identified negligent conduct that occurred after discharge from the hospital. Vol. 1 June 18, 2018, p. 53:7 to p.58: 23, p. 60:6 to p. 61:5.

RP Vol. 1 June 12, 2018 p. 241: 4-20.

Dr. Roback identified the injury caused by Dr. Lynch's failure to exercise the expected care and skill. RP Vol. 1 June 18, 2018, p. Vol. 1 June 2018 p. 29: 16 to p. 31:24, p. 32:13-19, p. 52:22 to p. 53:6. Dr. Roback identified how the Achilles tendon injury that occurred during the surgery was made worse by Dr. Lynch's on-going failures to exercise the expected skill care and learning following the surgery. RP Vol. 1 June 18, 2018 p. 52:22 to p. 53:6, see also p. 25:5 to p. 28:19, 33: to p. 43:2, see also p.29:16 to p. 32:19.

Dr. Roback identified more than the positioning of the foot during surgery, as posing the risk of damage to the Achilles Tendon. Dr. Roback testified that the expected care and skill was to protect the Achilles Tendon from both "overstretching" and "compression" during the surgery. RP Vol. 1 June 18, 2018 p. 25:17 to p. 27:10. The "bolster" is a medical device that is a metal bar placed on the operating table for positioning the foot during part of the surgery. During the surgery when the knee is bent the foot is rested against the bolster to keep the leg in place. RP *Id.*, RP Vol. 1 June 18, 2018 p. 163:3 to p. 166:4, p. 168:4 to 168:11, p. 212:16 to 213:2. At other times, the leg is extended out flat. At that time the calf of the leg is resting on the bolster. RP Vol. 1 June 18, 2018, p. 25-27. The surgeon controls the

location of where the bolster is set for a surgery. RP Vol. 1 June 18, 2018 p. 212:24 to p. 213:2, Vol. 1 June 12, 2018 p. 181:1 to p. 182:16.

The hospital records were silent on what position Mr. Borst's right leg and foot was placed during surgery. RP Vol. 1 June 12, 2018, p. 206. Despite Dr. Lynch's office chart documentation and admissions the Mr. Borst's foot was in dorsiflexion during the knee surgery, his expert witness, Timothy Lovell, MD, testified Dr. Lynch had Mr. Borst in a neutral position during the surgery. That is, Dr. Lovell testified that Dr. Lynch had the foot in a neutral, *e.g.* right angle 90 degree position. Dr. Lovell utilizing drawings opined that allegedly as a result of Dr. Lynch placing Mr. Borst foot on a bolster at 90 degrees. RP Vol. 1 June 18, 2018, p. 163:3 to p. 172:16, See also Exhibit 110 Y.

3. Pre and Post Knee Replacement Complaints Relating to Achilles' Tendon

Between 1998 and 2011, Dr. Lynch performed five arthroscopic knee surgeries on Mr. Borst. RP Vol. 1 June 12, 2018, p. 153:21-23. Before the September 19, 2011, knee replacement surgery Mr. Borst had no complaints associated with his Achilles Tendon, except for a sprained ankle five years before the knee replacement. RP Vol. 1 June 12, 2018, p. 248:22 to p. 249:20, p. 250:17-20.

In August 2006, Mr. Borst sprained his ankle and Achilles Tendon. The sprain resolved in days; Mr. Borst had had no on-going complaints as to his right ankle or right Achilles. RP Vol. 1 June 12, 2018 p. 250:17-20. Other than the ankle sprain five years before the knee replacement surgery, Mr. Borst had neither complaints of pain or disability or health care for his right foot, ankle or Achilles before the knee replacement surgery. RP Vol. 1 June 12, 2018, p. 248:22 to p.249:20, p. 250. In the preceding five years before the knee replacement surgery, Mr. Borst had a job where he was walking 80 per cent of his work day. RP Vol. 1 p 265:11 to p. 266:8.

In the hospital, September 19, 2011, when Mr. Borst regained consciousness he had foot pain and excruciating pain in his right heel RP 277. In the hospital, he was unable to put his right foot down, and had to walk on his toes. RP Vol. 1 June p. 278-79. After being discharged from the hospital, on September 28, 2011, Mr. Borst called Dr. Lynch's office complaining of right ankle and right Achilles pain. RP Vol. 1 June 12, 2018, p. 734:19 to p. 735:9. After months of complaints of pain, and limitations in walking a MRI was done, which showed a tear of the right Achilles Tendon. RP Vol. 1 June 18, 2018, pp. 28-31.

4. Haglund's Deformity

Part of Dr. Lynch's defense is that Mr. Borst had a pre-existing condition known as "Haglund's Deformity". A "Haglund's Deformity" is a boney enlargement on the calcaneus (heel bone), RP Vol. 4 June 19, 2018, p. 725:17-14. Mr. Borst had a Haglund's Deformity on both the right and left feet. RP Vol. 4 June 19, 2018 p. 766:13-18. A Haglund's Deformity is next to the Achilles tendon. RP Vol. 4 June 19, 2018, p. 725:17-14.

