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DIVISION II

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STATE OF WASHINGTON

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No. 54390-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL J. COLLINS

Appellant,

v.

OLYMPIC INTERIORS INC.,

Respondent.

SPECIFIC AMENDED BRIEF PAGES OF APPELLANT
SPECIFIC TO AMENDED ASSIGNMENTS OF ERRORS

RAP 10.2(a) RAP 10.3(a) 1-8 RAP 10.4 (a)(1)(2)(b)(c)(e)(f)(g)(h)

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II. ASSIGNMENTS OF ERROR

Assignments of Error

Trial court denied my Motion For Reconsideration, but as included, as date stamped filed. All Errors listed, also relate to trial courts', 'no material issues of triable fact', per Olympic Interiors Inc.

- "1. Trial court erred, by entering the order December 6, 2019, denying Plaintiffs' Intentional Injury case specific to RCW 51.24.020.
- "2. Trial court erred, by not allowing me Plaintiff, to have the benefit of CR 56(e)(f), upon Defendants CR 56(g) 'bad faith' Discovery.
- "3. Trial court erred, by not allowing me Plaintiff Discovery necessary to 'prepare for trial'.
- "4. Trial court erred, in signing a CR 56(h) order pre-written by counsel for the Defendant that includes *inter alia*, specific defendant argument and 'bad faith affidavits', to any such anti-SLAPP protection.
- "5. Trial court erred, deciding anti-SLAPP in Defendants' favor.
- "6. Trial court erred, in not as specific deciding what disputed facts of my RCW 51.24.020 case 'reasonable minds could differ'.
- "7. Trial court erred, not considering **spoliation** 'duty to preserve' rebuttal presumption of my January 30, 2017 Injuries Detailed' documented Time-Sheet.
- "8. Trial court erred, by not correctly interpreting court rules, and relevant statutes, for relevance to my 'arose out of' RCW 51.24.020 case.
- "9. Trial court erred by not as specific deciding Defamation *per se*, 'burden of proof standard', and **spoliation** 'burden of proof standard', as 'actionability' of my RCW 51.24.020 Intentional Injury case.
- "10. Trial court erred, by shifting burden of proof to me Plaintiff.

Issues Pertaining to Assignments of Error

1. Did the Trial Court incorrectly base its decision on, "insufficient factual support", as, "employers do have the right to dispute claims of injuries", then did trial judge based my RCW 51.24.020 Intentional Injury case on my June 20, 2017 Injuries Claim filed under the 'Industrial Insurance Act', rather than specifically on a separate RCW 51.24.020 'Intentional Injury'?

Assignment of Error No."1.

2. Was my RCW 51.24.020 case as filed, based on an employer Intentional Injury, separate from my January 30, 2017 Right Shoulder, and Neck Injury at issue, as separate injury claim(s) per the 'ACT' only?

Assignment of Error No."1.

3. Was Causation, 'but for' cause in fact, or legal causation damages, as questions of law and fact, not Trial Court correctly decided?

Assignments of Error No."1,"9.

4. Does a Plaintiff with CR 56(f) support specific to Defense Motion For Summary Judgment to Dismiss, have this court rule as legal support when Plaintiffs' continual attempt to procure a CR 26(i) 'meet and confer', ignored by Defendant Olympic Interiors Inc. legal counsel, as CR 56(f), compels an order written by the court, not a proposed order written by Defendant? Assignments of Error No."2,"3.

5. Would a Plaintiffs' 3 counts of Defamation, Deliberate Intentional Infliction Of Emotional Distress, to include pain and suffering, and Tort Of Outrage, if based on a correct legal standard, and if ignored by, and not as specific decided by Trial Court, be properly dismissed by the Trial Court, if based only on "employers do have the right to dispute claims of injuries", then Prejudicial Error?

Assignment of Errors No. "1,"4,"5,"6,"7,"8,"9,"10.

6. If Trial Court never decided as specific, whether an 'arose out of RCW 51.24.020 case, is a 'private concern', or, if it is a ('public concern' case, as 'a matter of law'), and if dispositive to the 'merits' of an RCW 51.24.020 also correct 'vicarious liability' case, not superseded by RCW 4.24.500 thru RCW 4.24.520, then does this factually, and statutorily support factual, and legal causation, for the Defendant, or is this a Trial Court Prejudicial Error?

Assignment of Errors No. "1,"4,"5,"6,"7,"8,"9,"10.

7. If the Trial Court did not properly decide whether CR 56(c) 'no genuine issues of material fact', or whether a CR 12(b)(6) 'claim upon which relief cannot be granted' legal standard, would be the proper legal standard in an RCW 51.24.020 INTENTIONAL INJURY case, but only as a specifically vague decision, specific to RCW 51.24.020, and if the RCW 51.24.020 INTENTIONAL INJURY

COMMENCEMENT OF ACTION provided 'sufficient provable documentary facts, does a proper RCW 51.24.020 INTENTIONAL INJURY case defeat both dismissal rules, for a Trial Court Prejudicial Error?

Assignments of Error No. "1,"4,"5,"6,"7,"8,"9,"10

8. If a **MEMO** is admissible evidence, containing 'undisclosed facts', and if Defendants specific medium, and specific audience, which had the authority to decide as specific to a **MEMO** only, as specific statements by Defendant were made, specific to a 'private concern' specific to Defamation *per se*, that in an RCW 51.24.020 INTENTIONAL INJURY case, based on 'totality of circumstances', and the lessor standard of proving damages by Plaintiff, as allowed in a Washington State Court for damages, if RCW 51.24.020 was Trial Court ignored, a Prejudicial Error?

Assignments of Error No. "1,"4,"5,"6,"7,"8,"9,"10

9. Is it substantively legally correct for Trial Court to find in favor of Defendant 'movant', if ('Intentional **Spoliation**' is provable, then commanding 'adverse inference', as Trial Court ignored Defamation *per se* by Defendant, then with burden of proof, as same), if 'doctrine of clean hands' violation alone, compels 'movant' RCW 51.16.070, and RCW 51.48.040 'duty to preserve, then a Prejudicial Error?

Assignments of Error "1,"2,"3,"4,"5,"6,"7,"8,"9,"10.

10. Did Trial Court ignore RCW 51.24.020 as controlling law, as Prejudicial Error? Assignments Of Error "1,"3,"4,"5,"6,"7,"8,"9"10.

III. STATEMENT OF HISTORY OF THE CASE

A. My January 3, 2019 RCW 51.24.020 Case As Filed

The Superior Court Order on Appeal of December 6, 2019 based ostensibly on a Defendant CR 56 Motion For Summary Judgment, as CP at 163-165. I Appellant, in my Assignment of errors, describe an amorphous, not specifically stated as my RCW 51.24.020 counts dismissed, order, dismissing my RCW 51.24.020 case. CP at 1-20, 21-27.

My January 3, 2019 filed RCW 51.24.020 COMMENCEMENT OF ACTION, was based **not** on my January 30, 2017 Right Shoulder, and (NECK INJURIES, capitalized for emphasis, as my neck injury was never medically adjudicated as a neck injury), but based on provable spoliation, falsification, and defamation, by Olympic Interiors Inc., as 'vicarious liability', for the sole Intent, to cover-up my January 30, 2017 Injuries, as Olympic Intentional Injury, consistent with RCW 51.24.020. But RP at pg.21 at 5-23 is based on Wells RP pg.8 at 5-8.

The documents included in my January 3, 2019 RCW 51.24.020 case as filed, created by Olympic Ex at 18-20, as 'merits' admissible, evidence, or created by me, Ex at 16-17, 'merits' admissible evidence.

My RCW 51.24.020 case was timely filed specific to all statutory limitations per RCW 51.24.020, RCW 4.16.100, and RCW 4.36.120

B. My Work History With Olympic Interiors Inc.

January 27, 2017, I sat 3 feet across the table from Doug Bagnell Olympic Interiors Inc., and completed my cursory pre-employment paperwork. At that moment in history, there was no active, no known, no diagnosed, and no treated neck condition, in my neck medical history. I commenced work [hanging] sheetrock Monday January 30, 2017, at approximately 5:25 a.m. dispatched as always, to [hang] sheetrock only, never dispatched as a lighter duty framer.

Immediately, I brought to the attention of my job supervisor Victor Lopez, Appendix **Ex B**, that WDLI safety recommendations were not consistent with size of material 4'x12'x5/8" thick full sheets of sheetrock, I was being demanded to [hang] by myself. Appendix **Ex B**. R.A.P. 10.3 (8), 10.4 (c). All CP Ex's,,, are separately cited Ex herein.

At approximately 10:51 a.m. Monday January 30, 2017, I, while lifting a full 4'x12'x5/8" thick full sheet, injured my Right Shoulder, and I injured my Neck, as the unsecured full sheet fell onto my head, whipping my neck. I immediately informed my supervisor Victor Lopez and documented on my Time-Sheet provided me by Doug Bagnell January 27, 2017, as detailed, describing the events that led to the

injuries described, to include the WDLI safety recommendations criteria. That Time-Sheet, is original 'merits' issue in my case. Ex at 19.

I worked light-duty, to mean, with a partner, who cut, carried, and lifted the sheets, while I simply screwed off the sheets, the remainder of my time working for Olympic, thru Thursday February 2, 2017.

On Thursday February 2, 2017, since I was being sent to another project, that I agreed to start on Monday, because I was still sore from my Right Shoulder, and Neck Injuries, but was able to work light duty, as I was not lifting any full sheets of sheetrock, I still desired a day off.

As protocol, I, and my immediate supervisor Victor Lopez, signed my January 30, 2017 INJURIES DETAILED Time-Sheet. Victor Lopez informed me in no uncertain terms, he would "file that Time-Sheet",,, with the office, then of course upon which my pay check type-of-work performed for Olympic, and the exact information employer Olympic would provide the Department in its Supplemental Quarterly Reports as total hours of type-of-work performed, would be directly based.

The law per the 'ACT' gives an injured worker a calendar year to file an injury claim. I filed my injuries claim June 20, 2017. It is common for strain type injuries, to file a claim later. Ex at 16-17.

Still as an employee on February 10, 2017, though a major snow-storm precluded me, Michael J. Collins from working, as an emergency

situation where I could not leave my house with no power, or any type of communication, as an extraneous issue not relevant to a defense argument. CP at 158-162, as my last day worked for Olympic was February 2, 2017, I was in Olympics office February 10, 2017, the day I would have received, as it turned to be, my only pay check from Olympic, due to no wish of mine at the time, and upon receipt of such pay stub, as the actual check would have been direct deposited, I noticed my pay stub had been incorrectly coded. Ex at 20.

I did adamantly bring this to the attention of Olympic persons in the office that day February 10, 2017, to include Doug Bagnell. Ex at 16-17. I was looking for work February 10, 2017, and thru March 29, 2017, as I was again in Olympics office to return tools I still possessed, and was asked to return.

I emailed Olympic in May, 2017 still looking for work, as, I was still relegated because of my weakness from my injuries, to work lighter-duty, and because I was injured at Olympic, as the employer of injury, Olympic by law, should have kept me working as employer of injury.

Olympic never me employed again, even though Doug Bagnell promised me future work when I was in Olympics office February 10, 2017, approximately 10:45 a.m., as I brought the pay stub 'miscoding' [sic.] to Olympics attention, and Olympic promised to correct Ex at 20.

But because Ex at 20, Olympic pay stub falsification, was never corrected by March 31, 2017 when Olympic filed its Supplemental Quarterly Reports Ex at 116-118, then Intentionally falsely filed to L&I. I found light-duty work for 72 hours as 'light duty' for another employer from February 15, 2017, thru February 24, 2017, working with a partner, and I informed Olympic prior to February 15, 2017, and after February 24, 2017, that they needed to put me back to work, as I am not employable working full duty, and Olympic is the employer of injury.

I did not further exacerbate my Right Shoulder, and Neck injuries while working for this other employer, that was also a Union Drywall employer, who paid the same wages, and the same health benefits as Olympic Interiors Inc., a Union Drywall employer, then if I Michael J. Collins had a nefarious plan to simply file a fraudulent injury claim, I would not go back to my prior employer, Olympic Interiors Inc., I would do that with my present employer, if,,, that evil hypothetical only, scenario, described, was the situation.

This is profoundly relevant to my veracity as is my case.

It is because I could not work but only lighter duty, as to why my time ended February 24, 2017, as the 'light duty', which is very rare in sheetrock work, was only available to me for 72 total hours.

I, Michael J. Collins informed Olympic vociferously on February 10, 2017, March 29, 2017, both in-person, and in May, 2017 in-person,

that they Olympic needed to correct the falsified information they had now Intentionally provided the Department, specific to my type-of-work performed, so if,, I needed to file an injury claim, my Report Of Injury, would not be inconsistent with, the type-of-work performed, Olympic provided the Department in its due date of March 31, 2017 Supplemental Quarterly Reports, Ex at 116-118, as it is the specific type-of-work performed, and size, and weight of the material involved, that injured me, to mean full sheets of 4'x12'x5/8" thick full sheets, not a much lighter framing material, that I was working with, lifting by myself, and that fell onto my head whiplashing my neck, when my injuries occurred. CP at 1-27, CP at 79-104, CP at 105-157.

C. My Injuries Claim And Board Of Industrial Appeals Case

As I Michael J. Collins stated in **B.** herein, I requested of Olympic from February 10, 2017, forward, to correct its February 10, 2017 pay stub falsification, and as same day February 10, 2017, I requested of Olympic to provide me a copy of my February 2, 2017 signed by me, and signed by my immediate supervisor Victor Lopez complete with my January 30, 2017 Right Shoulder, and Neck Injuries Detailed documented Time-Sheet, but received no relief as of this writing to either request, as Ex at 19-20 Olympic Intentionally falsified to cover-up type-of-work performed. CP at 1-20 Ex at 16-17.

As was my concern since February 10, 2017, I was forced into a situation where I, if necessary to file an injury claim, to have my injuries claim based on a much lighter duty type-of-work, Olympic did in fact fraudulently provide the Department, than the actual heavier duty type-of-work I performed for Olympic, and specific type-of-work [hanging] that injured me. CP at 105-136 Ex 116-118.

Fact: My Right Shoulder was not Department medically treated as a January 30, 2017 statutory Industrial injury, but as a statutory Occupational Disease, as my over 40 years working in the sheetrock [hanging] type-of-work as my occupation, repetitive strain on my Right Shoulder, even notwithstanding my January 30, 2017 injuries, would have allowed a Right Shoulder statutory Occupational Disease claim medical adjudication anyway, and Olympic, because I worked for them for only 32 hours, out of over 40 years, was not even a 'chargeable employer', for such specific Right Shoulder Occupational Disease.

Fact: My January 30, 2017 NECK INJURY, was not only never allowed to be medically treated as a statutory Neck Injury, but when I, Michael J. Collins filed a separate Department Neck injury only,,, claim, as my original June 20, 2017 Right Shoulder, and Neck Injuries claim, the Department did not even allow me to obtain a medical opinion per the 'ACT', specific to a January 30, 2017 NECK INJURY only,,, claim.

Board Of Industrial Insurance Appeals medical testimony as ER 804(b)(1) admissible, proves my January 30, 2017 NECK INJURY original claim as filed, was never even allowed to be diagnosed as a Neck Injury. And as my separate Neck Injury claim, I filed January 4, 2018, within the 1 year mandate, as was not an issue, as not known to me at the time, January 16, 2018, was rejected 3 days prior to my scheduled January 19, 2018 medical appointment, scheduled to be a separate Neck Injury medical opinion, than a statutory Neck Occupational Disease claim, that my original June 20, 2017 filed Injuries claim was Department adjudicated pursuant to, as I did not file my original Injuries claim to be adjudicated pursuant to a statutory Occupational Disease claim.

Again, as my original June 20, 2017 Injuries claim Department Independent Medical Exam, and as consistent with Board Of Appeals medical testimony, proves my January 30, 2017 Neck Injury, was never Department considered to be diagnosed as a Neck Injury, as Dr. Sullivan BIIA testimony pg.81. CP 137-157, Ex 157 all.

Fact: Even though there is no prior to my January 30, 2017 Injuries, **no** active, **no** known, **no** diagnosed, and **no** treated Neck condition as provable in my Neck medical history, and as Olympics' current legal counsel in this case, as signature permission given by

me Michael J. Collins, in this legal action, investigated to confirm, the Department Segregated my Neck condition, even though **no** statutory law, **no** settled law, and **no** Legislative Intent supports.

Fact: For a statutory Injury to be legally Segregated per the Industrial Insurance Act, based on any segregation rules as legally applied, to include RCW 51.32.080(5), a prior known, diagnosed, and treated condition, must be prior to current injury, medical history fact.

Fact: My RCW 51.24.020 Intentional Injury case is not based on my January 30, 2017 Right Shoulder, and NECK INJURIES, but as Olympic Interiors Inc., Intentional falsification of material facts, and Olympic Interiors Inc. Intentional cover-up of my Injuries, to include provable Defamation, and to include Olympics Deliberate Intent to Inflict Emotional Distress, and as a Tort Of Outrage, for the sole Olympic Interiors Inc. INTENT, to cover-up my January 30, 2017 INJURIES. CP at 1-27, as my January 3, 2019 case as filed.

IV. ARGUMENT

RCW 51.24.020 relevant language states,

"If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker,,, ,,shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title"...

Olympic counsel Wells, at December 6, 2019 Motion Hearing transcripts as RP at 8, argues that I Michael J. Collins, have somehow, already had my opportunity to litigate my specific INTENTIONAL INJURY issues at the Board Of Industrial Appeals, as absurd.

Ex at 19-20, as my CP 1-20 argument, as example of Board Hearing Exhibits as rejected, as the Board did not have jurisdiction, to hear my specific issues, as Olympics' documentarily provable INTENTIONAL INJURY per RCW 51.24.020. Wells RP at 8, at 6-8.

The trial Judge did not admonish, or decry, such absurdity by Olympic counsel. So as the third trial judge assigned to my Superior Court case, and because the trial courts' very incomplete decision, to a very involved case as my case is, now this Appeal must contemplate if this trial judge even read the substance of my RCW 51.24.020 INTENTIONAL INJURY case. I Michael J. Collins, made clear in my pleadings as filed in Superior Court now as (Clerks Papers), exactly what my Intentional Injury complaint is based on, and as a separate Intentional Injury, (from my January 30, 2017 Injuries, as would be Department only adjudicated, pursuant to the 'exclusive remedy provisions' of the Industrial Insurance Act as RCW 51.04.010).

Specific to my RCW 51.24.020 Intentional Injury case, it is not abolished by RCW 51.04.010. CP at 1-20.

**A. SPECIFIC TO OLYMPICS' DELIBERATE INTENTIONAL
INFLICTION OF EMOTIONAL DISTRESS,
AND TORT OF OUTRAGE**

Olympic Interiors Inc., specific to its INTENT, as documentarily provable, enters into the legal process as in violation of the 'doctrine of clean hands', and per RCW 51.24.020, cannot invoke any 'no-fault' legal argument, as specific to RCW 51.04.010 only. See last words in RCW 51.04.010, "except as in this title provided".

As this Appeals Court reviews my incontrovertible case specific to the *Birklid v Boeing* test as *Birklid v Boeing 904 P.2d 278, 127 Wash. 2d 853 (1995)*. But my RCW 51.24.020 case is a new test, as my Intentional Injury pales *Birklid v Boeing*, as specific to what actually is an employer caused, and employer motivated Intentional Injury.

"The proper inquiry is whether the employee was fulfilling his or her job functions at the time he or she engaged in the injurious conduct".

See my dispositive argument CP at 1-20. *Robel v Roundup Corp.*, *148 Wn. 2d 35 59 P.3d 611, (2002)*...

As the 'principle authority' Olympic Interiors Inc., and by way of its 'vicarious liability' as specific to RCW 51.24.020, authorized its own persons as 'within scope of their employment', job duties, were to review, and sign my mandated Time-Sheet provided me to complete by they Olympic, and base its payroll, as my pay check, pay

stub, Ex at 20, specific to that mandated Time-Sheet 'principle authority' signature and its 'duty to preserve' any such documents.

My dispositive argument CP at 1-20, 'The more power and control the defendant has over the plaintiff, the more likely the defendant's conduct should be deemed to be 'outrageous', and the plaintiff's emotional reaction, to be deemed severe'.

