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No. 68912-6-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRANDON TAPPERT,

Appellant,

vs.

NUPRECON GP, INC., and NUPRECON, LP,

Respondents.

RESPONSE BRIEF OF RESPONDENTS NUPRECON GP, INC., and NUPRECON, LP

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COUNTER-STATEMENT OF FACTS

A. Facts alleged in the Complaint.

Plaintiff, Brandon Tappert, was an employee of Defendant GP Inc., and/or Nuprecon LP as an asbestos abatement worker. Complaint, Paragraph 6. (CP 2) On July 5, 2007, Plaintiff was assigned to work at an asbestos abatement project in Seattle to remove asbestos tile. Complaint, Paragraph 7. (CP 2) Plaintiff's work required the use of a Blastrac floor chipper/stripper powered by a propane engine. There was a large warning label prominently displayed on the machine which warned the operator to vent the machine's exhaust fumes out of doors. According to the label, failure to vent the machine's exhaust fumes could result in fainting, nausea or death to carbon monoxide. Complaint, Paragraph 8. (CP 2) Declaration of Avery Brown. (CP 36)

The work area, including the windows in particular, were sealed as the work involved an asbestos abatement project and containment was necessary to prevent the possible spread of asbestos. Complaint, Paragraph 9. (CP 2)

Plaintiff was provided a dust mask to wear while operating the Blastrac machine. The purpose of the dust mask was to prevent the inhalation of dust and other particulate matter. It was not designed to protect workers against inhalation of carbon monoxide or other fumes or

gases. Complaint, Paragraph 10. (CP 2)

On July 5, 2007, Defendant required Plaintiff and his crew to work in a sealed room where the Blastrac was being used. The crew member operating the Blastrac would chip/strip the floor tiles off the floor; Plaintiff picked up the debris and put it in a garbage container in the room. Fumes from the Blastrac were not exhausted to the outside. Complaint, Paragraph 11. (CP 2)

The lead member of Plaintiff's crew wore a CO gas monitor. It was set to activate an alarm when the CO gas level reached 70 parts per million (PPM). Plaintiff was not given a CO detector to wear. He was unable to measure his exposure levels or be warned when levels of CO exceeded 70 PPM. Complaint, Paragraph 12. (CP 3)

"After the other crew members finished chipping and stripping the floor tiles with the Blastrac, they left Brandon in the sealed work room to clean up the debris. Brandon was left in the enclosed room where CO produced by the Blastrac, [sic] remained." Complaint, Paragraph 13, lines 12 – 14. (CP 3)

After approximately 20 minutes, one of the crew members returned to the area and found Plaintiff lying on the floor unconscious. Complaint, Paragraph 14 (Emphasis added). (CP 3)

Shortly after Plaintiff was found, a safety inspector from Labor and

Industries took CO readings which showed a CO level of 30,000 PPM. This was over 400 times the level set for the carbon monoxide detector which was worn by the lead crew member. Complaint, Paragraph 16. (CP 3)

Plaintiff alleged that, "Defendants were aware and had actual knowledge of the grave danger the unvented exhaust fumes of the Blastrac posed to its workers (including Brandon Tappert). They willfully and deliberately disregarded that danger." Complaint, Paragraph 17, lines 17 – 24. (CP 3)

Plaintiff was taken to the hospital where it was determined that he had suffered a massive exposure to carbon monoxide, and had a carboxy-hemoglobin level of 24%. Complaint, Paragraph 18. (CP 4)

The carbon monoxide exposure suffered by Plaintiff came from the unvented exhaust fumes of the Blastrac machine. Complaint, Paragraph 19. (CP 4) As a result of requiring employees to operate propane powered equipment or machinery indoors without venting the fumes outside, Plaintiff alleged that the Department of Labor & Industries cited Nuprecon for "serious" violations of the Washington Industrial Safety and Health Act and Washington Administrative Code. Complaint, Paragraph 20. (CP 4).

Plaintiff also alleged that Defendants have a history of workplace safety violations for exposing its workers to carbon monoxide gas, by operating gasoline or propane powered equipment indoors without venting the exhaust fumes outside. Complaint, Paragraph 21. (CP 4)

Based on the above, Plaintiff contends that Defendants engaged in a deliberate intent to injure Plaintiff as defined in RCW 51.24.020. Complaint, Paragraph 23. (CP 4)

B. Defendant's actual safety citation history and efforts to promote safety and health at the workplace.

Contrary to the allegations set forth in the Complaint, there were no material facts in dispute that Defendants were neither cited by the Department for requiring employees to operate propane powered equipment or machinery indoors without venting the fumes outside as alleged in Paragraph 20 of the Complaint, (CP 4), nor does Defendant have a history of exposing employees to carbon monoxide as alleged in Paragraph 21 of the Complaint.

As set forth in the Declaration of Avery Brown, (CP 38), and the Declaration of Aaron K. Owada (CP 47 – 202) the Washington State Department of Labor & Industries issued the following citations against Nuprecon for violations alleged to have occurred prior to July 5, 2007, the date Plaintiff was exposed to carbon monoxide:

No. 311119721. In that citation, the Department cited Nuprecon with two serious violations.

Item 1-1a WAC 296-155-110(3)(e) "Serious" $1400.00

Affirmed

"The employers written accident prevention program did not adequately address the following: Identification of hazardous gases used on the job and instruction about the emergency action to take after accidental exposure to them, in that it did not instruct employees to evacuate areas where elevated levels of carbon monoxide were detected."

Item 1-1(b) WAC 296-155-160(2) "Serious" **VACATED**

with total penalty assessed of $1400.00.

"The employer did not use feasible exposure controls to reduce employee exposure to carbon monoxide in that administrative controls did not require employees to evaluate areas where elevated levels of carbon monoxide were detected."

As noted in the Proposed Decision and Order, Item 1-1(b) was vacated.

This citation item was vacated by the Board. *See,* Proposed Decision & Order No. 07 W2093.

2. No. 310627937 Issued on 11/8/06

Item 1-1 WAC 296-62-07725(3)(a) "General"

"The employer failed to ensure that a medical surveillance examination was provided for one of the certified asbestos workers who was performing removal of class I asbestos material inside a negative pressure enclosure at Garfield High School... on September 7th, 2006."

3. No. 309879237 Issued on 7/18/06

Item 1-1 WAC 296-817-20035 "Serious" Changed to General

"Employer did not properly identify deficiencies in their hearing loss prevention program in that audiometric testing was not provided to employees who had noise exposure of over 180 days (Reference WAC 296-817-40010).

This Item was reduced from a "serious" violation with a $300.00 penalty to a "general" violation with no monetary penalty. See Order on Agreement of Parties dated May 30, 2007.

4. No. 309665156 Issued on 3/15/06

No violations issued.