B. Relevant Procedure

1. Objection and Exception Jury Instruction

Pre-trial Mr. Borst submitted jury instructions. CP 116-38. In the course of the trial he submitted supplemental jury instructions. CP 141-47, and also CP 139-40.

Mr. Borst objected to Court's Instruction No. 9, which was a WPI 105.02 instruction, because it omitted the word "physician". RP Vol. 4 June 20 pp. 882-83, see also CP 162, RP Vol 4 June 20, 2018, p. 878. Mr. Borst had expert witness proof that showed Dr. Lynch was not only a negligent surgeon, but he was also a negligent physician. RP Vol. 1 June 18, 2018, p. 53:7 to p.58: 23, p. 60:6 to p. 61:5.

In the submitted jury instructions Mr. Borst identified the errors of law in WPI 105.03. See CP 116-38 at p. 128, and CP 141-47 at p. 142. Mr. Borst objected to the Court's Instruction No. 10. RP Vol. 4, June 20, 2018, pp. 894-95, 913-14 he offered as an alternative CP , see also CP 152, 164.

Mr. Borst filed a brief detailing how given the evidence of the case that a WPI 105.07 Instruction was a comment on the evidence. CP 148-51, and see also RP Vol. 4 June 20, 2018, pp. 886-891, and also 913-14. Mr. Borst objected to Court's Instruction No. 13, which was a WPI 105.07 instruction. CP 148-51, and 140; RP Vol. 4 June 20, 2018 pp.886-91, 913-14.

2. Post Trial Motions

The Judgment on the [Defense] Verdict was entered on July 9, 2018. CP 174-75. Plaintiff timely moved for a New Trial. CP 176-77, 178-87. The time of the argument on the CR 59(a) Motion was extended by the Court. CP 211-12. On November 2, 2018, after hearing Mr. Borst's motion for a new trial was denied. CP 252-53. Thereafter on November 21, 2018, a timely Notice of Appeal was filed. CP 254-60.

V. SUMMARY OF ARGUMENT

In this health care negligence action there was agreement on the skill, care and learning expected of the physician. It was agreed that during the duty time at issue, i.e. the surgery, the defendant physician had exclusive and complete control over the body part.

The plaintiff objected that Court's Instruction No. 10, which was a WPI 6th 105.03 in correctly stated the law in the first element, when it spoke of "applicable standard of care". The plaintiff submitted that under RCW 7.70.040 that he did not need to prove the applicable standard of care. The statute set the burden of proof as proving a failure of the Defendant health care provider to exercise the skill, care and learning.

The plaintiff objected to the Court's Instruction No. 13, which was a WPI 6th 105.07 Instruction (No Guarantee Instruction). There was not substantial evidence supporting this instruction. In face of the improper as a matter of law Court's Instruction No. 10 giving this No Guarantee WPI 6th 105.07 Instruction was an impermissible Article IV, Section 16 comment on the evidence.

As a matter of law these errors in jury instructions were prejudicial. Therefore, the remedy is a new trial.

VII. ARGUMENT

A. Standard of Review for Jury Instructions

The well-established rules on review of jury instructions are the foundation of analyzing a claimed error as to a jury instruction.

First, when the claimed error is of law in the giving of jury instructions the review is *de novo*. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Jury instructions must be supported by substantial evidence. *State v. Clausing*, 147 Wn.2d 620, 627, 56 P.3d 550 (2002). The corollary being a prejudicial error occurs if the evidence does not support an issue given to the jury. *Clausing*, 147 Wn.2d at 627. Here, the Plaintiff submits there was not substantial evidence support giving the first sentence of the WPI 105.07 instruction (Court's Instruction No. 13).

Given that errors claimed as to giving Court's Instruction No. 13, in context of Court's Instruction No. 10, Mr. Borst directs to *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002), where the claimed error was that a WPI instruction was an error of law. The issue is not whether the Defendant needed a supplemental jury instruction. The question is whether errors of law existed in giving the set of instructions that included both Court's Instruction No. 10 (WPI

6th 105.03) and No. 13 (WPI 6th 105.07). As addressed above the *Keller* Court stated:

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 trier of fact of the applicable law." *Bodin*, 130 Wn.2d at 732, 927 P.2d 240. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. *Walker*, 67 Wn.App. at 615, 837 P.2d 1023. ***A clear misstatement of the law, however, is presumed to be prejudicial.*** *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977). (Emphasis added.)

The instruction No. 10, which was the verbatim WPI 6th 105.03 instruction, is an incorrect statement of the law. The instruction No. 13, which was verbatim WPI 6th 105.07 is error to give when the burden of proof instruction is an incorrect statement of the law, and when factually it becomes a comment on the evidence of the case at issue.

B. The Legislature Never Intended the Jury to Define the “Applicable Standard of Care”.

Mr. Borst submits as a matter of law it was legally preposterous to conclude that any jury was to make a factual determination of the “applicable standard of care”. It is the “court” that defines the standard of care that a defendant owes. The “standard of care” is not a factual determination. The law supports Mr. Borst position. *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983) is black letter law on this point that

proof “applicable standard of care” is the wrong legal test. The *Harris* Court held and stated:

Our holding today may be summarized as follows. The **standard of care** against which a health care provider's conduct is to be measured is that of a **reasonably prudent practitioner possessing the degree of skill, care, and learning possessed by other members of the same profession in the state of Washington**. The degree of care actually practiced by members of the profession is only some evidence of what is reasonably prudent--it is not dispositive. (Emphasis added.)

