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NO. 91963-1

SUPREME COURT _____ RECEIVED BY E-MAIL

IN THE STATE OF WASHINGTON

CLARK COUNTY,
RESPONDENT/PLAINTIFF

v.

PATRICK J. McMANUS,
PETITIONER/DEFENDANT.

SUPPLEMENTAL BRIEF OF PETITIONER PATRICK McMANUS

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 ORIGINAL

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Issue for Review

No. 1. Where the long-standing and settled rule of law requires finders of fact to give special consideration to opinions of attending physicians and where an attending physician has testified, is the trial court required to advise the jury of this rule of law?

Answer: The Superior Court abused its discretion because Defendant's Proposed Instruction No. 10 is an accurate statement of the law per this Court's decision in *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.3d 569, 761 P.2d 618 (1988). Where substantial evidence supports the instruction, giving it is non-discretionary.

Statement of the Case

Patrick McManus started working for Clark County, Washington, on June 12, 1989, as an entry-level maintenance worker. By 1998, Mr. McManus was a street sweeper operator, which he operated for over a decade. (Certified Appeal Board Record, P. McManus, Direct, pages 73 to 76; pages 80 to 84).

Over that decade, he operated a variety of different street sweepers, with various physical complaints and ailments. In the first part of 2010, Mr. McManus developed worsening of his low back pain. Later in 2010, it began radiating down his left leg, affecting his sleep and activities of daily living. Between January and April 2011, his low back pain became

progressively worse to the point where he stopped working, (CABR, P. McManus - Direct, pages 80 to 94).

Dr. Paul Won first treated Patrick McManus on January 13, 2005, for a separate on-the-job low back injury at work. On examination, Dr. Won found muscle spasms and limited range of motion. Dr. Won prescribed Ibuprofen and a muscle relaxer, and also placed Mr. McManus on modified work, which he performed for one day. Mr. McManus then went back to his regular job as a street sweeper after his low back condition improved. (CABR, Dr. Won - Direct, pages 5 to 13; page 23; and Cross page 36).

Dr. Won next saw Mr. McManus on April 11, 2011. Mr. McManus relayed the physical difficulties he had while operating the street sweeper with his worsening low back and left leg pain. He previously had a lumbar epidural injection without much improvement, and he had last worked on April 6, 2011. (CABR, Dr. Won - Direct, pages 18 to 21; and page 25).

Dr. Won's April 11, 2011 examination of Mr. McManus found he had difficulty standing from a seated position, and walked slowly and stiffly. Mr. McManus had limited range of motion of the low back, and could not bend backwards. Dr. Won reviewed a June 25, 2010 MRI, comparing it to a February 4, 2006 MRI. It showed a new central disc

protrusion at L2-3, resulting in moderate to severe stenosis, or narrowing, with crowding of the nerve root. Dr. Won diagnosed disc displacement at L2-3. Dr. Won continued to treat Mr. McManus through December 15, 2011. (CABR, Dr. Won - Direct, pages 22 to 23; and page 30).

As the attending physician, Dr. Won testified that driving the street sweeper, with the jarring and bouncing, had been a major contributor to Mr. McManus' lumbar condition. Mr. McManus worked full time, and a major portion of his activity was driving a street sweeper. He had no major outside activities, was a sedentary guy, and was just doing street sweeping work. Mr. McManus was a big man who drove a street sweeper on bumpy roads. Physical force equals mass times acceleration, ($P=M \times A$) and there was a great force focused on his low back. The L2-3 disc protrusion was symptomatic and the distinctive conditions of his employment driving a street sweeper were a cause of the disc herniation at L2-3. (CABR, Dr. Won – Direct, pages 31 to 32; page 38; and Re-Direct page 43).

Two other physicians testified before the Board of Industrial Insurance Appeals. Neither was a treating nor consulting physician, but were instead so-called independent medical examiners. The details of their testimony is not germane to the question of whether the Superior Court should have given the Attending Physician instruction. WPI 155.13.01. Furthermore, the procedure leading to the Supreme Court's review is

adequately summarized in the decision of the Court of Appeals and Mr. McManus' Petition for Review.