Then when Olympic 'within the scope of their employment' with Deliberate Intent, spoliated, and falsified my January 30, 2017 Injuries Detailed, signed by me, and by my immediate supervisor February 2, 2017 Time-Sheet, then falsified my total hours of specific type-of-work I performed, on my pay roll stub, Ex at 20, then provided that Olympic knowingly falsified total hours of specific type-of-work I Michael J. Collins performed from January 30, 2017, thru February 2, 2017, to the Department, Ex at 116-118 Olympics' March 31, 2017 Supplemental Quarterly Reports, for Olympics' sole Intent to cover-up my January 30, 2017 specific type-of-work performed, and that injured me, for Olympics' sole Intent, to cover-up its WDLI safety recommendations, violations specific to, 1 person safely [hanging] 4'x12'x5/8" sheetrock, for Olympics' sole self-serving Intent, to not have an adverse affect on its 'experience rating', and to thru its Intentional obloquy, to as a planned calculated Intent, discredit any future [would be] Injury Claim, I Michael J. Collins may have to file, to have Department records as information it Olympic, provided the Department not be consistent with,,, what my

June 27, 2017 Injury Report would truthfully describe. Ex at 56-57.

Then my 'Susceptibility to Emotional Distress', as Injury solidified, as my 'specific particular susceptibility', overcomes *Birklid* 'Disregard of a risk' only. CP at 1-20. WDLI (L&I) 1-person safety data Ex at 61-66.

For a calculated plan and as consistent with what Olympic did to me Michael J. Collins, and as precedent, see *Polk v INROADS/ST. LOUIS, Inc.*, 951 S. W. 2d 646, 648 (Mo. App. E.D. Jul 22, 1997)... CP at 1-20, CP at 21-27, Restatement (Second) of Torts section 46 cmt. d (1965),,, "The alleged motive behind INROADS' conduct was retaliation for plaintiff's exposing misrepresentation by her immediate supervisor which falsely enhanced the performance of INROADS St. Louis operation"...

In my case specific, Olympic retaliated against me, for my February 10, 2017 in-office visit, exposing Olympics' falsified pay stub specific 32 total hours of specific type-of-work I performed. But, before February 10, 2017, Olympic as its 'within the scope of its duty',,, but as violated, had already prior to February 10, 2017, as its 'vicarious liability' specific to my February 2, 2017 signed by me, and by my immediate supervisor, Injuries Detailed Time-Sheet, Ex at 19 falsified type-of-work I performed, then spoliated that signed Time-Sheet, as documentarily provably provided the Department falsified information,

in Olympics' March 31, 2017 Supplemental Quarterly Reports.

From *INROADS*, "all of the acts attributed to INROADS, taken together, were so outrageous as to be utterly intolerable in a civilized society. Plaintiff's petition stated a cause of action against INROADS for the intentional infliction of emotional distress"...

See CP at 1-20, "Robel should have gone to the trier of fact", from our State Supreme Court.

See CP at 1-20, 'From *Birklid*, *Reese* [separate-injury] test as the correct approach'.

See, From *Birklid*, the court,, "We hold the phrase "deliberate intention' in RCW 51.24.020 means, the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge"...

INROADS' specific parallel to my RCW 51.24.020 case, and the exact provable INTENT by Olympic, as I have documentarily proven, controls.

See RP at 8 Olympic counsel Wells argues, as simplistic, as not my case Intentional Injury specific, that 'outrage', can only be a successful action by the plaintiff, if it is somehow related to a horrible death, or the untoward disposing of the body after death, or the like. See *INROADS*'.

INROADS court finds, the exact facts in my case parallel to *INROADS* are sufficient for an Outrage claim.

This Appeals Courts' inquiry into Summary Judgment must include what exact criteria the trial court used to determine no 'Outrage' claim.

Barnum v State 72 Wn.2d 928, 435 P.2d 678 (1967),,, though based on CR 12(b)(6), from *Barnum* State Supreme Court,,,

“Plaintiff may or may not be able to establish facts which will entitle him to recover. We cannot say that, as a matter of law, he has no claim. This is especially true where the court has notice of facts in dispute that are material to the cause. It is obviously improper to resolve factual issues in a motion for judgment on the pleadings. The procedural rules under our present practice are to be liberally construed in order that full discovery proceedings will be afforded in all instances where factual inquires are in order. The judgment dismissing the plaintiff’s action was premature and is therefore reversed”.

See my CP at 38-66, CP at 158-162 DECLARATIONS filed in Opposition to defense Motion For Summary Judgment per CR 56.

My MOTION TO COMPEL, CP at 70-78, as dispositive, Olympic as Intentional, never justified, or corrected, its knowingly bad faith Deliberate Intent to provided the Department falsified information, as not decided by trial court December 6, 2019, CP at 163-165 Order on Appeal now. See CR 56(f) allows me Plaintiff further discovery, as I Michael J. Collins, as required, attempted to solidify a CR 26(i) ‘meet and confer’, with defendants, ignored by the trial court.

And CR 56(g) must be part of this Appeals inquiry, as defense based its Motion to Dismiss on its CR 56(h) documents, as in the December 6, 2019 Order on Appeal. See CP at 36-37, CP at 38-66. Black’s Law Dictionary 268 (8th ed. 2004) ‘duty to preserve’ bad faith, commands Olympic ‘burden of proof’ prior to CR 56(c) equitable relief.

See *Roberson v Perez* 123 Wn. App. 320 96 P.3d 120 (2004),,,

Superior Court on Plaintiffs Motion To Compel discovery, ordered that the city "shall deliver to this court", all records, and identifying information specified in certain discovery requests, [and] [a]ll personal records and files pertaining to the defendant".

Roberson relates to CR 37(a)(b)(2), as [my] trial Court denied me Plaintiff opportunity to demand specific Olympic discovery by not granting my proposed Order, but chose to deny me Plaintiff , "insufficient factual support". RP at 19. Continue *Roberson*.

'The Court' ,,, "Here, the Superior Court found that the city acted intentionally when it did not turn over all of the personnel, and investigative documents it had on file relating to the defendant"... 'The fact that the city kept separate files on employees in order to segregate confidential material, does not relieve the city of its discovery obligations'.

So had the trial judge in my case specific, ordered Olympic to produce dispositive material documents, Olympic would be legally compelled to, as 'a matter of law'. *Roberson* continued,,,

"The court ordered that the city produce all internal investigative material, because it was integral to the Plaintiffs case preparation, and plainly asked for in the discovery requests. It is clear from the context, that the term intentionally, as used by the court, encompasses willfully". "We conclude that the discovery violation here is substantial".

Remember, I was on a court mandated timer December 6, 2019, from Olympic counsel, then I could not argue details of my MOTION.

See RCW 51.48.040, RCW 51.16.070 CP at 105-136.

Doug Bagnell, Olympics' mastermind, who signed the June 22, 2017 **MEMO** at issue Ex at 18, in my Defamation claim herein, as my further ARGUMENT, and my various Opposition Briefs, completely contradicts his Board Of Appeals testimony, by signing his name to a Discovery DECLARATION November 4, 2019, knowing falsity of that DECLARATION, as Bagnell testimony is ER 804(b)(1) relevant, and admissible. Bagnell Ex at 119, recalls "coding error". Ex at 120-122 contradiction. See Ex at 124-125. CP at 137-157 Ex. at 150-154.

Behr Process Corp. 113 Wn. App. 306, 324, 54 P.3d 665 (2002),,,

"the trial court found the plaintiff's were substantively prejudiced in preparing for trial because the discovery violations complained of suppressed evidence that was relevant, because it goes to the heart of the Plaintiffs claims, and it supports them".
113 Wn. App. at 325 (quoting court proceedings)...

The Supreme Court,,, states,,, in *Magana v Hyundai Motor Am.*

167 Wn. 2d 570, 220 P.3d 191 (2009),,,

"The Court Of Appeals also uses the wrong standard when it asserts *Magana*, was not prejudiced in obtaining a fair trial, 141 Wn. App. at 516-18. This prong of the test looks to whether *Magana* was prejudiced in preparing for trial, not obtaining a fair trial. The record supports the findings of the trial court, that *Magana* was prejudiced in preparing for trial"...

The proposed order signed by trial judge in my case, specific to defense CR 56(h) documents, stating I Plaintiff has "zero evidence".
See CR 26(b)(1) 4L. Orland, Wash. Prac. Rules Practice (3rd ed.1983)

B. SPECIFIC TO INTENTIONAL DEFAMATION

Refer to my included Appendix and statutes for interpretation, RCW 4.24.500, and RCW 4.24.510.

As this Appeals Court references the Trial Court Order On Appeal from December 6, 2019 and as my Notice of appeal, see all Olympic counsel CR 56(h) documents included in the pre-written order by Olympic counsel as the proposed order now on review.

Interpretation of a statute, as same as a court rule, is a 'question of law', and are construed in accord with their purpose.

Olympic counsel Wells, knowing Olympic could never justify its conduct, in my documentarily provable RCW 51.24.020 claims, as a legally absurd defense, that settled law defies, but ultimately, Olympics' entire defense was based on RCW 4.24.510, as Olympic legally positions, that Olympic is somehow protected, by anti-SLAPP statute RCW 4.24.510. And trial court accepted this defense argument.

Olympic counsel Wells argues in his November 27, 2019 REPLY to my Opposition to Olympics' Motion For Summary Judgment, as CP at 198-204, also Wells RP at 9, not contextually legally supported, that 'good faith' intent is somehow not required. But this needs to now be interpreted in proper legal context. Wells states unambiguously in CP at 198-204, Olympic relies on RCW 4.24.510. I, Michael J. Collins,

in my December 2, 2019 Further Opposition to Wells' REPLY, and in this Appeal, show clearly, Olympic is not protected by anti-SLAPP in a 'private concern',,, not a 'public concern',,, but 'private concern' matter, such as my RCW 51.24.020 Intentional Injury case.

The extraordinary dynamic in my Defamation claim at issue, is, Olympics' documentarily provable conduct prior to its June 22, 2017, Olympics' Doug Bagnell signed defamatory **MEMO** at issue, Ex at 18, INTENT of which, was to introduce 'obloquy', exactly stated in Wells' REPLY, ft.nt.12,,, CP at 202, as a dynamic Wells references as somehow 'obloquy', is not apparent in my claim, as Wells then references 'obloquy', as needed standard for me to prevail, but 'obloquy', clearly is apparent in Olympics' June 22, 2017 **MEMO** Ex at 18, as settled law supports as combined with totality of Olympics' conduct leading up to the June 22, 2017 **MEMO** must also be considered, then 'obloquy' as Intentionally caused by Olympic in its June 22, 2017 **MEMO**, for the sole intent, to discredit me Michael J. Collins, after I had filed my June 20, 2017 L&I Injuries claim, as 'obloquy' is a legally appropriate cause, and legal standard, for me Plaintiff to prevail in a defamation claim.

The key point in RCW 4.24.510. "and is subject to oversight by the delegating agency",,, in other words, the Department as L&I.

But Olympic was never statutorily "subject to oversight" specific to,

RCW 51.48.040, or RCW 51.16.070 specific to my complaint of Olympics' documentarily provable pay roll documents falsification of the specific type-of-work I Michael J. Collins performed for Olympic Interiors Inc., from January 30, 2017 thru February 2, 2017.

See RCW 4.24.500, "The purpose of RCW 4.24.500 through RCW 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies".

So even if my RCW 51.24.020 Intentional Injury case was a 'public concern' case, as it is not, as a 'public concern', or a 'public interest' case, which is directly in-context to RCW 4.24.510 as specific to an individuals' 1st Amendment right to free speech,,, as the legal and mandatory standard specific to RCW 4.24.510, it is Olympics' prior conduct as Intentional spoliation, and falsification of specific pay roll documents, for Olympics' sole INTENT, to cover-up my January 30, 2017 Injuries, as is legally defined as Tort Of Outrage, *Polk v. INROADS/St.Louis, Inc., 951 S.W. 2d 646,648 (Mo. App. E.D. Jul 22 1997)*,,, Olympics' provable 'bad faith' Intent from its prior bad conduct would be taken into consideration. CP at 1-20.

But anti-SLAPP, is not legally appropriate for a 'private concern' case such as my specific RCW 51.24.020 case, then a defense based on anti-SLAPP is erroneous from its inception, even taking into

consideration Olympics' prior 'bad faith' INTENT since February 10, 2017, continues through Doug Bagnells November 4, 2019 discovery DECLARATION, Ex at 120-122 that as discoverable, and dispositive contradicts Bagnells' prior Board Of Appeals testimony, Ex at 124-125, as to what exact, specific type-of-work, was I Michael J. Collins hired January 27, 2017, to perform, and was that factual type-of-work, performed truthfully provided the Department, in Olympics' March 31, 2017 Supplemental Quarterly Report, Ex at 116-118, Olympic Intent as falsified, upon which would decide if my June 27, 2017 Report Of Injury, Ex at 56-57, as my description of type-of-work I Appellant factually performed, and the manner in which I was injured, consistent only to [hanging] sheetrock as specific type of material I worked with, and that injured me, as I was then discredited ('obloquy'),,, with Olympics' March 31, 2017 Supplemental Quarterly Report, even before Bagnells' June 22, 2017 defamatory **MEMO**, unsupported by any prior Olympic as necessary documentation from Olympics' Bagnell, as documented real-time January 27, 2017, as 'reasonable minds' deciding my case would expect to support the June 22, 2017 then defamatory **MEMO**, as Ex at 18 June 22, 2017 **MEMO** has no legal documentary support.

And CR 56(g) must be reviewed, as Bagnells' discovery 'bad faith' DECLARATION, but my desire is also CR 56(f) continuance to trial.

Any anti-SLAPP defense, must as mandatory, invoke Article 1 section 5 of the Washington Constitution for a Washington State 'public concern' 'public interest' case only, and for all U. S. citizens in a 'public concern' 'public interest' case only, the U. S. Constitution 1st Amendment defense must be invoked, and properly pleaded.

Olympic counsel Wells did not plead any necessary prerequisite factors as I describe, because anti-SLAPP does not support Olympic.

And, the December 6, 2019 trial court judge, did not challenge Wells on RCW 4.24.510, or any anti-SLAPP defense position, as the trial court knowing, that Olympic was now basing its Motion To Dismiss, on anti-SLAPP. Then a trial court 'Prejudicial Error'.

Then Olympics' desperate anti-SLAPP defense, and as the basis for the December 6, 2019 CR 56(h) defense proposed trial court order now on review, must be reversed by this Court Of Appeals, and justly remanded to CR 56(f) command complete discovery, and to allow me Michael J. Collins Pro se, and Olympic, to prepare for trial.

RCW 4.24.510 "oversight", as specific, must first be proven by Olympic, but as moot, as my case is not a 'public concern' case.

In Washington State a defamation claim can be *per se* defamation. Although I Plaintiff can, in a *per se* defamation claim, the plaintiff in such *per se* defamation claim, does not need to prove material injury,

because harm to plaintiff is **presumed** in the written statement.

But as I described herein, my case is even stronger than *per se* as **presumed**, as the prior documentarily provable 'bad faith' conduct of Olympic, must be considered in its totality to my defamation claim.

Washington State permits recovery of **presumed** harm, as Olympics' liability is based on its knowledge of falsity, and/or Intentional disregard for the truth, and the 'private defamation plaintiff', me, who has established liability under a less demanding standard than such 1st Amendment test, may recover for the actual injury.

Then I Plaintiff, now Appellant, in my RCW 51.24.20 case, as supported by *Sofie v Fibreboard 112 Wash. 2d 636 771 P.2d 711 (1989),,,* have shown clear INTENT, by Olympic, then extensive damages I seek are warranted. CP at 14.

Olympic counsel Wells in his CR 56(h) documents supporting CP at 163-165 trial court order now on review, denying RCW 4.24.525 as he Wells is not invoking to support Olympic, digs Olympics' own 'proverbial legal grave' as denouncing RCW 4.24.525, Wells admits Olympics' June 22, 2017 **MEMO** Ex at 18 is of a 'private concern' only. Wells completely misinterprets anti-SLAPP 'public concern' mandate.

Washington State Appeals Courts, and State Supreme Court, often reference as the State Of California test of 'public interest' and

U. S. Supreme Court discussion specific to anti-SLAPP protection, as Washington courts use the 'public concern' language test.

From *Dun & Bradstreet v Greenmoss Builders*, [472 U.S. 749, 762 105 S.Ct. 2939, 86 L.Ed .2d 593 (1985)],,,

"Whether an allegedly defamatory statement pertains to a matter of public concern, depends on the content, form, and context of the statement as shown by the entire record",,, and,,, "a matter of public interest should be something of concern to a substantial number of people"... "The assertion of a broad and amorphous public interest is not sufficient"...

This means, as my case specific, not just an L&I claims manager with (authority) to deny my claim, to facilitate (authority) Olympic Interiors Inc., with whom the Department shares the same financial interest as the audience, or receiver of such June 22, 2017 **MEMO** at issue, Ex at 18, does not qualify, as a "substantial number of people".

From *Gertz v Robert Welch, Inc.*, 418 U.S. 323 (1974),,,

(non-media defamation)... "Because private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating injury to the reputation of private individuals is therefore greater than for public officials and public figures"... 418 U.S. 343-345...

For my case specific, it is appropriate to replace "reputation", (though my reputation with the Department was injured by Olympics' June 22, 2017 **MEMO** Ex at 18 INTENT context, with 'obloquy'...

Yvonne A. K. Johnson, Appellant, v James P. Ryan, Respondent, Court Of Appeals Of Washington Division 3 No. 31837-I-III,,, for a substantive variety of cases, and discussion of RCW 4.24.525, why 'private matter' such as my RCW 51.24.020 case, does not afford Olympic any such protection per RCW 4.24.510 anti-SLAPP statute, as must only be specific to,,, a matter of ,,,'public concern',,,, as Wells misapplied.

Yvonne,,, see,,, *Dillon v Seattle Deposition Reporters, LLC*, 179 *Wn. App.* 41, 67-68, 316 *P.3d* 1119, review granted, 180 *Wn.2d* 1009, 325, *P.3d* 913 (2014),,,,

"In Dillon we find further support for the proposition that speech that only tangentially implicates a public issue, is not a matter of public concern"...

Protected speech is **not** the *gravamen*, or principle thrust of my RCW 51.24.020 claim. Bagnells June 22, 2017 **MEMO** is only speech in the colloquial sense, but not in the 1st Amendment sense, as my cause of action in-part based on written words do **not** qualify for anti-SLAPP protection as the 'parochial particulars' of the written words and the parties,,, do not satisfy the public issues requirements.

If my claim arises out of, an INTENTIONAL personal injury claim RCW 51.24.020, as the *gravamen* of my RCW 51.24.020 case, by Olympic acts, and omissions activity apart from, and distinct from, any

[would be] protected activity, even if it existed, which it does **not** in my case specific, anti-SLAPP is absurd, and does not apply.

Dillon, 179 Wn.App. at 72... (quoting *Martinez v Metabolife Int'l Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr.3d 494, (2003))...

Martinez,,, "a defendant in an ordinary private dispute, cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant". "[T]he statute does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding"...

(1) "We conclude, it is the *principle thrust or gravamen of the* plaintiff's cause of action that determines whether the anti-SLAPP statute applies.

(2) "[W]hen the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute"...

Then burden of proof, has **not** been shifted to me Plaintiff, but stays with Olympic, to prove it is a 'public concern',,, defendant, to invoke anti-SLAPP. So if Olympic was a 'public concern' defendant, which it is **not**, then cannot invoke any anti-SLAPP statute, Wells would still have to invoke RCW 4.24.525 at some point, to dismiss my case, by arguing Olympic is somehow but as absurd, a 'public interest' 'public concern' defendant.

Martinez,,, but Washington courts duty as well, the courts have construed the anti-SLAPP statute to require a moving defendant to *prima facie* show the plaintiff's claim arose from protected conduct,

and absent such showing, the statute does not apply, and **no** burden shifts to the plaintiff'...

But my trial judge did shift the burden to me plaintiff, by stating ,,, "insufficient factual support" ,,, and, "employers do have the right to dispute claims of injuries".. So my trial judge erred,,, by placing burden on me, as 'Prejudicial Error'. RP at 19-21.