See *Harris v. Groth*, 99 Wn.2d at p. 445.

The *Harris* holding predicated upon the plain clear language of RCW 7.70.040 does not support WPI 6th 105.03. The *Harris* Court states the “standard of care” is of reasonable prudence. That reasonable prudence is factually defined by the “expected skill, care and learning” of health care providers in the same or similar circumstances. Attempting to substitute the words “applicable standard of care” in a circumstance where the legislature has defined the job to be one of “expected skill, care and learning” is an error of law. Specifically, injecting the word “applicable standard of care” compounds the error of law in the instruction is not legislative law and it is misleading and it is confusing.

1. As to a Burden of Proof Jury Instruction WPI 6th 105.03 Is an Incorrect Statement of Law

Mr. Borst specifically set forth for the trial court his position that then Washington Patterned Instruction (Herein “WPI”) 6th 105.03 instruction incorrectly stated the law. He offered an instruction that was a correct statement of the law in accordance with RCW 7.70.040. CP 128. The offending language of Court’s Instruction No. 10 was

“First, that the defendant failed to follow the **applicable standard of care** and therefore was negligent.” (Emphasis added.)

RCW 7.70.040 identifies what a plaintiff/patient is required to prove as to a negligence claim. RCW 7.70.040 states:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider **failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider** at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances; . . . (Emphasis added.)

Washington’s Legislature made it plain and clear that the plaintiff patient is to prove the liability element by showing the failure to exercise the “care”, “skill” and “learning” expected. The legislature did not require the plaintiff patient to prove the “applicable standard of

care”. After all declaring some medical actions as “the applicable standard of care”, does not equal that such standard of care is reasonably prudent. “Applicable standard of care” is nothing more than health care providers stating this is what we do, irrespective of whether that “applicable standard of care” involves the reasonably prudent exercise of “skill”, “care” and “learning”.

In interpreting RCW 7.70.040 as to a jury instruction, the fundamental rule of law is that

The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.

See *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

Here in the Washington Legislature’s collective wisdom RCW 7.70.040 carved out three areas “skill, care and learning” to be proven. The “standard of care” of RCW 7.70.040 is to tell the judiciary that the standard of care is one of reasonable prudence. The jury is not deciding “what” the standard of care is. The jury is deciding the “facts” of whether a defendant failed to exercise the expected skill, care and learning. See *Reyes v. Yakima Health District*, 191 Wn.2d 79, 419 P.3d

819 (2018). Thereafter, as a matter of law the judiciary applies the “reasonable prudent” legal standard.

RCW 7.70.040 is plain on its face. When a statute's meaning is plain on its face, then the Court give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). RCW 7.70.040 subsumed all case law on what the elements of proof were of health care negligence. For lay persons, e.g. a juror, the words “applicable standard of care” are not synonymous with the statutory requirements as to proof of RCW 7.70.040.

2. In a Jury Instruction the Words “Applicable Standard of Care” Are Not a Substitute for “Expected Skill, Care and Learning”

Plaintiffs submit that when the statutory language is plain on its face, it is contrary to the law to instruct differently and changing the necessary elements of proof. The legal analytical question is when RCW 7.70.040 is clear and plain how did the WPI 6th 105.03 happen. Up until 1994 WPI 105.3 stated the first element to be proven was:

First, that the defendant failed to exercise the degree of skill, care and learning expected of a reasonably prudent _____ and was therefore negligent.

See WPI 3rd 105.03, Washington Practice: Washington Patterned Jury Instructions, Third Edition, West Publishing Vol. 6 p.514 (1989). The

foregoing language was certainly consistent with Legislative intent and expectations of RCW 7.70.040. Then, the Washington Supreme Court Committee on Jury Instructions as Constituted March 5, 1994, changed WPI 105.03 to read on the first element to be proven:

First, that the defendant failed to follow the **applicable standard of care**, and was therefore negligent. (Emphasis added.)

See Washington Practice: Washington Patterned Jury Instructions Civil Volume 6, Third Edition (1989).

In making this change the *Comment* to WPI 105.03 4th states “This instruction has been revised to make use of the term “standard of care”. See the *Comments* to WPI 105.01. Initially, the WPI 105.01 *Comment* was silent on why the change from the plain statutory language to the burden of proof first element of WPI 105.03. Then WPI 105.03 5th, when the *Comment* directs the user to the *Comment* for WPI 105.01 where it is stated:

The committee has, however, included a reference to the “standard of care.” In practice the term “standard of care” is frequently used by lawyers, judges and expert witnesses during a medical negligence jury trial and is referred to in many appellate decisions as well. See, e.g., *Van hook v. Anderson*, 64 Wn.App. 353, 358, 824 P.2d 509 (1992). Thus to comply with actual practice, the committee has included language to convey to the jury

that the duty of a health care provider is to comply with the “standard of care”.