Standard of Review

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 (2011). 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 Superior Court must give a jury instruction, supporting a party's theory of the case, so long as there is substantial evidence to support it. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980) ("a party is entitled" to its jury instruction). When determining substantial evidence, the court views the evidence in the light most favorable to the party who requested it. *Mina v. Boise Cascade Corp.*, 37 Wn. App. 445, 448, 681 P.2d 880 (1984), *aff'd*, 104 Wn.2d 696, 710 P.2d 184 (1985).

Argument

The Superior Court abused its discretion by refusing to instruct the jury as to the law that requires them to give the attending physician's

testimony special consideration. The attending physician rule requires finders of fact give special consideration to the opinions of attending physicians. *Hamilton v. Dep't of Labor & Indus.*, 111 Wash.2d 569, 761 P.2d 618 (1988). Respondents wrongfully urge *Hamilton's* abandonment because the Court of Appeals once questioned, in a footnote, how a jury is to apply the attending physician rule. *McClelland v. ITT Rayonier, Inc.*, 65 Wash. App. 386, 394, 828 P.2d 1138 (1992). Rather than abandon *Hamilton* and eighty years of settled precedent, the Court should affirm the policy underlying this rule and recognize the special role given to attending physicians in our Industrial Insurance Act.

1. The trial court abused its discretion when it refused to give the jury Defendant's Proposed Instruction No. 10.

The trial court abused its discretion because Defendant's Proposed Instruction No. 10, copying Washington Pattern Instruction 155.13.01, is a correct statement of the law. The jury heard testimony from Mr. McManus's attending physician, Dr. Won. No other treating physician testified. Therefore, substantial evidence supported giving the instruction.

Where these facts exist, the trial court must give any instruction that supports a party's theory of the case. *Egede-Nissen*, 93 Wn.2d at 135. This Court in *Hamilton* was unequivocal: where an attending physician has testified, the trial court must give the attending physician instruction

because:

[The instruction] reflects binding precedent in this state and correctly states the law. Since this is a rule of law, it is appropriate that the jury be informed of this by the instructions of the court. To refuse to do so would convert the rule of law into no more than the opinion of the claimant's attorney.

Hamilton, 111 Wash.2d at 571 (emphasis added). Below, the Court of Appeals mistakenly relied on its own precedent in *Boeing v. Harker-Lott*, 93 Wash. App. 181, 186-88, 968 P.2d 14 (1998); *rev. den.* 137 Wn.2d 1034 (1999), finding the trial court has discretion whether to give the instruction. This is error: “Once [the Supreme Court] has decided an issue of state law, that interpretation is binding until we overrule it.” *Hamilton* at 571.

The *Harker-Lott* decision rests on two pieces of mistaken analysis. First, it asserts the attending physician rule is not so esoteric that a juror could not figure it out. *Harker-Lott*, 93 Wash. App. at 187. But that is contrary to *Hamilton*'s analysis: the Court must tell the jury what is the law; otherwise the jury may confuse it with mere opinion of the attorneys. Whether or not the legal rule is esoteric is not a good test of an instruction. The courts are not necessarily skilled at determining what a juror will find obvious or esoteric. Also, the rule was included as a pattern instruction, suggesting its necessity.

Second, the *Harker-Lott* Court engaged in an *ex post* analysis by

finding that had the instruction been given, it likely would not have changed the outcome of the case. In essence, the Court was attempting to divine whether or not the injured worker was prejudiced. The rule established in *Egede-Nissen* requires an *ex ante* analysis: is there substantial evidence supporting the instruction, is the instruction an accurate statement of the law, and does the instruction allow its proponent to argue his theory of the case? Courts should not decide whether or not to give an instruction by deciding whether or not it will make a difference in the outcome.

