

No. 68912-6-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BRANDON TAPPERT,

Appellant,

vs.

NUPRECON GP, INC., and NUPRECON, LP,

Respondents.

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BRIEF OF APPELLANT BRANDON TAPPERT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
A. ASSIGNMENTS OF ERROR.....	1
(1) <u>Assignments of Error</u> .....	1
(2) <u>Issues Pertaining to Assignments of Error</u> .....	1
B. STATEMENT OF THE CASE.....	1
C. SUMMARY OF ARGUMENT .....	6
D. ARGUMENT .....	7
<u>The Trial Court Erred in Granting Nuprecon’s     Summary Judgment Under RCW 51.04.010,     Where Uncontroverted Evidence Established that     Nuprecon had Actual Knowledge that Injury was     Certain to Occur, and Disregarded that Knowledge</u> .....	7
E. CONCLUSION.....	14
Appendix	

TABLE OF AUTHORITIES

Page

Table of Cases

*Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). 8-9, 11, 14  
*French v. Uribe, Inc.* 132 Wn. App. 1, 130 P.3d 370 (2006). ..... 11, 13  
*Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231,  
159 P.3d 494 (2007)..... 11, 12  
*Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P3d 1268 (2001) .... 13  
*Kuhn v. Salerno*, 90 Wn. App. 110, 951 P.2d 321 (1998) ..... 7  
*Stenger v. Stanwood School District*, 95 Wn. App. 802,  
977 P.2d 660 (1999) ..... 13, 14  
*Vallandigham v. Clover Park School District No. 400*, 119 Wn. App 95,  
79 P.3d 18 (2003)..... 13, 14

Statutes

RCW 51.04.010 ..... 1, 7, 8  
RCW 51.24.020 ..... 1, 8, 11, 12, 13

A. ASSIGNMENTS OF ERROR

(1) Assignments of Error

The trial court erred in entering the order granting Nuprecon's motion for summary judgment dismissing Tappert's civil action as barred under the Workers' Compensation statute RCW 51.04.010.

(2) Issues Pertaining to Assignments of Error

Did the trial court err in dismissing Tappert's claim for injuries as allowed under RCW 51.24.020, where there is uncontroverted evidence that Nuprecon knew carbon monoxide had reached hazardous levels in the room, that injury was certain to occur, Nuprecon deliberately failed to warn Tappert of that certain danger, and instructed him to remain in the room and suffer continued exposure?

B. STATEMENT OF THE CASE<sup>1</sup>

The present case arises out of the tragic injury to Brandon Tappert by carbon monoxide exposure in the workplace. It is about an injured worker's right to proceed against his employer for intentional injury, outside of the workers' compensation system.

Brandon Tappert was an asbestos abatement worker for Nuprecon. It is Nuprecon's business to do remediation of asbestos and other

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<sup>1</sup> The Report of Proceedings is referenced by the date of the hearing (e.g. RP 5/18/2012).

hazardous materials. On July 5, 2007, Brandon was with his work crew at a jobsite in Seattle, Washington. Their duties on that day were to remove asbestos tiles, as part of an asbestos remediation project undertaken by the defendant. The work involved the use of a machine that chipped and/or stripped tiling and other flooring materials off the floor. The machine was manufactured by a company named Blastrac. CP 222, 237.

The Blastrac floor chipper/stripper was large machine, likened to a “ride-on lawnmower” and powered by a propane engine. CP 224. There was a large warning label, prominently displayed on the machine, warning the operator to vent the Blastrac’s exhaust fumes out of doors. According to the warning label, failure to vent the machine’s exhaust fumes could result in fainting, nausea or death to those exposed to carbon monoxide (CO) from the fumes. CP 215-216, 230, 237.

Because the worksite was a building undergoing asbestos remediation, that area of the building, and the windows in particular were sealed with plastic tarp-like sheets. These sheets were in place for containment purposes. They were to prevent the possible spread of asbestos contaminated particles to the surrounding outside area. There was also a negative air machine used, to keep the pressure in the abatement room lower than that outside the room, therefore containing the

asbestos dust within the abatement area.<sup>2</sup> CP 220. The plastic containment sheets and negative air machine also prevented the ventilation of carbon monoxide gases to the outside.

For their safety, Brandon Tappert and the other abatement crew members were given Tyvex suits, goggles and dust masks to wear. The dust mask covered the workers' nose and mouth, and created a seal to prevent inhalation of the asbestos dust. The mask had HEPA filters only, and was not designed to protect the wearer from the inhalation of carbon monoxide or other fumes or gases.<sup>3</sup> CP 222-223, 236-238.