See WPI 5th 105.01 Comment, See Washington Practice: Washington Patterned Jury Instruction Civil, West Publishing (2005) Vol. 6 page 555.

With all due respect, Mr. Borst submits just because various courts and the defense speaks of “standard of care” does not mean that RCW 7.70.040 can be re-written by a trial court or any of the appellate courts or any Washington Patterned Instruction Committee. Mr. Borst observes that in *Fast v. Kennewick Public Hospital District*, 187 Wn.2d 27, 32-33, 384 P.3d 232, 235, (2016) the Court stated:

Our fundamental goal in statutory interpretation is to "discern and implement the legislature's intent." *State v. Armendariz*, 160 Wn.2d 106, 110, ¶ 7, 156 P.3d 201 (2007). The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Campbell & Gwinn*, 146 Wn.2d at 9-10.

Consistent with the law of *Fast* and *Campbell & Gwinn* plain language RCW 7.70.040 does not require the plaintiff patient prove the “applicable standard of care”. The jury is to be directed to consider whether the defendant health care provider failed to exercise the expected skill, care and learning.

3. The “Applicable Standard of Care” Is Inconsistent With the Legislative Mandates.

In accordance with RCW 7.70.040 what the “applicable standard of care” is not a factual dispute. The *Harris v. Groth* answered that the “standard of care” is reasonable prudence. 99 Wn.2d at p. 445. The legislature made it clear that the factual dispute was whether a defendant “**failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider** at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances”. (Emphasis added.) RCW 7.70.040. The reality is the trial court as the gate keeper only allows in evidence of identified defendant’s area of practice. See *e.g. Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 218, 770 P.2d 182 (1989). The “court” not health care providers define the “applicable standard of care”. The court defines the legal yard stick, it is not a factual dispute for a jury to make.

With utmost respect, no Washington Patterned Jury Instruction Committee had the authority to usurp the Legislature’s authority to define the burden of proof as manifested by the plain language of RCW 7.70.040, which focuses on “skill, care and learning”. Likewise, what the “lawyers” and “judges” and “appellate decisions” use as a supposed short hand version of “standard of care” for RCW 7.70.040 is only that

a short hand version for the “professionals” of the law. Those lawyers, witnesses, judges and appellate decisions short hand version (standard of care) is not a substitute for a legislative mandate. It is observed that if the burden of proof is on the plain language of RCW 7.70.040, *e.g.* what are reasonably prudent “skills”, “care” and “learning” expected of the defendant then lawyers would reduce the use the short hand version “standard of care” in presenting a case.

WPI 6th 105.03 is the burden of proof instruction that is to be based upon the plain language of RCW 7.70.040. In the simplest terms the jury is to determine if a defendant failed to “exercise” the “skill”, “care” and “learning” expected . . .

In any health care negligence trial any defendant health care provider could present that he or she followed the “applicable standard of care” and therefore was not negligent. Such proof does not confirm one way or another whether that defendant “exercised” the skill, care and learning expected. See *e.g. Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 757 P.2d 507 (1988)(Summary Judgment reversed when proof of “how” a leg was fractured with treatment).

The injection of the words “applicable standard of care” creates a factual burden that is impossible to overcome. Any defendant health care provider can present proof that he or she followed he “applicable

standard of care”, thereafter with the WPI 6th 105.03, *e.g.* here Court’s Instruction No. 13, the provider is able to argue the plaintiff patient has failed to meet the burden of proof.

The reality is unless the specific evidence of the “expected skill, care and learning” is identified neither the trial judge nor the jury is able to conclude one way or another whether a jury was persuaded either way of reasonable prudence. Likewise, merely soliciting evidence that a defendant failed to follow the applicable standard of care, does not satisfy the legislative mandate of RCW 7.70.040.

In accordance with enacting RCW 7.70.040 legislature provided that a plaintiff patient was to prove that a health care provider failed to exercise the expected skill, care and learning. The elements “skill” “care” and “learning” are bite size lay person matters that are susceptible to non-health care provider making factual findings.

The word “applicable” is not defined in the jury instructions. The plain meaning of the word “applicable” includes “capable of being applied”. That definition, which the jury could apply as an ordinary meaning of the word “applicable”, has nothing to do with a plaintiff patient establishing the failure to exercise the expected skill, care and learning. The use of “applicable” means any action that can be applied to a circumstance is okay. That is contrary to what the legislature

intended in enacting RCW 7.70.040. Obviously, the legislature recognized that requiring litigant to factually establish any health care standard of care would be impossible. If the legal test of WPI 6th 105.03 is true then a defendant health care provider can submit that he or she followed the applicable standard of care, when that same provider factually failed to exercise the expected skill, care and learning. The jury should be instructed on the clear legislative mandates of RCW 7.70.040 rather than a professional group's short hand view of a statutory test.

C. Given the Factual Dispute and Defendant's Admission a WPI 105.07 Was Error of Law and a Judicial Comment on the Evidence

Court's Instruction No. 13 read:

An orthopedic surgeon does not guarantee the results of his or her care and treatment.

A poor medical result is not, by itself, evidence of negligence.