The *Harker-Lott* Court may have been attempting to articulate a different question: does the attending physician rule apply where only treating physicians have testified. But from its summary of the testimony, it is not clear whether only treating physicians testified or whether it was a mix of treating and forensic physicians. Regardless, that is not the question at bar: here only one attending physician testified versus two one-time examiners.

Failure to give the instruction was prejudicial. In our system, juries perform an appellate *de novo* review of the Board's decision. RCW 51.52.115. Such review should be on the same legal foundation used by the Board. Without the attending physician instruction, the jury is not engaging in the same analysis used by the Board. Here, the Board explained why it accepted Dr. Won's testimony and rejected the two one-time examiners, with citation to *Hamilton*. CABR p. 69, ln. 21-30. Failure to instruct the jury

on the attending physician rule meant they did not perform an appellate *de novo* review as required by statute. This was prejudicial error.

This Court was unequivocal in *Hamilton*: refusal to give the attending physician instruction converts this “settled” statement of “a long-standing rule of law” into a mere opinion of the attorney. *Hamilton, supra*. So long as substantial evidence supports the instruction, the trial court must give the instruction. Rather than overturn *Hamilton*, the Court should set aside *Harker-Lott* and instruct the trial court to give this instruction when this matter is retried. Finally, the reader is directed to Petitioner’s Petition for Review for further argument and analysis on the trial court’s prejudicial abuse of discretion to minimize repetition.

2. *Hamilton* did not create the attending physician rule, but it is the current apogee of the rule; the Court should not reject eighty years of settled precedent.

To understand why this Court should affirm *Hamilton* and set-aside *Harker-Lott* it must understand the policies underpinning this long-standing, settled, statement of the law. Over the last century, our Courts have watched the evolution of medicine’s interaction with the law. The attending physician rule emerged out of our courts’ observations that attending physicians are more aligned with the truth of a worker’s medical condition than hired, forensic examiners.

The current attending physician rule was first strongly enunciated by *Spalding v. Dep't of Labor & Indus.*, 29 Wash.2d 115, 186 P.2d 76 (1947). Citing to four earlier cases that give attending physicians' opinions special consideration without much analysis, the *Spalding* Court wrote:

It is our opinion that an attending physician, assuming of course that he shows himself to be qualified, who has attended a patient for a considerable period of time for the purpose of treatment, and who has treated the patient, is better qualified to give an opinion as to the patient's disability than a doctor who has seen and examined the patient once.

Spalding, 29 Wash.2d at 128-29; *citations omitted*. Even in 1947, the Court recognized the tension between physicians whose role is to treat the injured worker and those whose function is to perform one-time examinations at the behest of whomever pays for their time.

This tension was succinctly summarized fifty-five years later in *Intalco v. Dep't of Labor & Indus.*, 66 Wash. App. 644, 833 P.2d 390 (1992). After stating the attending physician must be given special consideration, the *Intalco* Court wrote, "This is because an attending physician is not an expert hired to give a particular opinion consistent with one party's view of the case." *Id.* at 654. *Intalco's* pithy summation underscores why it was prejudicial error for the trial court not to give this instruction. Treating physicians' opinions flow from their treatment and actual needs of the patient, not from their referral source. Their focus is on

the best interests of the injured worker not the legal issues being argued over in the claim.

In contrast, hired examiner's opinions are artificially created because they arise outside of the normal doctor-patient, therapeutic relationship. Furthermore, their opinions are distorted by the threat of force through suspension of benefits if the injured worker fails to cooperate. RCW 51.32.110. Finally, their opinions lack independence, despite protestations to the contrary, because Self-Insured Employers and the State arrange the large majority of payments for their services. This creates incentives for one-time examiners to ensure more referrals rather than reducing to a minimum the injured worker's suffering.

Also, the rule in *Spalding* was not absolute, but suggests a rebuttable presumption. The finder of fact must still analyze the attending physician's testimony for other indicia of reliability.

While we appreciate that the extent of the examination and the length of time the patient was under the care of his attending physician should be considered, we have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician.

Spalding, 29 Wash.2d at 129.