The supervisor for this work crew was Rob Lindsey. Lindsey had been a job supervisor for Nuprecon for several years. On July 5, 2007, Lindsey and his crew were behind schedule and under a lot of pressure to make up time. Lindsey and Tappert were working in classroom with the Blastrac, stripping floor tiles. The rest of the crew was in other rooms working. Lindsey operated the Blastrac, and Brandon picked up the debris and put it in a garbage container in the room. Because the work

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<sup>2</sup> This information came from Nuprecon's designated speaking agent, Peter Wold. During his deposition, Mr. Wold explained, doing this would "ensure that you have negative pressure inside the enclosures so that air is always trying to enter the enclosure rather than leave the enclosure as far as control of the fiber release." CP 220.

<sup>3</sup> HEPA filters are very fine filters designed to block particulate matter; in this case asbestos fibers. It forms a physical barrier to particles only. CP 223, 226, 237.

area was sealed, the Blastrac's exhaust fumes were not vented to the outside. CP 237.

The only type of "protective equipment" Nuprecon provided the work crew against carbon monoxide was a CO monitor worn by Lindsey. He was the only one given a CO gas monitor. CP 226-227. It was set to activate an alarm if carbon monoxide gas reached hazardous levels. Lindsey understood that level was 70 parts per million. CP 237. (Tappert and the other crew members were not given CO monitors, and had no way to measure their own exposure levels. In that regard, they had to rely on their supervisor to notify them of danger.)

As Lindsey was finishing chipping floor tiles in the classroom with Brandon, the carbon monoxide from the Blastrac's exhaust reached hazardous levels,<sup>4</sup> and the CO alarm went off. Lindsey turned off the Blastrac and left the room. He did not tell Brandon the alarm had been triggered. Because the crew was behind schedule and under pressure to make up time, Lindsey left Brandon in the room to finish cleaning up the debris. He told Brandon to ventilate the room, which was something Brandon could not do given the requirement to keep the abatement area

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<sup>4</sup> Approximately 90 minutes after the accident occurred, air quality readings taken the WISHA inspector showed a carbon monoxide level in the classroom of 30,000 parts per million, over 400 times the activation level for the CO monitor. CP 215, 228.

sealed. Lindsey then went to another room across the hallway to chip floor tiles. CP 237.

After approximately 20 minutes, Lindsey went back to check on Brandon's progress. He found Brandon unconscious on the floor with the dust mask still on his face. He and the others took Brandon outside and called 911. CP 238. Brandon was then taken to the hospital where it was determined that he had suffered a massive exposure to carbon monoxide. His carboxy-hemoglobin was 24%. The massive amounts of carbon monoxide he had been exposed to came from the unvented exhaust fumes of the Blastrac machine. CP 215.

An inspector from the Department of Labor and Industries arrived at the worksite shortly after the accident and tested the air quality. Carbon monoxide readings taken in the area in which Brandon had last been working (around the Blastrac), showed a CO level of 30,000 parts per million. This was over 400 times the level set for the CO monitor worn by Lindsey. CP 215, 228.

On June 29, 2010, Brandon Tappert filed suit against Nuprecon in King County Superior Court under cause number 10-2-23113-7, alleging Nuprecon's deliberate intent to injure him, and arguing the application of RCW 51.24.020 to grant jurisdiction to the superior court. CP 1-5.

Nuprecon moved pursuant to CR 12(b)(6) for dismissal of Tappert's claim on the grounds that workers' compensation was the sole remedy to the injured worker and his case was barred by RCW 51.04.010. After oral argument, the trial court entered an order denying Nuprecon's motion to dismiss. CP10-12.

On April 20, 2012, Nuprecon filed its motion for summary judgment seeking to have Tappert's case dismissed for failure to show deliberate intent to injure, thereby triggering the exception under RCW 51.24.020. Following oral argument at the hearing on April 18, 2012, the trial court granted Nuprecon's motion, and dismissed Tappert's case. CP 275-276.

Thereafter, Tapper filed his notice of appeal to this Court.

#### C. SUMMARY OF ARGUMENT

The trial court erred in granting summary judgment to Nuprecon and dismissing Brandon Tappert's claim. Nuprecon was in the business of asbestos remediation, a process which required the sealing and air-tight containment of the workspace. It forced its workers to work in enclosed spaces with machinery that produced carbon monoxide exhaust, and did not ventilate that exhaust out of doors as appropriate. It provided its individual workers with no equipment whatsoever to protect them from the dangers of carbon monoxide inhalation. The only equipment utilized

with regards to carbon monoxide was an alarm worn by the worksite supervisor. The individual workers depended upon the supervisor to alert them when the alarm was triggered by hazardous levels of carbon monoxide gas. When the carbon monoxide alarm, in fact did go off, the supervisor did not inform Tappert of that fact. Because the project was behind schedule, the supervisor instructed Tappert to remain in the room to continue clean-up while he, himself, left the area.