The moving defendant must *prima facie* show that the written words are eligible for 1st Amendment protection,,, by at least making some showing that the words were not false or misleading, before any burden shifts to the plaintiff. Olympic has failed to do so.

My trial judge has failed to do so, as 'Prejudicial Error'.

From *Yvonne A. K. Johnson*,,, As noted, we may also examine the speaker's intent or motive. By examining the primary content, form, and context, we better achieve the legislative purpose of balancing the rights of both litigants so that the expedited summary process weeds out only those defamation claims brought for the abusive primary purpose of chilling valid public free speech. Conversely, were we to align ourselves with the dissent's California approach and examine whether the speech had merely a "connection" to a matter of public concern, we would be ignoring this stated legislative purpose"...

Johnson,,, "there is nothing in the statute or the legislature's findings that evinces a legislative intent to make substantive changes to the law of defamation. When it comes to defamation claims, the legislature's preamble to the 2010 legislation tells us that its intent was to enable defendants to extricate themselves at the earliest possible stage from a claim that is doomed from its inception, not to alter a plaintiff's right to redress for defamatory falsehoods-- a right that arguably enjoys protection under article 1, section 5 of the Washington Constitution".

The only way my RCW 51.24.020 3 counts case, per my January 3, 2019 case filed, could be doomed at the inception, is if anti-SLAPP protection supported Olympic, as Wells based Olympics' entire 'legal life-blood' of its Motion To Dismiss, on RCW 4.24.510,,, as judicially affirmed RP at 19-21, by trial judge CP at 163-165 December 6, 2019, "insufficient factual support" ,,, "employers do have the right to dispute claims of injuries" ,,, but not what my RCW 51.24.020 case is based.

See 'common theme' as dispositive in my favor, as "legislative purpose"... RCW 4.24.510 2002 Amendment New Section **sec. 1** pg.1 at 9 states,,, "on a substantive issue of some public interest"...

Then Olympic must successfully argue, that Olympics' provably 'bad faith' INTENT, in its June 22, 2017 **MEMO** at issue, as provable, as its actions prior,,, since February 10, 2017,,, is of any type of "substantive issue of some public interest" ,,, or 'public concern'.

Olympic counsel Wells, cannot avoid RCW 4.24.525 just because he knows it cannot meet the standard of a 'public interest', as 'public concern' 1st Amendment argument, RCW 4.24.510 2002 Amendment **sec. 1** pg.1 at 10-12, "first Amendment rights, and rights under Article 1, section 5 of the Washington State Constitution which reads,,, "being responsible for the abuse of that right'...

Appendix **Ex. C - Ex.D.**

Olympic counsel Wells want it both ways, as he is avoiding a 1st Amendment argument, but must invoke as his support,,, argues that my RCW 51.24.020 'private concern' INTENTIONAL INJURY case, that I Plaintiff did **not**,,, base on the 1st Amendment,,, is somehow protected by RCW 4.24.510, that requires an Olympic 'good faith' '1st Amendment defense. "Is subject to oversight by the delegating agency" as the Department investigation **not** RCW 51.48.040, or RCW 51.16.070 fulfilled, but as I Appellant requested in 2017, as specific to Olympics' Intentional falsification, as never Olympic corrected, even though I Michael J. Collins, made clear to Olympics' Doug Bagnell *et al*, February 10, 2017 in-person, in Olympics' office, 'this must be corrected immediately,,, in case I need to file an injury claim',,, as I did June 20, 2017, proves it was Intentional. Ex at 16-17.

Then Olympic counsel has an insurmountable legal journey ahead. Olympic must fail. Whether defamation *per se* as a question of law or (question of fact for a jury), as could be decided by reasonable minds as a settled law constant specific to 'obloquy', was not as 'a matter of law' my trial court decided. As Olympic Interiors Inc., by Intentionally providing knowingly falsified information to the Department for the sole Intent to 'discredit me', Michael J. Collins if, and when I filed an injury claim, as 'obloquy', CP at 202, is a question of law as 'a matter of law'.

Doug Bagnells June 22, 2017 **MEMO**, contains what Bagnell alleges as fact specific to my if,,, I possessed a neck condition on January 27, 2017, not a medical opinion, but as Bagnell alleged fact, then fulfills that element of defamation. Ex at 18.

I Michael J. Collins fulfill elements of an actionable defamation claim, as (1) medium and 'context' of communication (2) audience, (authority) Department with authority to decide, or reject a legitimate injury claim, and (3) Ex at 18 **MEMO** implies 'undisclosed facts'.

Robel v Roundup CP at 8-11.

The third factor is the most crucial, as if the audience, the Department, does not know the facts, and then cannot judge truthfulness of the statement themselves, or does not care to, as not in its (Departments') best financial interest to do so, actionability is strong in my favor as 'a matter of law'. But see trial judge RP at 21.

Whether a statement is one of fact or opinion is a question of law unless the statement could only be characterized as either fact or opinion. So I made a *prima facie* case based on material facts, as I fulfill falsity, unprivileged communication, fault, and damages elements.

My January 3, 2019 COMMENCEMENT OF ACTION, and my subsequent briefing, included affirmative factual documentary evidence to defeat summary judgment. Ex at 19-20, Olympics falsified documents.

The Department, as now provable, took Bagnells' **MEMOs**' 'undisclosed facts', and segregated my neck condition as if there was a pre-existing active, known, diagnosed, and treated neck condition, when Olympic counsel Wells as approved my me, investigated my neck medical history and found **no** such active, known, diagnosed, and treated (as all elements must be medical history facts as a legal prerequisite, to legally segregate a specific body part per the 'ACT'), to first legally determine, then medically determine, a pre-existing neck condition prior to my January 30, 2017 NECK INJURY.

McGuire v Dept. Of Labor & Indust. 179 Wash. 645 38 P.2d 266 (1934),,,

"Without knowing their opinion on the matter of whether the arthritis was active or inactive prior to the injury, their reports and testimony do not reach the real question in the case"...

This is the impact Bagnells June 22, 2017 **MEMO**, had upon my June 20, 2017 Injuries claim as filed, as I plaintiff as a 'private figure', and as defamation *per se*, though I need not show malice, but does exist, only need show Bagnells knowingly false statement had some significant impact of material respect. See *Dun & Bradstreet* herein. And, **presumed** damages for a 'private figure' are my case correct.

Even if a statement is ambiguous, and can be characterized as fact or opinion, its characterization becomes a question of fact for a jury, as 'totality of circumstances' works in my as Plaintiffs' favor.

CP at 200, Olympic counsel Wells' November 27, 2019 REPLY, citation to *Repin v State* 198 Wn. App. 243, 392 P.3d 1174 (2017),,, as Wells cites erroneously. As my case specific has a combination of Intentional Infliction Of Emotional Distress Tort Of Outrage, and Defamation, see *Repin* specific to outrage, par 53.

See CP at 200, as Wells states, "Collins cites no authority supporting his position that an employer's right to dispute a worker's compensation claim or miscoding an employee's timesheet can form the basis of an Intentional Infliction Of Emotional Distress claim"...

This is typical of Wells as he forgets the ,,, 'totality of circumstances'...

As my trial judge at the December 6, 2019 MOTION Hearing, stated, RP at 21 at 6-9 as 'general context' only, "employers have the right to dispute claims of injuries". So this legal reasoning from my trial judge is in itself, is not legally correct, as my RCW 51.24.020 case is not based on, and could not be heard at the Board level jurisdiction.

And Wells states that I, "he fails to demonstrate that *any* alleged conduct by Olympic is sufficiently "outrageous" to give rise to liability; particularly when in Washington"...

But in *Repin*, a Washington State case, see at par 53 -3 elements to show *prima facie* tort of outrage, (3) actual result to the plaintiff of severe emotional distress. *Repin*, is based on negligence, a dispositive point lost on Wells as he once again misinterprets my RCW 51.24.020 case based on Intentional Infliction Of Emotional Distress, not negligent, as I made clear in my original case pleadings filed.

As the first element in *Repin* I have *prima facie* proven automatically, to clearly survive summary judgment, with my documents filed in my January 3, 2019 COMMENCEMENT OF ACTION, CP at 1-20, as, (1) extreme and outrageous conduct defines the element (2), and (3), and then is supported not only by (*Polk v INROADS/St.Louis,,*, see also pgs.19,20,26 herein), from my January 3, 2019 case as filed, but Defamation *per se* as **presumed**, does not compel me Plaintiff to show actual damages, but as I have successfully argued shown herein.

Repin, "Contrary to negligent infliction of emotional distress, the plaintiff need not establish objective symptomatology of the distress. The law assumes that intentional, rather than negligent, conduct of the defendant leads to severe emotional distress"...

"Need not establish objective symptomatology" means, I need not show a psychiatrists' report, as ongoing treatment to survive summary judgment, and Ex at 127 shows my psychiatrist witness confirmed.

See Wells' REPLY ft.nt.17 CP at 203, Wells cites *Bailey v State* (2008) 147 Wash. App. 251,191 P.3d 1285, review denied 166 Wash. 2d 1004, 208 P.3d 1123; *Phoenix Trading, Inc., v. Loops LLC*, 732 F.3d 936 (2013)... See my CP at 144 -146, as my then Plaintiffs' discussion to Wells erroneous citation to *Bailey and Phoenix Trading*. See the tie-in to RCW 4.24.510 by Wells CP at 203.

First see trial judge RP at 21 5-23.

Wells is comparing me Michael J. Collins, the victim of Olympics'

Intentional Injury, to *Bailey*, as an erroneous citation by Wells, for 2 very important, and indefensible reasons. First, *Bailey* was as fact, convicted of embezzlement prior, and perhaps had conflict of interest as an authority figure for the institution at issue in *Bailey v State*.

Baileys' husbands' business, was conducive to procuring contracts *Bailey* was by way of her deception attempting to procure.

Second, *Bailey* in-context, as Wells fails to provide context, *Baileys'* adversary, need not be bound by anti-SLAPP motive or intent test, as *Baileys'* adversary was not the 'bad faith' convict, but the honorable person simply informing the institution that *Bailey* the 'bad faith' convict, had a criminal history, and may have a conflict of interest as a person of authority. Wells cited *Bailey* to attempt to recover attorney fees.

So *Baileys'* complaint of her adversary who informed the institution of *Baileys'* current intent, and practice, did not need to be bound by any 'public figure', and 'public interest' factor per RCW 4.24.510, as my defamation case does, specific to Olympics' anti-SLAPP defense as *Baileys'* adversary was in keeping with RCW 4.24.510 statutory language, as "regarding any matter reasonably of concern to that agency or organization"... *Baileys'* adversary was not accused of outrageous misconduct as I accuse Olympic. No comparison.

Olympic is the provable 'bad faith' entity in my case specific.

See Wells,, “Moreover, there is no good faith requirement. However, even if there was a requirement, Olympic acted in good faith by disputing Collins’ claim, which was not contemporaneously reported and which he did not file until months after leaving Olympic”... CP at 203.

Remember, I wanted Olympic to correct its Intentional falsification of my pay roll documents, and to provide me with my signed copy of my January 30, 2017 Injuries Detailed Time-Sheet, signed by me and by my immediate supervisor February 2, 2017, as Olympics’ statutory ‘duty to preserve’, so the Department would be provided correct information as to my specific type-of-work performed. In the interim, Olympic as employer of injury, legally owed me light duty work, while it corrected its Intentional falsification of my January 30, 2017 (real-time) documented type-of-work injuries. Ex at 19-20.

Wells conveniently ignores this legally important point, and that supports my claim of Intentional Infliction Of Emotional Distress, only compounded by Doug Bagnells’ June 22, 2017 **MEMO**, Ex at 18 defamation, as Olympic spite for my filing my INJURIES claim.

In *Bailey*, par 31 the court, ‘advocacy’ also see *Phoenix Trading*,,, by a person with ‘good faith’ intent as *Baileys*’ adversary, “regardless of content or motive”, but communication must be made in ‘good faith’.

If Wells legally positions that “there is no good faith requirement”, then he is admitting Olympic acted in ‘bad faith’, but should receive

attorney fees. The *Bailey* court did not as specific, decide on 'public interest, 'public concern' test. And there are no conflicting statutes as, because in my case specific, a 'private matter' case as the test, then RCW 51.24.020 controls, as Intentional Injury not *Bailey* relevant.

See *Bailey*, the court, par 31 reference to 2002 Amendments.

See my pg.34 herein. See Wells still must invoke the U. S. Constitution in Olympics' anti-SLAPP position as the *Bailey* court, as Wells must explain why Olympic per article 1 section 5 of the Washington Constitution as Olympic violated as "being responsible for the abuse of that right", as Bagnell has admitted to 'coding error', as type-of-work performed Ex at 152, but Deliberate Intent to discredit me Michael J. Collins, since February 10, 2017, if I ever filed an injury claim, never corrected its falsification, for the sole Intent to cover-up the factual type-of-work I performed, and specific to type of material, (sheetrock), that injured me, then Bagnells' June 22, 2017 **MEMO**, Ex at 18, is article 1 section 5 "abuse of that right",,, but as specific to *Baileys'* adversary who was protected by the U. S. Constitution, did not abuse her right to free speech, as constitutionally, and RCW 4.24.510 statutorily correct 'advocacy' to government, Olympic as 'totality of circumstances' test, already had provable existing falsification of documents that were not corrected, unlike *Bailey* court test.

See my pgs.32-33 argument herein. Court Of Appeals Division III reversed the trial courts denial of (defendant as *Bailey* adversary) motion to dismiss because, as consistent with my argument, *Baileys'* case as the then plaintiff, arose from defendants' 'protected conduct', as defendant *prima facie* established, but defendant Olympic as the moving party, has not *prima facie* shown my case arose from its protected conduct, then Olympics' dismissal must be reversed.

Olympic has argued, and my trial judge incorrectly dismissed my RCW 51.24.020 statutorily correct Intentional Injury case, on 'employers do have the right to dispute claims of injuries,' as under a 'perfect world' scenario Olympic erroneously defends, would be true.

Then Olympic specific to the Industrial Insurance Act, must prove as the moving party to dismiss, as the burden has not shifted to me Plaintiff/Appellant, specific to the *Bailey* test alone,,, that as I have already proven to the contrary with my rejected Exhibits from the Board Of Appeals, as admissible Exhibits as 'sufficient evidence' to survive summary judgment in this present case, that I somehow could have had my RCW 51.24.020 case decided within the Boards' jurisdiction, and also, must *prima facie* prove that my RCW 51.24.020 Intentional Injury case arose from Olympic protected conduct.

As Olympic will fail, my case must be remanded to Superior Court.

Washington Law does not limit defamation *per se* to criminal, or infectious disease accusations. Defamation *per se* becomes question of fact for a jury, if in more nebulous or vague area, such as exposing an individual to 'obloquy', then I plaintiff can write an unidentified jury instruction as trial court specific.

Defamation *per se* loosens for the plaintiff the burden of proving damages, and then as a basis for recovery.

Plaintiff need not prove special damages to recover.

If a plaintiff shows defamation *per se*, the law presumes damages.

What constitutes an 'extreme' case specific to defamation *per se*, may create difficulties for practitioners and lower courts. Then trial courts may look to principles adopted in intentional infliction of emotional distress decisions to determine when conduct of a defendant constitutes outrage.

At the outset I have proven Olympics' Ex at 18 June 22, 2017 **MEMO**, is 'provably false' as my neck medical history investigated by Olympic counsel, proves **no active, known, diagnosed, and treated** neck problem, or neck condition, prior to my January 30, 2017 NECK INJURY. Again, all elements must be (prior) proven,,, all elements...

Olympics' June 22, 2017 **MEMO** is not an opinion, it is not meant to be an expression of hyperbole, it is meant to be a 'statement of fact'.

One way a statement can be provably false is when 'it falsely describes an act, condition or event, that comprises its 'subject matter'.

Then in my case specific, 'subject matter' must mean, the 'very heavy' WDLI (L&I) categorized nature of [hanging] sheetrock must be 'subject matter' question for a jury to decide, as to how could a 61 year old man (me) January 30, 2017, physically compete with a 27 year old fellow [hanger] who was in perfect health, sheet for sheet, if that 61 year old man had the neck condition described in Bagnells' statement in the June 22, 2017 **MEMO**, as is defamation *per se*, as Bagnells **MEMO** at least, implies the 'existence of undisclosed facts'.

I Plaintiff in my RCW 51.24.020 case, clearly establish causation through the omissions of Olympic Interiors Inc., as 'but for' Olympic, by not correcting its knowingly intentional falsification of specific payroll documents, as Olympics' statutory 'duty to preserve' as is the origin of my emotional distress caused by Olympic omissions as Olympics' refusal to fulfill its 'duty to preserve', deprived me Michael J. Collins, the opportunity to have documentary proof of my January 30, 2017 INJURIES as 'real time' detailed documented, and Olympics' intentional refusal to correct its knowingly falsified documents, for the sole intent to discredit me Michael J. Collins, is an outrage, then Olympics' Ex at 18 **MEMO** is defamation actionable.

There is no law that suggests or implies, that the rules of causation change in a defamation action. Violation of Olympics' 'duty to preserve' is the proximate cause of my emotional injury, then the proximate cause of my pain and suffering, as the cause in fact of both my emotional injury, and my pain and suffering.

Then legal causation as 'liability' is solidified, from standpoint of duty, as Olympics' provable spoliation, its statutory 'duty to preserve' my February 2, 2017 signed by me, and signed by my immediate supervisor January 30, 2017 Injuries Detailed documented Time-Sheet, falsification of my February 10, 2017 pay stub, Ex at 19-20, as Intentional, violate RCW 51.48.040, and RCW 51.16.070 'duty, to preserve', and Olympics' Intentional falsified information of my Michael J. Collins total hours of specific type-of-work I performed as provided the Department for Olympics' sole Intent to discredit me, if, and when I would need to file an injury claim, for the sole Intent for Olympic to cover-up its WDLI safety violations, and for sole Intent to protect its 'experience rating', caused the damages I seek in my RCW 51.24.020 Intentional Injury case, prior to Olympics' June 22, 2017 defamatory **MEMO**, as Olympic Intentional defamation *per se* stating 'undisclosed facts', intended to injure me, as 'obloquy'. Then causation and injury is established by 'totality of circumstances'.

C. SPECIFIC TO INTENTIONAL SPOILIATION

See my July 15, 2019 **PLAINTIFFS'**: FURTHER SPECIFIC ARGUMENT TO **SPOILIATION** test as CP at 28-33.

My spoliation argument herein, expounds on favorability to me. Olympic counsel Wells' November 27, 2019 REPLY CP at 198-204, CP at 201, as desperately incomplete spoliation argument, in 'general context' only, but excepted as comprehensive by trial court to dismiss my RCW 51.24.020 Intentional Injury, as incorrect, that somehow,, Washington State law does not recognize a duty specific to spoliation.

In a 'general context' based on mere negligence, or if the evidence at issue, is not most integral, and most relevant, and most dispositive to the case, or if the opposing party in a particular case had an opportunity to inspect evidence in discovery, that is true generally. None of which are specific to my RCW 51.24.020 case.

See this Division II Court of Appeals in *Homeworks Constr., Inc. v. Wells* 133 Wn. App. 892, 138 P.3d 654 (2006),, par. 15,,

"Washington case law on spoliation is sparse"...

Par. 17,, "The court then adopted Alaska's approach to determine when spoliation requires a sanction".

CP at 33, my citation as in correct context to *Homeworks*,, *Sweet v. Sisters of Providence in Wash.*, 895 P.2d 484,491 (Alaska 1995)...

Sanction is the key, as 'a sanction', in-context to, whether spoliation is relevant to a particular case, as it is in my Washington State RCW 51.24.020 case, means, whether an 'adverse jury instruction', is properly given in my particular case, as it would be.

Refer back to par.17 from *Homeworks*, Division II states,

"This division adopted the *Henderson* test in *Marshall v. Bally's Pacwest, Inc.*, 94 Wn.App. 372, 381-82, 972 P.2d 475, (1999)...

Division II is referencing *Henderson v Tyrrell* 80 Wn. App. 592 910 P.2d 522 (1996)... Refer to *Marshall*...

