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No. 96527-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
(Formerly Court of Appeals No. 76717-8-I)

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,
Petitioners,
v.

INLAND WASHINGTON, LLC, a Washington limited liability company,
Respondent,

and

INLAND GROUP P.S., LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation;
Defendants

MOTION FOR DISCRETIONARY REVIEW OF DISMISSAL OF CLAIMS AGAINST GENERAL CONTRACTOR INLAND WASHINGTON

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I. IDENTITY OF PETITIONERS

The Petitioners are plaintiffs Gildardo Crisostomo Vargas (through litigation Guardian ad Litem William Dussault), Lucina Flores, Patricia Crisostomo Flores, and Rosario Crisostomo Flores. ("the Vargas family"). On May 23, 2013, Mr. Vargas suffered a severe traumatic brain injury when he was whipped in the head by the end of a pressurized concrete pump hose. His wife and children bring loss of consortium claims.

II. CITATION TO COURT OF APPEALS DECISION

The Vargas family seeks review and reversal of trial court orders granting summary judgment dismissal to defendant Inland Washington LLC, the general contractor on the subject construction site, contrary to Washington workplace safety law including the seminal case of Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990). Division I granted discretionary review and set oral argument, but abruptly reversed its decision based on this Court's July 19, 2018 decision in Afoa v. Port of Seattle (II), 191 Wn.2d 110, 421 P.3d 903 (2018).

The Vargas family seeks review of the decisions on September 17, 2018 by Division I of the Court of Appeals reversing its previous decisions accepting review in the Vargas

family's appeal, No. 76717-8-I and in Ralph's linked appeal, No. 76893-0-I (Supreme Court No. 96564-1),[1] and of the Court of Appeals' October 17, 2018 orders denying reconsideration thereof.[2] Gildardo Crisostomo Vargas, et al. v. Inland Washington LLC, et al, __Wn. App__, __ P.3d __ (Div. 1, 2018, Unpublished).

III. ISSUES PRESENTED FOR REVIEW

A. Whether this Court's decision in Afoa v. Port of Seattle (II) overruled longstanding Washington law regarding safe workplace and WISHA duties of general contractors including Stute v. P.B.M.C. and Millican v. N.A. Degerstrom, Inc.

B. Whether the dismissal of the Vargas family's claims against undisputed general contractor Inland Washington, LLC should be reversed when a general contractor has *per se* control over a construction site under Stute v. P.B.M.C. and is vicariously liable for breaches of statutory duties under WISHA, and common law duties under the retained control doctrine.

C. Whether the Court should accept discretionary review under RAP 13.5 of the Court of Appeals' abrupt reversal of its prior acceptance of review on the eve of oral argument in this matter because of this Court's opinion in Afoa II, when remanding this case to trial without the general contractor as a party would result in a massive waste of judicial resources followed by an inevitable appeal on the same legal questions presented now.

IV. STATEMENT OF THE CASE

On May 23, 2013, Mr. Vargas was hit in the head by a pressurized concrete hose while working on a large construction project known as the North City Apartment complex in Shoreline,

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[1] The unpublished decisions reversing review are attached (App. at 516-521).
[2] The orders denying reconsideration are attached (App. 522-527).

Washington.[3] At the time of his injury, Mr. Vargas was working for Hilltop Concrete Construction, Inc. ("Hilltop"), his direct Title 51 RCW immune employer. Defendant Inland Washington, LLC ("Inland") was the general contractor on the project who subcontracted with Hilltop to install concrete.[4] Hilltop used Defendant Ralph's Concrete Pumping, Inc. ("Ralph's") to pump concrete into forms built by Hilltop carpenters.

Defendant Miles Sand and Gravel Co. d/b/a Concrete Nor'west ("Miles") provided the Redi-mix concrete, which it brought on site with concrete trucks.[5] In order to build concrete walls, Miles' operator would pour the Redi-mix concrete from Miles' truck into the hopper of Ralph's pump truck, which would pump the concrete through a 46 meter boom to a flexible hose at the end. Hilltop's carpenters, including Mr. Vargas, would use the hose to place concrete into the wooden wall forms. Ralph's operator, Anthony Howell, controlled the boom and the operation of the pump by remote control.

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[3] Due to his traumatic brain injury, William Dussault was appointed as his Litigation Guardian ad Litem and brings his claims on his behalf. Mr. Vargas' wife and children bring loss of consortium claims.

[4] See App. at 034-038 (Order Granting Plaintiffs' Motion for Partial Summary Judgment) Defendant Inland Group, LLC ("Inland Group") is the parent company of Inland WA, but also provided the safety plan that general contractor Inland WA used on this project, which was not site-specific and was used on many Inland Group projects.

[5] Defendant Miles also filed a motion for summary judgment for dismissal, which was denied on October 28, 2016, and is not part of this appeal.

A. Facts of the Incident

Mr. Vargas was knocked unconscious and sustained a permanent brain injury from a pressurized concrete pump hose, which violently whipped and hit him in the head. The hose whipped from a combination of a clog or plug in the hose, air getting into the system, and high pressure being applied.[6]

Anthony Howell was Ralph's concrete pump operator at the time of the incident, who set up the pump truck and hooked up the end hose.[7] Mr. Howell laid the boom out flat with the end hose on top of the wall form because the boom he had wasn't long enough.[8] Hilltop ordered a 46 meter boom truck but hoped Ralph's would provide a 55 meter boom truck.[9]

Mr. Howell was with Hilltop supervisor Matt Skoog on the floor of the building when Mr. Howell turned the pump on for the first time that day.[10] Mr. Howell reports that three hilltop workers, including Mr. Vargas, were on the scaffolding by the hose, with

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[6] See Accident Investigation Report of Matt Skoog (App. at 179-181); Deposition of Gordon Skoog, pages 53-64. (App. at 191-202); Deposition of Steve Miller, page 37:2 and pages 60-61 (App. at 246-247); Deposition of Tim Henson, pages 24-25 and 98-99 (App. at 263-264)
[7] Deposition of Anthony Howell, pages 16, 22, 27-28. (App. at 270, 276, 278-279)
[8] Id., pages 27-28 (App. at 278-279)
[9] Id.
[10] Id., pages 28-29 (App. at 279-280)

Mr. Vargas about 12 feet from the end of the hose[11] Mr. Howell was controlling the boom and the pump by a wireless remote control.[12] According to Mr. Howell, after two strokes of the boom, the remote control signal to the truck was lost, resulting in an automatic shutdown of the pump.[13] Mr. Howell moved to re-establish a connection with the truck, then signaled to the Hilltop workers that they were going to start.[14] He "took one full stroke and it went off like a shotgun."[15] Mr. Howell saw the hose strike Mr. Vargas in the head rendering him unconscious.[16]

Mr. Howell completed a Driver Equipment Report the next day showing the pump truck's antenna was broken and that it was missing a vibrator.[17] Mr. Howell testifies the truck was bought used by Ralph's, and that there was no vibrator on the hopper.[18] He testified the vibrator "helps not to get air into" the concrete.[19]

B. <u>Safety Requirements in the Putzmeister Manual</u>

The manufacturer's manual for the Putzmeister concrete pump that Ralph's was using addresses the potential for hose

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[11] See Id., pages 30 and 40 (App. at 281, 291); See Id., Exhibit 1, page 2 showing Mr. Vargas' location (App. at 320)
[12] Id., page 31(App. at 281)
[13] Id.
[14] See Id., pages 34 and 39 (App. at 285, 290) and Id., Exhibit 1, pages 2 and 3 showing locations (App. at 320, 321)
[15] Id., page 39:7-8 (App. at 290)
[16] Deposition of Anthony Howell, pages 48:21-49:2 (App. at 298-299)
[17] Deposition of Anthony Howell, pages 76-79 (App. at 300-303)
[18] Id., page 95 (App. at 307)
[19] Id., page 96:2 (App. at 308)

injuries and cautions there is "considerable risk of injury from the end hose striking out when starting to pump."[20] It defines a "danger zone" for the end hose as having a diameter of "twice the end hose length" and requires the pump operator "[e]nsure that no-one is standing in the danger zone."[21] It specifically prohibits allowing workers to hold or be near the hose when pumping is started.[22] Thomas Hurley, Putzmeister America, Inc.'s CR 30(b)(6) designee testified Putzmeister defines "starting to pump" as describing "the time period from when you begin to move concrete with the pump, to the time you have a continuous flow of concrete from the end hose." Deposition of Thomas Hurley, page 28:1-5 and page 29:8-10. (App. at 378-379).