5. No. 309238160 Issued on 12/21/05

Item 1-1 WAC 296-155-160(3) "Serious" Changed to "General"

"Nuprecon had not tested for unsafe concentrations of carbon monoxide while a propane-powered concrete saw exhausted into the enclosed space of the Bellevue Place Wintergarden atrium."

This Citation was changed from a "serious" violation to a "general" violation and the monetary penalty was reduced from $1,500 to $300. See Order on Agreement of Parties Docket No. 06 W0033.

6. No. 3086700595 Issued on 4/14/05

No violations issued.

7. No. 308670470 Issued on 5/02/05

Item 1-1 WAC 296-155-489(19)(b)(vi) "Serious"

$1,050.00

"Employer did not assure employee had donned fall protection gear when working from two separate elevated boom work platforms at heights roughly 25-ft above ground."

Item 1- 2a WAC 296-155-24510 "Serious"

$350.00

"Employer did not ensure an adequate fall restraint or fall arrest system was provided when employees were exposed to a fall hazard from an open edge of the roof top as well as parapet work locations that were roughly 22 plus feet above broken concrete and other building debris piles as well as hard concrete surfaces."

Item 1- 2b WAC 296-155-24505(1) "Serious"

"The employer did not ensure that a fall protection work plan was developed and implemented when employees are assigned to work in areas where fall hazards of more than 22 feet existed."

Item 1-3 WAC 296-155-489(19)(f) "Serious"

$1,225.00

"Employer did not assure employee observed operating instruction safety precautions by not standing on guardrails of the elevated boom work platform roughly 11-ft above ground."

8. No. 308073733 Issued on 11/22/04

Item 1-1 WAC 296-817-20035 "Serious"

$275.00 changed to "de minimis" with no monetary penalty.

"The employer did not ensure audiometric testing was used to identify hearing loss. One Nuteceh Concrete employee exposed to greater than 85 db TWA (time-weighted average) had not received an annual audiogram as required by WAC 296-817-40015. Inspection site: Morrison Hotel, 509 3rd Ave in Seattle, Wa"

This citation was modified by the Board from a "serious" violation to a "deminimus" [sic] violation with no monetary penalty. The Board concluded that there was no employee exposure to noise hazards as the employee was wearing hearing protection and the failure to get an audiometric test was an administrative error that did not diminish the effectiveness of the employer's comprehensive hearing conservation program that was a model for the industry. Proposed Decision & Order, pages 4 -5.

Contrary to the allegations made in the Complaint, there was ample evidence before the Court that Defendant did not have a history of workplace safety violations for exposing its workers to carbon monoxide gas, by operating gasoline or propane powered equipment indoors without venting the exhaust fumes outside as alleged in the Complaint at Paragraph 21.

C. L&I's inspection for the events that took place on July 5, 2007 involving Plaintiff at the John Roger's Elementary School.

As set forth in the Declaration of Avery Brown, Field Safety Officer for Nuprecon, Defendant had a policy and procedure to safely

control exhaust emissions. Specifically, Procedure 16.1.17, attached as Exhibit 1 to Mr. Brown's Declaration, set forth definitions and procedures to safely control carbon monoxide. This document provided definitions for carbon monoxide and, more importantly, it addressed specific procedures on how to set up the equipment, set up the job, regulate emission levels and what actions to take in the event an alarm was sounded. Additionally, Defendant conducted a Daily Safety Check, that specifically included checking for levels of carbon monoxide. As noted in Mr. Brown's Declaration, CO levels were monitored at the start of the job. There is a notation for a reading of ".0013" for "CO" on July 3, 2007. (CP 38).

Mr. Brown also indicated in his Declaration that the Blastrac BMS-270LPII Operating Instructions/Safety Precautions prepared by the manufacture were at the job site. Finally, Mr. Brown testified that the Blastrac machine that used liquid propane fuel was rented from Sun Belt as the equipment was not owned by Defendant. See Exhibit 3, (CP 43)the Invoice which shows that the equipment was rented from June 29, 2007 – July 5, 2007. Mr. Brown explained that the equipment came with a scrubber that removes 99% of the carbon monoxide. However, he was of the opinion that the scrubber must have malfunctioned as it is undisputed that Plaintiff was overcome by CO (Carbon Monoxide) which had been in

the room where he was working. Defendant was not aware that the scrubber on the Blastrac was malfunctioning on July 5, 2007. (CP 39)

D. The Declaration of Robert Lindsay submitted by Plaintiff do not support the conclusions presented by Plaintiff.

Mr. Robert Lindsey states in Paragraph 9 of his Declaration, (CP 237), provided by Plaintiff that, "…I, as the supervisor wore a carbon monoxide monitor, with an alarm that was set to go off if the carbon monoxide reached hazardous levels, which I understood to be 70 parts per million."

Mr. Lindsey also declared in Paragraph 13 of his Declaration (CP 237),

> As I was finishing chipping the floor tiles in the classroom I was working with Brandon, the carbon monoxide alarm went off. ***I turned off the blastract.*** I do not recall telling Brandon that the carbon monoxide alarm had gone off. ***I just told Brandon to ventilate the room***. Then I left him in the room to finish cleaning up. I went to another room across the hall to chip floor tiles.
>
> (Emphasis added).

Mr. Lindsey then stated that he never checked to verify that Brandon had ventilated the room. Lindsey Declaration at Paragraph 14. (CP 237). About twenty minutes later, ***he went back to check on Brandon.*** Lindsey Declaration at Paragraph 15. After finding Brandon unconscious, Paragraph 15, (CP 238), Brandon still had a mask on his

face, ***Mr. Lindsey took him outside of the room, and called 911 for medical aid.*** (Emphasis added).

Mr. Lindsey then stated at CP 238:

> 16. ***I should not have left Brandon to ventilate the room by himself. I should have had more than one person ventilate*** the room and gotten everyone out until the carbon monoxide fumes had dissipated.

(Emphasis added).

Mr. Lindsey did not provide any information in his Declaration that he was aware of what the actual carbon monoxide levels were in the classroom when he left Plaintiff to continue to clean up. Nor did Mr. Lindsey state that he left Brandon in the classroom alone, knowing that he would be overcome by carbon monoxide. More importantly, Mr. Lindsey did not indicate in his Declaration that he had any concerns that Brandon would be adversely affected by carbon monoxide by being left alone to work in the classroom, nor did he testify that he disregarded those concerns. At the time that he directed Brandon to ventilate the classroom, Mr. Lindsey did not indicate any understanding that the classroom **could not be** ventilated at that stage because of the asbestos project that had been taking place. Mr. Lindsey also did not indicate that it was a Class I asbestos project taking place in his Declaration. Finally, as the WISHA inspection and readings did not take place until after the incident, at the

time he directed Plaintiff to remain and clean up Mr. Lindsey did not report that he was aware of the levels carbon monoxide reading of 30,000 ppm that the Department had taken during their investigation that Mr. Petgrave alleges in his Declaration.[1]

Appellant argues that a negative air machine was used to create a negative pressure in the abatement room. While this is a method of containment mentioned by Peter Wold, CP at 220, Page 12, line 20 – page 13, line 3, there was no evidence in the record to support that this was the method of containment used at the John Rogers Elementary project on July 5, 2007. In fact, Peter Wold was never at the site and could not provide specific details as to what was, in fact, used on the date in question. See, CP 22, Page 21, lines 20 -21.