The strongest formulation of the attending physician rule is found in *Groff v. Dep't of Labor & Indus.*, 65 Wash.2d 35, 395 P.2d 633 (1964). While, the *Groff* Court acknowledged the attending physician rule does not

place the treating physician on a pedestal above one-time examiners, it explained what it means to give special consideration:

We are not saying that the trier of the facts should believe the testimony of the treating physician; the trier of the facts determines whom it will believe; but it should, in its findings, indicate that it recognizes that we have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician. If it elects to accept the testimony of the examining physician, there should be some indication why it is preferable to that of the attending physician.

Groff, 65 Wash.2d at 45; citations omitted; emphasis added. *Spalding's* implicit rebuttable presumption becomes explicit in *Groff*.

Groff answers the question posed several decades later by the *McClelland* Court: how does a jury actually apply special consideration? The jurors should be instructed they must be able to articulate a reason why the forensic opinions are better than the treating physician's opinions. The jurors should be instructed that if they cannot articulate that reason, then it should rely upon the attending physician's testimony.

This is not an impermissible comment on the evidence. The juror could state to herself the attending physician was not believable; or the attending physician did not possess sufficient expertise; or the attending physician was not aware of a key piece of evidence. The *Groff* version simply explains to the jury the analytical process it should use when

evaluating which expert opinion it will rely upon. However, juries are not the only finder of fact using the attending physician rule.

a. The Court should revitalize the attending physician rule, which is used by every trier of fact in workers compensation, not discard it.

The attending physician rule applies to every finder of fact in our system: the Department of Labor & Industries, the Board of Industrial Insurance Appeals, superior court judges and juries. The Court's affirmation of the attending physician rule will be instructive to how the Department and the Board analyzes competing medical opinions. It's present formulation should restate *Groff*: to overcome the attending physician's opinion, the finder of fact must be able to explain why the hired examiner's opinions are better.

The Department, with its original subject matter jurisdiction over injured workers, makes the initial determinations of fact and law in every workers compensation claim. This includes deciding whom to believe if there is a disagreement between attending physicians and one-time examiners. If the Department elects to accept the evidence of its "expert hired to give a particular opinion", then the *Groff* rule requires it indicate why that opinion is better than the treating physician's opinion. *Intalco*, 66 Wash. App. at 654.

The second finder of fact, the Board of Industrial Insurance Appeals,

is given appellate jurisdiction to review the Department's decisions. The Board is required to reduce its decisions to writing with specific Findings of Fact. RCW 51.52.104. The *Groff* Court suggests, if not mandates, the Board's Findings of Fact specify why it prefers the testimony of these hired examiners over the treating physician. Here, the Board explained why it rejected the hired examiners' testimony. CABR p. 69, ln. 21-30.

Admittedly, it is difficult to observe how a jury applies special consideration. Just because it is difficult, does not mean we should not instruct them on this long-standing, settled rule of law. What this does mean is the trial court should give special care to instruct jurors on the process they should use in analyzing the evidence and reaching a decision. In contrast, superior court bench trials, like Board decisions, result in a written decision, allowing for observation of the rule's application.

The struggle since *Hamilton* is how do you advise a jury of the law without impermissibly commenting on the evidence? But this is no different than advising the jury that RCW 51.52.115 requires it to presume the decision of the Board is correct unless the preponderance of the evidence does not support its decision. *Gorre v. City of Tacoma*, 184 Wash.2d 30, 36, 357 P.3d 625 (2015). It is advising jurors the Board's decision has this same pride of place: to overturn it, a juror must be able to articulate to herself what is wrong with it.

If the present pattern instruction is as meaningless as was suggested in *McClelland*, then this Court should reformulate the instruction so it has use for the deliberating juror. Per *Groff*, the attending physician rule means their opinion is presumed correct. Special consideration should mean accepting the opinion of the attending physician, unless jurors identify a reason the hired examiner's opinion is better or find a fatal flaw in the attending physician's opinion.

b. A revitalized attending physician rule does not unfairly benefit injured workers.