C. <u>Facts Regarding Lack of Site-Specific Safety Plans</u>

There was no site-specific safety plan on this project that addressed the hazards involved with pump hoses or how to prevent hose injuries such as detailed in the Putzmeister manual. The Department of Labor and Industries ("L&I") investigated the incident and found Hilltop's safety plan did not address the hazards.[23] In response to L&I's post-incident inspection, Gordon Skoog typed up an "addition" to Hilltop's deficient safety book

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[20] Putzmeister Manual, Sec. 2, page 14 (App. at 361)
[21] Id. Sec. 2, page 36. (App. at 363)
[22] Id. Sec. 2, page 77 (App. at 368)
[23] Deposition of Gordon Skoog, pages 76-77. (App. at 217-218)

which he states put his previously verbal training in writing.[24] This "addition" addresses clogged hoses and counsels workers to "duck and cover" and to "yell clog and everybody immediately move away from the hose" whenever "you hear or sense a plug."[25]

Ralph's general manager Tim Henson reviewed Hilltop's post-incident addition and found it to be inadequate.[26] For its part, Ralph's did not have a site specific safety plan, was not provided with any safety plans by either Inland or Hilltop, and was not required by either Inland or Hilltop to provide a site specific safety plan.[27] Inland superintendent Steve Miller testified that he had no knowledge of safety plans or training that addressed the risks of pressurized concrete hoses on the project.[28]

D. Facts Regarding Aggregate Rock Size Being Too Big For the Three Inch Hose

It is undisputed that the aggregate in the concrete mix included rocks of up to 1.5 inches in size or greater, which was being pumped through a delivery system that was reduced to a 3 inch end hose. Miles assistant general manager testified that Miles' proprietary concrete mix code "0260A" conformed to the

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[24] Id.; Id., Exhibit 78 (Hilltop's addition to safety book) (App. at 397)
[25] Id. (underline in original); See also Deposition of Gordon Skoog, pages 61-64 (App. at 209-212)
[26] Deposition of Tim Henson, pages 38:24-40:9 (App. at 260-262)
[27] Id., pages 19-20 and 36-40 (App. at 254-255 and 258-262)
[28] Deposition of Steve Miller, pages 52-56 (App. at 241-245)

ASTM C33 number 57 standard for wall mix, which includes rocks up to 1.5 inches or greater in size.[29] He also testified that "7/8 #57" listed on the mix ticket referred to the "57" standard but that "7/8 doesn't mean anything."[30] But the fact that rocks could be 1.5 inches or greater was not communicated to the people directly involved in the pour. Hilltop's foreman Matt Skoog did not know what the rock sizes were.[31] Miles concrete truck driver Derek Mansur did not know the rock size either.[32] They both testified they thought 7/8 inch was about the maximum rock size.[33]

E. <u>Relevant Procedural History.</u>

Inland Washington, Inland Group, and Ralph's brought summary judgment motions for dismissal from this matter back in 2015. All three motions were denied. In March of 2017 Judge Schapira retired and the case was transferred to Judge Jeffrey M. Ramsdell (who retired during the pendency of this appeal). Inland Washington, LLC brought a second motion for summary judgment

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[29] See Deposition of Dave Enders, pages 32-44 (App. at 404-416)
[30] Id., page 37:23-25 and 44:2-3(App. at 409 and 416)
[31] Deposition of Matt Skoog (Vol. 2), pages 106:23-107:10. (App. at 424-425)
[32] Deposition of Derek Mansur, pages 21-22 and 26-27. (App. at 339-340 and 344-345)
[33] Deposition of Matt Skoog (Vol. 2), page 105:7-11. (App. at 423); Deposition of Derek Mansur, page 43:17-18. (App. at 415) ("most of the rock will be around 7/8 of an inch or less")

seeking dismissal.[34] Ralph's also brought a second motion for dismissal.[35]

On March 31, 2017, the trial court granted Inland Washington's motion for summary judgment dismissal,[36] but denied Ralph's.[37] On July 21, 2017, following briefing and oral argument, Division I of the Court of Appeals granted discretionary review of both the dismissal of Inland Washington and the denial of Ralph's motion for dismissal.[38] After discretionary review of both petitions was granted, the parties submitted briefings on both appeals from October 2017 through March of 2018. Over a year later, on July 24, 2018, and after extensive briefing, Division I scheduled oral argument for Sept. 10, 2018. (App. at 504-506)

On July 19, 2018, just before oral argument was scheduled in this matter, this Court issued its opinion in Afoa v. Port of Seattle (II), 191 Wn.2d 110, 421 P.3d 903 (2018), finding that liability for breach of non-delegable workplace safety duties under WISHA and the common law was subject to apportionment to non-

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[34] App. at 039-060; The Vargas family also appealed the trial court's order denying Plaintiffs' motion for a protective order regarding discovery of witnesses' immigration status. App. at 005-009 and 149-156. The Court of Appeals denied review of this issue. App. at 498 and 500.
[35] See Petition for Review on Ralph's Appeal, Supreme Court No. 96564-1
[36] App. at 017-021
[37] See Petition for Review on Ralph's Appeal, Supreme Court No. 96564-1
[38] The Court of Appeals assigned Cause No. 76717-8-I to Plaintiffs' appeal, assigned Cause No. 76893-0-I to Ralph's appeal, and linked the two cases in its July 21, 2017 Order granting review. App. at 488-500

parties under RCW 4.22.070 unless there was an express finding of agency,[39] in which case vicarious liability would apply.[40]

On July 26, 2018, Division I of the Court of Appeals entered a Notation Ruling, *sua sponte*, stating that the "The parties should be prepared to address the applicability of the decision in Afoa v. Port of Seattle (94525-0)" at the previously noted oral argument. Notation Ruling, July 26, 2018, Court of Appeals Division I, No. 76717-8-I. (App. at 507-509)

On August 30, 2018, Division I of the Court of Appeals issued a Notation Ruling, *sua sponte*, striking the oral argument hearing. Notation Ruling, August 30, 2018, Court of Appeals Division I, No. 76717-8-I. (App. at 510-512) Division I also issued a Notation Ruling on August 30, 2018 under No. 76893-0-I (Ralph's appeal) with identical language striking oral argument. (App. at 513-516)

On September 17, 2018, the Court of Appeals reversed its previous decisions granting review. Division I reversed its decision on the Vargas family's appeal, as follows:

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[39] Vicarious liability may also apply under the "acting in concert" exception, which this Court noted, but did not address. Afoa II, 191 Wn.2d 110, n.5

[40] This Court's opinion reversed the Court of Appeals decision in Afoa II, which found jobsite owners who retained sufficient control to be analogous to general contractors on construction sites were vicariously liable for breaches of these non-delegable duties by non-parties on the jobsite without the necessity of an express finding of agency. *See* Afoa v. Port of Seattle (II), 198 Wn. App. 206, 393 P.3d 802 (Div. 1, 2017).

> **In light of the Supreme Court's decision** in Afoa v. Port of Seattle, 191 Wn.2d 110, 421 P.3d 903 (2018), which reversed this court's decision in Afoa v. Port of Seattle, 198 Wn. App. 206, 393 P.3d 802 (2017), the standards for discretionary review set forth in RAP 2.3(b)(4) are not met. Accordingly, we deem review improvidently granted. This matter is remanded to the superior court for further proceedings, as if review had never been granted by this court in the first instance. Dismissed.

Unpublished Opinion, September 17, 2018, Court of Appeals Division I, No. 76717-8-I. (App. at 516-518) (emphasis added). Likewise, Division I also dismissed Ralph's appeal. (App. at 519-521) The Vargas family sought reconsideration of both orders, which Division I denied on Oct. 17, 2018. (App. at 522-527)

V. ARGUMENT FOR GRANTING REVIEW

Division I made the right decision when it first accepted discretionary review in this matter, and wrongly reversed this decision because of Afoa II. This Court's reversal of Division I's opinion in Afoa II was on grounds unrelated to any issue in this case. This Court explicitly affirmed Division I's holding on vicarious liability for non-delegable duties in Afoa II. Reversal in Afoa II was based on the question of whether fault for breaches of non-delegable duties could be allocated to non-party "empty chairs." Since there are no allegations of non-party fault in this case, this Court's Afoa II decision is immaterial to this case, and Division I should not have changed its discretionary review

decision on that basis. The controlling questions of law remain at issue, with further clarification needed to establish that the holdings in Stute and Millican were not overruled by Afoa II.

Accepting review at this time would materially advance the ultimate termination of this litigation, as the work done in terms of briefing and preparing the record for review in this case would not have to be repeated after an expensive and pointless trial where the general contractor, with *per se* control, is not a party. Inland has concurrent, non-delegable duties, and cannot be let out, particularly in light of this Court's holding in Afoa II that liability for breach of non-delegable duties are subject to apportionment.

A. Dismissal of the general contractor from a *Stute* case is obvious error, warranting review under RAP 13.5.

The Vargas family brings claims against general contractor Inland under Stute v. P.B.M.C. Inc. which held that "general contractor's supervisory authority is *per se* control over the workplace" and that non-delegable safe workplace duties and duties under WISHA are "placed upon the general contractor as a matter of law." Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990). As the general contractor with *per se* control, the control element under the retained control doctrine is met for Inland to owe these duties. Control need not be proven as it does in cases against landowners who are not general

contractors, such as in Kamla, Afoa I, and Arnold. For landowners, facts must show they have similar innate supervisory authority over the work to that of a general contractor on a construction site for the duties to attach.[41] Even if proof were needed of Inland's right to control the concrete operations, this was shown by the authority retained by Inland's superintendent.

The Vargas family seeks review under RAP 13.5 (b) (1) and (2) which provide for discretionary review based on "obvious error" and "probable error." The Court of Appeals' abrupt cancellation warrants this Court's acceptance of review under RAP 13.5 (b)(3), which provides for review where "the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings" as to warrant review. RAP 13.5 (b)(3).

B. This Court in *Afoa II* affirmed vicarious liability, and did not overrule *Stute* or *Millican*; its reversal of Division I's *Afoa II* opinion was on unrelated grounds of apportionment of non-delegable duties.

This Court's decision in Afoa II did not overrule Stute, and it did not abolish vicarious liability of general contractors for breaches of non-delegable safe workplace duties under Millican v.

[41] Kamla v. Space Needle Corp.,147 Wn. 2d 114, 52 P.3d 472 (2002) (Insufficient control found on part of owner of Space Needle) *c.f.* Kinney v. Space Needle Corp., 121 Wn. App. 242, 85 P.3d 918 (2004) (Finding the Space Needle owner did retain control in unrelated case); Afoa v. Port of Seattle (I), 176 Wn.2d 460, 296 P.3d 800 (2013) (Sufficient control found on part of airport authority); Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 666, 240 P.3d 162 (Div. 2, 2010) *review denied*, 249 P.3d 1029 (2011) (Sufficient control found on part of shipbuilder)

N.A. Degerstrom, Inc., 177 Wn. App. 881, 313 P.3d 1215 (2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014). This Court explicitly upheld vicarious liability but found it could be apportioned under RCW 4.22.070 to other entities sharing concurrent duties. Justice Gonzalez wrote for the 5-4 majority:

> The primary question for review is whether the jury's verdict warrants finding the Port is vicariously liable for the airlines' negligence, justifying the imposition of joint and several liability on the Port. **We hold that RCW 4.22.070(1)(a) does preserve joint and several liability when a defendant is vicariously liable for another's fault.** Whether vicarious liability exists, however, is a factual question. Here, the jury's findings do not support the conclusion that the Port is vicariously liable for the airlines' fault.