The error of law in giving the Court's Instruction No. 13 involves three categories of errors of law. That is the lack of substantial evidence to support giving the instruction, the error attendant to Court's Instruction No. 10 and third, the error an impermissible Article IV, Section 16 comment on the evidence. See CP 148-51, and also CP 127,

128, 142; RP Vol. 4 June 20, 2018, pp.890-91, 913-14, and also pp. 886-890.

In analyzing the third error of law, additional Standards of Review consideration are pertinent to Court's Instruction No. 13.

1. Standard of Review When Jury Instruction Is a Comment on the Evidence

In addition to the above standard of review as to errors of law as to jury instructions, Mr. Borst, specifically, objected that given the factual dispute that WPI 105.07 was a comment on the evidence, *e.g.* CP 148-51, RP Vol. 4 June 20, 2018, pp.886-91, 913-14.

Given the factual dispute of a case, the WPI 105.07 Instruction constituted an impermissible comment on the evidence. Therefore, in considering the error of giving Instruction No. 13 (WPI 105.07) the standard of review includes the following.

See *State v. Levy*, 156 Wn.2d 709, 722, 132 P.3d 1076 (2006)

A judge is prohibited by article IV, section 16 [of Washington Constitution] from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." *Becker*, 132 Wn2d at 64, 935 P.2d 1321. Moreover, the court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d

1 (1970); *Lampshire*, 74 Wn2d at 892, 447 P.2d 727. Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.

In the context of impermissible comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963). In criminal cases a second step to the analysis includes a burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment. See *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929, (1995). By analogy a similar two step method of review is considered for civil jury instructions that are misleading. See *Keller v. City of Spokane*, 146 Wn.2d 237, 249-250, 44 P.3d 845 (2002), see also *State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213, (2015). Nevertheless, as to impermissible judicial comments on the evidence, the presumptive error test, is applied even when “the burden of showing that the jury's decision was not influenced, *even when the evidence is undisputed or overwhelming*”. *Levy*, 156 Wn.2d at p. 723 (Italics Court’s). See also *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015)

2. There Substantial Evidence Was Lacking to Support Giving a WPI 6th 105.07 Instruction.

Generally, the law is that the each party is entitled to an instruction about his or her theory of the case if it is supported by law and has foundation in the evidence. *De Koning v. Williams*, 47 Wn.2d 139, 141, 286 P.2d 694 (1955), and also see *Dabroe v. Rhodes Co.*, 64 Wn.2d 431, 435, 392 P.2d 317 (1964); and *Meredith v. Hanson*, 40 Wn. App. 170, 174, 697 P.2d 602 (1985).

Here, the health care provide was to do surgery to replace the right knee. The knee replacement surgery was successful, *e.g.* a successful result. Basically, as to liability there was no evidence that the knee replacement surgery was a failure as to the knee, thus a WPI 105.07 Instruction was unwarranted. The confusion and misleading of the jury with Court's Instruction No. 13, without substantial evidence, is how does a lay jury thread its way as to what "result" is the topic of this WPI 105.07 Instruction.

In a knee replacement surgery, the right foot, hence the Achilles Tendon, is a target of the care and skill the physician utilize in positioning the right foot. Here the evidence was that there was no dispute as to the duty owed by the physician in positioning the right foot. The evidence was both plaintiff and defendants agreed the

surgeon had exclusive control over the position of the foot during surgery. Likewise, it was essentially agreed that dorsiflexion of the foot was to be avoided, because of the risk of damaging the Achilles. Both the plaintiff's proof and defendants' proof was the surgeon was to exercise the skill and care to keep position the foot in a neutral position with the foot at a ninety degree angle to the leg.

Here, the "factual" question was whether Dr. Lynch did what he documented and admitted, *i.e.* put the right foot in dorsiflexion, or as Dr. Lovell opined Dr. Lynch had the right foot at a ninety degree angle to the leg during the surgery. On behalf of Mr. Borst, Dr. Roback testified that the Achilles Tendon was damaged because Dr. Lynch placed the foot in dorsiflexion. On behalf of Dr. Lynch, the defense was to ignore Dr. Lynch's documentation and admissions, with the focus by Dr. Lovell on what was the agreed upon duty. None of this evidence supported the WPI 105.07 Instruction.

The causation opinion that Craig Barrows, MD had as to Mr. Borst pre-existing Haglund's Deformity was not substantial evidence that supported giving a WPI 105.07 Instruction.

Dr. Barrows testified that Mr. Borst's Haglund's Deformity had been present for 2 to 5 years before the said MRI. RP Vol. 4 June 19,

2018, p. 731. Dr. Barrows's opinion was that the tear of the Achilles Tendon was caused by the Haglund's Deformity. Although it is "factual" Dr. Barrow never addressed "why" if the Haglund Deformity was the cause of the tear, that Mr. Borst had no difficult with pain, walking or the use of his right foot in the two to five years before the knee replacement.