"Spoliation is the "intentional destruction of evidence". BLACKS' LAW DICTIONARY 1401 (6th ed. 1990); ,,, "Of the few Washington cases that directly address spoliation, the most prominent is *Pier 67, Inc., v. King County*, 89 Wash. 2d 379, 573 P.2d 2 (1977). The court held":

"[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that evidence would be unfavorable to him". *Pier 67, 89 Wash. 2d at 385-86*. To remedy spoliation the court may apply a rebuttal presumption, which shifts the burden of proof to a party who destroys or alters important evidence"

"In deciding whether to apply a rebuttal presumption in spoliation cases, two factors control: "(1) the potential importance or relevance of the missing evidence; and, (2) the culpability or fault of the adverse party". "In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. Culpability turns on whether the party acted in bad faith or whether there was an innocent explanation for the destruction"... "or acted in conscience disregard"... *Cook* Id. at 611

Olympics' CR 56(g) specific 'bad faith', affords me CR 56(f) denied me.

But my spoliation argument is even stronger, as Olympic, as I Plaintiff included in my January 3, 2019 COMMENCEMENT OF ACTION, an Intentionally falsified Olympic after-the-fact fabrication of my original February 2, 2017 signed by me, signed by my supervisor, as January 30, 2017 Injuries Detailed documented Time-Sheet, that proved real-time documentation of my January 30, 2017 Right Shoulder and NECK Injuries, then importance of that original document prevails. But see RP at 21, 5-23.

And now Olympics' legal counsel Wells, see my Appendix **Ex. A** thru discovery, submits a yet further falsified fabricated time sheet, that per RCW 51.24.020 Intentional Injury test, 'Intentional' is verified by the fact, that Olympic has never corrected its Time-Sheet type-of-work I Michael J. Collins performed, causation as fact Ex at 19, and Doug Bagnells DECLARATION Ex at 120-122, causation as fact, as contradicting his admissible, Board testimony, Ex at 124-125.

Then the Department whose job it was, to determine credibility between the provable falsified information Olympic provided it, the Department, specific to my type-of-work performed, and how I was injured, depended solely on my February 2, 2017 signed, and then verified by my supervisor Time-Sheet. Why would Olympic not have an interest in producing my February 2, 2017 Time-Sheet, if,,, I

Michael J. Collins was not injured, and then could prove no real-time documentation of my Injuries on January 30, 2017? And remember Ex at 16-17, as fact, I was in Olympics' office February 10, 2017, as 'I inquired to Olympic Interiors, immediately upon receiving my only pay stub',,, that was February 10, 2017, as my only pay day for Olympic, and Olympic would have needed that signed Time-Sheet to complete their payroll for my pay check.

Then 'vicarious liability' RCW 51.24.020 actionable, and Olympics' RCW 51.48.040, and RCW 51.16.070 'duty to preserve' anyway, supersedes Washington State spoliation ('general' duty to preserve, as not Washington Law recognized in a 'general',,, negligence case).

An an even further 'totality of circumstances' as to 'outrage', combined with subsequent defamation *per se*, as Appendix **Ex. A** implicates Appendix **Ex. B**. See Appendix **Ex. A** the printed name Mike Collins. See Appendix **Ex. B** My January 27, 2017 printed name, and my signature. I, Michael J. Collins, have never,,, I have never,,, in my entire adult life, ever printed, or signed as 'Mike'.

This shows that Appendix **Ex. A**, is an Olympic after-the-fact of my signed February 2, 2017 Injuries Detailed Time-Sheet, fraud.

Appendix **Ex. B** has a further point in my favor. If Olympic had as an employer protection (as proper), upon a new hire pre-employment

paperwork completion, made me sign an Employee Acknowledgment, then why would Olympic not also have the corporation business acumen for its protection, compel me as a new hire, to sign a 'Waiver of Employer Legal Responsibility if,,, I had any such 'neck restrictions' conditions January 27, 2017, when I sat 3 feet across the table from Doug Bagnell, as Ex at 18 June 22, 2017 **MEMO** "undisclosed facts"?

To solidify my spoliation argument as Washington law recognized specific to my RCW 51.24.020 Intentional Injury case, see, *Cook v. Tarbert Logging, Inc.* 190 Wn. App. 448, 360 P.3d 855 (2015),

par. 2, "and because only intentional spoliation logically supports an adverse inference"... *Cook* par. 39, "the *Henderson* court looked to other sources for duty such as the duty of a partner to preserve records"... *Cook* par. 43, "[i]n practice, an adverse inference instruction often ends litigation—it is to difficult a hurdle for the spoliator to overcome... When a jury is instructed that it may 'infer that a party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable,' the party suffering this instruction will be hard-pressed to prevail on the merits"... Citing *Zubalake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y 2003)...

Even a federal case will not support an 'adverse inference' jury instruction in Washington, if only based on simple negligence. My RCW 51.24.020 case, is not based on simple negligence, but on an Intentional Time-Sheet spoliation, then 'adverse inference' is correct. *Cook* par. 49 "*Henderson*, would not support the suggestion of an adverse inference absent bad faith or, at a minimum, gross negligence".

As from *Black's Law Dictionary 1401 (6th ed. 1990)*,,, and from

Karl B. Tegland, 5 Washington Practice: Evidence sec. 402.6 at 37

(Supp. 2005),,, Cook 20-21, spoliation encompasses a broad range of acts beyond those that are purely intentional or done in bad faith. Henderson, 80 Wn. App. at 605. It is possible, therefore, that a party may be responsible for spoliation without a finding of bad faith. But even under this theory, the party must do more than disregard the importance of the evidence; the party must also have a duty to preserve the evidence. A party's actions are "improper" and constitute spoliation where the party has a duty to preserve the evidence in the first place"... Tegland, supra, sec.402.6, at 37

Cook par.23 "Whether an actor violated a duty to preserve evidence is an important consideration"... Henderson, 80 Wn. App. at 610...

Olympic had an RCW 51.48.040, and RCW 51.16.070 statutory 'duty to preserve' my February 2, 2017 signed by me and signed by my immediate supervisor ,,, 'Injuries Detailed' ,,, Time-Sheet.

I have shown every possible legal position Olympic could argue, in my citations herein, specific to spoliation, that Olympic is somehow exempt under Washington State Law to escape an 'adverse inference' jury instruction, even absent Olympics' bad faith, which is not absent.

Olympic had February 10, 2017 'prior notice' Ex at 16-17, to preserve my February 2, 2017 signed Injuries Detailed Time-Sheet, that Olympic needed for its payroll completion. My February 2, 2017 signed Time-Sheet, was **not** accidentally lost, February 10, 2017.

Olympic has no favorable spoliation scenario. Olympic cannot prevail on the 'merits', upon a remand for 'preparation for trial'.

So the spoliation 'rebuttal presumption' does not shift the burden of proof to me plaintiff, but instead Olympic maintains that burden, as see in *Sweet v Sisters Of Providence*, where the Alaska Supreme Court agreed with the same approach from a Florida Supreme Court decision, specific to rebuttal presumption burden of proof from the defendant as a preliminary determination by the trial court must first decide the potential importance of the missing records, to determine whether the missing records would hinder Plaintiffs' ability to proceed, thus shifting burden of producing evidence on the 'merits' of the claim.

I Plaintiff, in my discovery requests, and in the whole of my case to the trial court, maintained that spoliation of my January 30, 2017 real-time Injuries Detailed signed by me, and signed by my immediate supervisor February 2, 2017 Time-Sheet, factually hinders my ability to present my *prima facie* case.

See from *Sweet*, 'rebuttal presumptions' which shifts the burden of proof are 'social policy', as 'public policy', to mean, Olympic had an RCW 51.48.040, and RCW 51.16.070, statutory 'duty to preserve' my Time-Sheet. Though *Sweet* is a negligence case, that is not dispositive to my Intentional Injury argument of Olympics' 'duty to preserve', as, my RCW 51.24.020 case is Olympic 'Intentional Injury', not negligent Injury, then my spoliation argument is recognized by Washington law.

See Appendix: *ORTIZ V CHIPOTLE MEXICAN GRILL*

(Cal. Super. 2018),,, cited per RAP 10.4(c)(h), and GR 14.1(b)(d).

Olympic counsel Wells, immediately upon appearance in my RCW 51.24.020 case, as absurd, attempted to position, that the 'at-will' employment protection would support Olympic Interiors Inc., because somehow, I Michael J. Collins' employment was terminated by Olympic. I was not terminated by Olympic overtly. But as I had the audacity to complain January 30, 2017, about Olympics' violations of WDLI safety recommendation employer requirements, specific to 1 person [hanging] 4'x12'x5/8" sheetrock, Ex at 61-66, upon my January 30, 2017 injuries, then Olympics' refusal to further employ me became convenient for them, as specific to Olympics' legal obligation per the 'ACT', to continue to pay me full pay scale, for lessor light duty work, is a financial burden for a company Olympics' size.

Then on February 10, 2017 that very important day in my case, I Michael J. Collins in-person in Olympics' office, seeking further work, (albeit still 'light duty' work, as I had not, and would not, unknown at that time February 10, 2017, would not recover from my Injuries), and after I had emailed Olympic earlier that morning, yet again, had the audacity to request my falsified pay stub be timely corrected, and that I needed an exact copy of my January 30, 2017 Injuries Detailed

signed by me, and signed by my immediate supervisor February 2, 2017 Time-Sheet, proving real-time documentation of my Injuries, to real-time verify my case, if I would ever need to file an injury claim.

But see CP at 201, Olympic counsel Wells states,, "in the present case, Olympic did not terminate Collins' employment"...

My RCW 51.24.020 Intentional Injury case, as I have laid out intelligently in Superior Court, and in this Appeal, need not be based as specific, on any such unjust termination by Olympic, even as it is what took place, because I was injured working for Olympic.

But what is relevant is, Wells' desperate defense of the premise of *Ortiz v Chipotle*. *Ortiz* is a profound case, that fact, was never published in a California Appellate court, because once the trial court jury awarded *Ortiz* nearly \$7,000,000.00, *Chipotles'* attorney moved to settle, even prior to, a California allowed, punitive damages phase of that case, and before *Chipotle* would most certainly Appeal.

Ortiz injured her wrist working for *Chipotle*. Then only ,,after,, *Ortiz* filed a timely injury claim, *Chipotle* accused *Ortiz* of stealing money from the company safe, and,, *Chipotle* claimed that they had video proof of *Ortiz* stealing from the safe. As it turned out, there was no such video, and the jury never believed there was such a video, and the jury 'did not believe, that *Chipotle*, a corporation, did

not institute a 'corporate policy' to preserve that video, if it existed'.

I Michael J. Collins accurately paraphrase from *Ortiz v Chipotle*.

That is exactly what Olympic did to me. Olympic is a corporation.

See Appendix **Ex. B** my signature on an Employee Acknowledgment is a standard employer protection, as would be a corporate policy to document, or video record, to include requesting I as a new hire, sign a Waiver of Olympic Legal Responsibility if,, I possessed any such **MEMO** 'neck restrictions', January 27, 2017, as I was hired as a 61 year old man, to do L&I, and DOL categorized, 'very heavy' sheetrock [hanging] work. So a jury will not believe in my case specific, that Olympic both did not document or record any such, if,,, any such 'neck conditions' existed January 27, 2017, and,,, then Olympic somehow does not possess my Injuries Detailed Time-Sheet, that would allow me Plaintiff, to *prima facie* real-time prove my having documented my Injuries, when that real-time signed Time-Sheet also had to be the exact document, upon which my payroll pay check was completed as pay roll procedure protocol. That is the relevant *Ortiz* parallel to my case. *Ortiz* prevailed as her original case based on Defamation, Emotional Distress, as same as I have filed in my case.

I then Plaintiff, explained the profound parallel from *Ortiz* to my case very clearly in my Superior Court Briefs, but trial court ignored.

Wells CP at 198-204. RP at 7, 9-10, RP at 8, 1-4, 6-7.

Wells is factually and legally incorrect, because L&I never based my original, and subsequent NECK INJURY claims, on a neck injury, my Neck Injury L&I segregated, that **no** statutory law, **no** settled law, or Legislative Intent supports, because **no** active, known, diagnosed, and treated (prior to my January 30, 2017 INJURIES) neck condition existed in my neck medical history, as disingenuous by Wells, as he investigated my neck medical history in this case. Then because **no** law supports what L&I legal adjudicator 'ACT' segregated, the only criteria L&I could have based its decision to segregate, then reject my Neck Injury, is the information provided it, by Olympic Interiors Inc., in Olympics March 31, 2017 Supplemental Quarterly Report, Ex at 116-118, and its June 22, 2017 **MEMO** Ex at 18, provably intended to discredit me Michael J. Collins, if I were to ever file an L&I claim, specific to, total hours of the exact type-of-work I performed, and that injured me, when I filed my Injury Report events description Ex at 56-57, working by myself, as Olympic violation of WDLI (L&I) safety recommendations, Ex at 61-66, than factual type-of-work total hours [hanging] that Olympic filed in its March 31, 2017 Supplemental Quarterly Report. Ex at 116-118, as 'merits' dispositive, Olympic had 'fair notice' by me Plaintiff February 10, 2017, to timely correct this.

See my time constrained argument RP at 16 -18 all...

Wells as legally absurd, argues December 6, 2019 RP at 8 5-11 that I am only attempting to re-litigate my Workmens' Compensation claim, then the trial judge must have also accepted this erroneous legal argument in the trial judges' dismissal as "insufficient factual support",,, "employers do have the right to dispute claims of injuries".

In a short reference to *Dicomes v State 113 Wn. 2d 612, 782 P.2d 1002 (1989)*,,, as very often cited out-of context, by otherwise competent attorneys', but specific to a claim of 'outrage',,, *Dicomes'* 1st Amendment claims becomes not relevant, because she was as an Executive Secretary considered by the court, a 'policy-maker', and, "a public employee's interest in freedom of speech may be overridden where the State shows a need for political loyalty and confidentiality of its employees who are vested with discretionary authority and policy-making responsibilities"...

That aside, *Dicomes* claims her discharge was 'outrage', as the discharge report was intended to embarrass, humiliate, terminate her.

This is why defense attorneys quickly cite 'mere inconveniences' and 'petty annoyances' etc. are not outrage. I agree. *Dicomes* court,,,

"It is the manner in which a discharge is accomplished that might constitute outrageous conduct"...

So *Dicomes* court supports my (Olympic cleverly accomplished prohibiting me from further Olympic employment) as I describe herein,

but my RCW 51.24.020 Intentional Injury case is not as specific, based on wrongful termination anyway, as it need not be, but, on a 'totality of circumstances'. Olympic Intended to Injure me, by way of Intentional falsification, spoliation, then by way of 'obloquy', and as unlike *Dicomes* at [5],[6], my case 'arose out of', a 'private concern', to also destroy Olympics' anti-SLAPP defamation *per se* argument.

My 'outrage' claim as proper, is based on the parallel from *Polk v. INROADS/St.Louis,,* CP at 13, and pgs.19,20,26,39 herein.

Dicomes, is not in-context to my actual 'outrage' claim, for multiple legal reasons, then not precluding my actual 'outrage' claim.

My trial court did not properly decide my RCW 51.24.020 Intentional Injury case. Olympic spoliation only, as specific, is **not** a separate Intentional Tort, but as supported by *stare decisis* cited herein, my legal position supports a trial court sanction as an 'adverse inference' jury instruction, which becomes a legal domino effect in my favor, as Olympic, as 'presumed' in its legal position, has alleged, that I filed a false Workmens' Compensation injury claim, as a red herring to their as proven, spoliation, and falsification of very 'important' documents.

That specific allegation by Olympic, supports defamation *per se*, and specific to June 22, 2017 **MEMO** defamation solidifying *per se*, as Olympic cannot overcome its statutory 'duty to preserve', that now

becomes its legal albatross, as *per se*, allows me a lessor standard of proof, as never decided by the trial court. My trial court not only erred as in my Assignments Of Errors as specific, but 'Intentional Injury' as as 'totality of circumstances', as *a fortiori*, Olympic cannot overcome. See Appendix RAP 10.4(c) **Exhibits C-G**. RP at 21, 20-23.

My RCW 51.24.020 Intentional Injury case, as trial court **not** legally correct decided, as if somehow, I was able to litigate Intentional Injury per the 'ACT', as statutory error by trial court, as not RCW 51.24.020 Legislative Intent, as trial court based on a Workmens' Compensation claim only, objective medical evidence only mandate, as convenient for (trial court) to dismiss, as, "employers do have the right to dispute claims of injuries", only. (RP at 21, 6-9, 'self-employed' mistake) 17-19.

Then I Appellant, factually prove with my original January 3, 2019 COMMENCEMENT OF ACTION as included documents, that prove 'fair notice' to Olympic Interiors Inc. Ex 16-17 as my email, that prove with prior admissible testimony by Olympics' Doug Bagnell, that there is a falsified pay roll document at issue, Ex at 20, and a provable spoliated Time-Sheet at issue, Ex at 19 spoliated for sole Olympic Intent, to cover-up my January 30, 2017 Injuries, and type-of-work I performed, as documents I filed to support INTENT 'issues of triable fact'. Then RP at 19, 19-20, RP at 19, 21-22 as trial judges' deciding

"insufficient factual support" ,,, does not take my original filed documents into consideration, nor does the trial judge take defamation *per se* as in-context as **presumed**, as a lessor standard of proof into consideration, nor does the trial judge consider as 'a matter of law', as specific, for trial court to determine as 'issues of triable fact', if reasonable minds could differ, ie., a jury, but first,,, whether burden of proof, as it does, to both spoliation, and defamation *per se*, shifts to the moving party, as Olympic, as trial court erred as 'a matter of law'.

Then as trial judge "employers do have the right to dispute claims of injuries", solidifies, the trial judge never considered the 'separate injury test' CP at 11 my citing from Reese,,, as trial judge never even mentions RCW 51.24.020, then trial judge as 'arbitrary', 'capricious' and as 'Prejudicial Error', bases its decision, as if I could have had my 'separate injury' decided by the Board Of Industrial Insurance Appeals, as statutorily not correct, as I have proven by the Board Of Appeals rejection of Olympics' 05/18/2018 Intentionally falsified Time Sheet, and the rejection of Olympics' February 10, 2017 falsified pay stub, Ex at 19-20, as documents filed with my original January 3, 2019 COMMENCEMENT OF ACTION, that pass the "issues of triable fact" RCW 51.24.020 separate injury 'test' ,,, ignored by the trial court.

Then when Olympic counsel RP at 8, 5-11 as legally absurd argues

out-of-context, but convincing the trial court, then as 'Prejudicial Error', as 'a matter of law', that I then Plaintiff, am only "using this lawsuit to relitigate those same claims" ,,, again ignored the 'separate injury test', I as Plaintiff pass convincingly, to survive defense Motion For Summary Judgment, in addition to CR 56(g) violations by Olympic Interiors Inc. and its legal counsel, to include Olympics' Bagnells' November 4, 2019 DECLARATION Ex at 120-122, that contradicts his prior Board testimony. Ex at 119 "coding error"... Ex at 124-125.

All of my documents as even stronger for me than a Declaration, as my January 3, 2019 RCW 51.24.020 case as filed included, are my Plaintiffs' tantamount to Declaration as 'sufficient factual support'.

A remand for CR 56(f) ,,, "discovery to be had, or make such other order as is just" ,,, specific to defamation *per se*, and spoliation as Olympic 'burden of proof' herein, is 'a matter of law', because Olympic as it in RP at 7, 3-6 and all, cites Dr. Sullivan, and RP at 8, 1-4 all,,, thru discovery as I then Plaintiff requested, and in a CR 26(i) 'meet and confer attempt as my obligation fulfilled, did not fulfill its 'duty to preserve' per RCW 51.16.070 and RCW 51.48.040, must now attempt to justify with its 'burden of proof' not shifted to me Plaintiff, why somehow my January 30, 2017 Injuries Detailed, as real-time documented, as signed by me and by my supervisor February 2, 2017, Time-Sheet,

is somehow,,, not integral, or relevant, to my Intentional Injury case.