Afoa v. Port of Seattle (II), 191 Wn.2d 110, 421 P.3d 903 (July 19, 2018). (emphasis added). In Afoa II, this Court further explained:

> **An entity that delegates its nondelegable duty will be vicariously liable for the negligence of the entity subject to its delegation**, but an entity's nondelegable duty cannot substitute for a factual determination of vicarious liability when RCW 4.22.070(1) clearly requires apportionment to "every entity which caused the claimant's damages."

Id. at 910-911 (emphasis added). Even when fault is apportioned, vicarious liability still applies upon a finding of agency:

> The Port can still be vicariously liable for the airlines' negligence if the jury makes the necessary finding of control because RCW 4.22.070(1)(a) "explicitly retains principles of common law vicarious liability" within its exceptions.

Id. at 911, *quoting* Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 950, 247 P.3d 18 (Div. 1, 2011). This Court found that even where the airlines were not parties, the Port still could have been vicariously liable for the Airlines' fault had a jury finding of Port control over the airlines been made:

> There is a long-standing common law duty to provide a safe workplace in Washington, and the Port is directly liable in this case as a result; while **the Port could be vicariously liable for the airlines' breach of their concurrent nondelegable duties if a jury found that the Port retained control over the airlines** ...

Id. (emphasis added) Conversely, RCW 4.22.070 notwithstanding, the Port would have been vicariously liable for the airlines' negligence had there been an explicit finding that the Port, as a landowner, retained control over the airlines.

Here, unlike in Afoa II, there are no potential non-immune entities that share Inland's nondelegable duties who are not parties to this case. There are no equivalents of the non-party airlines in this case. Inland is liable for its own negligence and vicariously liable for the breaches of non-delegable safe workplace and WISHA duties by Ralph's, Miles, and Hilltop. Under this Court's decision in Afoa II, liability should be apportioned between Inland, Ralphs, and Miles under RCW 4.22.070, but Afoa II does **not** support dismissal of the general contractor.

While Inland is vicariously liable for breaches of non-delegable duties of Hilltop, Mr. Vargas's Title 51 RCW immune direct employer, no liability may be apportioned to Hilltop under RCW 4.22.070, which explicitly prohibits fault allocation to Title 51 RCW immune entities. RCW 4.22.070 (1). In Afoa II, there was no question that Mr. Afoa's direct employer EAGLE was immune and exempt from apportionment.

Also, the Port's affirmative defense of airline liability was based on the airlines' vicarious liability for EAGLE's negligence. Mr. Afoa was between the gates of Hawaiian and China airlines when the brakes and steering on his pushback failed. He was nowhere near any operations of British and EVA, yet all four airlines were found to have vicarious fault for EAGLE's negligence in failing to ensure the pushback was safely maintained in compliance with WISHA standards.

Inland superintendent Steve Miller testified that his job duties included "coordinating the job" and required him to "play babysitter when somebody cries, solve problems that arise."[42] Hilltop foreman Matt Skoog testified that Steve Miller was involved in deciding where to park the pump truck that morning:

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[42] App. at 237 (Deposition of Steve Miller, page 42:2-8)

Q. Do you know who made that decision as to where to park the pump truck that morning?
A. I believe we all did in order to find the best spot for the pump to sit to pour.
Q. When you say "we all", who was involved in that?
A. Steve Miller and I and possibly Don from Ralph's Concrete Pumping.

App. 534-535 (Deposition of Matthew Skoog, Pages 59:22-60:3).

The level of control shown by Inland over the concrete operations in this case far exceeds that shown by British or EVA over EAGLE's pushback operations in Afoa II.

C. Inland Washington, as the general contractor, had *per se* control of the work under *Stute* and owed non-delegable duties to provide workers with a safe workplace free of WISHA violations.

Mr. Vargas was injured as a result of breaches of 1) safety duties under WISHA, 2) safety duties under the retained control doctrine, and 3) safety duties owed by a possessor of land. The seminal case for duties under WISHA is Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 788 P.2d 545 (1990). Duties to provide a safe workplace under the retained control doctrine are described as set forth in Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 582 P.2d 500, 505 (1978). These three safety duties are described in the Afoa I decisions of this Court and the Court of Appeals.[43]

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[43] Afoa v. Port of Seattle (I), 176 Wn.2d 460, 296 P.3d 800 (2013); Afoa v. Port of Seattle (I), 160 Wn. App. 234, 247 P.3d 482 (Div. 1, 2011).

For a landowner to owe safety duties under WISHA, it must retain the right to control the manner and instrumentalities of the work. Afoa (I), 176 Wn.2d at 472; Kamla v. Space Needle Corp.,147 Wn. 2d 114, 52 P.3d 472 (2002). General contractors have *per se* control under Stute.

1. General contractor Inland has *per se* control under *Stute*; the *Kamla* analysis does not apply.

Under Stute, a "general contractor's supervisory authority is *per se* control over the workplace, and the [non-delegable duty to provide a safe place to work for employees of subcontractors] is placed upon the general contractor as a matter of law." Stute, 114 Wn.2d at 463-464. Since control is established *per se*, the analysis as applied in cases such as Kamla, Afoa, and Arnold, which involved jobsite owners who were not general contractors on construction sites, does not apply.[44]

2. After this Court's *Afoa II* decision, longstanding Washington law providing that general contractors are vicariously liable for breaches of non-delegable safe workplace duties must be affirmed.

Prior to this Court's decision in Afoa II, it was clear that general contractors were vicariously liable for the acts and omissions of its subcontractors. In 2013, Division III examined

[44] Kamla v. Space Needle Corp.,147 Wn. 2d 114, 52 P.3d 472 (2002); Afoa v. Port of Seattle (I), 176 Wn.2d 460, 296 P.3d 800 (2013); Arnold v. Saberhagen Holdings, Inc., 157 Wn. App. 649, 666, 240 P.3d 162 (Div. 2, 2010) *review denied*, 249 P.3d 1029 (2011).

general contractors' duties under Stute and explained that general contractors are vicariously liable for damages caused by breaches of non-delegable duties by subcontractors such that independent negligence of the general contractor need not be shown. Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 313 P.3d 1215, (2013) *review denied,* 179 Wn.2d 1026, 320 P.3d 718 (2014). The Millican court examined Stute, Kelley, and other Washington workplace safety cases and proclaimed that "when it comes to violations of WISHA, **vicarious liability for breach of a duty that is nondelegable**. A violation of WISHA by a subcontractor's employee is therefore not only chargeable to the subcontractor, it is also chargeable to a general contractor." Millican, 177 Wn. App. at 883 (emphasis added). The Millican court explained general contractors are vicariously liable for breaches of non-delegable duties under the Restatement (Second) of Torts "even if the principal has itself exercised reasonable care" and that these are "rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault." Millican, 177 Wn. App. at 890-891, *quoting* Restatement (Second) of Torts (1965). The Millican court also explained that "nondelegable duty" equated to "vicarious liability" under the Restatement (Third) of Torts (2012). Millican,177 Wn. App. at 896.

This comports with longstanding Washington law as affirmed by this Court in Afoa I. This Court cited the 1951 case of Myers v. Little Church by the Side of the Road with approval and explained how the workplace safety doctrine has developed. Afoa I, 176 Wn.2d at 475 (citations omitted) *citing* Myers v. Little Church by the Side of the Road, 37 Wn.2d 897, 901-4, 227 P.2d 165 (1951). (holding employer's duty to provide a safe workplace was nondelegable and that such liability was vicarious.) See also Blancher v. Bank of California, 47 Wn. 2d 1, 8, 286 P.2d 92 (1955) *quoting* Vicarious Liability, 28 Tulane L.Rev. 204 (emphasis added) (holding land occupier vicariously liable for its contractor's breach of non-delegable duty.) As a general contractor with *per se* control, Inland is vicariously liable for the acts and omissions of Hilltop, Ralph's, and Miles. This Court's decision in Afoa II did not change this.

VI. CONCLUSION

Dismissal of the general contractor in a Stute case was obvious error. The Vargas family respectfully requests this Court accept review and affirm that Stute and longstanding Washington workplace safety law were not overturned by this Court in Afoa II.

Respectfully submitted this 12th day of December, 2018.

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Petitioners Vargas

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Exhibit 1

Hon. Jeffrey M. Ramsdell

STATE OF WASHINGTON KING COUNTY SUPERIOR COURT

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	Case No. 13-2-32219-6 SEA ~~[PROPOSED]~~ ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY ORDER GRANTING INLAND WASHINGTON, LLC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL TO THE COURT OF APPEALS

gmr 4/21/17

This matter came before the Court on Plaintiffs' Motion to Certify Order Granting Inland Washington, LLC's ("Inland WA") Motion for Summary Judgment of Dismissal to the Court of Appeals, the Court reviewed the pleadings and files on record, including:

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19743 First Avenue South
Normandy Park, WA 98148-2401
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1. Plaintiffs' Motion to Certify Order Granting Inland WA's Motion for Summary Judgment of Dismissal to the Court of Appeals, with Declarations in support and Exhibits;

2. Defendants' Response(s) to Plaintiff's Motion to Certify Order Granting Inland Washington, LLC's ("Inland WA") Motion for Summary Judgment of Dismissal to the Court of Appeals, if any, with Declarations in support and Exhibits, if any;

3. ~~Plaintiffs' Reply to Defendants' Response(s), if any;~~

JMR 4/21/17

4. Inland WA's March 3, 2017 Motion for Summary Judgment of Dismissal, and Reponses and Replies, with Declarations in support and Exhibits;

5. _____; and

6. _____.