The third case relied upon by *Hamilton* is also instructive as to the practical application of this rule, *Chalmers v. Dep't of Labor & Indus.*, 72 Wash.2d 595, 434 P.2d 720 (1967). Here, the attending physician testified based upon a factual error: what types of chemicals the worker used. While recognizing the attending physician rule, the *Chalmers* Court held, "The fact that the doctor was the treating physician is insufficient to overcome [this] defect." *Chalmers*, 72 Wash.2d at 601. Consistent with *Groff*, the Court concluded the finder of fact was right to reject the attending physician's opinion because of this factual flaw.

A restatement of the attending physician rule does not create an automatic benefit for only one party. There is no guarantee the attending physicians will invariably testify favorably for injured workers. On occasion,

the attending physician does not support further benefits; or there is a split in opinions between various treating physicians. In such situations, the attending physician instruction must still be given. If the expert testimony in the case at bar were reversed, then Clark County would be trumpeting the attending physician rule rather than seeking its demise. The *Hamilton, Chalmers, Groff, and Spalding* rule was not created merely to benefit injured workers but to neutrally state the law: treating physicians are in a better position than one-time examiners in determining an injured worker's disability and claim-related medical issues.

The Court should not reject this rule merely because it happens to give a rebuttable presumption to Mr. McManus' physician in this particular case. As formulated, the rule summarizes the reality of medical opinions: treating physicians are generally more reliable than handpicked, hired examiners. This is well-settled law regardless of whether the treating physicians' testimony supports further benefits or not.

3. Favoring the opinions of attending physicians over hired examiners is consistent with the Legislature's stated policy preferences.

The attending physician rule is also supported by the explicit workers compensation policy preferences of the Legislature. The *Hamilton* Court affirmatively cited to the long-standing rule of liberal construction used in workers compensation. But it did not fully cite its source RCW 51.12.010:

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

The purpose of our system of industrial justice is the reduction of the injured worker's suffering and economic loss. This purpose aligns with the purpose of the attending physician: to treat the injured worker to reduce her suffering and to get her back to gainful employment. The hired examiners' purpose is to simply answer questions without context to the betterment of the injured worker and provide opinions consistent one party's view of the case. *Intalco v. Dep't of Labor & Indus., supra.*

While not always the case, it is often the case these litigations devolve into a medical dispute between the treating physician and these one-time examiners. Injured workers, who have suffered economic harm, often cannot afford to pay for their own forensic medical examinations. Instead they are reliant on the opinions of their treating physicians.

The attending physician rule levels the economic playing field between injured workers and their Employers or the State. It levels the playing field because it requires the finder of fact to rely upon the attending physicians opinion, no matter how many one-time examiners are arrayed against it. The finder of fact must rely upon this opinion, unless it can articulate how it is flawed. Without it, injured workers must act like

Employers and the State by buying examinations with money they do not have to spend.

As argued above, attending physicians do not always support further benefits. Regardless, the rule minimizes suffering and harm because it speeds the adjudication process at all levels. Anything that speeds the process, even if it denies benefits, minimizes suffering because it expedites resolution of their claim. The workers know that answer was achieved through reliance on their doctors. Without the attending physician rule, workers' economic harm is increased. With this rule their suffering and economic harm is kept to a minimum.

The attending physician rule also matches the other major statement of policy underlying Title 51 RCW:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault.

RCW 51.04.010. Again the focus of the Act is the remediation of the injured worker; providing sure and certain relief to them under the Industrial Insurance Act. In other words, providing benefits with a minimum of delay.

This is also the interest of the attending physician, but not necessarily of hired examiners. Again, the attending physician's interest is to

expeditiously treat injured workers to provide them relief from their injuries. Hired examiners have a variety of interests, only one of which might be helping injured workers to get better.