Dr. Barrows did not know what Dr. Lynch testified to as to the positioning of the right foot during the surgery. See *E.g.* RP Vol. 2 June 19, 2018 p. 716:23 to p. 717:18 contrasted with Dr. Lynch' admission RP Vol. 1 June 12, 2018 p. 241: 4-20. All of Dr. Barrows testimony was presented as if what Dr. Lovell testified as to Dr. Lynch's surgical positioning of the right foot was the only truth. Dr. Barrows never factored into his testimony what was Dr. Lynch's admission that Mr. Borst's foot was placed in dorsiflexion for the knee replacement surgery. Thus, Dr. Barrows never provided any testimony one way or another as to what would occur to the Achilles where a foot with a Haglund's Deformity was positioned in dorsiflexion during a knee replacement surgery.

The legal conclusion to be drawn from all the causation evidence is that Dr. Barrow's testimony did not provide substantial

evidence that the tearing of the Achilles Tendon occurred without improper positioning of the foot during surgery. When addressing a request for a jury instruction, the trial court is not deciding “whether” a party is entitled to have the jury instructed on a theory. Rather the trial court is making a decision as to law, *i.e.*, is there substantial evidence and what is the law. Put another way, a party’s basic “entitlement” to instruction on a theory of a case is not a discretionary matter. It is a legal “right” of the party. The rationale being the instruction on the law is necessary to “allow the jury to determine the issues presented intelligently.” *Fikes v. Cleg-horn*, 47 F.3d 1011, 1013 (9th Cir. 1995).

In deciding whether a WPI 105.07 Instruction is justified the trial court is looking to see if there is something more than a scintilla of proof that relates to the doctrine of WPI 105.07. Based upon Dr. Barrows’ testimony it was speculation, conjecture and nothing beyond a scintilla of proof that the Haglund’s Deformity alone accounted for Mr. Borst in ability to use his right foot, *e.g.* Achilles Tendon, normally. On appellate review, the evidence is construed in a light most favorable to Dr. Lynch as far as a WPI 105.07 Instruction. *E.g.* *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The appellate consideration also keeps in mind that “[m]ere possibility,

suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence." *State v. Taplin*, 9 Wn.App. 545, 557, 513 P.2d 549(1973). Here, it is speculation, conjecture and only a scintilla that the Haglund's Deformity had anything to do with Mr. Borst's Achilles injury.

3. Court's Instruction No. 10 Was Not an Accurate Statement of Law, Which Introduced Confusion and Mislaid the Jury. The Error of Court's Instruction No. 10 along with No. 13 Was an Improper Delegation of the Law to the Jury.

The first sentence of WPI 105.07 (Court's Instruction No. 13) states: "An orthopedic surgeon does not guarantee the **results** of his care and treatment." (Emphasis added).

It is recognized that an WPI 105.07 instruction is not a full and accurate statement of a physician's duty of care, and it would be error to give such an instruction as the sole statement of a physician's duty. *Watson v. Hockett*, 42 Wn.App. 549, 554, 712 P.2d 855, (1986). Here, the analysis begins with the first element of Court's Instruction No. 10, which reads:

"First, that the Defendant failed to follow the **applicable standard of care** and therefore negligent;"

Logically, the analysis should begin with the question of whether the other instructions correctly defined how the Mr. Borst was to prove his negligence claim. It was and is Mr. Borst position that given the error of Court's Instruction focusing on the "applicable standard of care" and "result" focus of Court's Instruction No. 13 is so misleading and confusing it is a comment on the evidence.

Here, as addressed above in section B pp.13-23. Court's Instruction No. 10 was an incorrect statement of the law. Court's Instruction No. 10 misleads the jury as to "what" Mr. Borst's burden of proof was. When the first sentence of Court's Instruction No. 13 is read with Court's Instruction no. 10, the jury is left without directions as to how it is to consider the evidence. Here the proof is that all physicians agree that the surgeon has complete control over the foot, and the physician is to keep the foot in a neutral position. How is the jury to reconcile the undefined term "applicable standard of care" and the sentence: "[a]n orthopedic surgeon does not guarantee the results of his care and treatment"? The undisputed evidence was the foot was to be kept in neutral position and not put in dorsiflexion. The Defendants' expert witness testified Dr. Lynch did not violate the standard of care, even though, Dr. Lynch documented and admitted that he placed Mr.

Borst's foot in dorsiflexion. Under Court's Instruction No. 10, the jury could conclude putting Mr. Borst foot in dorsiflexion was the "applicable standard of care", because Court's Instruction No. 13 tells the jury the physician is not required to guarantee that his care and treatment will result in him putting the foot in dorsiflexion.

The court is improperly delegating the need to interpret the law to the jury, when there was no substantial evidence to support he supplemental instruction and the instruction on the burden proof was an incorrect statement of the law. *Kjellman v. Richards*, 82 Wn.2d 766, 769, 514 P.2d 134 (1973). The *Kjellman* Court observed in these circumstances:

This failure could result in prejudicial confusion by permitting the jury to resolve a question of law. The court may not so abdicate its responsibility. *State v. Chambers*, 81 Wn.2d 929, 932, 506 P.2d 311 (1973).

See *Kjellman*, 82 Wn.2d at p. 769.

4. With No Substantial Evidence To Support The WPI 6th 105.07 Instruction, the Consequence Was an Impermissible Comment on the Evidence that Lent Credence to Speculative Testimony.