Therefore, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion is GRANTED. The Court hereby CERTIFIES that the March 21, 2017 Order Granting Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, and the Court's affirmation of its finding that Inland WA is not vicariously liable involve a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review of the order and finding may materially advance the ultimate termination of the litigation.

~~IT IS FURTHER ORDERED, ADJUDGED and DECREED that:~~

JMR 4/21/17

_____

_____

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DATED this 21st day of April, 2017.

Judge Jeffrey M. Ramsdell

Presented By:

BISHOP LEGAL

Derek K. Moore, WSBA No. 37921
Attorneys for Plaintiff

Notice of Presentation Waived, Approved as to Form:

Christie Law Group

By: _____
Bob Christie, WSBA #10895
Alexander Casey, WSBA # 43520
Attorneys for Defendant
Ralph's Concrete Pumping

Aiken, St. Louis & Siljeg, P.S.

By: _____
David P. Hansen, WSBA #10755
Attorneys for Inland Group, P.S.

Lee Smart, P.S., Inc.

By: _____
Steven G. Wraith, WSBA #17364
Attorneys for Miles Sand & Gravel

Preg O'Donnell & Gillet

By: _____
David Chawes, WSBA #36322
John K. Butler, WSBA #28528
Attorneys for Inland Washington, LLC

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Exhibit 2

Hon. Jeffrey M. Ramsdell

STATE OF WASHINGTON KING COUNTY SUPERIOR COURT

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	Case No. 13-2-32219-6 SEA ~~[PROPOSED]~~ ORDER GRANTING PLAINTIFFS' MOTION TO CERTIFY IMMIGRATION DISCOVERY ORDERS TO THE COURT OF APPEALS

jmr 4/21/17

This matter came before the Court on Plaintiffs' Motion to Certify Immigration Discovery Orders to the Court of Appeals, the Court reviewed the pleadings and files on record, including:

1. Plaintiffs' Motion to Certify Immigration Discovery Orders to the Court of Appeals, with Declarations in support and Exhibits;

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2. Defendants' Response(s) to Plaintiff's Motion to Certify Immigration Discovery Orders to the Court of Appeals, if any, with Declarations in support and Exhibits, if any;

3. Plaintiffs' Reply to Defendant's Response(s), if any;

4. Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC ("Inland WA") and Hilltop Concrete Construction ("Hilltop"), and Responses and Replies, with Declarations in support and Exhibits;

5. Plaintiffs' Motion for Protective Order to Prevent Defendants from Inquiring into the Immigration Statuses of Witnesses and Parties, and Responses and Replies, with Declarations in support and Exhibits;

6. Inland WA's Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores, and Responses and Replies, with Declarations in support and Exhibits;

7. Plaintiffs' Motion for Reconsideration of Inland WA's Motion to Compel Continued Depositions of Plaintiffs' Gildardo Crisostomo Vargas and Lucina Flores;

8. Defendants' Responses, ~~if any,~~ to Plaintiffs' Motion to Certify Immigration Discovery Orders to the Court of Appeals, with Declarations in support and Exhibits, if any;

9. Plaintiffs' Reply, ~~if any~~, in Support of Motion to Certify Immigration Discovery Orders to the Court of Appeals, with Declarations in support and Exhibits, if any;

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10. ~~_____~~; and

11. ~~_____~~.

JMR 4/21/17

Therefore, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion is GRANTED. The Court hereby CERTIFIES the orders allowing Defendants to depose Plaintiffs on their immigration status and denying Plaintiffs' leave to depose non-party employer Hilltop Concrete Construction and Defendant Inland Washington, LLC on their use of undocumented labor and the ability of undocumented workers to find employment on their jobsites involve a controlling question of law as to which there is substantial ground for difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The Certified Orders include:

- The March 20, 2017 Order Denying Plaintiffs' Motion for Reconsideration of the March 7, 2017 Order Granting Inland Washington's Motion to Compel Continued Depositions of Plaintiffs; and
- The March 20, 2017 Order Denying Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction.

IT ~~IS FURTHER ORDERED, ADJUDGED~~ and DECREED that:

~~_____~~

~~_____~~

JMR 4/21/17

DATED this 21st day of April, 2017.

Judge Jeffrey M. Ramsdell

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Presented By:

BISHOP LEGAL

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Attorneys for Plaintiff

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Alexander Casey, WSBA # 43520
Attorneys for Defendant
Ralph's Concrete Pumping

Aiken, St. Louis & Siljeg, P.S.

By: _____
David P. Hansen, WSBA #10755
Attorneys for Inland Group, P.S.

Lee Smart, P.S., Inc.

By: _____
Steven G. Wraith, WSBA #17364
Attorneys for Miles Sand & Gravel

Preg O'Donnell & Gillet

By: _____
David Chawes, WSBA #36322
John K. Butler, WSBA #28528
Attorneys for Inland Washington, LLC

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Exhibit 3

Honorable Jeffrey M. Ramsdell

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

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiff(s), v. INLAND GROUP P.S., LLC, a Washington limited liability company; INLAND WASHINGTON, LLC, a Washington limited liability company; RALPH'S CONCRETE PUMPING, INC., a Washington corporation; and MILES SAND & GRAVEL COMPANY, d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendant(s).	NO. 13-2-32219-6 SEA ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING INLAND WASHINGTON, LLC'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER having come before the above-entitled Court on Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment, and the Court having considered the files and records herein, including:

PREG O'DONNELL & GILLETT PLLC
901 FIFTH AVE., SUITE 3400
SEATTLE, WASHINGTON 98164-2026
TELEPHONE: (206) 287-1775 • FACSIMILE: (206) 287-9113

1. Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment;

2. Declaration of Derek K. Moore in Support of Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment, with attached exhibits;

3. Declaration of Oscar Flores In Support of Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment;

4. Defendant Inland Washington, LLC's Opposition to Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment

5. Declaration of John K. Butler in Support of Defendant Inland Washington LLC's Opposition to Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment, with attached exhibits;

6. _____;

7. _____;

8. _____

and the Court having determined the following findings of fact and having made the following conclusions of law:

1.

2.

3.

4. _____;

5. _____;

and being otherwise fully advised in the premises, now, therefore, it is hereby

AM 1/20/17

PREG O'DONNELL & GILLETT PLLC
901 FIFTH AVE., SUITE 3400
SEATTLE, WASHINGTON 98164-2026
TELEPHONE: (206) 287-1775 • FACSIMILE (206) 287-9113

ORDERED that Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington, LLC's Motion for Summary Judgment is **DENIED**, ~~and~~

~~IT IS FURTHER ORDERED~~ that

DATED this 21st day of April, 2017.

Honorable Jeffrey M. Ramsdell
King County Superior Court Judge

Presented by:

PREG O'DONNELL & GILLETT PLLC

By /s/ John K. Butler
John K. Butler, WSBA #28528
David E. Chawes, WSBA #36322
Michelle Pham, WSBA #44286
Attorneys for Defendant Inland Washington, LLC

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Notice of Presentation Waived:

BISHOP LEGAL

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Derek K. Moore, WSBA #37921
Ruby Aliment, WSBA #51242
Attorneys for Plaintiffs

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Copy Received; Approved as to Form;
Notice of Presentation Waived:

AIKEN, ST. LOUIS & SILJEG, P.S.

By_____
David P. Hansen, WSBA #10755
Attorneys for Defendant Inland Group P.S., LLC

Copy Received; Approved as to Form;
Notice of Presentation Waived:

LEE SMART, P.S., INC.

By_____
Steven G. Wraith, WSBA #17364
Dirk J. Muse, WSBA #28911
Attorneys for Defendant Miles Sand &
Gravel Company, d/b/a Concrete Nor-West

Copy Received; Approved as to Form;
Notice of Presentation Waived:

CHRISTIE LAW GROUP, PLLC

By_____
Robert L. Christie, Esq., WSBA #10895
Thomas P. Miller, Esq., WSBA #34473
Alexander J. Casey, Esq., WSBA #43520
Attorneys for Defendant Ralph's Concrete Pumping, Inc.

PREG O'DONNELL & GILLETT PLLC
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TELEPHONE: (206) 287-1775 • FACSIMILE: (206) 287-9113

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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Raymond E.S. Bishop, Esq.
Derek K. Moore, Esq.
Ruby Aliment, Esq.
Bishop Legal
19743 First Avenue South
Normandy Park, WA 98148-2401

____ **Via Messenger**
____ **Via Facsimile – (206) 592-9001**
____ **Via U.S. Mail, postage prepaid**
____ **Via Overnight Mail, postage prepaid**
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Seattle, WA 98101-3929

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Counsel for Defendant Ralph's Concrete Pumping, Inc.:
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Thomas P. Miller, Esq.
Alexander J. Casey, Esq.
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Seattle, WA 98109

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_X_ **Via Court E-Service or email with recipient's approval** ***bob@christielawgroup.com***

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901 FIFTH AVE., SUITE 3400
SEATTLE, WASHINGTON 98164-2026
TELEPHONE: (206) 287-1775 • FACSIMILE: (206) 287-9113

DATED in Seattle, Washington, this _____ day of April, 2017.