Appellant further alleges at page 7 of his brief that, "Because the project was behind schedule, the supervisor instructed Tappert to remain in the room to continue to clean-up while he, himself, left the area." No where does Mr. Lindsay state in his Declaration that that was the reason why he instructed Mr. Tappert to continue to clean up the room. See

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1 Defendants' objected to this hearsay statements contained in the WISHA investigation file, but asserted at the Superior Court level that even if this statement was not hearsay, it would still be of no significance as Mr. Lindsay was not aware of the Department's air monitor reading when he made the work assignment to Plaintiff, even if it were true and admissible.

Paragraph 13, (CP at 237).

Mr. Petgrave's Declaration recites portions of the WISHA inspection file that took place ***after*** the incident involving Plaintiff. However, Mr. Lindsey did not know of these air monitor readings at the time he assigned Plaintiff to clean up the classroom. See Declaration of Robert Lindsey. As noted at CP 228, the Exhibit referenced by Mr. Petgrave in his Declaration was not prepared until "12/26/2007" See the bottom right corner of the Enforcement Information worksheet. (CP 228) Clearly, information regarding the "30,000 PPM" is not only hearsay, it was not even known to Mr. Lindsay at the time he directed Mr. Tappert to ventilate the room.

II. ISSUES

A. Where Defendant does not have a history of safety violations as alleged in the Complaint for exposing employees to carbon monoxide (CO), has Plaintiff demonstrated that Defendant had an actual intent to injure him in order to overcome the Title 51 barrier set forth in RCW 51.24.020?

B. Where Mr. Lindsay directed Plaintiff to ventilate the room and went back to check on him, did the Superior Court err by concluding that Mr. Lindsay did not deliberately intend to injure Plaintiff?

C. Where Defendants had no actual knowledge that Plaintiff was being affected by CO or that there were high levels of CO when they left him to work alone, Plaintiff cannot demonstrate that Defendants deliberately intended to injure him.

III. ARGUMENT

A. Standard of Review for Motions for Summary Judgment.

As a matter of law, based on the facts alleged by Plaintiff, the Superior Court correctly concluded that it lacked jurisdiction pursuant to RCW 51.24.020. CR 56 holds that Summary Judgment should be granted when there are no material facts in dispute and that, as a matter of law, judgment, as a matter of law is appropriate.

To avoid summary judgment, the plaintiff must establish a prima facie case on the essential elements of his claim. *Boguch v. Landover Corp.,* 153 WnApp 595, 609 (2009). If the plaintiff fails to make a sufficient showing of the essential elements, summary judgment for the defendant is appropriate because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial" Id at 609, quoting *Young v. Key Pharmacy, Inc.,* 112 Wn2d 216, 225 (1989).

B. Washington's Worker Compensation is premised on barring civil suits against employers for work related accidents.

1. Background of the Title 51 bar or immunity from suit.

In exercising its police power, Washington enacted its Worker's Compensation laws in 1911 to preclude employees from resolving worker

injuries in Superior Court. Prior to enactment of our Industrial Insurance Act (IIA), codified at Title 51 RCW, the legislature concluded that resolving worker injuries in Superior Court was not in the best interest of employees or employers. Washington's IIA was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. In exchange, Employers were given immunity from civil suits by workers. *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916).

Thus, the very first statute in the Industrial Insurance Act, RCW 51.04.010 declares that the Superior Courts lack jurisdiction to address employee actions for injuries against employers. Thus, the Act abolished civil actions against employers for on-the-job injuries and guaranteed swift compensation to injured workers regardless of fault.

2. The legislature allowed a narrow exemption for intentional acts of injury.

Despite the bar to civil actions, the Legislature allowed ***intentional acts*** by an employer against his employee. RCW 51.24.020. This statute declares:

> 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. (Emphasis added).

The exception for injuries deliberately intended by the employer is narrowly interpreted however. *Vallandigham*, 154 Wn.2d at 27, 109 P.3d 805. Negligence-even gross negligence-is not sufficient to show a deliberate intent to injure. *Id.* "Even failure to observe safety laws or procedures does not constitute specific intent to injure, nor does an act that had only substantial certainty of producing injury." *Id.* (citing Birklid, 127 Wn.2d at 860, 904 P.2d 278).

Originally, Washington courts interpreted the exception to apply only when an employer (or agent of the employer) physically assaulted a worker. *Birklid*, 127 Wn.2d at 861-62, 904 P.2d 278. *Birklid* re-examined the language of RCW 51.24.020 and held that the legislature must have meant to include employer actions beyond assault and battery. *Birklid,* 127 Wn.2d at 862-63, 904 P.2d 278.

After rejecting tests applied in other jurisdictions, the *Birklid* court held that "deliberate intention" under RCW 51.24.020 means (1) the employer had actual knowledge that an injury was certain to occur, and (2) disregarded that knowledge. *Birklid*, 127 Wn.2d at 865, 904 P.2d 278. **The intention, however, must relate to the injury, not to the act causing the injury**. *Id.* at 861, 904 P.2d 278. **"Simply exposing**

employees to unsafe conditions is not enough." *Valencia*, 125 Wash. App. at 351, 104 P.3d 734

The facts supporting the *Birklid* decision are important. In that case, Boeing began employing a new woven fiberglass cloth impregnated with a phenol-formaldehyde resin in 1987 to meet FAA regulations for flammability. This material was used to make highly contoured interior parts of airplanes. Before it began using the material in production, Boeing did preproduction testing on it at its Auburn fabrication facility. In February 1987, a Boeing general supervisor, Dan Johnson, wrote:

> During R & D layup of phenolic pre-preg, obnoxious odors were present. Employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach. We anticipate this problem to increase as temperatures rise and production increases.

The general supervisor, Dan Johnson, requested improved ventilation, but Boeing management denied the request at that time, apparently for economic reasons. The Supreme Court noted Boeing did not believe that the odor level warranted expenditures of funds.

After full production began, as Boeing's supervisor predicted, workers experienced dermatitis, rashes, nausea, headaches, and dizziness. **Workers passed out on the job**. Mr. Johnson said he knew these complaints were reactions to working with the phenolic material. *Id.* at 857.