In his case Dr. Lynch the defense split the "liability" testimony from the "causation" testimony. This split of the proof did nothing but compounded the error of the first sentence of Court's Instruction No.

13. Dr. Barrow's "causation" testimony was predicated upon an assumption of the surgical events, contrary to what Dr. Lynch documented and admitted.

Meanwhile contrary to the language of first sentence is both the plaintiff's witness and defense witness agree that the surgeon exclusively controlled the positioning of the foot. That is the "result" of the physician's exclusive control would be a ninety degree angle positioning of the foot, *i.e.* the foot would not be dorsal flexed. The first sentence is a comment on the admitted testimony of all the liability witnesses, *e.g.* Dr. Lynch, Dr. Roback and Dr. Lovell. The "result" of the physician's exclusive control is that the foot would be kept at a right angle to the leg. The "result" of the physician's exclusive control is the "result" that the foot would not be placed in dorsiflexion.

Given the evidence and the factual dispute, the word "result" in Court's Instruction No. 13 is problematic. CP 148:15 to 149:7. The word "result" is a noun. The Court's Instructions did not define which noun "result" was intended to mean, *e.g.* ultimate position of the foot or the ultimate knee replacement or the "condition" of the Achilles Tendon or all three. The lack of identification as to what "result" means is made confusing by the error of Court's Instruction No. 10,

which tells the jury Mr. Borst had to prove Dr. Lynch failed to follow the “applicable standard of care”.

As a noun, result can mean the “position of the foot” in relationship to how Dr. Lynch allegedly “cared for” the foot during surgery by the “treatment” that involved a “bolster”. Given the factual disputes of this case the first sentence of Court’s Instruction No. 13 is an impermissible comment on the evidence. It is telling the jury, Dr. Lynch has followed the “applicable standard of care”, despite his failure to exercise the skill and care to avoid putting the foot in dorsiflexion during the surgery. The comment by the Court as to the first sentence of Court’s Instruction No. 13, is that physician does not guarantee that he will exercise the skill, care and learning in positioning the foot, when the physician is the “only” person positioning the foot during surgery to replace the knee.

5. In Accordance With the Evidence the Second Sentence of the Court’s Instruction No. 13 Was a Comment on the Evidence.

Dr. Roback’s expert testimony was but for Dr. Lynch admittedly putting Mr. Borst foot in a dorsiflexion position the Achilles Tendon would not have been torn. The fact that the Achilles Tendon was torn was proof of negligence. Further at trial, Dr. Lynch agreed with both

Dr. Roback and Dr. Lovell that foot needed to be in a neutral position. That is, all the physicians testifying on the standard of care in essence testified that but for the incorrect positioning of the foot the Achilles Tendon would not have been torn. Clearly, the second sentence of Court's Instruction No. 13 (WPI 105.07) was a comment on the evidence. That is "[a] poor medical result is not, by itself, evidence of negligence." The Court was telling the jury to disregard Dr. Roback's testimony on Dr. Lynch's failure to exercise the necessary skill, care and learning, and therefore make a decision based upon Craig Barrow, MD's proximate cause testimony.

Dr. Lovell testified the foot was to be in a neutral ninety degree position. The Court Instruction No. 13 was a comment to the jury that Dr. Lovell's testimony as to what he believed Dr. Lynch did should be believed over what Dr. Lynch admitted that he did, *e.g.* put the foot in dorsiflexion, and Dr. Roback's forensic opinion.

The Court Instruction No. 13, bolstered Dr. Barrows speculation and conjecture that the Achilles Tendon condition, was due to something besides the positioning of the foot in the September 19, 2011 knee replacement surgery. Based upon the state of the record, including Dr. Lynch's admissions, the Court's Instruction No. 13, perpetuated the speculation created by Dr. Barrow's testimony that the

tear of the Achilles Tendon had existed for years and was related to a Haglund's Deformity.

These circumstances highlight why as a matter of law there needs to be substantial evidence to support each instruction. With no rationale analysis as to whether there was substantial evidence to support this theory, the jury is left to speculate as to application of this jury instruction. This is similar to the error of law, that occurs when the jury is instructed on contributory negligence, when there is a lack of substantial evidence to support the jury instruction. See *Nelson v. Blake*, 69 Wn.2d 626, 419 P.2d 596 (1966); *Arnold v. Sanstol*, 43 Wn.2d 94, 260 P.2d 327 (1953).

Under the facts of this case, the WPI 105.07 instruction is in effect the court deciding the factual dispute between plaintiff, e.g. Dr. Roback's testimony along with Dr. Lynch's admission as to his medical record documentation and the opinion expressed by defense witnesses Timothy Lovell, MD and Craig Barrows, MD.

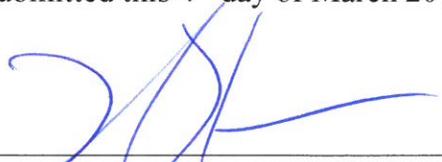
Dr. Lynch may argue that the word "result" in the second sentence of the WPI 105.07 Instruction was linking "causation" to liability. As far as the "condition" of the Achilles Tendon, the dispute was whether Dr. Roback's causation opinion, along with Dr. Lynch's

admissions as to his documentation was correct or Dr. Barrow's opinion was correct. The lack of substantial evidence from Dr. Barrows, cannot be cured by giving Court's Instruction No. 13, which is in the context of the speculation and the error of Court's Instruction No. 10 is a an impermissible comment on the evidence.