_____
Mary R. Munson-Allen

PREG O'DONNELL & GILLETT PLLC
901 FIFTH AVE., SUITE 3400
SEATTLE, WASHINGTON 98164-2026
TELEPHONE: (206) 287-1775 • FACSIMILE: (206) 287-9113

Exhibit 4

FILED
KING COUNTY, WASHINGTON
MAR 31 2017
SUPERIOR COURT CLERK
BY Kim Noble
DEPUTY

Honorable Jeffrey M. Ramsdell
Hearing: March 31, 2017 at 1:00 p.m.
With Oral Argument

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

GILDARDO CRISOSTOMO VARGAS, et al., Plaintiffs, v. INLAND GROUP P.S., LLC, et al. Defendants.	NO. 13-2-32219-6 SEA ORDER GRANTING DEFENDANT INLAND WASHINGTON, LLC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL ~~(Revised & Proposed)~~

gmt 3/31/17

THIS MATTER having come before the above-entitled Court on Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, and the Court having considered the files and records herein, including:

1. Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, dated March 3, 2017;
2. Declaration of David E. Chawes in Support of Inland Washington, LLC's' Motion for Summary Judgment of Dismissal, dated March 3, 2017, with attached exhibits;

PREG O'DONNELL & GILLETT PLLC
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SEATTLE, WASHINGTON 98164-2026
TELEPHONE (206) 287-1775 · FACSIMILE (206) 287-9115

3. Plaintiffs' Opposition to Inland Washington LLC's (Second) Motion for Summary Judgment of Dismissal;

4. Declaration of Derek K. Moore in Support of Plaintiffs' Opposition to Defendant Ralph's Concrete Pumping, Inc.'s Motion for Summary Judgment and Inland Washington LLC's Motion for Summary Judgment of Dismissal, with attached exhibits;

5. Defendant Inland Washington LLC's Reply Re: Motion for Summary Judgment of Dismissal;

6. _____ _____ _____ -

and having heard argument of counsel in open court, and being otherwise fully advised in the premises, now, therefore, it is hereby

ORDERED that Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal is **GRANTED**, and that all claims against Defendant Inland Washington, LLC are **DISMISSED** with prejudice.

Or in the alternative:

ORDERED that Plaintiffs shall not assert any vicarious liability or concert of action theories against Inland Washington LLC at the trial of this matter.

_____ _____ _____

_____ _____ _____

DATED this 31st day of March, 2017.

Hon. Jeffrey M. Ramsdell
King County Superior Court Judge

PREG O'DONNELL & GILLETT PLLC
901 FIFTH AVE., SUITE 3400
SEATTLE, WASHINGTON 98164-2026
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Presented by:

PREG O'DONNELL & GILLETT PLLC

By /s/ David E. Chawes
John K. Butler, WSBA #26528
David E. Chawes, WSBA #36322
Michelle Q. Pham, WSBA #44286
Attorneys for Defendant Inland Washington, LLC

Copy Received; Approved as to Form; Notice of Presentation Waived:

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By_____
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Derek K. Moore, Esq., WSBA #37921
Ruby Aliment, Esq., WSBA #51242
Attorneys for Plaintiffs

AIKEN, ST. LOUIS & SILJEG, P.S.

By_____
David P. Hansen, Esq., WSBA #10755
Attorneys for Defendant Inland Group P.S., LLC

LEE SMART, P.S., INC.

By_____
Steven G. Wraith, Esq., WSBA #17364
Attorneys for Defendant Miles Sand & Gravel Company, d/b/a Concrete Nor-West

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CHRISTIE LAW GROUP, PLLC

By_____
Robert L. Christie, Esq., WSBA #10895
Thomas P. Miller, Esq., WSBA #34473
Alexander J. Casey, Esq., WSBA #10895
Attorneys for Defendant Ralph's Concrete Pumping, Inc.

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Exhibit 5

Hon. Jeffrey M. Ramsdell
Hearing Date: March 21, 2017
Without Oral Argument

WASHINGTON SUPERIOR COURT FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	Case No. 13-2-32219-6 SEA ~~[PROPOSED]~~ ORDER ~~GRANTING~~ Denying PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING INLAND WA'S MOTION TO COMPEL CONTINUED DEPOSITIONS OF PLAINTIFFS **(Clerk's Action Required)**

JMR 3/20/17

THIS MATTER having come on regularly for hearing upon Plaintiffs' Motion for Reconsideration of Inland Washington, LLC's Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores., and the court having considered the files and records herein, including:

1. Plaintiffs' Motion for Reconsideration, with Declarations in Support and Exhibits thereto;
2. ~~Responses to Plaintiffs' Motion for Reconsideration, if any, with declarations in support, if any, and Replies thereto, if any;~~

JMR 3/20/17

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3. _____;

4. _____;

5. _____;

6. _____; and

7. _____.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Reconsideration of Inland Washington, LLC's Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores be ~~GRANTED~~. Denied.

~~IT IS FURTHER ORDERED, ADJUDGED, and DECREED that:~~

~~(1) the Court's Order Granting Defendant Inland Washington, LLC's Motion to Compel Continued Depositions of Plaintiffs is VACATED;~~

~~(2) Inland Washington, LLC's Motion to Compel Continued Depositions of Plaintiffs is DENIED.~~

JMR 3/20/17

~~IT IS FURTHER ORDERED, ADJUDGED, and DECREED that:~~

_____

_____

_____

_____

DATED this 20th day of March, 2017.

Honorable Jeffrey M. Ramsdell
King County Superior Court Judge

Presented By:

BISHOP LEGAL

_____
Derek K. Moore, WSBA No. 37921
Attorneys for Plaintiffs

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Exhibit 6

Honorable Jeffrey M. Ramsdell

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

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiff(s), v. INLAND GROUP P.S., LLC, a Washington limited liability company; INLAND WASHINGTON, LLC, a Washington limited liability company; RALPH'S CONCRETE PUMPING, INC., a Washington corporation; and MILES SAND & GRAVEL COMPANY, d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendant(s).	NO. 13-2-32219-6 SEA ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE OF COURT TO DEPOSE INLAND WASHINGTON, LLC AND HILLTOP CONCRETE CONSTRUCTION ~~[PROPOSED]~~

JMR 3/20/17

THIS MATTER having come before the above-entitled Court on Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction, and the Court having considered the files and records herein, including:

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1. Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction;

2. Declaration of Derek K. Moore in Support of Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction, and the attached exhibits;

3. Plaintiffs' Proposed Order Granting Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction;

4. Plaintiffs' Praecipe Re: Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction;

5. Plaintiffs' Amended Subpoena to Hilltop Concrete Construction, Inc., dated March 10, 2017;

6. Defendant Inland Washington, LLC's Opposition to Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction;

7. Declaration of Michelle Pham in Support of Defendant Inland Washington, LLC's Opposition to Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction, and the attached exhibits;

8. Plaintiff's Reply _____; gmm 3/20/17

9. _____;

10. _____;

and being otherwise fully advised in the premises, now, therefore, it is hereby

ORDERED that Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction is DENIED.

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DATED this 20th day of March, 2017.

Honorable Jeffrey M. Ramsdell
King County Superior Court Judge

Presented by:

PREG O'DONNELL & GILLETT PLLC

By_____
John K. Butler, WSBA #28528
David E. Chawes, WSBA #36322
Michelle Q. Pham, WSBA #44286
Attorneys for Defendant Inland Washington, LLC

Copy Received; Approved as to Form; Notice of Presentation Waived:

BISHOP LEGAL

By_____
Raymond E.S. Bishop, WSBA #22794
Derek K. Moore, WSBA #37921
Ruby Aliment, WSBA #51242
Attorneys for Plaintiffs Oscar Crisostomo Flores, as GAL for Gildardo Crisostomo Vargas; Lucina Flores, as GAL for Patricia Crisostomo Flores and Rosario Crisostomo Flores

Copy Received; Approved as to Form; Notice of Presentation Waived:

AIKEN, ST. LOUIS & SILJEG, P.S.

By_____
David P. Hansen, WSBA #10755
Attorneys for Defendant Inland Group P.S., LLC

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LEE SMART, P.S., INC.

By_____
Steven G. Wraith, WSBA #17364
Dirk J. Muse, WSBA #28911
Attorneys for Defendant Miles Sand & Gravel Company, d/b/a Concrete Nor-West

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CHRISTIE LAW GROUP, PLLC

By_____
Robert L. Christie, WSBA #10895
Thomas P. Miller, WSBA #34473
Alexander J. Casey, WSBA #10895
Attorneys for Defendant Ralph's Concrete Pumping, Inc.

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Exhibit 7

HONORABLE JEFFREY M. RAMSDELL
Hearing Date: Wednesday, May 3, 2017 (w/o oral argument)

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

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs, v. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington Limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation; Defendants.	NO. 13-2-32219-6 SEA **~~[PROPOSED]~~ ORDER GRANTING DEFENDANT RALPH'S CONCRETE PUMPING, INC.'S MOTION TO CERTIFY IN ACCORDANCE WITH RAP 2.3(b)(4)**

gmr 5/2/17

ORDER

THIS MATTER having come before the Court on Defendant Ralph's Concrete Pumping,

CHRISTIE LAW GROUP, PLLC
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Inc.'s Motion to Certify in accordance with RAP 2.3(b)(4), and specifically including this Court's previous Order Denying Ralph's Concrete Pumping, Inc.'s Motion for Summary Judgment dismissal, dated March 31, 2017, and Order Denying Ralph's Concrete Pumping, Inc.'s Motion for Reconsideration of Ralph's Concrete Pumping, Inc.'s Motion for Summary Judgment dismissal, dated April 21, 2017, and the Court having reviewed the following materials and otherwise being fully apprised:

1. Defendant Ralph's Concrete Pumping, Inc.'s Motion to Certify;
2. Responses of Plaintiff ~~, if any;~~
3. Reply of Ralph's Concrete Pumping Inc., ~~if any;~~
4. Relevant pleadings already in the record, including those associated with the underlying Motions for Summary Judgment, and additionally including the Court's Order Granting Plaintiffs' Motion to Certify Order Granting Defendant Inland Washington, LLC's Motion for Summary Judgment (and other related underlying pleadings); and
5. _____.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Ralph's Concrete Pumping, Inc.'s Motion to Certify is GRANTED. In accordance with RAP 2.3(b)(4), the Court CERTIFIES for discretionary review the Order Denying Ralph's Concrete Pumping, Inc.'s Motion for Summary Judgment dismissal, dated March 31, 2017, and Order Denying Ralph's Concrete Pumping, Inc.'s Motion for Reconsideration of Order Denying Ralph's Concrete Pumping, Inc.'s Motion for Summary Judgment dismissal, dated April 21, 2017. Both

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orders involve controlling issues of law as to which there is a substantial ground for a difference of opinion, and immediate appellate review of the orders may materially advance the ultimate termination of the litigation.