This, as Olympic counsel Wells supports my "information provided the Department" argument, RP at 8, 1-2, as his weak reference to Dr. Sullivan, supports the whole of my legal position, as Dr. Sullivan testimony Ex at 51, 5-6, 23-25, proves my January 30, 2017 NECK INJURY, was never allowed by the Department to be medically adjudicated as a ,,NECK INJURY... Then Olympics June 22, 2017 **MEMO** 'undisclosed facts', must be justified, as Olympics' Defamation *per se* as specific, as legally **presumed** 'burden of proof', combined with Olympics' provable spoliation 'burden of proof' to produce justification.

This as my 1/16/2018 Department Rejection Order that I, Plaintiff filed in my November 8, 2019 **PLAINTIFFS OPPOSITION:** Ex at 93, **not** based on any medical opinion, "that there is no proof of a specific injury at a definite time and location in the course of employment" ,, if it has no 'medical evidence' to support such an order by the Department. Then RP at 7, 1-11, Olympic counsel Wells supports my position but Wells absurd assertion that, RP at 7, 9-11 "were that true",,, remember, my Right Shoulder Occupational Disease would have statutorily compelled the Department to approve anyway, whether injury had ever taken place January 30, 2017, or not, because of my over 40 years repetitive stress to my shoulder(s) from [hanging] sheetrock.

Dr. Sullivans' Board testimony Ex at 51,5-6, 23-25 is proof, as testimony ER 804(b)(1) allowed, is on this present case witness list. And per the 'ACT', as I only worked for Olympic for 32 total hours, of over 40 years, Olympic was not a 'chargeable employer', for any costs of my Right Shoulder (2 surgeries), so Olympic was (Injury,,, protected).

Then Wells' legal argument has no basis in fact, or law. But Wells' absurd argument was excepted by the trial judge as true, as RP at 21, 22 "dismissing the claims in whole that Mr. Collins has made",,, then the trial judge is ignoring the 'merits' legal premise of RCW 51.24.020 separate injury test, that I, then Plaintiff, pass, in my January 3, 2019 COMMENCEMENT OF ACTION, and in the 'whole of my RCW 51.24.020 claims made'... CP at 1-27.

Then, if **no** statutory law, **no** settled law, and **no** Legislative Intent supports the Department Segregation Order, and the Departments' subsequent separate Neck Injury only,,, claim Rejection Order, but as 1/16/2018 Rejection Order, has **no** 'medical evidence to support that 1/16/2018 Rejection Order Ex at 93, as provably based on a Department prior illegal Segregation Order, and supported by Wells' RP at 7, 1-3,,, but as Wells dishonest at RP at 7, 3-6, then the only criteria the Department could have possibly used, to first illegally Segregate my Neck conditions, then to Reject my NECK INJURY claim, but as the

Department did not allow any medical examination to take place as scheduled for January 19, 2018, as an examination scheduled specific to, NECK INJURY only,,, as my earliest possible medical appointment as scheduled, as my subsequent NECK INJURY only,,, claim was Rejected January 16, 2018 Ex at 93, was June 22, 2017 MEMO Ex at 18 information Olympic provided,,, after it falsified my February 10, 2017 pay stub, and spoliated my Time-Sheet, filed with my January 3, 2019 COMMENCEMENT OF ACTION, as an Olympic cover-up of my type-of-work performed, and that injured me, the true Time-Sheet of which, implicates Olympics' statutory 'duty to preserve', proved my Injuries as real-time documented January 30, 2017, then shifts 'burden of proof' to Olympic, but ignored by trial judge 'Prejudicial Error',,, RP at 21 5-19, 20-23. CP at 1-20. CP at 21-27. CP at 105-136.

As my case sole intent, to show Department witness relevance only, as why I Michael J. Collins filed my Confirmed Witness List included in my November 12, 2019 FURTHER OPPOSITION CP at 105-136, specific to Department Claim Manager Mark Fowble, and importance of his testimony, to prove that he Fowble, had **no** statutory law, **no** settled law, and **no** Legislative Intent to support his illegal Segregation of my Neck condition, then Fowble had/has no medical evidence, (as he did not allow, to then protect Olympic), to support my subsequently

filed (NECK INJURY only,, claim), only needed because my original June 20, 2017 INJURIES claim, was not adjudicated as INJURIES.

See CP at 128 **ft.nt 1**, and, Appendix Exhibit H.

Contrary to Board Of Appeals IAJ, Board Panel, and Assistant AG counsel for the Department, Fowble, as supervisory level person only, is **not,,** immune from testimony, or discovery, by a misinterpretation of 'deliberative process' privilege, I desired trial court to CR 56(f) decide.

As I was not allowed time to argue December 6, 2019, but as in CP at 128 **ft.nt 1** my attempt to compel Fowble discovery, would be objected to by AAG. Fowble testimony will prove, he did not base Segregation/Rejection on any legal, or medical facts, then based on Olympic information provided, supports my RCW 51.24.020 defamation *per se*, and spoliation argument, as trial court, and Wells, chose to invoke my L&I Injuries claim herein. RP at 7-8-21 all.

As the trial court improper 'dicta' only, ignored my Intentional Injury case, but supported as employer separate Intentional injury, also by *2 Arthur K. Larson & Lex K. Larson, Larson's Workers' Compensation Desk Edition section 103.03, ft n.1,,* 'when the injury is the result of actions the employer knew were "substantially certain" to cause injury'.

Then for 'Intentional Injury', I Plaintiff need not provide tangible proof of Olympics' 'state of mind', but only that I can prove what Olympic did, and asking the jury to infer from just that, Olympics' 'INTENT'.

(W. Prosser, Handbook of the Law of Torts 4th Ed. 1971),,, "that a particular result was substantially certain to follow, he will be dealt with by the jury, or even the court, as though he had intended it".

This specific to Olympics' Intentional spoliation for the sole Intent to cover-up my January 30, 2017 INJURIES, as Olympics' statutory 'duty to preserve', violated, precludes Olympic seeking, and trial court granting 'equitable relief' as summary judgment, as Olympics' violation of the 'clean hands doctrine', from Blacks' Law Dictionary 268 (8th Ed. 2004), combining Olympics' defamation *per se*, does **not** shift burden of proof to me, as Olympic fails to justify destroying the very document,,, as is my January 30, 2017 ,,Injuries Detailed,,, signed by me, and signed by my supervisor, February 2, 2017, Time-Sheet,,, that would confirm me the injured worker, to prove real-time documentation, as my L&I injuries claim filed, *prima facie* 'merits' of my L&I Injury claim denied, as Olympic falsification, then Defamation.

V. CONCLUSION

December 6, 2019 trial court decision was vague, and incomplete.

As consistent with my combined Assignment Of Errors criteria, I request my RCW 51.24.020 case be remanded, so my case can proceed to 'preparation for trial', as 'a matter of law' supported.


Michael J. Collins Pro se

Michael J. Collins Pro se
PO Box 111483 Tacoma, Wn. 98411
(253) 348-5842

Ortiz v Chipotle Mexican Grill (Cal. Super. 2018) (unpublished)
RAP 10.4(h) GR 14.1(b)(d).....54,55,56

Exhibit A Olympic Interiors Inc., 05/18/2018 Falsified Time Sheet, and Olympics' February 10, 2017 Falsified Pay Stub, both Rejected at BIIA, but as foundation established with Olympic persons same day 09/25/2018 Board testimony, and as 2 of 4 dispositive Exhibits filed with my January 3, 2019 COMMENCEMENT OF ACTION. And also, Olympic counsel further version of its Falsified Time Sheet, it offered thru No.19-2-04348-8 discovery, as a combined Exhibit A.
.....8,9,10,11,12,49,50,60,61,65

Exhibit B Olympic Interiors Inc., Employee Acknowledgment...50,56

Exhibit C RCW 4.24.500
"good faith" mandate never amended, then includes "good faith" Intent, as "subject to oversight by the delegating agency", specific to RCW 4.24.510.....4,24,26

Exhibit D RCW 4.24.510
To include Legislative Amendment **NOTES: Intent---2002 c 232** specific to "public interest" and "1st Amendment" mandate and specific "advocacy" mandate only
.....4,24,25,26,28,31,34,35,39,40,42

Exhibit E RCW 5.45.020.....5

Exhibit F RCW 51.16.070.....5,22,26,35,46,50,52,53,62

Exhibit G RCW 51.48.040.....5,22,26,35,46,50,52,53,62

Exhibit H Excerpts: Simultaneous Board Of Appeals NECK INJURY, as separate Superior Court de novo review No. 19-2-09661-1, specific to Mark Fowble as 'supervisory level person' only, not a policy-maker, then not protected by any misinterpretation of, 'deliberative process privilege', or not relevant 'qualified immunity' opposing argument. No. 19-2-09661-1 Excerpts: As pages 1, 6-29, 40-41 as this Exhibit H. I meet, *Steve Swak v L&I 40 Wn.2d 51, 240 P.2d 560 (1952)*,, test.
.....65-66

EXHIBIT A

Name: Michael J Collins

Timesheet

Printed on: 05/18/2018

Jan 30 to Feb 5, 2017

Customer:Job	Service Item	Payroll Item	Notes	M	Tu	W	Th	F	Sa	Su	Total	Bill*
Swinerton Builders:216-202 UW VMC Level 2 D&T Remodel	2200 Hanging:2202 Hanging Labor	Wages Hanging		2.00							2.00	N
Swinerton Builders:216-202 UW VMC Level 2 D&T Remodel	1100 Framing:1102 Framing Labor	Wages Framing		6.00	7.00	8.00	8.00				29.00	N
Swinerton Builders:216-202 UW VMC Level 2 D&T Remodel	9900 Miscellaneous:Miscellaneous Labor:9905 Trucking/Stock & Clean:9905A Hanging Scrap	Wages Hanging Scrap			1.00						1.00	N
Totals				8.00	8.00	8.00	8.00	0.00	0.00	0.00	32.00	

Signature _____

Olympic Interiors, Inc.
 815 S. 336th Street
 Federal Way, WA. 98003

Michael J Collins
 10101 43rd St. Ct. East
 Edgewood, WA 98371

Employee Pay Stub Check number: Pay Period: 01/30/2017 - 02/05/2017 Pay Date: 02/10/2017

Employee	Status (Fed/State)	Allowances/Extra
Michael J Collins, 10101 43rd St. Ct. East, Edgewood, WA 98371	Married/(none)	Fed-4/0/WA-0/0

Earnings and Hours	Qty	Rate	Current	YTD Amount	Non-taxable Company Items	Current	YTD Amount
Wages Hanging	2.00	40.92	81.84	81.84	L&I Co-Framing Install	123.83	123.83
Wages Framing	29.00	40.92	1,186.68	1,186.68	L&I Co-Hanging Install	26.59	26.59
Wages Hanging Scrap	1.00	40.92	40.92	40.92	Fringe Benefits-PNW Carpenters	478.08	478.08
	32.00		1,309.44	1,309.44			
Taxes			Current	YTD Amount			
Medicare Employee Addl Tax			0.00	0.00			
Federal Withholding			-107.00	-107.00			
Social Security Employee			-81.19	-81.19			
Medicare Employee			-18.99	-18.99			
			-207.18	-207.18			
Adjustments to Net Pay			Current	YTD Amount			
L&I EE-Framing Install			-20.72	-20.72			
L&I EE-Hanging Install			-4.22	-4.22			
Install-Vac PNW Carpenters			-32.00	-32.00			
Dues-Journeyman Install			-52.48	-52.48			
			-109.42	-109.42			
Net Pay			992.84	992.84			

Board of
 Industrial Insurance Appeals
 In re: Collins
 Docket No. 1810790
 Exhibit No. 7
 ADM. 9/25/18 Date REJ.

EXHIBIT B

Olympic Interiors, Inc.

EMPLOYEE ACKNOWLEDGMENT

PLEASE READ, SIGN, & RETURN THIS FORM TO THE JOB SITE SUPERVISOR OR THE SAFETY PROGRAM ADMINISTRATOR.

I have read and understand the contents of this Employee Handbook.

I will, to the best of my ability, work in a safe manner and follow established work rules and procedures.

I will ask for clarification of safety procedures of which I am not sure **prior** to performing a task.

I will report to the job site supervisor or competent person any unsafe acts or procedures and will ensure they are addressed and resolved before continuing work.

I understand that the complete safety program is located at:

815 S. 336th St.
Federal Way, WA 98003

and is available for my review.

Michael J. Collins
(Employee Name)

Michael J. Collins
(Signature)

1-27-2017
(Date)

EXHIBITS C-G

RCW 4.24.500

Good faith communication to government agency—Legislative findings—Purpose.

Information provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government. The legislature finds that the threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of RCW 4.24.500 through 4.24.520 is to protect individuals who make good-faith reports to appropriate governmental bodies.

[1989 c 234 § 1.]

RCW 4.24.510

Communication to government agency or self-regulatory organization—Immunity from civil liability.

A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense and in addition shall receive statutory damages of ten thousand dollars. Statutory damages may be denied if the court finds that the complaint or information was communicated in bad faith.

[2002 c 232 § 2; 1999 c 54 § 1; 1989 c 234 § 2.]

NOTES:

Intent—2002 c 232: "Strategic lawsuits against public participation, or SLAPP suits, involve communications made to influence a government action or outcome which results in a civil complaint or counterclaim filed against individuals or organizations on a substantive issue of some public interest or social significance. SLAPP suits are designed to intimidate the exercise of First Amendment rights and rights under Article I, section 5 of the Washington state Constitution.

Although Washington state adopted the first modern anti-SLAPP law in 1989, that law has, in practice, failed to set forth clear rules for early dismissal review. Since that time, the United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. Chapter 232, Laws of 2002 amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making." [2002 c 232 § 1.]

RCW 5.45.020

Business records as evidence.

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

[1947 c 53 § 2; Rem. Supp. 1947 § 1263-2. Formerly RCW 5.44.110.]

RCW 51.16.070**Employer's records—Unified business identifier—Confidentiality.**

(1)(a) Every employer shall keep at his or her place of business a record of his or her employment from which the information needed by the department may be obtained and such record shall at all times be open to the inspection of the director, supervisor of industrial insurance, or the traveling auditors, agents, or assistants of the department, as provided in RCW 51.48.040.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a record of the unified business identifier account number for and the compensation paid to the person or entity performing the work. Failure to obtain or maintain the record is subject to RCW 39.06.010 and to a penalty under RCW 51.48.030.

(2) Information obtained from employing unit records under the provisions of this title shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties), but any interested party shall be supplied with information from such records to the extent necessary for the proper presentation of the case in question: PROVIDED, That any employing unit may authorize inspection of its records by written consent.

[2008 c 120 § 5; 1997 c 54 § 3; 1961 c 23 § 51.16.070. Prior: 1957 c 70 § 48; prior: 1947 c 247 § 1, part; Rem. Supp. 1947 § 7676c, part.]

NOTES:

Conflict with federal requirements—Severability—2008 c 120: See notes following RCW 18.27.030.

RCW 51.48.040**Inspection of employer's records.**

(1) The books, records and payrolls of the employer pertinent to the administration of this title shall always be open to inspection by the department or its traveling auditor, agent or assistant, for the purpose of ascertaining the correctness of the payroll, the persons employed, and such other information as may be necessary for the department and its management under this title.

(2) Refusal on the part of the employer to submit his or her books, records and payrolls for such inspection to the department, or any assistant presenting written authority from the director, shall subject the offending employer to a penalty determined by the director but not to exceed two hundred fifty dollars for each offense and the individual who personally gives such refusal is guilty of a misdemeanor.

(3) Any employer who fails to allow adequate inspection in accordance with the requirements of this section is subject to having its certificate of coverage revoked by order of the department and is forever barred from questioning in any proceeding in front of the board of industrial insurance appeals or any court, the correctness of any assessment by the department based on any period for which such records have not been produced for inspection.

[2003 c 53 § 282; 1986 c 9 § 9; 1985 c 347 § 5; 1961 c 23 § 51.48.040. Prior: 1911 c 74 § 15, part; RRS § 7690, part.]

NOTES:

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

EXHIBIT H

FILED
IN COUNTY CLERK'S OFFICE

JAN 09 2020

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

Honorable Judge Frank E. Cuthbertson

No. 19-2-09661-1

MICHAEL J. COLLINS PRO SE
(APPELLANT)

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR &
INDUSTRIES (RESPONDENTS)

APPELLANTS OPENING BRIEF:
SPECIFIC TO BIIA DOCKET 17 25495
AND BIIA DOCKET 18 10796. AND
SPECIFIC TO IAJ, AND BOARD PANEL
RCW 51.52.115 'IRREGULARITY'.

I. INTRODUCTION

COMES FORTH Michael J. Collins Pro se, to file my Opening Brief as specific to Board Of Industrial Insurance Appeals Abuse Of Discretion, and as specific to the premise of its final decision in claim ZB21147 Docket 17 25495, and claim ZB23273 Docket 18 10796, specific to both Industrial Appeals Judge, and Board Panel, in my Petition For Review. In this Opening Brief, I Michael J. Collins Pro se, will reference **CABR** documents, (in-order APPEND) specific **CABR** documents, identified in the **CABR** as filed, to facilitate the courts' reference to my argument, and specific to Departments' Mark Fowbles' testimony denied me, as Board 'abuse of discretion' in the decision in my 2 Dockets at issue, then Superior Court de novo review, to invoke the 'abuse of discretion' standard of review, as proper, and as I asked the IAJ, and the Board, to invoke the 'abuse of discretion' standard of review, specific to the Department adjudication of my 2 claims at issue.

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As I Michael J. Collins, cited *In re: Robynhawk Freebyrd-Brown*, BIIA Dec., 02 10758 (2003),, in direct reference, and in-context to, the Department January 16, 2018 Rejection Order, as controlling as specific, in my both Dockets Appeals at issue, "Ms. Freebyrd-Brown also argued that the Department rejected the claim without a medical basis. The Department did not respond to the assertion that it did not have medical evidence in support of its position. For the rejection of the claim to be affirmed, the facts must preclude allowance of the claim based on either theory". (My case, to mean, either NECK SEGREGATION, or separate claim NECK INJURY).

Robynhawk,, continued,, "Based on prior Board decisions, in such a defense a claim can be rejected only if the claimant is unsuccessful in establishing an injury"... "The defense was advanced without reasonable cause".

Per *Robynhawk*,, the Department in my case specific, should be subject to sanctions for intentionally advancing its defense "without reasonable cause". The Department in my case specific, has ignored the significance of *Robynhawk*, to me. The Department did not allow a 'medical opinion' January 19, 2018, as they, not known to me at the time, rejected my NECK INJURY only,, claim, January 16, 2018.

In re: Diane K. Deridder Docket 98 22312,, "We agree with our industrial appeals judge that it is appropriate to rely on Decisions and Orders of the Board that are not published as "significant" decisions, pursuant to RCW 51.52.160. Such reliance promotes the consistent application of the law, which in turn promotes the equality of treatment of all parties who appear before us. As noted by the U. S. Supreme Court: "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents"... *Deridder pg.3 at 10-16* "As a quasi-judicial agency, we are bound by this "duty of consistency", to follow our prior decisions, whether designated "significant" or not, unless there are articulable reasons", for not doing so. We expect our industrial appeals judges to do so as well"...

In re: Dennis Johnson, BIIA Dec., 17 18840 (2018), "The Department's segregation of a condition without evidence that the worker has been diagnosed with the condition is improper"... (Relate all required elements, as, my **not active, not known, not diagnosed, not treated neck condition**, prior to my January 30, 2017 NECK INJURY, and (Department claim ZB21147 Segregation Order, as based on my original claim ZB21147 **not medical history diagnosed neck condition**), and my not being allowed January 19, 2018, to have claim ZB23273 medically diagnosed, as what my January 30, 2017, NECK INJURY only, even involves). *Johnson continued*,,"Mr. Johnson asserts, the Department does not have subject matter jurisdiction to issue an order segregating a non-existent condition... He argues that by doing so, he is forced to either prove a causal relationship between this non-existent condition and his industrial injury or let the order stand and risk the ramifications of res judicata should the conditions arise at a later date"... The Board,, "We agree with Mr. Johnson that it is improper for the Department to segregate a non-existent undiagnosed condition" **REVERSED AND REMANDED** to the Department,, as of Department Order date. (My Department Order date, as direct context to Johnson, is, January 16, 2018)...