In addition to injury from exposure to toxic substances, the workers alleged misconduct constituting the tort of outrage by Boeing, including removal of labels on the chemicals and denial of access to Material Safety Data Sheets, harassment of employees who requested protective equipment or availed themselves of medical treatment, alteration of workplace conditions during government safety tests to manipulate test results and disguise the harm of the chemicals, and experimental exposure of workers to toxic chemicals without their informed consent. *Id.* at 857. Based on these facts, the *Birklid* court found that the exception in RCW 51.24.020 had been established as an intentional tort.

The *Birklid* court at page 861 re-examined prior holdings that:

> Neither gross negligence nor failure to observe safety procedures and laws governing safety constitutes a specific intent to injure. *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 54 P.2d 235 (1936); *Peterick v. State*, 22 Wash.App. 163, 189, 589 P.2d 250 (1970), overruled on other grounds by *Stenberg v. Pacific Power & Light Co.*, 104 Wash.2d 710, 709 P.2d 793 (1985). Nor is an act that has a substantial certainty of producing injury sufficient to show deliberate intention. *Higley v. Weyerhaeuser Co.*, 13 Wash.App. 269, 271-72, 534 P.2d 596 (1975). In Higley, a saw operator was injured when a piece of a saw's rotating cutterhead broke loose, breaking through a *861 Plexiglass shield and driving a piece of the shield into Higley's right eye. Higley sued, alleging negligence so gross as to constitute an intentional act. He submitted affidavits attesting to the frequency of breaking and flying cutterheads and the inadequacy of the Plexiglass shielding.

> The Court of Appeals, citing *Winterroth v. Meats, Inc.,* 10 Wash.App. 7, 516 P.2d 522 (1973), held that Higley's failure to show the employer's specific intent to injure him was fatal to his claim. Higley, 13 Wash.App. at 271, 534 P.2d 596.

The *Birklid* court set forth a two part test by holding that:

> We think by the words "deliberate intention to produce the injury" that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross.

Following the *Birklid* decision, subsequent courts addressed whether injured employees could bring a tort action against employers. In *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wash. App. 231, 159 P.3d 494, (Div. 3 2007), the Plaintiffs, family members of employee who died of injuries from a pipe rupture of toxic gas at the plant, alleged that workers were frequently exposed to toxic gas fumes at workplace, that employer knew that pipes in the plant were eroding and corroding, and that employer did not timely comply with process safety management standards adopted by federal and state regulators indicated that employer knew or should have known that rupture of a pipe was imminent or certain to occur eventually. The Court dismissed the complaint because Plaintiffs did not show that employer had actual knowledge that injury ***to the particular employee*** was certain to occur, and thus the intentional-injury

exception to employer's immunity under Industrial Insurance Act did not apply to Plaintiff's tort action.

In *French v. Uribe, Inc.*, 132 Wash. App. 1, 130 P.3d 370, (Div. 3 2006), Plaintiffs alleged that the Employer was not immune from liability where an employee was electrocuted, and another employee was permanently injured after trying to rescue the victim. The Superior Court concluded that there were sufficient facts to show a dispute of material facts such that the case should go on to trial before a jury. The Court of Appeals, however, disagreed and ruled that the Superior Court should have dismissed the Tort action for wrongful death.

Uribe, Inc., argued that Plaintiff failed to establish a question of material fact as to whether it deliberately intended to injure Mr. Meier and Mr. French by electrocution. Plaintiff argued that Uribe, Inc., was well aware that its workers were routinely operating within the ten-foot zone of energized electrical wires, that ***no safety measures were taken*** to prevent the boom from striking a wire, and that no contact was made with the power company to de-energize the lines.

Despite these contentions, the Court of Appeals dismissed the tort action pursuant to RCW 51.04.010 by concluding that there were no material facts demonstrating a deliberate intent to injure the employees.

The Court in *Uribe* concluded that a showing of a ***pattern of***

injuries is required in order to meet the first prong of *Birklid*. Plaintiff failed to present any facts establishing a pattern of injuries to Uribe, Inc. employees caused by line strikes. Thus, absent such evidence, Plaintiff failed to establish actual knowledge that injury was certain to occur.

Based on *Birklid*, subsequent courts have established that in order to establish a cause of action pursuant to RCW 51.24.020, the Plaintiff must establish:

1. The employer had actual knowledge that injury ***to the particular employee*** was certain to occur. *Garribay v. Advanced Silicon Materials, Inc.*, 139 Wash. App. 231.

2. There was a prior pattern of injuries that the Employer was aware of. *French v. Uribe, Inc.*, 132 Wash. App. 1.

In our present case, Plaintiff failed to allege in his Complaint both of these elements. The facts set forth in the Complaint do not demonstrate that the Defendants had actual knowledge of the injury to Mr. Tappert. Secondly, Plaintiff Tappert did not allege that there were previous injuries involving carbon monoxide poisoning, nor did he provide any evidence of prior injuries caused by carbon monoxide at this or any other worksite.

C. The facts set forth in the Complaint do not demonstrate that Defendants had actual knowledge of injury to Plaintiff, or that certain injury would occur.

Based on the facts alleged in the Complaint, the crew members stopped running the Blastrac machine and ***left Brandon in the sealed work room to clean up debris.***

> "After the other crew members finished chipping and stripping the floor tiles with the Blastrac, they left Brandon in the sealed work room to clean up the debris. Brandon was left in the enclosed room where CO produced by the Blastrac, [sic] remained." Complaint, Paragraph 13, lines 12 – 14. (CP3).

When they left Brandon to work in the room, Plaintiff did not have a CO detector, and there was no allegation that anyone knew if there were high levels of CO that had remained. There was no claim or inference that Plaintiff, or any other employee, at that point in time had suffered any affects of CO poisoning.

Moreover, Plaintiff was not discovered to be unconscious until 20 minutes after the crew members left him to work.

> ***"After approximately 20 minutes***, one of the crew members returned to the area and found Brandon Tappert lying on the floor unconscious." Complaint, Paragraph 14 (Emphasis added). (CP3).

Until 20 minutes after leaving Plaintiff in the room, according to the Complaint, no one had any knowledge that Plaintiff was injured until he was found lying unconscious on the floor. Certainly when the employees left, Plaintiff did not allege that anyone was aware that he was injured, or that he was certain to be injured. Moreover, Plaintiff did not allege that any specific Defendant had knowledge that at the time they left Mr. Tappert to work alone there were high levels of CO gas present. Under his own facts, Plaintiff failed to allege or establish any intentional

act of any Defendant to deliberately injure him. While Plaintiff's allegation of facts may demonstrate a safety violation under the Washington Industrial Safety and Health Act, a safety violation is not sufficient to overcome the Title 51 barrier provided in RCW 51.24.020. **"Simply exposing employees to unsafe conditions is not enough**." *Valencia*, 125 Wash. App. at 351, 104 P.3d 734, (Div 3, 2005).