DONE IN CHAMBERS/OPEN COURT this 2nd day of May, 2017.

HONORABLE JEFFREY M. RAMSDELL

Presented by

CHRISTIE LAW GROUP, PLLC

By /s/ Robert L. Christie
ROBERT L. CHRISTIE, WSBA #10895
Attorney for Defendant Ralph's Concrete Pumping, Inc.

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Exhibit 8

Hon. Jeffrey M. Ramsdell
Hearing Date: Friday, March 17, 2017 at 1:00 p.m.
With Oral Argument

STATE OF WASHINGTON KING COUNTY SUPERIOR COURT

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	Case No. 13-2-32219-6 SEA [~~PROPOSED~~] ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING EFFECT OF TITLE 51 IMMUNITY AND COLLATERAL SOURCES

JMR 3/20/17

THIS MATTER came on regularly before the undersigned Judge of the above-entitled Court for hearing upon Plaintiffs' Motion for Partial Summary Judgment Regarding Effect of Title 51 Immunity and Collateral Sources ("Plaintiff's Motion"), and the Court having considered the argument of counsel, if any, and the pleadings and papers filed herein, including:

1. Plaintiff's Motion;

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2. Defendants' Ralph's Concrete's & Inland WA's Response(s) to Plaintiff's Motion, if any, with declarations in support and exhibits thereto, if any;

3. Plaintiff's Reply to Defendant's Response(s), ~~if any;~~

4. Plaintiff's First Amended Complaint;

5. Defendants Inland Group P.S., LLC and Inland Washington LLC's Answer to Plaintiff's First Amended Complaint;

6. Plaintiff's Second Amended Complaint;

7. Inland Washington LLC's Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint;

8. Defendant Ralph's Concrete Plumbing, Inc.'s Answer to Plaintiff's Second Amended Complaint;

9. Defendant Miles Sand and Gravel's Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint;

10. Defendant Miles Sand & Gravel's joinders to Defendant Inland WA's and Defendant Ralph's Concrete's oppositions;

11. _____;

12. _____;

13. _____;

14. _____;

15. _____;

16. _____;

17. _____;

18. _____; and

19. _____.

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Therefore, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiff's Motion is GRANTED, such that the Court enters the following findings of conclusions of law:

Conclusions of Law

Plaintiffs have met their burden of proving the absence of a genuine dispute of material fact opposing the following conclusions of law:

1. Defendant Inland Washington, LLC was a general contractor on the subject jobsite as admitted in ~~#~~ it's answer. gmr 3/20/17
2. At all times material hereto, Plaintiff Gildardo Crisostomo Vargas was directly employed by Hilltop Concrete Construction, Inc.;
3. As Mr. Vargas's direct employer, Hilltop Concrete Construction, Inc. is immune from liability to Plaintiffs under Title 51 RCW. Any and all of Mr. Vargas's co-workers that are also directly employed by Hilltop Concrete Construction, Inc. and who are yet to be determined are also immune.; gmr 3/20/17
4. Under RCW 4.22.070, no liability may be apportioned to Hilltop Concrete Construction, Inc., to any of Mr. Vargas's co-workers that are also directly employed by Hilltop Concrete Construction, Inc. as determined pursuant to (3) above, or to anyone else found to be immune from liability to Plaintiffs under Title 51 RCW. gmr 3/20/17
5. Plaintiffs' damages and recovery, if any, shall not be offset or reduced by benefits received from the Department of Labor and Industries or any other collateral source defined as being any source independent of one of the tortfeasors. gmr 3/20/17

IT IS FURTHER ORDERED, ADJUDGED and DECREED that:

_____

_____

_____

_____

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DATED this 20th day of March, 2017.

Judge Jeffrey M. Ramsdell

Presented By:

BISHOP LEGAL

Derek K. Moore, WSBA No. 37921
Attorneys for Plaintiff

Notice of Presentation Waived, Approved as to Form:

Christie Law Group

By: _____
Bob Christie, WSBA #10895
Alexander Casey, WSBA # 43520
Attorneys for Defendant
Ralph's Concrete Pumping

Aiken, St. Louis & Siljeg, P.S.

By: _____
David P. Hansen, WSBA #10755
Attorneys for Inland Group, P.S.

Lee Smart, P.S., Inc.

By: _____
Steven G. Wraith, WSBA #17364
Attorneys for Miles Sand & Gravel

Preg O'Donnell & Gillet

By: _____
David Chawes, WSBA #36322
John K. Butler, WSBA #28528
Attorneys for Inland Washington, LLC

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Exhibit 9

Honorable Jeffrey M. Ramsdell
Hearing: March 31, 2017; 1:00 p.m.
With Oral Argument

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

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiff(s), v. INLAND GROUP P.S., LLC, a Washington limited liability company; INLAND WASHINGTON, LLC, a Washington limited liability company; RALPH'S CONCRETE PUMPING, INC., a Washington corporation; and MILES SAND & GRAVEL COMPANY, d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendant(s).	NO. 13-2-32219-6 SEA **INLAND WASHINGTON, LLC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL**

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I. INTRODUCTION AND RELIEF REQUESTED

Defendant Inland Washington, LLC ("Inland Washington") moves for summary judgment of dismissal pursuant to CR 56(c), as Inland Washington is not liable for the acts or omissions of others, and there is no genuine issue of material fact that it did not breach a duty owed to Plaintiff Gildardo Vargas ("Gildardo Vargas"). The law of this case is that Inland Washington is "not vicariously liable".[1] The Incident allegedly resulting in Gildardo Vargas' damages occurred entirely within a specific non-common area of the North City Apartments Project ("Project"), which at all times material was under the full control of Inland Washington's subcontractor and Gildardo Vargas's employer, Hilltop Concrete Construction ("Hilltop").[2]

Inland Washington did not owe Gildardo Vargas a duty to provide a safe non-common work area of the Project under the sole control of his employer at the time of the Incident that is the subject of this lawsuit. There is no record evidence that Inland Washington violated any Washington Industrial Safety and Health Act ("WISHA") regulations at the site which proximately caused Gildardo Vargas' damages. Because Plaintiffs are unable to prove all essential elements of Plaintiffs' negligence claim against Inland Washington, the Court should dismiss the claim against Inland Washington with prejudice as a matter of law.

If the Court is not inclined to dismiss the claim, then Inland Washington requests that Court bar Plaintiffs from asserting any allegations that Inland Washington acted in concert with Hilltop of the other defendants to harm Gildardo Vargas.

II. FACTUAL BACKGROUND

This case arises from a construction site Incident in which Plaintiffs allege Gildardo Vargas was severely injured after being struck in the head by a concrete pump hose. There is no dispute that Inland Washington was the general contractor of the Project, that it had

---

[1] *Chawes Decl.*, Exhibit A (*Order Denying Defendant Inland Washington, LLC's Motion for Summary Judgment*, dated June 26, 2015; hereinafter, "MSJ Order"), at p.2.
[2] Hilltop is not a party to this litigation.

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subcontracted with Hilltop to perform concrete work at the Project, and that Gildardo Vargas was an employee of Hilltop at the time of the Incident. *Chawes Decl.*, Exhibit B (hereinafter, "*Gordon Skoog Depo.*"), at 24:18 to 26:1, 27:19 to 33:25. The Inland Washington-Hilltop subcontract required Hilltop to safely perform work in its own work areas of the Project. *See, generally, Chawes Decl.*, Exhibit C (Hilltop-Inland WA Subcontract Agreement). Hilltop in turn had hired Defendant Miles Sand & Gravel ("Miles") to supply the concrete mix for the Project, and had also hired Defendant Ralph's Concrete Pumping ("Ralph's") to pump the concrete from the Miles truck into wall forms erected by Hilltop. *Gordon Skoog Depo.*, at 35:3-17. Hilltop retained overall control of concrete pouring at the Project:

> Q When you say somebody in charge of pouring concrete, who would that be?
>
> [Form objection]
>
> A An employee at Hilltop.

Chawes Decl., Exhibit D (hereinafter, "*Matt Skoog Depo.*"), at 108:13-16. Matt Skoog, a Hilltop supervisor, was that employee:

> Q And is that because you were sort of overseeing the entire process each day?
>
> A For the concrete portion.

Matt Skoog Depo., at 176:5 to 176:7. Matt Skoog controlled the start of the pour:

> Q In terms of your practice, the pump truck operator wouldn't just typically start up without giving a signal to either the pourers or you giving a signal to him; is that fair?
>
> [Form objection]
>
> A Yes.
>
> Q And was it your communication with him that signaled that it was okay to attempt to start the pour?
>
> A Yes.