Question of Law and Fact: What is the totality of my factually undiagnosed NECK INJURY condition segregated? Segregation is a legal concept, as Question Of Law.
In re: Gail Conelly, BIIA Dec., 97 3849 (1998),, "In matters of claims administration, not involving the actual adjudication of entitlement to benefits, the standard of review is abuse of discretion".

1.
2. A. SEGREGATION AS NOT LEGALLY APPLIED IN MY CASE

3.
4. There are only 2 legal concepts, as Questions of Law, that are 'ACT' available
5. to my January 30, 2017 NECK INJURY at issue. **Segregation**, and **Lighting up**.
6. But only 1 can be 'claim specific', as they rule each other out,,, in my case specific.

7. Segregation is directly related to aggravation, and worsening as synonymous,
8. based on a legally pre-existing condition. Legally,,, pre-existing,,, only if prior active,
9. known, diagnosed, and treated prior to INJURY at issue,,, as all essential to be fact.

10. Since I have proven without fail, that if there is **no** prior to January 30, 2017
11. NECK INJURY at issue, active, known, diagnosed, and treated neck conditions,
12. then Segregation is **not** legally correct. Then the only legal concept as a Question
13. of Law, and as a Question of Law and Fact,,, that can be applied to my case specific,
14. is 'Lighting up'. 'Lighting-up', is also a jury instruction, as WPI 155.20 for a reason.

15. To tie together August 21, 2017, thru November 8, 2017 IME Dr. Joan Sullivan,
16. to Department Segregation 'misapplication of the law', see Department 11/03/17
17. IME Addendum Request, and November 8, 2017 IME opinion, as **CABR 800-802**.
18. as Dr. Sullivan November 8, 2017 states "would neither cause nor aggravate, nor
19. worsen the preexisting cervical spine disease that was present"... Again, I **do not**
20. need to prove my neck injury ,,,"caused,,, my cervical spine disease, as from
21. *Dennis v Dept. Of Labor & Industries 109 Wn. 2d 467 745 P.2d 1295 (1987)*,,,
22. "the underlying disease does not need to be employment caused"... And unless
23. there is an active, known, diagnosed, and treated condition, prior to injury, there
24. can be **no** legal aggravation/worsening as synonymous, only a 'Lighting Up', by
25. the injury. See Dr. Sullivan 09/24/2018 Docket 17 25495 pg.63 **CABR 1022**,,, "And,
26. yes, certain things can make you aware that you have the disease". In other words,
27. an injury that ,,,"Lights up'... And Dr. Sullivan 09/24/2018 Docket 17 25495 pg.75

1. CABR 1034, "the fact that he had disease was actually unknown only found out
2. by virtue of the fact, that unbiased, I ordered x-rays of his neck"... In (APPENDIX)
3. Dr. Sullivan, as CABR 1022, pg.63, at 2-4, and CABR 1034 pg.75 at 12-15.
4.

5. B. ACTIVE: AS DISPOSITIVE QUESTION OF LAW AND FACT

6. See Dr. Sullivan CABR 1202, as 10/31/2018 Docket 18 10796 pg.46² at 24-
7. 25 (APPENDIX), as Dr. Sullivan states, "Again, I can't know when I do an IME if
8. something is active. That really is up to a provider rendering" ,,, (next page) 'care'...

9. But I was not able to get an opinion from a provider January 19, 2018. And
10. as Dr. Sullivan pg.81 at 5-6, "I was never asked if he had an injury, I did not address
11. it, and so I can't give an opinion". (APPENDIX), proving my original Right Shoulder/
12. NECK INJURIES, not allowed to be medically addressed, as INJURIES only,,, claim.

13. ²
14. For the ,,ACTIVE,,, or not,,, dynamic, see *McGuire v Department Of Labor &*
15. *Industries 179 Wash. 645 38 P.2d 266 (1934)*,,, pg.2,,, "if that arthritic condition was
16. *inactive or dormant and was lighted up and made active by the injury, then the claim-*
17. *ant's condition would be the result of the accident, and not the result of any prior*
18. *arthritic condition"... 'Pg.3 'The fact that the claimant at the time of the injury, had an*
19. *arthritic condition which was dormant and inactive, would not justify the refusal*
20. *of compensation"... "Inquiry must then be directed as to whether the claimant's*
21. *arthritic condition was inactive or dormant at the time of the accident, because,*
22. *under the authorities cited, if it was inactive or dormant, then his condition was due*
23. *to the accident, and not to the previous arthritic condition"... Continue McGuire*
24. *pg.3. "The physicians generally seem to agree that, in many persons of the age of*
25. *the claimant, there is an arthritic condition which causes no inconvenience until*
26. *something happens which causes it to become active"... "None of these doctors,*
27. *however, express any opinion upon the vital question of fact pg.4, in the case, and*
28. *that is, whether the arthritic condition prior to the accident was active or inactive"...*
"In answering questions as to the extent of the partial permanent disability resulting
solely from the injury, had there been no preëxisting arthritis, the doctors necessarily
not only passed upon a question of fact, but upon a question of law"...
Continue pg.4. "Without knowing their opinion on the matter of whether the arthritis
was active or inactive prior to the injury, their reports and testimony do not reach the
real question in the case. We find no evidence in the case bearing upon the question
which overcomes the evidence offered by the claimant, from which it would seem to
irresistibly follow that the arthritic condition prior to the accident was dormant or
inactive"... "It appears to us that from the beginning the department, as to this
claimant, proceeded upon an incorrect theory of the law. We recognize that the
decision of the department is prima facie correct and the burden was upon the
claimant to overcome it, and that the claimant has done in this case. In fact, as
already indicated, the evidence offered by the claimant upon the vital issue has not
been met by the department"...

1.
2. Then segregation rules,, that apply to a particular case, must be legally,, invoked.

3. If,, Permanent partial disability is not case relevant at the time as, per
4. RCW 51.32.080(5), then specific criteria must invoke inactive, **not** known, **not**
5. diagnosed, **not** treated, prior to injury, then **not** legally pre-existing, even though
6. condition may pre-exist,, but never active,, Segregation,, is **not** legally correct...

7. And refer back to *Robynhawk Freebryd-Brown*,, pg.2 "She asserted that one
8. medical witness identified by the Department,, ,,had not provided an opinion about
9. her condition until after the Department had denied her claim"... See similar parallel
10. to my visit to Dr. McNair January 19, 2018, but Dr. McNair never provided an opinion,
11. specific to my NECK INJURY only, as claim ZB23273 was Rejected January 16, 2018.
12. Dr. McNair **not** a witness in my case, does not harm my case, as Segregation,, is a
13. 'question of law', and Dr. Sullivans' testimony proves NECK INJURY,, **not** diagnosed.

14. C. MARK FOWBLE KNEW I DEMANDED 'LIGHTING UP' AS INVOKED
15. THEN LIED ABOUT DOCTORS FINDING A LIGHTING UP.

16. See my June 22, 2017 letter to L&I, as **CABR 803**. Mark Fowble was not
17. yet on my claim, but when he became claims manager, Fowble provably received
18. multiple communications from me, and I invariably talked about ,, 'Lighting Up' ,,
19. after my June 21, 2017 doctor visit, of any [would be] condition, and after,,
20. Dr. Joan Sullivans' August 21, 2017 IME.

21. See Olympic Interiors Inc., June 22, 2017 **MEMO** as 9/25/18 Docket
22. 18 10796 Accepted Exhibit 3, as **CABR 702**. See Doug Bagnell who sat 3 feet
23. across the table from me January 27, 2017, when I in Olympics' office, filled out
24. my pre-employment paperwork. See Bagnell "obvious mobility restrictions with
25. his neck"... But Bagnell has no real-time proof by way of documentation, and as
26. any such Waiver of Olympic Legal Responsibility, if,,,,, I had any such 'obvious
27. mobility restrictions with my neck', January 27, 2017, as would be standard
28. procedure, for any drywall employer upon pre-employment interview,, if.....

1.
2.
3. Mark Fowble never asked Bagnell to prove his assertion in that **MEMO**, why would
4. Fowble want to do that? June 22, 2017 **MEMO** (APPENDIX).

5. This gave Mark Fowble impetus to favor Olympic, (APPENDIX) when I was
6. scheduled to see Dr. Sullivan for the August 21, 2017 IME. Olympic counsel Ann
7. Silvernale in a 7/20/2017 CLAIMS PHONE REFERRAL, even though she knew
8. Olympic was not a self-insured employer, and then could **not** have an ex-parte
9. communication before-the-fact with the August 21, 2017 IME, asked Fowble to,,
10. as Fowble did,,, forward a letter to Dr. Sullivan, stating in part, 'Collins is dishonest,
11. and not injured'. This should now be considered by this court as Fowble taint upon
12. the original & sole tribunal IME process, and be conducted again, but based on
13. NECK INJURY only,,, without such Olympic improper pre-examination interference.

14. See specific to Lighting up,,, which remember, renders Segregation irrelevant,
15. and Fowble knew it,,, Fowble in **CABR** Docket 18 10796 Rejected Exhibits 3-10, as
16. I have (APPENDIX) selective IAJ rejected documents, to solidify my specific discus-
17. sion, and see, 1/12/18 document. See By WRKPOS ID: U680 is Mark Fowble.

18. See "and was not lit up"... Make this clear,,, no medical doctor,,, to include
19. Dr. Joan Sullivan, Fowble is referencing in that specific document, ever decided,,,
20. "was not lit up" as those specific words. 'Lit up',,, is same as legal concept only, not
21. medical concept,,, but legal concept only,,, as, Lighting Up, or lighted up,,, specific
22. to an injury,,, activating,,, an otherwise inactive,,, condition...

23. Then Mark Fowble makes it appear as if he is allowing me to schedule a new
24. appointment, to see (as it would turn out to be, Dr. McNair. But again, that January
25. 19, 2018 doctor visit, was claim rejected January 16, 2018. So much for Fowble
26. allowing me to see a doctor to file a new claim. This is oppressive, as Fowble
27. pre-meditated guileful, and a clear Fowble claim adjudication 'abuse of discretion'.
28.

1.
2.
3. See Mark Fowble in **CABR** Docket 18 10796 Rejected Exhibits 3-10 as a
4. specific Rejected Exhibit (APPENDIX) as, February 1, 2018 document,, "As we
5. already have an IME opinion that states, without equivocation, that your cervical
6. degenerative condition was in no way caused by, lit up by, nor aggravated by the
7. incident of 1/30/17". Now let me dissect that quotation for its Mark Fowble intent.

8. First, again,, no doctor in this equation at issue, since my June 20, 2017 filed
9. INJURIES claim, has ever stated "in no way" ,,, or ,,, "lit up by"... Remember,,
10. Fowble needed to defeat me on 'lit up' ,,, or 'Lighting Up' ,,, (same), because my
11. January 30, 2017 NECK INJURY at issue, legally 'Lighted up', my inactive cervical
12. degeneration, and no doctor determined this 'dispositive legality'. Why do I position
13. so matter of fact to ,,, 'Lighting Up' ,,,? Because of the premise of *McGuire v Dept.*
14. *Of Labor & Industries*. See ft.nt. 2 pg.7. And second, remember, 'aggravated' ,,, is
15. specific to,, an active, known, diagnosed, and treated pre-existing condition, prior
16. to injury, so Fowble is in contradiction to 'lit up', if my neck condition was not active,
17. known, diagnosed, and treated, prior to January 30, 2017. As if a condition is 'lit up',
18. it cannot at same time, also be prior active, known, diagnosed, and treated condition,
19. as Doug Bagnell lied about in his June 22, 2017 **MEMO** to L&I, but Bagnell cannot
20. support with real-time January 27, 2017 requisite documentation, any such condition.

21. And third, but most important, Fowble 'abuse of discretion', as he directly refers
22. to Dr. Sullivan, **CABR 1237** 10/31/2018 Docket 18 10796 pg.81 at 5-6 (APPENDIX)
23. as "I was never asked if he had an injury, I did not address it". Then why did Fowble
24. even pretend to allow me to schedule a doctor visit for January 19, 2018, when he
25. Fowble, had no intention of allowing me to obtain a NECK INJURY,, medical
26. opinion, specific to my January 30, 2017 NECK INJURY only,, claim, ZB23273, as
27. Docket 18 10796. This is intentionally oppressive, and Fowble 'abuse of discretion'.
28.

1.
2.
3. See 2 variables must be reported by an attending physician as characteristics
4. as is pre-existing condition. 1. Indicator variables: Whether the patient received any
5. prior treatment for the diagnosis. 2. Whether in the opinion of the treating physician
6. the claimant had a pre-existing impairment, (related or unrelated to the claim).

7. See RCW 51.32.080(5), "Should a worker receive an injury to a member or part of
8. his or her body already, from whatever cause, permanently partially disabled",,,
9. is a specific statutory ,,Segregation rule,,, Fowble illegally applies to me.

10. See (APPENDIX) September 24, 2018 Docket 17 25495 Dr. Sullivan testimony
11. pg.25 at 25 pg. 26 at 1-6, my question, 'Doesn't pre-existing condition, Dr. Sullivan,
12. also refer directly to something that was a known - - prior known diagnosed and
13. treated condition, yes, or no? Dr. Sullivan answer pg.26 at 3, Yes. CABR 984-985.

14. Read all of pg.26. See at 16-20, Dr. Sullivan supports my pre-existing legal
15. theory, and my prevailing pre-existing legal argument,,, "the reason it was said
16. to be pre-existing was based on studies that were done of his neck"... "Those
17. studies reflected disease in his neck that could - - that take time to develop"...
18. Those Dr. Sullivan referred to studies, were conducted August 23, 2017.

19. Refer to specific controlling precedent as, *Dennis v Dept. Of L&I* pg.6, and
20. Dr. Sullivans' testimony pg.63 **CABR 1022** pg.6 herein, and to *McGuire v Dept.*
21. *Of L&I* pg.7 ft.nt. 2 herein, to support Dr. Sullivan opinion, then as ,,dispositive,,,
22. supporting my legal argument, as ,,what is legally,,, **not** simply medically,,, as **not**
23. my case specific relevant,,, but what is legally,,, pre-existing,,, to then Segregate.

24. Mark Fowble,,, as the 'original and sole tribunal' Department legal adjudicator,
25. then as an Industrial Insurance Law Expert, Rejected my NECK INJURY only,,,
26. claim, based on a pre-existing condition. Then Fowbles' 'SEGREGATION', and
27. 'lit up', as both (legal concepts) basis for his Rejection, must be legally supported.

1.
2. D. MARK FOWBLE WAS NOT PROTECTED BY ANY PRIVILEGE
3. AS HIS 'ABUSE OF DISCRETION' WAIVES ANY PRIVILEGE

4. See my May 16, 2019 SPECIFIC RAISED OBJECTIONS^{3,4}, as specific to
5. Mark Fowble, and his not,,, being exempt, or protected from testimony mandate,
6. by any 'deliberative process' privilege, as Fowble, a supervisory level person only,
7. not a literal 'official', and not a 'policy maker', and as timely filed to the Board, are
8. also **CABR 59-60-61**, as included in my BIIA Petition For Review as **CABR 33-58**.

9. ³
10. Mark Fowble: Department Claim Manager who wrote the November 14, 2017
11. SEGREGATION Order, included in my timely filed witness list, to testify at Dckts.
12. 17 25495-18 10796 BIIA Hearings. But Fowble, was IAJ excused from testimony,
13. as 'prejudicial' to me, specific to BIIA out-of-context cited case law, *McDonald v*
14. *Dept. Of Labor & Indust. 104 Wn. App. 617, 17 P.3d 1195 (2001)*,,, *Division Two*
15. *C.O.A.*, specific to 'deliberative processes' privilege not afforded Fowble,,, in my
16. case specific, as part of this complete record. (*McDonald ... in McDonald v L&I*),,
17. did not bring his Objection, to Department claim decision, as my specific ISSUE
18. at the BOARD Level. ("Thus" quote), de novo trial court, or Appeals Court, could
19. **not entertain** (*McDonald v L&I*), specific [below] Department, or BIIA 'deliberative
20. processes' issue,,, and, (*McDonald*), ultimately, was allowed to argue his 'legal
21. theory of his case anyway'. 'Deliberative processes', same as 'mental processes'.

22. And, BIIA Judge Cynthia C. McDonald, and her supervisor, who erroneously
23. cite (*McDonald*), also cite other case examples as, *Nationscapital v Dept. Of*
24. *Financial Institutions, 133 Wn. App. 723 137 P.3d 78 (2006), Division Two C.O.A.*

25. See *Nationscapital* discussion as based on agency application of statutory duty,
26. where the agency at issue in *Nationscapital*, properly interpreted statutory con-
27. struction, and my specific argument as prevailing is, Mark Fowble has no statute
28. per the 'ACT',,, that supports his November 14, 2017 SEGREGATION Order.

29. SEGREGATION is a ,,legal concept,,, and cannot be discussed by medical
30. testimony only. It required Mark Fowble to testify as to SEGREGATION. I cite
31. *Dennis v Dept. Of Labor & Industries 109 Wn. 2d 467 (1987)*,,, where the 'legal
32. concept' of SEGREGATION in my case specific, is **not** correct, and must be correct
33. per RCW 51.32.080(5),,, as a dispositively mandatory ISSUE, in my case specific.

34. If no statute per the 'ACT' supports Mark Fowble's November 14, 2017
35. SEGREGATION Order, then this was a discretion violation by Fowble, then
36. he should have testified to his 'abuse of discretion method' of SEGREGATION.

37. See the additional cases erroneously cited by Judge McDonald, and Knowrasa
38. T. Patrick (Judge McDonald's supervisor),,, in my August 13, 2018 **MOTION**, all
39. cases to include *U S v Morgan*,,, where statutory law Intent as in *Nationscapital*,,,
40. supported a specific government action 'Deliberative decision making process',
41. unlike Mark Fowble's [no statute supported SEGREGATION Order], in my case.

42. This is simple, if I Michael J. Collins Pro se, did not prevail at the BOARD level,,,
43. specific to 'misapplication of the law' SEGREGATION Order at ISSUE, then I was
44. not allowed to argue, and prevail, to this dispositive 'legal theory of my case'...
45. Then a clear 'PREJUDICIAL ERROR',,, specific to claims ZB21147, and ZB23273.

4
Judge Cynthia C. McDonalds' erroneous protection of Claim manager Mark Fowble, by citing *McDonald v Dept. of L&I, Nationscapital*, and *U S v Morgan*, are defeated by my proper legal argument, as on pg.13 herein.

But, to further strengthen my legal argument, as to why Fowble is **not** protected from subpoenaed testimony, also is, the 'Deliberative Process', is relegated protection from, as only protecting 'policy level' (persons as officials) decision making process, **not** to a lower level supervisory level employee like Mark Fowble, who was **not** 'making policy' when he wrote the November 14, 2017 Segregation Order, as **not** supported by statutory, or settled law, then a 'misapplication of the law', as 'a matter of law', as an 'issue of law' before the Board, or, when Fowble wrote the January 16, 2018 Rejection Order, that has **no** 'INJURY', 'medical evidence' to support it.

For Fowble to have been exempted from subpoena testimony, as protected by my specific 'Deliberative Process' legal argument, prevailing for me, as to why he Fowble should have been compelled to testify, Fowble would also have to be a 'policy level' (official), writing, for example, an advisory opinion, or 'policy level' recommendations, comprising part of a process by which governmental decisions and policies are formulated.

The purpose of the 'deliberative process' privilege, does **not** extend to 'factual information' contained in an otherwise deliberative agency document, unless, disclosure of the information would so expose 'deliberative process' within an agency, that it must be deemed exempted. In other words, if the document, would so expose a 'policy level' (official) policymaking decision, of which a claim manager, Fowble, writing a Department Order, from the supervisory level, an Order, that is for 'public consumption', does **not** share document 'deliberative process' privilege. Then not relevant.