The trial court erred in finding that the supervisor's actions of failing to notify Tappert about the carbon monoxide alarm, and leaving him in the sealed room with hazardous levels of carbon monoxide fumes, did not constitute deliberate intent to injure Brandon Tappert, as required under RCW 51.24.020.

D. ARGUMENT

This Court reviews summary judgments *de novo*; all facts and inferences from the facts are to be viewed in a light most favorable to the nonmoving party. *Kuhn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

- (1) The Trial Court Erred in Granting Nuprecon's Summary Judgment Under RCW 51.04.010, Where Uncontroverted Evidence Established that Nuprecon had Actual Knowledge that Injury was Certain to Occur, and Disregarded that Knowledge.

Washington State's workers' compensation law – the Industrial Insurance Act – is codified under RCW Title 51. In general, this act provides the sole remedy for workers injured during the course of their employment. It acts as a bar to seeking relief in civil court by removing jurisdiction. RCW 51.04.010. There is an exception to that bar which is found in RCW 51.24.020. It reads:

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of 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.

RCW 51.24.020. The exception to the bar applies in this case, and the plaintiff has provided sufficient evidence to establish deliberate intent.

The exception stated above has been the subject of considerable litigation. Initially it applied only in cases where the employer physically assaulted the worker. The application was expanded in 1995 in the case of *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278. The facts in *Birklid* are significant. In that case, Boeing began using a fiber glass cloth containing phenol-formaldehyde resins. This was necessary to meet fire retardancy standards. The exact effects of these resins on Boeing workers were uncertain. After a course of time, workers began experiencing adverse physical symptoms as a result of their exposure. They requested

various forms of relief, which were ignored by Boeing, and they continued to suffer injury. Based upon the fact that the workers were being injured, Boeing disregarded the injuries and required the workers to continue working in the conditions, the court found Boeing displayed the deliberate intent to injure its employees. The court established a two part test defining “deliberate intention.” With this test the plaintiff must show that 1) the employer had actual knowledge that an injury was certain to occur, and that 2) the employer disregarded that knowledge. *Birklid* at 865. This two pronged test is the universally applied test for establishing an employer’s deliberate intent.

The instant case deals with carbon monoxide, the hazards of which are common knowledge universally accepted. It is common knowledge that carbon monoxide is a deadly poison found in the exhaust fumes of gasoline and propane engines, charcoal grills, and fireplace smoke. It is common knowledge that many people commit suicide by breathing car exhaust (i.e. carbon monoxide). It is common knowledge that carbon monoxide was used in death chambers of Nazis concentration camps during World War II. Every winter public service announcements warn of the carbon monoxide hazard of using charcoal grills indoors during power outages. Therefore, a company like Nuprecon, was well aware of the inherent hazards of carbon monoxide exposure.

In addition, the Blastrac floor chipper had a large warning label on it. The label warned of the injury and possibility of death that would result if fumes were not properly vented. CP 215-216, 230, 237. However, because this was an asbestos abatement project, and the room *had to be sealed*, the Nuprecon deliberately disregarded this label, forcing Tappert and the others to be exposed to unvented exhaust fumes.

Here, Nuprecon had actual knowledge the moment the supervisor's carbon monoxide alarm went off. The alarm was set to activate when carbon monoxide reached hazardous levels. Of utmost significance is that the carbon monoxide alarm was the *only* piece of safety equipment used by the employer that pertained to carbon monoxide; and it was *only* issued to the supervisor (Rob Lindsey). As a result, the workers were utterly reliant on the supervisor to warn them of carbon monoxide hazards, and it was the supervisor's duty to do so. CP 222-223, 237. If the alarm activated, Lindsey was to warn the others. The procedure was to then to clear everyone out of the room and ventilate the area until the gas dissipated. CP 238.

When the supervisor's alarm activated, he knew the carbon monoxide would cause injury to whoever remained in the room (i.e. Tappert). He also knew that *he* was Tappert's only source for warning, and that Tappert's reliance on him was absolute. By instructing Tappert to

stay in the room and finish cleaning up, without telling him the alarm had activated, the supervisor disregarded the actual knowledge that injury to Tappert was certain to occur.

The fact that the supervisor told Tappert to “ventilate the room,” as he walked out, is irrelevant. The supervisor did not give Tappert the context necessary (i.e. that the alarm had activated), to make it meaningful. A trained asbestos worker such as Tappert would not “ventilate” a room where asbestos containment was necessary, without a reason to do so. Had the statement included the information about the carbon monoxide alarm, then Tappert would have ventilated the room and left with his supervisor until the fumes had dissipated. This would, of course, have cost valuable time and put the employer farther behind schedule on the project.

These facts are uncontroverted. These facts are sufficient to support the application of RCW 51.24.020 and defeat Nuprecon’s Summary Judgment for dismissal.