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Matt Skoog Depo., at 178:19 to 179:1. Gildardo Vargas was second in command to Matt Skoog at the pour:

> Q Earlier you indicated, and I believe it's in your declaration, that Mr. Gildardo Vargas was the lead of the pouring team?
>
> A Yes.
>
> Q Was he your effective second in command on the location?
>
> A Yes.

Matt Skoog Depo., at 185:9 to 185:14.

There is no dispute that on May 23, 2013, Hilltop employees were the only ones present at the specific area where the concrete pour itself took place:

> Q But there were several other contractors for different trades on the site at that time; is that accurate?
>
> A When the accident happened it was pretty much just our company in that area.

Gordon Skoog Depo., at 34:17-20.

> Q But you don't know of anybody other than Hilltop people who were in the vicinity of the incident when it happened?
>
> A No.

Gordon Skoog Depo., at 34:25 to 35:2.

Matt Skoog and Ralph's concrete pump operator were standing on the concrete deck near the pour prior to the occurrence of the Incident:

> Q At some point you went out onto the slab; is that right?
>
> A The deck?
>
> Q Yeah, the deck.
>
> A Yes.
>
> Q And you were standing how close to where the pour was occurring?
>
> A Ten to twenty feet.

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Q And Mr. Howell, or the pump truck operator, was right next to you?

A At some point.

Matt Skoog Depo., at 177:15-24. The concrete pump operator moved a distance away from Matt Skoog's position prior to the Incident:

> Q I'll quote directly. It says: When we started, the pump operator could not get his boom bump [*sic*] to work where he was standing, which was next to where the pour was starting. Did I read that correctly?
>
> A Yes.
>
> Q And is that accurate as to what happened when you started?
>
> [Form objection]
>
> A That's what I wrote at the time. That's what I remembered at the time.
>
> Q So then on the next page you wrote that **he moved about 50 feet closer to his pump** so his remote would work, and that's a direct quote. Is that accurate?
>
> A That's correct.

Matt Skoog Depo., at 132:19 to 133:6 (emphasis added).

Gildardo Vargas and two other Hilltop employees were assigned to conduct the concrete pour on the day of the Incident, and they "were positioned on the scaffolding next to the concrete forms." *Chawes Decl.*, Exhibit E (Exh. 1 to *Matt Skoog Depo.*, hereinafter *Matt Skoog Decl.*) ¶ 5, at p.2. Matt Skoog testified that his declaration was accurate. *Matt Skoog Depo.*, at 200:2-8. Hilltop employees were the only ones on the scaffold itself at the time of the Incident:

> Q Do you recall how many people were near the hose at the time of the incident?
>
> A Three.
>
> Q Do you know who they were?
>
> A Gildardo and two others.
>
> Q Do you remember who the two others were?
>
> A I do not.

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Q Where was Gildardo at the time?

A Holding the hose.

Q What part of the hose was he holding?

A The end.

Matt Skoog Depo., at 116:25 to 117:10.

Q So reading through this [declaration], you wrote: Gildardo was about to run the hose, Juan was ready to use the vibrator, and Enrique was going to operate the motor on the vibrator. Is that true and accurate?

A Yes.

Q And does anything in this statement here refresh your recollection as to what happened and where everybody was?

A It refreshes my memory as to who the other two people were.

Q Who is Juan?

A Gildardo's brother.

Q Juan Crisostomo Vargas?

A Yes.

Q And who is Enrique?

A Another employee of Hilltop Concrete.

Q Was that Enrique Cruz Medina?

A I don't know his last name.

Matt Skoog Depo., at 129:22 to 130:12. No other trades were nearby:

> There were no other trade workers near our work site. This was important, so that we could focus on doing our work properly and safely during the pour."

Matt Skoog Decl. ¶ 5, at p.2.

After the Incident, Kyle Grayson, a Compliance Health and Safety Officer from the Washington Department of Labor & Industries, inspected the Project with two other inspectors and determined that Inland Washington had not violated any WISHA safety regulations:

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Q Okay. And you've been handed what's been marked Exhibit 13. Can you identify what's been marked as Exhibit 13?

A Yes. This is Inspection 316802677, Inland Construction and Development.[3]

Q And who made this Exhibit 13?

A This is an inspection that was opened by Kyle Grayson and Troy Woodard and Roberto Gonzalez.

Q And Kyle Grayson being you?

A Yes.

Chawes Decl., Exhibit F ("Kyle Grayson Depo."), at 71:3-12.

Q (By Mr. Moore) So looking at Exhibit 13, how did this set of documents come to be.

[Form objection]

A This is a document that is created when we opened inspection with Inland Construction and Development. And during the course of an investigation with this company, this is the results.

Kyle Grayson Depo., at 72:20 to 73:1.

Q Am I understanding correctly that your job as an inspector is to identify any WISHA regulation violations?

A Yeah.

....

Q Did the results of your investigation result in a report that found citations for WISHA violation?

A Which inspection are you referring to, sir?

Q Inland Washington.

A Inland.

Q Yes.

A There were no violations for Inland.

[3] Later clarified to be Inland Washington.

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Kyle Grayson Depo., at 141:10-24 (emphasis added); *see also, Chawes Decl.*, Exhibit G (Exh. 13 to *Kyle Grayson Depo.*, "Results of Inspection, Inspection: 316802677"), at p.2 ("No violations were cited. No penalties were assessed. We appreciate your interest in and concern for workplace safety and health.").

In their Second Amended Complaint, Plaintiffs brought a single claim of negligence against Inland Washington. *Chawes Decl.*, Exhibit H (hereinafter, "Plaintiffs' Complaint"). Lacking evidence that all essential elements of a negligence claim can be maintained, Inland Washington should be dismissed as a matter of law.

III. ISSUES PRESENTED

Whether this Court should dismiss Plaintiffs' claims against Inland Washington, pursuant to CR 56(c), when there is no evidence that the Incident occurred in a common work area of the Project, or that Inland Washington violated a specific WISHA safety regulation which proximately caused the Incident.

Answer: **YES**.

Whether this Court should bar Plaintiffs from asserting allegations that Inland Washington acted in concert with others to harm Gildardo Vargas, when there is no evidence supporting such an assertion.

Answer: **YES**.

IV. EVIDENCE RELIED UPON

This motion relies on the Declaration of David E. Chawes, with attached exhibits; and the papers and pleadings in the court clerk's file.

V. AUTHORITY

A. Summary Judgment Standard

The standards governing summary judgment motions are well established. A motion for summary judgment should be granted when there are no genuine issues as to material facts and the moving party is entitled to summary judgment as a matter of law. CR 56(c). *Wilson v. Steinbach*, 98 Wn.2d 434, 437 656 P.2d 1030 (1982). Summary judgment is a legitimate

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procedure for testing a party's evidence. *Cofer v. Pierce County*, 8 Wn. App. 258, 262–63, 505 P.2d 476 (1973). A defendant may move for summary judgment by simply pointing out to the court that there is an absence of evidence to support the plaintiffs' case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the party moving for summary judgment has made an initial showing that there is no genuine issue of material fact, the nonmoving party must demonstrate the existence of such an issue by setting forth specific facts which, if believed, would be beyond mere unsupported allegations and would raise a genuine issue as to a material fact. *Brame v. St. Regis Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982). Absent that showing, the trial court should grant the defendant's motion. *Young*, 112 Wn.2d at 225.

The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. *Seven Gables Corp. v. MGM/US Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

"[I]f there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a Plaintiffs would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred." *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). To defeat the motion, the plaintiffs must provide sufficient evidence upon which a jury could reasonably find a verdict for it:

> No longer are judges required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. . . . [T]here is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon

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> which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d. 202, 106 S. Ct. 2505 (1986).

Plaintiffs have sued Inland Washington and the other defendants[4] under a theory of negligence. Inland Washington brought an initial motion for summary judgment of dismissal in 2015, based on the evidence available at that time. While the Court denied Inland Washington's request for outright dismissal, the Court did rule that "Inland WA[shington] is not vicariously liable". *See MSJ Order*. Because the law of the case is that Inland Washington is not vicariously liable, it cannot be held liable for any acts or omissions of Hilltop, Ralph's or Miles, or of their employees or agents.

In order to prevail on a claim of negligence, a plaintiff must prove (1) the existence of a duty to the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach is a proximate cause of the injury. *Crowe v. Gaston*, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998). The existence of a duty is a question of law. *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 528, 754 P.2d 155 (1988).

As explained below, there is no genuine issue of material fact that Inland Washington did not owe a duty of care, and did not violate any applicable WISHA regulation proximately causing the Incident. Summary judgment of dismissal is appropriate as to Inland Washington.

B. Inland Washington Did Not Owe a Duty of Care Because the Incident Did Not Occur in a Common Work Area of the Project

Here, the specific work area where the Incident occurred, namely an elevated scaffold on which Hilltop was pouring concrete into a wall form, was <u>not</u> a common work area of the Project. Rather, the scaffold was being used solely by Hilltop's employees, with no other trades working on the scaffold on the day of the Incident. This means that Inland Washington did not owe a duty of care to Gildardo Vargas.

---

[4] Plaintiffs are also suing Defendant Miles Sand & Gravel for product liability. Miles has filed a separate motion addressing that claim.

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The general rule in Washington is that a party which employs an independent contractor is not liable for injuries sustained by the independent contractor's employees. Restatement (Second) of Torts § 409 (1965); *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978). An exception to that general rule occurs where a general contractor may be held liable for injuries resulting from an unsafe "common work area". *Id.* at 332. A general contractor does not owe a legal duty to an injured employee of its subcontractor where there is no evidence that the employee's injury occurred in a "common [work] area." *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 693–94, 795 P.2d 1167 (1990) (citing *Kelley*, 90 Wn.2d at 332).