The attending physician rule provides a shorthand for all of the finders of fact in our workers compensation system: follow the attending physician's opinion unless there is a good reason you should not (e.g. relying upon wrong or incomplete facts, basic mistakes in anatomy and physiology, lack of sufficient expertise, etc.). If the attending physician's opinion does not support further benefits, then the rule expedites denial so the worker may use alternative resources to obtain treatment. Either way, the rule expedites the decision making process, aiding in achieving sure and certain relief.

Rather than delay claims with endless hired examinations, the first finder of fact (the Department) provides "sure and certain relief" by accepting attending physician's reasonable opinions. The Board, the second finder of fact, provides "sure and certain relief" through giving attending physicians a rebuttable presumption their opinions are correct. Our juries provide "sure and certain relief" when they are properly advised as to the role and scope of attending physicians. When juries are not advised of this nearly one-century-old rule of law, then the policy of "sure and certain relief" is frustrated.

These policy preferences in favor of attending physicians are

reflected elsewhere in Title 51 RCW. The attending physician's special role is explicitly stated:

It shall be the duty of the [attending] physician to inform the injured worker of his or her rights under this title and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the worker.

RCW 51.28.020(1)(b). The Legislature recognized the superior position and independent role of attending physicians. This Court, in another context, affirmed this role:

The IIA makes it abundantly clear that a worker's attending physician plays an important role once the worker has chosen that physician for treatment. . . . Once a claim is made, the worker's chosen physician becomes an intricate part of the process until the claim is closed.

Shafer v. Dep't of Labor & Indus., 166 Wash.2d 710, 720, 213 P.3d 591 (2009).

Attending physicians are given special consideration because they have a special role in our system. Their role realizes the liberal construction's purpose of minimizing injured workers' suffering and economic loss. Special consideration aids in providing workers sure and certain relief.

Without special consideration, injured workers are at the mercy of Self-Insured Employers and the State with their large financial resources. Those resources can delay benefits through buying as many opinions as

necessary to tip the scales against injured workers. The attending physician rule rebalances those scales by requiring all of our finders of fact to rely upon the attending physician's opinions unless it can articulate a flaw.

CONCLUSION

The Court should reverse the decision below: it was a prejudicial abuse of discretion not to give the attending physician instruction. This is also the Court's chance to answer the challenge presented in *McClelland*: how should juries apply the rule? Rather than rejecting this 80-year old precedent, the Court should breathe new life by answering *McClelland*'s challenge. Attending physicians' opinions should be given special consideration because they are the medical experts in the best position to assist the finder of fact in deciding the medical issues presented. They are in the best position because their opinions are based upon a doctor-patient therapeutic relationship. Their opinions should only be rejected where a flaw is identified. This further guidance achieves the purposes of the Industrial Insurance Act: sure and certain relief that reduces injured workers' suffering and economic loss.



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SUPREME COURT

IN THE STATE OF WASHINGTON

CLARK COUNTY,

Respondent/Plaintiff,

v.

PATRICK McMANUS,

Petitioner/Defendant.

) Supreme Court Case No. 91963-1

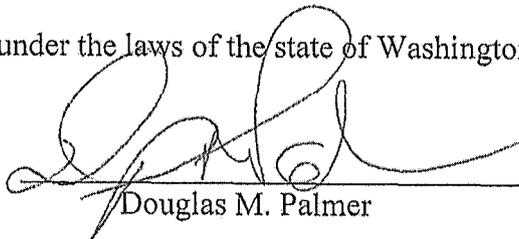
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The undersigned states that on Thursday, the 31st day of December, 2015, I deposited in the United States Mail, with proper postage prepaid, Supplemental Brief of Petitioner Patrick McManus dated December 31, 2015, addressed as follows:

Brett B. Schoepper
The Law Office of Gress and Clark, LLC
9020 SW Washington Square Rd., Ste. 560
Portland, OR 97223

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

December 31, 2015 Vancouver, WA



Douglas M. Palmer

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Re: Patrick McManus
Case No. 94963-1

To whom it may concern,
Attached please find the Supplemental Brief to Supreme Court, dated December 31, 2015, for the claimant Patrick McManus.

--

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