As supporting 'legal theory', although is **not** my intent, to be in-context to Government tort, or arguing States 11th Amendment Sovereign Immunity, unless Department counsel as Office Of The Attorney General, chooses to now, as would be an erroneous legal argument, and **not** within then BIIA jurisdiction, and **not** relevant to my specific legal argument, but only to the extent of a 'separation of powers', specific to the Fowble act, decision, or omission, as Department Orders at issue in Docket 17 25495 - Docket 18 10796, and, Were the Orders at the 'policymaking' level, **NO**? As they were, at the (my case specific), 'supervisory' level only, then **not** protected by a 'deliberative process' privilege. Even *****Former Attorney General Rob McKenna**, (see *Evangelical United Bretheren Church Of Adna v State 67 Wash. 2d (1965)*, as the *Adna* court did **not** purport to interpret scope of waiver of sovereign immunity at all), *****misinterpreted the *Adna* court**, that only decided on the common-law limits on tortious conduct, as distinguishing 'high-level policymaking', and low-level 'operational acts' to implement policy only, as Fowbles' Orders, then (context relevance) to my case, based on that specific legal argument only, as policymaking, and 'quasi-judicial functions', as (hearings), enjoy discretionary immunity as government (officials), of which Fowble is **not**, then Fowble has **no** supervisory level 'abuse of discretion' immunity, as Fowble 'abuse of discretion', is within Boards' 'standard of review' jurisdiction. As I have shown Fowble 'bad faith', denies Fowble 'mental processes' privilege.

1.
2. Then combined Docket 17 25495, and Docket 18 10796 'RAISED OBJECTION'
3. as to Department claim manager Mark Fowble dispositive Segregation Order, and
4. Rejection Order, as Judge Cynthia C. McDonald protected, and as 'prejudicial err',,
5. non-existent Fowble 'Deliberative Process' privilege.

6. Department subject-matter jurisdiction, is **not** same as, Fowble 'deliberative
7. process' privilege. Fowble testimony would have identified, and established
8. foundation, to 10/09/2018 Docket 17 25495 **Rej. Ex.4**, and then to 10/31/2018
9. Docket 18 10796 **Rej. Ex's. 1,3,4,5,6,7,8,9,10**.

10. *McDonald, in McDonald v Department Of L&I*,, ft.nts. **3-4**, attempts to argue
11. that an L&I decision to re-open his claim, was an 'admission by a party opponent',
12. as ER 801(d)(2). But the Court found *McDonald's* argument fails, as L&I decision
13. was not an admission by a party opponent, simply to re-open, and, 'processes',,
14. were 2 levels below, at the Department, as trial court reviewed the BIIA's decision,
15. not L&I's. The BIIA took its own evidence, reviewing *McDonald* re-open application.

16. That is the reason L&I's 'deliberative processes' were irrelevant at trial, where
17. the jury's task was to review the BIIA's decision. See (thus) in *McDonald*,, specific
18. to this reason I give, why 'deliberative processes' were **not** relevant at trial, 2 steps
19. up the legal ladder, so when Division II later in *McDonald*, states again,, "However,
20. the processes L&I employed in reaching its ultimate decision,, ,,are irrelevant",,
21. that is only in reference to,, trial court only reviewing the BIIA decision, **not** L&I's...

22. *McDonald* could **not** bring forth, as I can, an argument waiving any [would be]
23. claim manager 'deliberative processes' privilege, because provable Fowble 'abuse
24. of discretion' waives any such privilege, even if existed, under best of circumstances,
25. to protect Mark Fowble. The trial court's jury instructions allowed *McDonald* to argue
26. his legal theory of the case. And as no jury instruction was going to be relevant to an
27. L&I deliberative process, only whether the BIIA properly decided *McDonald's* case.

1.
2. Deliberative Processes privilege was intended to allow government agencies
3. to withhold testimony relating to policy formulations from the courts, but only for
4. executive branch officials, discussing policy, **not** supervisory level claim managers
5. who Segregate, and Reject, but based on no statutory, or settled law support.

6. Once a claims manager makes public, a Segregation, or Rejection Order, then
7. no invoking security secrecy,,, is relevant to exemption of 'deliberative processes',
8. and if I can, as I have, show an 'arbitrary, and capricious' Board decision,,, to deny
9. my ability to question claim manager Mark Fowble, then, Board 'abuse of discretion'.

10. Under the 'arbitrary and capricious' or 'unaccompanied reasoned', legal review,
11. the U. S. Supreme Court has emphasized, that it is aimed at 'the decision-making
12. process, not only merits of the decision itself. Thus to take a 'hard look' review as a
13. procedural check of the agencies', ie., L&I's action, but the Board did **not** do so.

14. As this review court can follow the APA procedure as a guide, as a court can
15. set aside an agency's action, findings and conclusions, found to be ⁵(A) "arbitrary,
16. capricious, an abuse of discretion, or otherwise not in accordance with law". And
17. (F) "unwarranted by the facts to the extent that the facts are subject to trial
18. de novo by the reviewing court"...

19. This must now be specific to Superior Court review of the Board decision
20. to deny me Mark Fowble testimony, as a Board Of Appeals 'abuse of discretion',
21. and as Board 'arbitrary and capricious', as 'hard look' review goes to inspection
22. of process, then required Board in my case specific, to consider relevant factors.

23. ⁵
24. 5 U.S.C. Spec. Sec. 706. Scope Of Review,,, "A court may reverse a decision
25. if the agency fails to consider plausible alternative measures and explain why it
26. rejected these for the regulatory path it chose"... See RCW 51.52.020 Board--
27. Rule-making power. See WAC 263-12-120. **CABR** documents show my request.
28. I Michael J. Collins specific to Docket 17 25495, and Docket 18 10796, asked
the Board to invoke this statute, and WAC code, "to decide fairly, and equitably" ,,,
and as an 'alternative measure' ,,, specific also to the procedure before the Board,
as real-time litigation, and as timely Issues of Law, requested by me, to the Board.
'Policy of the agency', as a Department Order intended only to explain, after,,, de-
cision is made, is **not** protected by 'deliberative process privilege'.

1.
2. And,,, the deliberative process privilege, is inapplicable “[W]here the
3. decision-making process itself is the subject of the litigation, as is often the case
4. in agency litigation”. *Giuliani, 1998 U.S Dist. LEXIS at Burka v New York City*
5. *Transit Auth., 110 F.R.D. 660, 667, (S.D.N.Y. 1986)*...

6. Since Mark Fowbles’ November 14, 2017 Segregation Order, and thru Mark
7. Fowbles’ January 16, 2018 Rejection Order, Fowbles’ ‘decision-making process
8. itself is the subject of my Docket 17 25495, and Docket 18 10796 litigation’.

9. Dispositive point: The ‘deliberative processes’ are also bound by (third party
10. Olympic Interiors Inc.,) influence on Fowbles decision, as proven at the Board, but
11. the ‘Board’ would **not** allow me to attack on cross-examination, Olympic witnesses,
12. as IAJ dismissed my Appeal, prior to already scheduled, Department, and Olympic
13. cases-in-chief. And so IAJ deprived me specific to ER 608(b) ER 607, ER 614,
14. and did **not** allow me to attack specific to ER 806, on my direct exam of Olympic
15. witnesses, that is ER 401 relevant, and as probative, as to this day, the BIIA, nor
16. this Superior Court de novo review, is certain, as to what specific type-of-work I
17. Michael J. Collins performed for Olympic, January 30, 2017, thru February 2, 2017,
18. and was my INJURIES only,,, claim, based on the facts of my specific type-of-work
19. performed. Then also, IAJ **not** allowing me to pursue specific questions to Olympic
20. witnesses, on direct exam, as the specific type-of-work Olympic provided the
21. Department in its requisite Individual employee hours, and type-of-work performed,
22. as a complete departure from, and as a much lighter type-of-work than, the truthful
23. type-of-work I performed, and that injured me. Then my June 27, 2017 Injury Report
24. to L&I, per Olympic type-of-work, and total hours thereto performed, as Olympic
25. provided to the Department, in its due 3/31/2017 Supplemental Quarterly Report,,,
26. would make me out to be untruthful in my June 27, 2017 Injury Report,,, as exact

1.
2.
3. type-of-work performed, and total hours performed, working by myself, until injuries,
4. and detailed in my February 2, 2017, signed by me, and my supervisor, INJURIES
5. DETAILED,,, Time-Sheet **spoliated**. See **CABR** Rejected Exhibit 1, as an Olympic
6. after-the-fact falsified Time sheet, never type-of-work, and total hours performing
7. such specific type-of-work, corrected by Olympic, but as provided the Department.

8. RCW 51.48.040, and RCW 51.16.070 compel an employer with a 'duty to
9. preserve', and to have available for inspection, all business records. That must
10. include my February 2, 2017 signed by me, and my supervisor, January 30, 2017
11. INJURIES DETAILED Time-Sheet, as because of INJURIES DETAILED, upon my
12. INJURIES claim as filed, Olympic 'duty to preserve', must provide the Department,
13. to prove as ,,,'real-time documented',,,, my January 30, 2017 INJURIES affirmed...

14. Then as Olympic **spoliation** 'rebuttal presumption', would shift the burden to
15. Olympic, to prove timely correction to the Department, but IAJ, and Board ignored.

16. See Docket 18 10796 RP 09/25/2018 **CABR** Rejected Exhibits 1, and 2, as
17. Olympics' February 10, 2017 falsely documented pay stub, and 05/18/2018
18. falsified after-the-fact,,, Time-Sheet, and as Olympic specific information provably
19. provided to the Department, as, I possess Olympics' 3/31/2017 Supplemental
20. Quarterly Reports, consistent with, Olympics' falsification in Rejected Exhibits 1, 2.

21. Then a Board 'abuse of discretion', and as Board 'arbitrary, and capricious',
22. and as ultimately its 'Prejudicial Error', as when the Department February 1, 2018,
23. in its follow-up to its January 16, 2018 NECK INJURY only,,, claim ZB23273, as
24. Docket 18 10796 Rejection Order as boilerplate, but clearly, states,,, "There is no
25. proof of a specific injury at a definite time and place within the course of employ-
26. ment" ,,, the Question now is,,, what specific,,, type-of-work performed,,, is that
27. based on,,, as never corrected to the Department by Olympic Interiors Inc.,?

1.
2. And even without the influence by Olympic, Mark Fowble as a supervisory
3. level person only, **not** making policy, is **not** 'deliberative process' privilege protected.

4. As the Department and IAJ, also relied on *Nationscapital v Dept. Of Financial*
5. *Institutions*, 133 Wn. App. 723, 137 P.3d 78 (2006),,, then also carelessly cited by
6. the IAJ, as *Nationscapital* demanded statutory interpretation, and Legislative Intent.

7. ⁶
8. In *Nationscapital* P29 - "An agency action is arbitrary and capricious where willful
9. and unreasoning and taken without regard to the attending facts or circumstances".
10. Meaning: IAJ and Board, knew that **no** Statutory Intent supported the Department
11. Segregation Order, and no medical evidence, then **no** law, supported Department
12. Rejection Order, so Mark Fowble 'deliberative processes' are **not** protected.
13. P112- Specific to 'mental processes' of officers, In absence of evidence to the
14. contrary, courts should "presume public officers perform their duties properly, legally,
15. and in compliance with controlling statutory provisions"... See *Ledgering v State*.
16. First: Refer back to my pgs.13-18 herein specific to Mark Fowble as a supervisory
17. level person **not** an officer, or policy-maker, then renders *Nationscapital* absurd.

18. Second: *Nationscapital* P113 - "An exception exists when the record is insufficient
19. to permit meaningful judicial review of an agency action". See reference to
20. *Ledgering*. See exception in my favor as,,, issue was Director relegating authority
21. to subordinates like Fowble. I complained to Fowble many times prior to January
22. 16, 2018. Then Fowble should have consulted the Director. If he did not he erred.
23. If he did consult the Director, then the Director failed to exercise his discretionary
24. authority,,, specific to,,, Segregation,,, **not** supported by statutorily, or settled law.
25. And specific to Rejection,,, **not** supported by medical evidence,,, then the IAJ,
26. and Board, should have remanded back to the Department. See *Ledgering*,,
27. "The court remanded for further factual findings on the question"... My case
28. specific, Segregation,,, is a legal concept, and is a Question, and an Issue of Law.

19. *Nationscapital*: P114 - "The Supreme Court remanded for inquiry into admini-
20. strators' reasons"... .."The court held that inquiry into the official's decision-
21. making process was necessary for effective judicial review under the APA to
22. determine whether the official considered the relevant factors in rendering a
23. decision. But the court held that where administrative findings do set forth the
24. grounds of decision, "there must be a strong showing of bad faith, or improper
25. behavior before such inquiry may be made"... I show Fowble "bad faith"...

26. My case specific: Fowble knew his Segregation Order was **not** supported by
27. statutory and settled law. Fowble knew his Rejection Order was **not** supported
28. by any medical evidence. Fowble with Intent, would **not** allow any such medical
evidence to be in my favor. IAJ, or the Board, should have remanded for a 'merits'
inquiry. **Not** demanding a Fowble 'merits' inquiry, IAJ/Board Panel, were 'arbitrary',
'capricious', 'abuse of discretion', and a 'Prejudicial Error'. 'Clean hands doctrine',
Black's Law Dictionary 268 (8th ed. 2004),,, Department as 'movant' to dismiss,,,
"cannot seek equitable relief or assert an equitable defense if that party has vio-
lated an equitable principle". Dismissing my Appeals, specific to IAJ/Board Panel
misapplication of 'deliberative process privilege', is legally tantamount to 'mistrial'.

1.
2.
3. Fowble did **not** have Legislative Intent specific to Segregation,,, of an inactive,
4. not known, not diagnosed, not treated neck condition prior to my January 30, 2017
5. INJURIES, nor statutory support for Rejection, and with **no** medical evidence to
6. support the Rejection Order. And if there is no statutory law, settled law, and my
7. case specific, **no** medical history evidence to support the Department Segregation,
8. or Rejection Orders, then my *McDonald v Dept. Of Labor & Indust.* argument, as
9. in my previous pgs.13-18 herein, prevails,,, without regard to any other misplaced,
10. IAJ Cynthia C. McDonald, and Assist. Chief Judge Knowrasa T. Patrick erroneous
11. citations, Board Panel affirmed, perhaps because *McDonald, and Nationscapital*
12. originate at Division II C.O.A., thinking it would withstand 'scrutiny',,, in favor of the
13. Department, and Mark Fowble. This is 'arbitrary', 'capricious', 'abuse of discretion',
14. and 'Prejudicial Error', by IAJ, and Board Panel, as Mark Fowble was my 'material
15. witness', to answer to his illegal Segregation, and Rejection Orders, that **no** medical
16. witness could answer to, as Questions Of Law. Then no such attempted, misplaced,
17. Department argument, that somehow I could have mitigated this issue, is absurd,
18. as no medical opinion could 'fix', the Questions of Law, *ripe* in my case, and that are
19. prevailing for me, specific to what I have elicited from Dr. Sullivan, as her Board
20. Testimony addressed what must still be Question Of Fact, medical Provider decided.

21. Dr. Sullivan in her August 21, 2017 IME opinion, and in her November 8, 2017
22. IME Addendum, never states 'Segregation', or 'lit up', as legal, **not** medical concepts,
23. and as legal concepts, then as ,,Issues of Law,,, should have been Board decided.

24. *Nationscapital* 'advanced no evidence',,, showing that discretion was exercised
25. contrary to law. Then exploring officials' 'deliberative processes',,, would yield no
26. result to support *Nationscapital*. Then no err. I have shown Fowble acted contrary to
27. law... Then clear 'Prejudicial Error',,, on part of IAJ, and the Board Panel, to ignore.
28.

1.
2.
3. In *U.S. v Morgan* 313 U.S. 409 (1941),, also erroneously cited by IAJ, and
4. Department counsel, again is specific to a policy-maker, as Secretary Of Agriculture
5. fixing 'Packers Act' public rates, is administrative and judicial processes protected,
6. as the Secretary had authority to properly determine fair rates for services rendered,
7. because it's ,,, 'public policy' decision-making,,, by an Executive Branch cabinet
8. Secretary, **not** a supervisory lower level person only, as Mark Fowble, if confused,
9. should have deferred to the Directors' discretion, specific to Fowbles' Segregation
10. Order **not** supported by statutory Intent, or settled law, and Fowbles' Rejection
11. Order **not** supported by medical evidence. But if there was proven 'bad faith' ,,, by
12. the *Morgan* cabinet Secretary, 'deliberative processes' privilege,,, would be **not**...
13. The '*Morgan* doctrine' simply cautions against taking depositions from "high-ranking
14. government officials" ,,, protecting the decision-making process of such officials.
15. Then the Court analogized the ,,, "high-ranking government official" ,,, to a judge.

16. But Fowble was **not** confused, he, in 'bad faith', knew exactly what he was
17. 'with Intent', doing. Then Fowble is **not** protected, for reasons I refer to in *McDonald*,
18. *Nationscapital*, and *U.S. v Morgan*, all cases IAJ, Department, and Board relied on,
19. to quash Fowble from being compelled to testify, are erroneously cited, and Fowble
20. was compelled to testify as my material witness, who's testimony would have
21. exposed his Intent, and I would have been allowed to have my NECK INJURY only,,,
22. claim legally, medically adjudicated. Then this is IAJ and Board 'arbitrary' 'capricious',
23. an 'abuse of discretion', and 'Prejudicial Error', and must be remanded to the
24. Department for a legal adjudication of my January 30, 2017 NECK INJURY.

25. See (APPENDIX) Dr. Sullivan October 31, 2018 Docket 18 10796 testimony
26. pg.72. See all pg.72, Dr. Sullivan profoundly material testimony, to any [would be]
27. ,,, 'Provider' ,,, I as deprived January 19, 2018, and how important it is to procure a

1.
2.
3. when I was in Olympics' office as February 10, 2017 was my payday, and Olympic,
4. though direct-deposited my check, would have been able to, as they did in-person,
5. provide me a pay stub, and later an after-the-fact Time sheet, as RP 09/25/2018
6. Docket 18 10796 **CABR** Rejected Exhibits 1- 2 respectively,,, both falsified, that
7. Olympic as the ,,, 'movant' ,,, in its Motion to Dismiss Docket 18 10796, must have
8. but did **not**,,, fulfill its burden of proof,,, to produce that then **spoliated** Time-Sheet,
9. and,,, prove timely correction of,,, my specific type-of-work performed,,, and the
10. total hours of specific type-of-work I performed, as would have been provided to
11. the Department in Olympics' 'Supplemental Quarterly Reports' ,,, to have a chance
12. at success in achieving dismissal of my ZB23273 claim. But these dispositive facts,
13. now Prejudicial, because IAJ, and the Board, never allowed me to attack credibility
14. of Olympic witnesses as the IAJ and Board dismissed my Docket 17 25495, and my
15. Docket 18 10796 Appeals, without Department, and Olympic cases-in-chief heard.

16. This was never IAJ or Board considered, but as materially relevant, as to
17. whether I was ever injured, as Fowble Rejected my NECK INJURY claim.

18. This is an IAJ and Board caused IRREGULARITY, and is 'arbitrary', 'capricious',
19. an 'abuse of discretion', and a 'Prejudicial Error' to now remand in my favor.

20. ⁷
21. _____
22. Where a mandatory and material procedure or condition is overlooked when
23. an administrative decision is made, the omission cannot be ignored on the basis
24. that the outcome was inevitable, even if the step was taken. No-one can argue that
25. following the correct procedure would have made no difference. It cannot be known
26. with certainty what course the process might have taken if the procedural require-
27. ment had been properly observed. In those circumstances therefore the correct
28. decision is to declare the administrative decision unlawful.

As a Procedural IRREGULARITY. The materiality of any failure to follow a
legal requirement, must be taken into account, where appropriate, by linking the
question of compliance to the purpose of the overlooked requirement before
concluding that the decision should be reviewed or set aside.... IRREGULARITY is
the technical term for every defect in practical proceedings, or the mode of conducting
an action, or defense, as distinguishable from defects in pleadings. The doing or not
doing that, in the conduct of a legal action, ought to be conformed to practice of a
court. Blacks' Law Dictionary. I was not allowed to cross examine Bagnell **MEMO**.
IAJ and the Board never decided whether the Segregation Order was legally correct.

1.
2.
3. 'Original and sole tribunal',,, Department claim manager legal adjudicator,,,
4. Mark Fowble,,, **did not fulfill** his Legislative Intent,,, legal obligation,,, properly,,,
5. specific to ft.nt. 7 criteria mandate, and was **not considered** by IAJ, or the Board,
6. specific to whether 'Segregation rules' were ever implemented legally, and correctly.