VII. CONCLUSION

The errors here are the law. The errors are prejudicial. As a matter of law the remedy is a new trial. This matter should be reversed.

Respectfully Submitted this 4th day of March 2018,



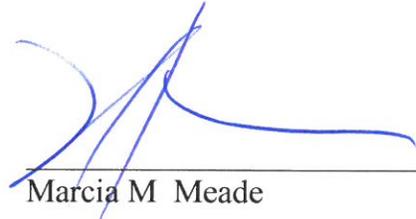
Marcia M Meade, WSBA #11122
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2020, I caused a true and correct copy of the Appellant's Opening Brief to be served as indicated.

James B. King	<input checked="" type="checkbox"/> U.S. Mail
Evans, Craven & Lackie, P.S.	<input type="checkbox"/> Hand Delivery
818 W. Riverside, Suite 250	<input checked="" type="checkbox"/> Supplemental Email
Spokane, Washington 99201-0910	<input type="checkbox"/> And Supplemental Fax
jking@ecl-law.com	509.455-3632

I declare under penalty of perjury that the foregoing is true and correct. EXECUTED on this 4th day of March, 2020, at Spokane, Washington.



Marcia M Meade

APPENDIX A

State of Washington Constitution Article IV Section 16

SECTION 16 CHARGING JURIES. Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

RCW 7.70.040 Necessary elements of proof that injury resulted from failure to follow accepted standard of care.

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was a proximate cause of the injury complained of.

[2011 c 336 § 251; 1983 c 149 § 2; 1975-'76 2nd ex.s. c 56 § 9.]

APPENDIX B

Court's Instructions at Issue

Instruction No. 10

In connection with the Plaintiff's claims of injury resulting from negligence, the Plaintiff has the burden of proving each of the following propositions:

First, that the Defendant failed to follow the applicable standard of care and was therefore negligent;

Second, that the Plaintiff was injured;

Third, that the negligence of the Defendant was a proximate cause of the injury to the Plaintiff.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the Plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the Defendants.

Instruction No. 13

An orthopedic surgeon does not guarantee the results of his care and treatment.

A poor medical result is not, by itself, evidence of negligence.

APPENDIX C

Appellant's Proposed Jury Instructions

INSTRUCTION NO. _____

In connection with the plaintiffs' claims of injury resulting from negligence, the plaintiffs have the burden of proving each of the following propositions:

First, that the defendant failed to exercise the degree of care, skill, and learning expected and was therefore negligent;

Second, that the plaintiff was injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant as to this claim.

WPI 6th 105.03. Plaintiffs object to the language of WPI 6th 105.03 on the second element of proof in that it misstates the law, is confusing, misleading, inconsistent with the other instructions and results in abdication of the duty to instruct to the jury. Under RCW 7.70.040 the legislature directs that a plaintiff must prove that the defendant health care provider “failed to **exercise that degree of care, skill, and learning expected** of a reasonably prudent” physician.” (Emphasis added). The statute does not say the negligence is a “standard of care” proof, but rather an enhanced “reasonable prudence” test. The term “standard of care” is not defined in the jury instructions. Therefore, it is misleading and confusing for the jury to through in an undefined term of art. Objection is made that this WPI instruction uses the word “applicable” when referring to standard of care. This word is misleading and potentially allows the jury to set the “duty” for a health care provider contrary to the law. It is for the court to declare the law, therefore it is an error of law for the court to abdicate that responsibility to the jury. The use of the word “follow” is an incorrect statement of the law. The legislature stated physician and a hospital are to “exercise” the defined enhanced negligence standard; the legislature did not adopt the potentially lesser standard to “follow”. The words “standard of care” “applicable” and “follow” all are misleading, confusing and in context a misstatement of the law. Further, plaintiffs object to the word “and” in the first element. The language should be in a disjunctive “or”. The use of conjunctive word “and” imposes an additional burden on plaintiff that is to prove all three failures

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INSTRUCTION NO. ____

In connection with the plaintiff's claims of injury resulting from negligence, the plaintiffs have the burden of proving each of the following propositions:

First, that the defendant failed to follow the standard of care and was therefore negligent;

Second, that the plaintiff was injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant as to this claim.

WPI 6th 105.03 Modified. The word "applicable" has been removed. The word "applicable" is not defined in the instruction. The jury instruction do not define "applicable" to whom. It is misleading and confusing to have such an defined term that would be subject to many different interpretations. Plaintiff incorporates by reference the law of his briefing on defining the "disability" term. RCW 7.70.040 directs it is a standard "expected". *Harris v. Groth*, 99 Wn.2d 438, 663 P.2d 113 (1983) established that it is what general society expects of health care provider rather than confining it to the health care providers society. Using the word "applicable" in this case is a comment on the evidence, in that every provider agreed that positioning is basic and important. On positioning the defendant has attempted to confuse the matters of standard of care by introducing topics that are not relevant to the dispute.

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