D. The actual citation history demonstrates that Plaintiff cannot establilsh any prior pattern of injuries or citations caused by Defendants.

At Paragraph 21 (CP 4) Plaintiff merely alleged that defendants, "have a history of workplace safety violations for exposing its workers to carbon monoxide gas, by operating gasoline or propane powered equipment indoors without venting the exhaust fumes outside." Plaintiff only asserted that Defendants had a prior ***history*** of safety violations. Like the facts in *Uribe* where Plaintiff alleged that there was a history of not following safety rules, the fact that there were safety violations is distinguished from a ***history of prior injuries.*** The undisputed facts are that Defendants do not have a history of actually exposing and causing injury to employees by exposing them to unsafe levels of carbon monoxide.

Unlike the specific facts in *Birklid* where there was an actual history of workers getting sick, Plaintiff Tappert made no such allegation

in his Complaint, nor did he provide any facts to support this claim. Thus, as held in *Uribe*, Plaintiff Tappert failed to allege a pattern of injuries to meet the first prong of *Birklid.*

Thus, at best Plaintiff through the Complaint has attacked the act that caused the injury, but ignored the dispositive question as to whether Nuprecon ***intentionally*** caused the injury. The citation history for Defendant demonstrates that there was a previous citation issued on December 21, 2005 which alleged that Nuprecon had not tested for carbon monoxide while a propane-powered concrete saw exhausted into the enclosed space of the Bellevue Place Wintergarden atrium. See Citation & Notice No. 309238160, (CP 134 – 143).

The Department cited WAC 296-155-160(3), which states in relevant part:

> (3) Whenever internal combustion equipment exhausts in enclosed spaces, tests shall be made and recorded to ensure that employees are not exposed to unsafe concentrations of toxic gases or oxygen deficient atmospheres.
> (CP 138)

This Citation was changed from a "serious" violation to a "general" violation and the monetary penalty was reduced from $1,500 to $300. See Order on Agreement of Parties Docket No. 06 W0033. The plain language of the cited code is for not testing, not for exposing employees to carbon monoxide at unsafe levels. Overexposing

employees to carbon monoxide and other hazardous gasses is addressed in a different section of the code. Specifically, WAC 296-155-160(2) declares that:

> (2) To achieve compliance with subsection (1) of this section, administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, ***protective equipment or other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in WAC 296-62-07515***.
>
> (Emphasis added).

Not only did the December 2005 citation take place at a different job site, it involved the use of different equipment, and was based on Nuprecon's lack of testing. It is undisputed that this citation did not allege that Defendant exposed its employees to the hazards of carbon monoxide. Moreover, the citation was reduced from a "serious" violation to a "general" violation.

1. The outrageous behavior found in *Birklid* was not present in Plaintiff's Complaint.

The following facts were present in *Birklid* that allowed Plaintiff to overcome the RCW 51.24.020 intentional tort exception:

- A preproduction testing memo that anticipated increased problems of being exposed to the chemicals;
- A request for improved ventilation to address the chemical exposure;
- Employer denial of providing improved ventilation;
- Acknowledgement of workers experiencing dermatitis, rashes, nausea, headaches, and dizziness, **Workers passing out on the**

job which were all related to exposure to the phenolic just as Boeing's supervisor predicted

- Removal of labels on the chemicals and denial of access to Material Safety Data Sheets;
- Harassment of employees who requested protective equipment or availed themselves of medical treatment;
- Alteration of workplace conditions during government safety tests to manipulate test results and disguise the harm of the chemicals; and,
- Experimental exposure of workers to toxic chemicals without their informed consent.

Plaintiff Tappert raised no facts in his Complaint alleging the magnitude of employer misconduct and knowledge exhibited in *Birklid.* Rather, Plaintiff merely asserted Nuprecon's failure to comply with safety regulations and negligence – all of which are barred by RCW 51.24.010.

To the contrary, the Declaration of Avery Brown demonstrated that Defendant rented equipment that has a "scrubber" to remove almost all of the carbon monoxide. Additionally, Defendant had Standard Operating Procedures and a daily checklist to ensure safety of its employees. The Daily Checklist also covered propane powered equipment and procedures to ensure that emissions were safely controlled. Carbon monoxide levels were checked on July 2, 2007 as evidenced by the Declaration of Avery Brown.

Finally, Plaintiff's bold allegation that Defendant has a "history" of workplace safety violations involving carbon monoxide is simply not supported by the actual citation history presented to the Superior Court.

The only prior citation for carbon monoxide prior to July 5, 2007 was at a different location involving a different crew.

In *Byrd v. System Transport, et al.,* 124 Wash.App. 196, 204, 99 P.3d 394 (Div. 3 2004), the Court of Appeals reversed the trial court's denial of summary judgment requested by the Employer. In that case, the trial court concluded that there were questions of material fact on whether the Defendant had any intent to injure the Plaintiff, and therefore denied the Employer's Motion for Summary Judgment. Relying on *Birklid,* the *Byrd* court held that Washington courts have **narrowly interpreted RCW 51.24.020 to consistently require a specific intent to injure**. The *Byrd* court noted that *Birklid* was the first Washington case in which the immunity provided in RCW 51.24.020 could be overcome by unsafe working conditions. However, it was clear in *Birklid* that there must still be a specific intent to injure.

The *Byrd* court cited the following holding in *Birklid:*

> "**There was no accident here**." Id. at 863, 904 P.2d 278. Rather, Boeing chose to put the new resin into production even though it knew in advance that the phenol-formaldehyde fumes would make its employees ill. Id. at 862–63, 904 P.2d 278. In fact, Boeing observed its workers become ill from exposure to the resin and continued to use it. Id. at 863, 904 P.2d 278.

The *Byrd* court then provided a good recital of cases following the *Birklid* decision:

Courts have consistently applied the *Birklid* standard to find a loss of employer immunity under RCW 51.24.020 where evidence established **a pattern of recurring employee complaints of injuries caused by continuing employer practices**. See *Baker v. Schatz,* 80 Wash.App. 775, 912 P.2d 501 (1996) (*General Plastics Manufacturing Co.* intentionally exposed its employees to toxic chemicals that **caused frequent complaints of breathing difficulty, severe headaches, nausea, dizziness and skin rashes**); *Stenger v. Stanwood Sch. Dist.,* 95 Wash.App. 802, 977 P.2d 660 (1999) (district continued to require its employees to work with a multi-handicapped, special education student who had inflicted more than **1300 injuries to district staff over 5 years**); *Hope v. Larry's Mkts.*, 108 Wash.App. 185, 29 P.3d 1268 (2001) (Larry's refused to discontinue its use of industrial strength cleaners that **caused rashes and blisters on its employees' hands, arms, legs and chests**).