7. Remember: The only reason both Olympic, and Department counsel did not
8. object to Olympics' Doug Bagnells' signed RP09/25/2018 Docket 18 10796 as did
9. become Accepted Exhibit 3, **MEMO**,,, is, they both positioned, that the **MEMO**
10. where Olympics' Doug Bagnell makes my neck history, game-changing assertions,
11. and as specific to what, if,,, would ever have been an active, known, diagnosed,
12. and treated neck condition, as must be legally determined, as legally pre-existing,,,
13. though none of which is my neck medical history,,, factually provable,,, to then
14. legally SEGREGATE,,, nefariously positioned, would be an Exhibit in their favor,,,
15. when both Olympic, and Department, 'objected' successfully to,,, my requesting
16. as admissible,,, RP09/25/2018 Docket 18 10796 **CABR** Rejected Exhibits 1-2...

17. Refer back to (APPENDIX) Dr. Sullivans' pg.25 at 25 - pg.26 at 1-6, specific
18. to pre-existing,,, mandate testimony, and her pg.46 at 24-25 testimony specific to
19. active, or not, as must be Provider (I was January 19, 2018 denied), determined.

20. ⁸ Because Mark Fowble would have based his **not** legal, as **not** supported by
21. any statutory, or settled law,,, and **not** supported by any (my neck medical history),,,
22. as if,,, my neck condition was ever an active, known, diagnosed, or treated neck
23. condition,,, SEGREGATION,,, of my NECK INJURY,,, based solely on the provably
24. falsified information provided the Department, by Olympic in its 3/31/2017 due date
25. for Olympics' 'Supplemental Quarterly Report' employer obligation, and Olympics'
26. Doug Bagnells' June 22, 2017 **MEMO** as RP09/25/2018 Docket 18 10796 Accepted
27. Exhibit 3, as **CABR 702**, as Collins "obvious mobility restrictions with his neck",,,
28.

1.
2. the IAJ and Board, should have, but did **not** consider, whether SEGREGATION of
3. my January 30, 2017 NECK INJURY,,, was legally correct, per original INJURIES
4. claim ZB21147, as Docket 17 25495, but as Rejection of my NECK INJURY only,,,
5. claim ZB23273, as Docket 18 10796 was provably,,, as Mark Fowble created,,,
6. specific RP10/31/2018 Docket 18 10796 **CABR** Rejected Exs'. 3-10, directly based.

7. Then I could **not** mitigate this situation, with some other medical opinion after
8. my rejected medical appointment January 19, 2018 based on NECK INJURY,,,
9. only, because Fowble had already based his NECK INJURY,,, only claim ZB23273
10. Rejection Order, on a claim ZB21147 SEGREGATION of my neck, as if there was,
11. but there was **not**,,, a legally pre-existing neck problem anyway, as IAJ, and Board
12. ignored, then 'arbitrary', 'capricious' as 'abuse of discretion' and 'Prejudicial Error'.

13. Then now Olympic, and ...the Department,,, must prove a legally pre-existing
14. condition in my Neck prior to my January 30, 2017 NECK INJURY, as I, in 2018
15. signed approval of such (my neck medical history) investigation,,, to support the
16. RP09/25/2018 Docket 18 10796 Accepted Exhibit 3 Doug Bagnell **MEMO**, as must
17. be, but, the Olympic, and Department investigation yielded **no**, prior active, known,
18. diagnosed, and treated condition to be legally,,, pre-existing,,, then to somehow
19. hope to support a SEGREGATION ,,, 'legal' ,,, concept, for which they will fail.

20. ⁸

21. To qualify for the deliberative processes privilege, records must be both pre-
22. decisional, (they must precede a final decision), and deliberative (they must be
23. opinions, and recommendations). No Fowble opinions/recommendations relevant.

24. But, once Fowble made a final decision, then the privilege is waived for the
25. decision itself, and for any records directly relied upon in making the decision.

26. That means, the IAJ, and the Board, were obligated to consider RP09/25/2018
27. Docket 18 10796 Accepted **CABR** Exhibit 3, Doug Bagnell's June 22, 2017 **MEMO**.

28. If Fowble considered more than one alternative, the rejected alternatives are
still protected. There was no alternative criteria for Fowbles' SEGREGATION Order,
and (REJECTION Order, as directly based on Fowbles' SEGREGATION Order).

To invoke Fowble deliberative processes privilege, as a knee-jerk reaction to my
request, and to **not** allow my valid argument against Mark Fowble being protected
by the privilege, by citing *McDonald, Nationscapital, and U S v Morgan*, as out-of
context, and erroneous, as only self-serving for the IAJ, and the Board, then is IAJ,
and Board, 'arbitrary' 'capricious', an 'abuse of discretion', and 'Prejudicial Error'.

1.
2. Ft.nt.8 pg.25 substance, and continued, from Seattle University Law Review
3. *Sherman: Deliberative Paradox, and Administrative Law* *BYU L. Rev.* 413 (2015),,
4. Weaver, Jones, *Missouri Law Review Deliberative Process Privilege, The*, 54
5. *Mo. L. Rev.* (1989),,, "ensuring persons in an advisory role, would be able to
6. express their opinions freely to agency decision makers,, without fear of inhibiting
7. frank discussion of policymakers. That does **not** include supervisory level Fowble.

8. "Some litigants properly seek to overturn an agency action, using the
9. device of 'contemporaneous construction discovery', and believe statements
10. made during the deliberative process will be helpful" ... See Fowble RP10/31/2018
11. Docket 18 10796 Rejected Exhibits 3-10, for ,, 'Fowble ,,statements made',,, and
12. directly upon which Fowble Rejection Order, based on prior (SEGREGATION Order,
13. as a misapplication of the law),,, was used to reject my NECK INJURY only,, claim.

14. "Others want factual data, contained in predecisional materials" ... Relate to
15. SEGREGATION, and LIGHTING UP,, as opposing 'legal concepts', as 'Questions
16. Of Law',,, from pg.34 of the Medical Examiners' Handbook, my pre-existing,, legal
17. argument is directly based. Only 'Lighting Up', is legally proper in my case-specific.

18. Do not conflate 'contemporaneous construction discovery' ... Its label means,,
19. I can use this legal practice as a more 'general attack on agency interpretations...

20. Agency to mean, IAJ,, and the Board,, and how agency IAJ,, and the Board,,
21. applied its interpretation of 'deliberative process privilege' ,, and 'whether it was
22. contemporaneously issued, and whether it was precedent consistently applied' ...
23. If discovery, (or my May 16, 2019 SPECIFIC RAISED OBJECTIONS) **CABR 59-61**,
24. specific to why Fowble is **not** protected by 'deliberative, or mental process' privilege,
25. if present interpretation ie., (IAJ, and Assistant Chief Judge Knowrasa T. Patrick)
26. and then the Board Panel,, has been inconsistently applied,, then,, "the present
27. interpretation,, is entitled to little or no deference". My extra commas for emphasis.

1.
2. Department would need to defeat even just one of,,, but will **not** be able to
3. defeat any one of,,, multiple reasons herein,,, why Mark Fowble is **not** protected
4. by any 'deliberative process' (as same as 'mental process') privilege.

5. As this court refers to Dr. Sullivans' pages from her medical testimony, all in
6. my favor, to include (APPENDIX) RP10/31/2018 Docket 18 10796 pgs.52-56,
7. ,,,'in my favor',,, to mean, Dr. Sullivan makes it clear, throughout her both Dockets
8. testimony, that ,,,'more workup',,, should have been done. And see Dr. Sullivan
9. pg.52 all, and at 2-17,,, what could cause ,,,'displacement',,, and ,,,'instability',,,
10. and at 23-25,,, ,,,'Occult',,, Injury, could result from, what is **not** seen, or known
11. on a simple x-ray... See Dr. Sullivan pg.53 at 1-9. See pg.55 my question at 5-8.

12. See my question pg.55 at 21-25, specific to x-ray report possible fracture.
13. See pg.56 at 1 Dr. Sullivan answer,,, Yes. See Dr. Sullivan at 14-21. See at 16-17
14. ,,,'the State',,, as the Department did conceal,,, perhaps very important diagnostic
15. information from Dr. Sullivan, as prior films were based on my original,,, June 20,
16. 2017 INJURIES only,,, claim, ZB21147, as Docket 17 25495. This is a textbook
17. example of 'State',,, 'abuse of discretion',,, and commanded a Board,,, 'abuse of
18. discretion' standard of review, but denied me. Pg.56. at 19-21, 'but doctors could
19. **not** do more',,, as my January 30, 2017 NECK INJURY,,, was **not** allowed to be
20. medically, or legally,,, ie., ,,,'Lighting Up',,, ,,,' adjudicated,,, as a NECK INJURY.⁹

21. Remember: 'Legal concept' of ,,,'Segregation',,, pg.34 the Medical Examiners'
22. Handbook, is also legally,,, directly related to,,, 'pre-existing',,, and 'aggravation'...

23. ⁹
Stone v Olinger (Supervisor of the Department) 6 Wn. 2d 643 (1940) [2]
24. *"In considering cases of "aggravation", following a classification of perma-*
25. *nent partial disability, the court proceeds upon the principle that the aggra-*
26. *vation has reference to an increase of disability occurring after a claim has*
27. *been closed; and there can be no proper award in such a case, unless it ap-*
28. *pears that, (1) the condition of the injured workmen has previously been de-*
termined to have reached a fixed state; (2) a rate of compensation was estab-
lished for such disability; (3) the claim was closed on that basis and; (4) the
increase of disability was found to occur after the date of such closing".
Reference- Rem. Rev. Stat., section 7679... RCW 51.32.080(5)...

1.
2. Refer back to Dr. Sullivan RP09/24/2018 Docket 17 25495 pg.26 at 15-20,
3. (APPENDIX) medical testimony, **not** based, as **not** defeated by my legal argument,
4. as Dr. Sullivan,,, "The reason it was said to be pre-existing was based on studies
5. that were done on his neck"... "Those studies reflected disease in his neck that
6. could -- take time to develop"... So when Dr. Sullivan in her November 8, 2017
7. Addendum report, 'not aggravated by', it is **not** (medical Dr. Sullivan) legally inten-
8. ded to be, based on a 'legal concept' of SEGREGATION. *McGuire ft.nt 2* pg.8.

9. This was completely ignored by the IAJ, and the Board Panel, but as was
10. the IAJ, and Board Panel legal duty, to also decide SEGREGATION legal concept.¹⁰

11. But when you view RP10/31/2018 Docket 18 10796 **CABR** Rejected Exs'.
12. 3-10,,, Mark Fowble refers directly to Dr. Sullivans' medical opinion only,,, based on
13. 'aggravation', but,,, as the 'ACT' ,,,'original and sole tribunal legal adjudicator' ,,,
14. Mark Fowble is legally obligated to determine 'aggravation' ,,,' to 'SEGREGATE' ,,,'
15. as pg.34,,, the Medical Examiners' Handbook, ,,,'Whether a condition has been
16. "lighted up" or needs to be "segregated" is a legal determination made by the
17. department"... But in my case specific,,, ,,,'SEGREGATION,,, must be based on
18. whether a pre-existing condition was active, known, diagnosed, and treated prior to
19. my January 30, 2017 INJURIES. Dr. Sullivan "studies" were done August 23, 2017.

20. Refer back to *McGuire v Dept. Of Labor & Industries*,,, pg.8 ft.nt.2 herein, as
21. the "vital question" ,,,' and as controlling *stare decisis* to my specific legal argument.

22. And see why the Department, and (Olympic Interiors Inc., as in violation of
23. the 'doctrine of clean hands'),,, then cannot successfully legally argue, any type
24. of preclusive effect, whether *res judicata*, or collateral estoppel.

25. ¹⁰
26. *King v Department Of Labor & Industries 12 Wn. App. 1 (1974) "However,*
27. *before a party can be precluded by principles of res judicata from litigating a*
28. *specific issue at a later time, the party must have had clear and unequivocal*
notice of issues adjudicated by the prior order, so that the party has had an op-
portunity to challenge the specific finding. Indeed, we have held on several oc-
casions that an order of the Department will not be held to have a res judicata
effect unless it specifically apprises the parties of the determinations being made".

1.
2. So if Dr. Sullivan's testimony, as 'studies done', as specific, refers to
3. 'studies done', August 23, 2017, as specific to "pre-existing", then Dr. Sullivan
4. was **not** possibly as specific, determining a legal reference to SEGREGATION,
5. and then Dr. Sullivan as specific, could **not** legally have been, as specific to
6. "pre-existing", legally determining an ****active**, known, diagnosed, and treated
7. NECK condition prior to my January 30, 2017 NECK INJURY. Then Mark Fowble
8. lied in RP10/31/2018 Docket 18 10796 **CABR** Rejected Exs'.3-10, as Department
9. 'abuse of discretion', ignored, as never determined by IAJ, or IAJ Chief Assistant
10. Judge, or by the Board Panel. See ****Dr. Sullivan 10/31/2018 pg.46 at 24-25**
11. (APPENDIX) I was deprived a medical opinion by a ("provider", pg.46 at 25).

12. See also RP10/31/2018 Docket 18 10796 pg.100 (APPENDIX). IAJ Judge
13. McDonald, referencing all Board judges who incorrectly decided that Fowble was
14. somehow exempt from testimony. Pg.100 at 18-20, "the rationale and the case law
15. backing up that up is in the record"... I have defeated BIIA 'rationale and case law'.

16. Then as I have successfully demonstrated herein, Mark Fowble was **not**
17. exempt from testimony, as the 'deliberative processes' decision by both IAJ
18. Judge Cynthia C. McDonald, and Board Assistant Chief Judge Knowrasa T. Patrick,
19. and ultimately by the Board, is misplaced, as 'arbitrary', 'capricious', an 'abuse
20. of discretion', and as a 'Prejudicial Error', as Mark Fowble was my 'material
21. witness', as dispositive, as Dr. Sullivan's medical testimony is in my favor, as
22. prevailing for me, as the only medical testimony I needed, because I was denied
23. a 'fairly and equitably process', (see pg.16 ft.nt.5), by Mark Fowble, January 19,
24. 2018, was within the jurisdictional province of the Board per the 'ACT', to consider,
25. "fairly and equitably", to compel Fowble testimony, then **not** 'ACT' correct for IAJ,
26. or Board, and **not** Department, or Olympic defensible per the 'ACT', and must be
27. reversed and remanded, after further RCW 51.52.115 IRREGULARITY testimony.

1.
2. As properly interpreted from the bench, the bar, and from academia, as
3. 'deliberative process privilege' is rooted in the common law doctrine, and main
4. relevance specific to FOIA request, and to a federal court, then invoking the
5. 'Morgan doctrine', from *Morgan v United States* 304 U.S. 1,18 (1938),,, but as
6. in-context to a Secretary of Agriculture as a policy-maker, and as a quasi-judicial
7. official, performing an adjudicatory role presiding over proceedings resembling
8. Judicial Hearings, then restricts the court to take leave to 'probe into the inner
9. processes of the administrators' mental state', does **not** apply to Fowble, as a
10. supervisory level person, as the Department (L&I) Director, would have had to
11. invoke any such executive policy-making authority prior to Fowble being called
12. as a timely confirmed witness, even if the L&I Director was considered a quasi-
13. judicial policy-maker, which the IAJ, nor Board Panel ever established.

14. As the best example, Board Of Appeals is a quasi-judicial agency.

15. ¹¹ Fordham Law Review Vol. 77 ISSUE 3 Article 6,,, The need to stem abuse...
16. 'Permitting invocation of the deliberative process privilege far down the chain
17. of command in a government agency poses a high risk for abuse of the privilege
18. in litigation, highlights not only the great weight granted to private litigants needs,
19. but also the potential for abuse in the litigation context, as those invoking the
20. privilege may do so merely to win discovery skirmishes'... This as both AAG
21. Balch, IAJ, and the Board Panel abused proper interpretation of the privilege.

22. 'Deliberative Process Privilege must balance the relevance of the evidence,
23. the availability of other evidence, the seriousness of the litigation, the role of
24. the government, ie., (the 'ACT'),, and the possibility of future timidity by govern-
25. ment employees'... 'The determination of sufficient need occurs on a case-by-
26. case basis. Moreover, when the litigation concerns a claim of government mis-
27. conduct, the deliberative process privilege will not apply'. This specific to Fowble
28. misapplication of the law specific to SEGREGATION of my NECK INJURY.

29. 'Because litigants have specific lawsuit related claims, for which they need the
30. requested documents, there must be procedural requirements that are more
31. stringent in the context of litigation, than in the FOIA Framework so as to filter out
32. flimsy assertions of the deliberative process privilege'...

33. I requested the IAJ, and the Board Panel to invoke its RCW 51.52.020 'rule-
34. making power', that would **not** compel the Board to enlarge, or restrict, its juris-
35. diction, or,, modify, or abrogate, the 'substantive law'.
36. 3 Procedural Requirements: (1) A formal claim of privilege invoked by the head
37. of the department. My case specific,, did **not** happen. (2) The person asserting the
38. privilege must have personally considered the information requested. My case
39. specific, means the L&I Director, as 'personally',,, did **not** happen. (3) There must
40. be a detailed specification of the privilege claimed, as well as an explanation as
41. to why the requested information falls within the scope of the privilege.

1.
2. There is no 'functioning of the government' concern for the Department, as
3. **not** correctly interpreted, or considered by AAG Balch, the IAJ, and Board Panel.

4. (APPENDIX) No.6. Once Fowble communicated the November 14, 2017
5. Segregation Order, then my immediate Appeal,,, giving the Board ,,jurisdiction,,,
6. specific to claim ZB21147, as Docket 17 25495, then,,, 60 days as to Fowble
7. January 16, 2018 Rejection Order ie., RCW 51.52.060 transpired,,, then making
8. final, the November 14, 2017 Segregation Order, 'The Department and Fowble, is
9. 'without authority to affirm, or modify" the November 14, 2017 Segregation Order.

10. But Fowble as provable, (APPENDIX) No. 6 document included, "because
11. there is a current medical opinion",,, meaning,,, Fowble invoked the November 14,
12. 2017 Segregation Order,,, to Reject separate claim ZB23273 as Docket 18 10796,
13. that not only does the January 16, 2018 Rejection Order **not** have medical evidence
14. to support that Rejection Order, (see ft.nt. 1 pg.6 herein),,,, but the Department, as
15. Fowble, was 'without authority', and,,, without 'subject matter jurisdiction', to invoke
16. a November 14, 2017 claim ZB21147 Segregation decision, to on January 16, 2018,
17. Reject my separate NECK INJURY claim ZB23273, because claim ZB21147 was
18. at that moment,,, January 16, 2018,,, within the Boards' jurisdiction,,, only...

19. Then the IAJ, and Board Panel,,, never considered,,, whether the Department
20. January 16, 2018 Rejection Order should be void,,, as the Board only... had juris-
21. isdiction to decide Segregation,,, not the Department,,, on January 16, 2018...

22. Then the Board Panel never considered CR 60(b)(4) specific to Olympics' 'duty
23. to preserve', and document falsification violation', but also CR 60(b)(5) specific to
24. Department January 16, 2018 Rejection Order based on Department jurisdictional
25. defect, and specific to a Board RCW 51.52.115 Fowble privilege 'IRREGULARITY'.

26. *Cena v. State* 121 Wn. App. 352 88 P.3d 432 (2004),,, (originally *Cena v L&I*),,,
27. Mandamus. St. Supreme Court Petition denied, as 'the court',,, "Cena could have
28. filed a writ of mandamus pursuant to RCW 7.16.160 in Superior Court". 'I did'...

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 54390-7-II

DECLARATION OF MAILING SERVICE

I Michael J. Collins Pro se, under penalty of perjury, and pursuant to the laws of the State Of Washington, do hereby declare, I will both U. S. mail with U.S. mail receipt proof of such U.S. mailing, and will by way of email verification to Olympic Interiors Inc. legal counsel of record Williams, Kastner & Gibbs PLLC, serve an exact copy of my Appellants' Brief, Motion To File my Over sized Brief, and Letter to Court to include my Appendix mandate, as I will timely serve as first Court date stamped, to the address, and on the specific date as listed.

On this day  February 10, 2020

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