Prior case law in this area is easily distinguished. Two significant cases decided by this Court have been cited in an attempt to change the universal *Birklid* test. They were heavily relied upon by the respondent in its briefings. They are: *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 159 P.3d 494 (2007); and *French v. Uribe, Inc.*, 132 Wn.

App. 1, 130 P.3d 370 (2006). However, this issue by nature is fact intensive, and they are distinguishable.

In *Garibay*, a sudden, catastrophic rupture of a gas pipe exposed the worker to toxic gases killing him. The worker's family brought suit under RCW 51.24.020 on the grounds that the defendant had failed to maintain the structural integrity of the pipe and knew or should have known that a rupture was imminent. The court ruled that the defendant's failure to maintain the pipe did not give it actual knowledge that injury would occur to that worker. The court reasoned that the defendant may have had knowledge that a rupture would occur in the pipe some at some location and at some time in the future, but who (if anyone) would be present at that time and place was unknown. Given this *uncertainty* of time and place and presence of the plaintiff at the moment of rupture, the court held that the employer had to have actual knowledge that injury to that employee was *certain* to occur.

Here, Nuprecon put Tappert in a sealed room it knew was filling up with carbon monoxide exhaust. Nuprecon knew the hazardous nature of the carbon monoxide exhaust. It also knew the carbon monoxide exhaust was supposed to be vented out of doors and refused to do it. The remoteness of time, place and presence of the plaintiff, as seen in *Garibay*,

does not exist here. Nuprecon had actual knowledge that injury to Brandon Tappert was certain to occur.

In *French*, the plaintiff was injured as a result of a construction crane striking a live electrical wire. The crane had been operating in close enough proximity to the wires to require the wires to be de-energized. The defendant employer ignored this requirement. The crane subsequently struck the live wire and plaintiff suffered serious injury. The plaintiff argued that the defendant was liable under RCW 51.24.020 on the grounds that it had violated safety standards when it failed to de-energize the line due the crane's proximity. The defendant argued that it had no knowledge of the effects a crane strike on a live wire would have. Therefore, the court held that absent a pattern of past injuries from live-wire strikes, the plaintiff could not establish the requisite level of knowledge of the defendant. The court reached this conclusion after analyzing several cases: *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P3d 1268 (2001), *Stenger v. Stanwood School District*, 95 Wn. App. 802, 977 P.2d 660 (1999), and *Vallandigham v. Clover Park School District No. 400*, 119 Wn. App 95, 79 P.3d 18 (2003).

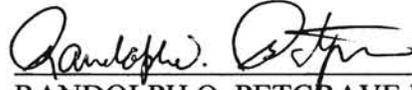
In *Hope*, the plaintiff was forced to use cleaning solutions which caused rashes. Since the effects of the cleaning products were uncertain and not known for causing harm, a pattern of injury to the plaintiff was

required to give the employer knowledge. In *Stegner* the plaintiff was a special education teacher who was repeatedly injured by a violent student. Since the child's propensity for violence was uncertain and unknown at the time, a pattern of injury to the plaintiff was required to impute knowledge to the employer. In *Vallandigham* the plaintiff was another special education teacher being repeatedly injured by a violent student. In this case, however, the defendant had implemented remedial measures. The plaintiff filed suit before it could be determined whether or not the remedial measures worked. The court dismissed the action on the grounds that there was not pattern of injury following the remedial measures. The same cannot be said of the present case. The commonly known hazards of carbon monoxide, the triggering of the alarm, and the instruction to Tappert to remain in the room, clearly meet the *Birkliid* test, and establish Nuprecon's deliberate intent to injure Brandon Tappert.

#### E. CONCLUSION

For the reasons outlined above, the trial court erred in dismissing the Tappert's civil suit against his employer Nuprecon, for the deliberate injuries he suffered from exposure to carbon monoxide.

DATED this 9<sup>th</sup> day of October, 2012.



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# APPENDIX

RCW 51.04.010

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

RCW 51.24.020:

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of 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.

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OF THE STATE OF WASHINGTON

BRANDON TAPPERT,	)	Case No.: 68912-6-1
	)	
Appellant,	)	CERTIFICATE OF SERVICE
	)	
vs.	)	
	)	
NUPRECON GP, INC., and NUPRECON,	)	
LP,	)	
	)	
Respondents.	)	
_____	)	

I, Randolph O. Petgrave, hereby certify under the penalty of perjury of the laws of the State of Washington that on October 8, 2012, I filed the Appellate Brief of Appellant Brandon Tappert, with the Court of Appeals Division I, and that I further served the same on Aaron Owada by email at [aowada@amslaw.net](mailto:aowada@amslaw.net), and [lockerman@amslaw.net](mailto:lockerman@amslaw.net), the parties having agreed to accept service of documents by email.

Dated this 8th day of October, 2012.

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