Conversely, the courts have refused to find deliberate intent where there was no previo
us record of harm sufficient to charge the employer with knowledge of certain injury and willful disregard of that knowledge. See *Goad v. Hambridge,* 85 Wash.App. 98, 931 P.2d 200 (1997) (no deliberate intent **where employer was advised of machine's potential for serious injury and failed to advise employee of those concerns**); *Henson v. Crisp,* 88 Wash.App. 957, 946 P.2d 1252 (1997) (no deliberate intent where employer intentionally pointed and fired a toy gun at an employee, causing her to experience severe emotional distress); *Judy v. Hanford Envtl. Health Found.*, 106 Wash.App. 26, 22 P.3d 810 (2001) (no deliberate injury where employer failed to inform employee of her physical limitations disclosed by evaluation even though she suffered injury on the job 10 months later as a result of that limitation); see also *Folsom*, 135 Wash.2d at 667, 958 P.2d 301 (no deliberate intent where employer knew about former employee's criminal history and propensity for sexual harassment of female co-workers, and failed to take security measures to protect female employees).
Byrd at pages 203 – 204.

In *Byrd,* the court identified the distinguishing factors of prior

cases where the court held that immunity was not available. Specifically, the *Byrd* court held that immunity was not available where there was an employer practice that **directly caused** an employee injury, **and** the employer refused to take appropriate remedial measures despite repeated employee complaints. *Byrd* at page 205. The *Byrd* court specifically held:

> Ms. Byrd contends that the condition of Ms. Guttierrez's employment is an obvious factual issue to be considered by a jury. She cites *Baker* for the proposition that deliberate intent may be found when an employer knows its employees are suffering from an illness and that certain injury will occur if the working environment is not modified. She relies on *Hope* for its premise that an employer's knowledge of continuing injury in the workplace coupled with insufficient remedial efforts presents a question of fact as to the intent to injure. She finds support in *Stenger* for the principle that a plaintiff may establish willful disregard of an employer's knowledge of certain injury by providing evidence to challenge its remedial measures. **But Ms. Byrd ignores the distinguishing factors in those cases: each involved an employer whose practices directly caused the employee's injury, and who refused to take appropriate remedial measures despite repeated employee complaints.**

As in the *Byrd* case, Plaintiff Tappert also ignores the distinguishing factor: there was no direct practice (this was a one time incident of an injury); Mr. Lindsey did not refuse to take appropriate remedial measures (in fact he was directing Brandon to ventilate – a remedial measure), and there were no prior complaints or injuries of carbon monoxide. Rather, Plaintiff Tappert cites *Garibay v. Advanced*

Silicon Materials, inc., 139 Wash. App. 231, and asserts that, "...the court held that the employer had to have actual knowledge that injury to that employee was *certain* to occur." Plaintiff then asserted at Page 7, line 23 – Page 8, line 3 that:

> "Here, Nuprecon put Tappert in a sealed room it knew was filling up with carbon monoxide exhaust. The defendant knew the hazardous nature of the carbon monoxide exhaust. They 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. The defendant thus had actual knowledge that injury to Brandon Tappert was certain to occur."

Plaintiff's argument is not supported by the Declaration of Mr. Lindsey. First, no where in his Declaration does Mr. Lindsey state that he knew that the room was filling up with carbon monoxide when he directed Mr. Tappert to ventilate the classroom. In fact, he states directly in his Declaration that he, "**turned off the blastrac**." Once the blastrac was turned off, it would not be filling up with carbon monoxide when Mr. Lindsey instructed Plaintiff to continue to clean the classroom where they had all been working together. Moreover, there is nothing in Mr. Lindsey's Declaration that indicates that he knew that, "carbon monoxide was supposed to be vented out of doors and that he refused to do it." In fact, Mr. Lindsey's Declaration totally contradicts Plaintiff's argument that he refused to ventilate the room.

Mr. Lindsey, in fact, stated in his Declaration submitted by the Plaintiff that, "**I *just* told Brandon to ventilate the room.**" Lindsey Declaration at paragraph 13 (emphasis added). Then, in paragraph 16, Mr. Lindsey declared that he should not have left Brandon to ventilate the room by himself and that he should have had more than one person ventilate the room. These statements clearly do not indicate that Mr. Lindsey refused to ventilate the room, nor do they support any inference that he ***refused to ventilate*** as argued by Plaintiff. Plaintiff argues, incorrectly, that Mr. Lindsey could not have ventilated the room because it was an abatement project, but fails to show that Mr. Lindsey also understood or believed that the room could not be ventilated. Plaintiff makes a conclusory argument that because the regulations prohibited Mr. Lindsey from ventilating the room, that Mr. Lindsey also had that state of mind. He did not have that state of mind, nor can that be a reasonable inference as Plaintiff's legal position is not correct for two reasons: first, the regulations do not require that the fumes be vented outside; second, as a Class II asbestos project, the Defendants were not required to seal off the classroom.

WAC 296-155-160(3) declares:

> (3) Whenever internal combustion equipment ***exhausts in enclosed spaces***, tests shall be made and recorded to ensure that employees are not exposed to unsafe concentrations of toxic gases or oxygen

> deficient atmospheres. See chapter 296-62 WAC, the general occupational health standards and chapter 296-841 WAC, identifying and controlling respiratory hazards.

(Emphasis added).

WAC 296-155-160(3) specifically allows the exhaust to be ventilated inside the classroom, provided air monitoring tests are performed. Thus, the specific regulation does not support Plaintiff's assertion that Mr. Lindsey knew that the exhaust had to be vented outside the classroom.

There is also no dispute that the project involved the removal of vinyl asbestos tiles. In fact, a blastrac was being used to remove the tiles. Under the Washington Administrative Code, the Department has defined four classes of asbestos projects, Class I – Class IV. They are defined as follows in WAC 296-62-07703:

> **Class I asbestos work** means activities involving the removal of thermal system insulation or surfacing ACM/PACM.
>
> **Class II asbestos work** means activities involving the removal of ACM which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos-containing wallboard, **floor tile** and sheeting, roofing and siding shingles, and construction mastics.
>
> **Class III asbestos work** means repair and maintenance operations where "ACM," including TSI and surfacing ACM and PACM, may be disturbed.
>
> **Class IV asbestos work** means maintenance and custodial activities during which employees contact but do not disturb ACM

> or PACM and activities to clean up dust, waste and debris resulting from Class I, II, and III activities.
>
> (Emphasis added)

As this work involved floor tile, the work at the Roger's Elementary school was a Class II asbestos work project as defined in WAC 296-62-07703.

This distinction is very important because the asbestos work practice regulations are different based on the specific Class of work being performed. Sealing the room, or establishing "critical barriers" only applies to Class I asbestos work. It simply does not apply to Class II projects. WAC 296-62-07712(6)(b)(i) declares:

> (b) For all **Class I** jobs involving the removal of more than twenty-five linear or ten square feet of thermal system insulation or surfacing material; for all other Class I jobs, where the employer cannot produce a negative exposure assessment according to WAC 296-62-07709(3), or where employees are working in areas adjacent to the regulated area, while the Class I work is being performed, the employer must use one of the following methods to ensure that airborne asbestos does not migrate from the regulated area:
>
> > (i) **Critical barriers must be placed over all the openings to the regulated area, except where activities are performed outdoors**;

Based on the different legal requirements for asbestos projects, and Mr. Lindsey's own Declaration, Plaintiff has provided no evidence to support his conclusion that Mr. Lindsey knew that the room could not be

ventilated. Because the regulations did not require the room to remain sealed for a Class II asbestos project, Plaintiff cannot make the inference that Mr. Lindsey knew that the room could not be ventilated.

At the time Mr. Lindsey assigned Plaintiff to ventilate the room, he had been working with Plaintiff in the same classroom when the carbon monoxide alarm went off. He indicates that he doesn't recall telling Brandon that the carbon monoxide alarm had gone off. However, Mr. Lindsey doesn't indicate when, in relationship to him giving the assignment to ventilate, that the alarm sounded. More importantly, Mr. Lindsey did not indicate that he, or anyone else in the classroom had any signs of severe nausea or fainting, symptoms that were described in the warning label on the machine itself. See paragraph 12 of Mr. Lindsey's Declaration.

As there were no complaints or visible symptoms of carbon monoxide poisoning, by merely instructing Mr. Tappert to ventilate the classroom and continue cleaning, Mr. Lindsey did not have knowledge that it was certain that Mr. Tapper would be overcome by carbon monoxide. It could be argued that Mr. Lindsay probably should have told Mr. Tappert that the alarm had sounded, but that would constitute negligence on his part, not an intent to injure Mr. Tappert.

Close review of Mr. Lindsey's Declaration supports the inference

that he did not expect to find Mr. Tappert unconscious in the classroom. Mr. Lindsey left Mr. Tappert in the room to finish cleaning up. He then went to another room across the hall to chip floor tiles. Then, at paragraph 14, Mr. Lindsey states, "I never checked to verify that Brandon had ventilated the room." About 20 minutes later, he went back in to check on Brandon. He then states in paragraph 15, "I found him unconscious on the floor. The mask was still on his face. We took Brandon outside and called 911." Mr. Lindsey's Declaration demonstrates that he did not know that Brandon was unconscious ***until twenty minutes later*** when he went back to check in on him.

As held in *Schuchman v. Hoehn,* 119 Wash.App. 61 (2003), the mere presence of a dangerous situation is not sufficient to establish deliberate intent. Moreover, in *Goad v. Hambridge,* 85 Wash.App. 98 (1997), the court held that there is no deliberate intent to injure where the employer was advised of a machine's potential for serious injury and failed to advise the employee of those concerns. Thus, even if Mr. Lindsey believed that there was a hazardous situation in the classroom at the time he assigned Plaintiff to ventilate, under *Goad* a failure to advise Mr. Tappert of the hazardous situation is not sufficient to establish a deliberate intent to injure Mr. Tappert.

In our present case, Plaintiff at best has demonstrated that Mr.

Lindsey was aware that the carbon monoxide alarm had gone off at one point in time, that he instructed Mr. Tappert to ventilate the classroom, and that, after the fact, Mr. Lindsey believed that he should have had more than one person ventilate the classroom. Under the facts as presented by Plaintiff and the law, Plaintiff has failed to demonstrate that Mr. Lindsey knew for certain that Brandon would be overcome by carbon monoxide when he assigned Plaintiff to continue working in the same room that Mr. Lindsey had been working in.

Based on the above, there are no material facts in dispute. Plaintiff failed to demonstrate that Mr. Lindsey knew that it was certain that Plaintiff would be injured by carbon monoxide when he directed Plaintiff to clean up the classroom. As such, Plaintiff Tappert could not establish the first prong in *Birklid*. On that basis, the Court did not err in granting the Defendants' Motion for Summary Judgment.

E. Defendant's actual safety citation history did not establish that there was a pattern of injuries that Defendant was aware of to establish a specific intent to injure Plaintiff.

Contrary to the allegations set forth in the Complaint and Plaintiff's Brief, in the Declarations of Mr. Lindsey or Mr. Petgrave, there are no material facts in dispute to establish that Defendants had a history of ***prior injuries*** involving carbon monoxide. As such, there was no evidence presented to the Superior Court to show that any Defendant

intended to injure Plaintiff. The prior citation history demonstrates that the Defendants were neither cited by the Department for requiring employees to operate propane powered equipment or machinery indoors without venting the fumes outside as alleged in Paragraph 20 of the Complaint, nor did Plaintiff establish that the Defendants had a history of exposing employees to carbon monoxide as alleged in Paragraph 21 of the Complaint.

Although Plaintiff is not accurate in the dates, it appears that Plaintiff refers to Citation & Notice No. 309238160 that was actually issued on December 21, 2005. In that Citation, the Department alleged the following violation:

> Item 1-1 WAC 296-155-160(3)
>
> "Nuprecon had not tested for unsafe concentrations of carbon monoxide while a propane-powered concrete saw exhausted into the enclosed space of the Bellevue Place Wintergarden atrium."

The specific allegation cited under WAC 296-155-160(3) was for not testing nor was it based on improper ventilation as asserted by Plaintiff in his Brief. The cited standard reads as follows:

> (3) Whenever internal combustion equipment ***exhausts in enclosed spaces***, tests shall be made and recorded to ensure that employees are not exposed to unsafe concentrations of toxic gases or oxygen deficient atmospheres. See chapter 296-62 WAC, the general occupational health standards and chapter 296-841 WAC, identifying and controlling respiratory hazards.

(Emphasis added).

Plaintiff's allegation that Nuprecon was cited for not venting the fumes outside is incorrect because that's not how the citation reads, ***and*** the cited standard does not require that propane powered equipment be vented *outside* as argued by Plaintiff. Rather, the clear meaning of WAC 296-155-160(3) demonstrates that internal combustion can be exhausted in enclosed areas provided proper testing is performed. Again, Plaintiff's statement of the law and the facts are not accurate.

Moreover, the specific Citation relied on by Plaintiff was changed from a "serious" violation to a "general" violation[2], and the monetary penalty was reduced from $1,500 to $300. *See*, Order on Agreement of Parties Docket No. 06 W0033. After issuing the citation identified by Plaintiff, the Department did not characterize the citation as either a "serious" or "willful" violation in the final order.

As indicated by the citation and the WISHA inspection history, there were no complaints of exposure to carbon monoxide nor was any

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2 The Department has the authority to issue "serious" violations. Pursuant to RCW 49.17.180(6),
a "serious" violation is when there is a substantial probability that death or serious injury will occur. Additionally, the Department may issue a citation as a "willful" violation. A "willful" violation is one where there is a deliberate intent to violate the standard, or there is "plain indifference" to being in compliance.
WAC 296-900-14020, Table 6.

employee injured by carbon monoxide exposure. The lack of any injury or employee complaints is significant and detrimental to Plaintiff. Based on *Birklid*, where injuries and employee complaints were known to Boeing, courts have consistently held that a pattern of ***injuries***, not citations, was needed to overcome the RCW 51.24.020 immunity set forth in *Birklid*.

The following cases clearly hold that there must be prior injuries to establish the "certainty" test in *Birklid*: *Baker v. Schatz,* 80 Wash.App. 775, 912 P.2d 501 (1996), where the evidence established **a pattern of recurring employee complaints of injuries caused by continuing employer practices**. (*General Plastics Manufacturing Co.* intentionally exposed its employees to toxic chemicals that **caused frequent complaints of breathing difficulty, severe headaches, nausea, dizziness and skin rashes**); *Stenger v. Stanwood Sch. Dist.,* 95 Wash.App. 802, 977 P.2d 660 (1999) where the district continued to require its employees to work with a multi-handicapped, special education student who had inflicted more than **1,300 injuries to district staff over 5 years**); *Hope v. Larry's Mkts*., 108 Wash.App. 185, 29 P.3d 1268 (2001), where the evidence established that Larry's Markets refused to discontinue its use of industrial strength cleaners that **caused rashes and blisters on its**

employees' hands, arms, legs and chests; *French v. Uribe*, 132 Wash. App. 1, (2006) where the Court specifically held at page 11:

> "These cases demonstrate the conclusion of *Byrd.* **A showing of a pattern of injuries is required in order to meet the first prong of *Birklid.*** Here, Ms. Meier has failed to present any facts establishing a pattern of injuries to Uribe, Inc. employees caused by line strikes. Absent such evidence, Ms. Meier has failed to establish actual knowledge that injury is certain to occur."
>
> (Emphasis added).

In our present case, Plaintiff Tappert failed to show a pattern of prior injuries caused by carbon monoxide at Nuprecon, either by way of Declaration or citation history. Plaintiff argues that the court must address the specific facts of each case. While that may be true, the Washington courts following *Birklid* all required the Plaintiff to show a pattern of injuries were caused directly by the Employer to demonstrate that to the Employer it was **certain** that an injury would occur.

Rather than showing a pattern of injuries, Plaintiff Tappert argued that the dangers of carbon monoxide are well known. Accepting that proposition to be true, even though propane powered equipment are commonly used (ie, propane heaters, barbeques and even propane powered forklifts), the mere presence of a dangerous situation is not sufficient to establish deliberate intent. *Schuchman v. Hoehn,* 119 Wash. App. 61 (2003). In that case, one of the employers told the child's mother

that they knew that an injury by an ice auger was going to happen. Despite this admission, the court concluded that the employer did not have certain knowledge that the auger would injure the child. In that case, there were six violations of the child labor laws. The court found that gross negligence and failure to follow safety procedures was insufficient to establish the deliberate intent needed to overcome the immunity set forth in RCW 51.24.020.

Thus, based on *Schuchman*, Plaintiff Tappert's argument that Mr. Lindsey was aware of the hazards of carbon monoxide is not sufficient to establish a deliberate intent. Here, Mr. Lindsey made no statement that he knew that Mr. Tappert or any other employee would be injured by carbon monoxide. Moreover, he never made the statement that an injury was likely to occur by directing Mr. Tappert to stay in the classroom to ventilate and clean it. In fact, by directing Plaintiff to ventilate the classroom, the logical inference is that he was directing the very safety measures to be taken to avoid the dangers of carbon monoxide.

Under the second prong of *Birklid,* Plaintiff must establish that Mr. Lindsey not only had certain knowledge that Mr. Tappert would be injured, but that he also deliberately disregarded this knowledge.

As indicated above, Mr. Lindsey directed Mr. Tappert to ventilate the room. It was undisputed that ventilating the room was in

conformance with the warning label on the Blastrac as a method to abate the hazards of carbon monoxide. It can hardly be argued that by directing Plaintiff to abate the hazard, Mr. Lindsey deliberately intended to injure Plaintiff by the same hazard he was seeking to avoid.

The Superior Court specifically recognized this point in granting the Defendants' Motion for Summary Judgment. Plaintiff bears this burden and must overcome RCW 51.24.020 bar to suit which must be narrowly interpreted in favor of immunity. Plaintiff failed to assert any material facts to meet both the first and second prongs of *Birklid.* As such, the Court did not err in granting Defendants' Motion for Summary Judgment.

IV. CONCLUSION

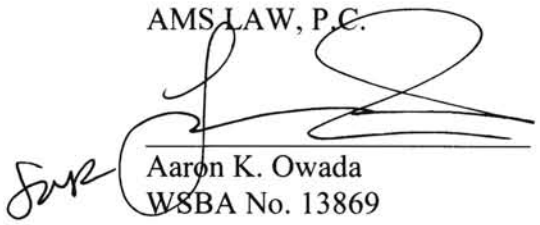
The exception to the Title 51 bar set forth in RCW 51.24.020 must be narrowly construed and Appellant failed to establish any material fact demonstrating that Defendants intended to injure Mr. Tappert. While it may have been negligent for Mr. Lindsay to have not warned Mr. Tappert that the carbon monoxide alarm had sounded, the fact that there had been no complaints of employees being overcome by carbon monoxide, or any pattern of injuries caused by carbon monoxide poisoning, and Mr. Lindsay directed Mr. Tappert to ventilate the room, the Superior Court did not err in granting the Defendants' Motion for Summary Judgment.

Under the circumstances presented, there were no facts to conclude that Mr. Lindsay knew that it was certain that Mr. Tappert would be overcome by carbon monoxide when he left him in the classroom to ventilate and to finish cleaning it up. Mr. Lindsay's own acknowledgment that he should not have left Mr. Tappert alone demonstrates that he never intended that Mr. Tappert be injured by carbon monoxide.

This court must affirm the Superior Court's decision.

Respectfully submitted this 26th day of November, 2012.

AMS LAW, P.C.



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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRANDON TAPPERT Appellant, v. NUPRECON GP, INC., AND NUPRECON, LP, Respondents	**No. 68912-6-1** **CERTIFICATE OF SERVICE**

I, Kasey Johansen , hereby certify under penalty of perjury under the laws of the State of Washington that on November 26, 2012, I filed with the Court of Appeals, Division I, via Legal Messenger, the original of the following document:

1. Response Brief of Respondents

and that I further served a copy via Legal Messenger upon:

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SIGNED in Seattle, Washington on December 13, 2012.

Kasey Johansen

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