The Washington Supreme Court defines a "common work area" as one in which workers of multiple trades work. *Kelley*, 90 Wn.2d at 331-32. In *Kelley,* a subcontractor's employee who installed metal decking suffered brain damage after falling from a fourth floor platform. *Id.* at 326-27. The accident occurred in an area of the job site where "four different contractors had worked within a short period of time." *Id.* at 332. Adopting the approach taken by the Michigan Supreme Court, the *Kelley* court placed the ultimate responsibility on the general contractor for job safety <u>in common work areas</u>. *Id.* (citing *Funk v. General Motors Corp.,* 392 Mich. 91, 104, 220 N.W.2d 641 (1974)). Specifically, the Michigan Supreme Court held in *Funk*:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers **in common work areas** which create a high degree of risk to a significant number of workmen.

Kelly, 90 Wn.2d at 332 (quoting *Funk,* 392 Mich. at 104) (emphasis added). The *Kelley* court found the general contractor had a duty to provide a safe place to workers in the common work area, which was described to be the location (1) where the accident occurred, (2) where "four different contractors had worked," and (3) "within a short period of time." *Id.* The court held that the general contractor "had a duty to see that proper safety precautions were taken **in that area** to provide the employees with a safe place of work." *Id.* (emphasis added).

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In a Division I case where the court held there was no record evidence to support a finding that a third-tier subcontractor employee's fall occurred in a "common area", *Weinert v. Bronco Nat'l Co.,* 58 Wn. App. 692, 693-94, 795 P.2d 1167 (1990), the plaintiff employee was working alone on scaffolding that was brought to the site and erected by a third-tier subcontractor. *Id.* at 693. There was no direct evidence that the owner/developer or the second-tier subcontractor participated in erecting the scaffolding or had specific knowledge of its alleged defects. *Id.*

In a case where the court set forth various factors for determining what constitutes a "common work area", representatives of a subcontractor's deceased employee brought an asbestos personal injury action against the owner and operator of a shipyard operation. *Arnold v. Saberhagen Holdings, Inc.,* 157 Wn. App. 649, 666, 240 P.3d 162 (2010). After reviewing prior cases that applied the "common work area" doctrine, the court held that the plaintiffs had presented sufficient evidence to survive summary judgment where the shipyard owner/operator had monitored and coordinated the work of multiple subcontractors in close quarters below deck. *Id.* In short, the *Arnold* court considered a "common work area" to include any area where "multiple contractors" worked "in close quarters." *Id.*

In *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013), the Court noted that "general contractors that retain control over a work site have a duty to **maintain safe common work areas**." *Id.* at 475 (emphasis added). The *Afoa* Court reaffirmed the *Kelley* decision:

> We held [in *Kelley*] that where a principal retains control over "some part of the work," we disregard the "independent contractor" designation and require the principal (in *Kelley,* a general contractor) to maintain **safe common workplaces for all workers on the site**.

Afoa, 176 Wn.2d at 296 (2013) (emphasis added).

Similar to the scaffold in *Weinert*, here the scaffold on which Gildardo Vargas was working at the time of the Incident was not a "common work area" within the partial or exclusive

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control of Inland Washington, rendering that general contractor not liable for any injury that might occur there. Unlike the facts in *Kelley*, here the Incident involving Gildardo Vargas occurred in a specific limited-access area of the Project (i.e., the scaffold) where Hilltop was the only subcontractor in exclusive control of the concrete pour. There is no evidence Inland Washington was performing construction work of its own at the site at the time of the Incident. Pursuant to its subcontract and its actual performance, Hilltop had complete supervisory control of the concrete pour activities, including the activities of Ralph's and Miles, who were supplying concrete to the concrete pour work area.

The instant case is more analogous to the facts and holding in *Bozung v. Condo. Builders, Inc.*, 42 Wn. App. 442, 711 P.2d 1090 (1985), where the general contractor was found to owe no duty, because only one subcontractor was on site at the time of the injury, and the general contractor was not doing its own work on the site. *Id.* at 444. In *Bozung*, a subcontractor's employee operating a Caterpillar suffered injuries after the vehicle rolled over during clearing and grading activities. *Id.* The general contractor's site superintendent only dealt with the subcontractor's foreman and did not direct Mr. Bozung to do anything. *Id.* at 445. Because the subcontractor was the only contractor active on the site at the time of the accident, the court held that the general contractor "had no statutory duty that encompasses responsibility for [the plaintiff]." *Id. at* 452. General contractual rights, such as "to order the work stopped or to control the order of the work or the right to inspect the progress of the work do not mean that the general contractor controls the method of the subcontractor's work". *Id.* at 447 (citing Restatement (Second) of Torts § 414 Comment C (1965)).

Like the plaintiff in *Bozung,* here Gildardo Vargas was injured in a specific work area where Hilltop was the sole subcontractor working directly for Inland Washington. Hilltop's employees on the concrete-pour scaffold were members of the same trade, i.e., concrete pourers. No evidence exists that Inland Washington coordinated or controlled the methods or

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the equipment used by Hilltop for this concrete pour, undertook supervision over how Hilltop performed any substantive part of the task that resulted in occurrence of the Incident, or had the right to control the pour itself. Because Hilltop had exclusive control over the subject work and over the specific work area in question, Inland Washington did not owe a duty to Gildardo Vargas during the concrete pour.

All evidence points to the undisputed fact that the Incident occurred in a non-common work area under the supervision and control of Hilltop alone. Summary judgment should be granted because there is no evidence the Incident occurred in a common work area under the control of Inland Washington.

C. Inland Washington Did Not Violate a WISHA Regulation that Proximately Caused Plaintiffs' Damages

Even if the specific work area where the Incident occurred is deemed to be a common work area, which it was not, Plaintiffs here are unable to meet their burden on summary judgment to show that Inland Washington more probably than not violated a specific WISHA regulation that was a proximate cause of Gildardo Vargas's damages.[5] The Department of Labor & Industries determined, after an extensive site inspection conducted almost immediately after the Incident, and after interviewing multiple witnesses, that Inland Washington did not violate any WISHA regulation. Significantly, Kyle Grayson, the Labor & Industries safety inspector who investigated the scene of the accident immediately after it occurred, found that Inland Washington did not violate any WISHA regulations.

Inland Washington did not owe a duty of care and is not liable for the acts or omissions of Hilltop, Ralph's or Miles. Inland Washington did not violate a specific WISHA safety standard causing Gildardo Vargas' damages. The Inland Washington Accident Prevention Program for

[5] As the Court is aware, Inland Washington sought summary judgment in 2015, challenging the lack of evidence establishing a violation of any duty by Inland Washington. Now, on the eve of the discovery cutoff (March 17), Inland Washington submits that the new evidence adduced to date relative to the allegations made against Inland Washington are now ripe for dismissal on summary judgment.

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the North City Apartments specifically requires site workers to rely upon the equipment manuals of equipment used at the site to derive specific safety procedures. *Chawes Decl.*, Exhibit I, at INWA 003401. In compliance, Ralph's had on site the Putzmeister manual for the concrete pump truck, which stated that the boom could lay flat when pouring concrete, and that workers only needed to stay out of the danger zone during startup of pumping, not during short pauses once pumping of concrete had started. Chawes Decl., Exhibit J (Putzmeister Manual). Only portions of this manual were known to exist at the time of Inland Washington's first summary judgment. Since then the complete, 496 page Putzmeister manual has been obtained.

Plaintiffs' Safety Expert Rick Gleason opined in his deposition that the only criticism he had of Inland Washington was that its Accident Prevention Plan did not address the hazards of hose whip injury. *Chawes Decl.*, Exhibit K (Gleason Depo.), at 90:3-19. Mr. Gleason cites WAC 296-155-100-110 as the specific provisions applicable to Inland Washington. Those provisions require, in relevant part, the existence of a formal accident prevention plan, and training to improve the skill and competency of employees. Mr. Gleason's opinions have not been changed or amended in this regard to deal with the existence of the Putzmeister Manual as included by reference in the overall Inland Washington Accident Prevention Plan. Further, Mr. Gleason apparently never even considered the specific hose whip prevention guidance included in Ralph's safety training program information contained in the manual and in the safety plan documents signed by the concrete pump operator, Anthony Howell, before the date of the Incident. *See Chawes Decl.*, Exhibit L. Finally, on the issue of Hilltop's safety procedures as the concrete placement crew, Matt Skoog recently testified via declaration (and via deposition), consistent with Gordon Skoog and Brian Skoog, that all workers are trained on the job about

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hose whips, or "blow out" incidents.[6] Consequently, Inland Washington is not liable under any theory of negligence as a matter of law, and all claims against it should be dismissed.

D. Inland Washington Did Not Act in Concert with Others

Plaintiffs should be barred from asserting a theory at trial that Inland Washington acted in concert with the other defendants and with Hilltop. *See* Plaintiffs' Complaint ¶ 5.2-5.3. Because the law of the case is that Inland Washington is not vicariously liable, it cannot be found to have acted in concert with other parties, given that the "theory of concerted action derives from vicarious liability." *Martin v. Abbott Labs.*, 102 Wn.2d 581, 596, 689 P.2d 368 (1984).

> The plaintiff must show a tacit agreement among defendants to perform a tortious act. Prosser, at 291-92. The Restatement requires a showing that a defendant
>
> > (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> >
> > (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
> >
> > (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.
>
> Restatement (Second) of Torts § 876(a)-(c) (1977), at 315. The basic difference between alternate liability and concerted action is that the former involves independent acts by two or more tortfeasors, all of whom have acted wrongfully, but only one of whom has injured the plaintiff, whereas **concert of action is a true joint tort in that all acted jointly to produce the harm**. *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, 176 (1984).

Martin, 102 Wn.2d at 596 (emphasis added). The concerted action alleged by the *Martin* plaintiffs but found by the court not to be an action in concert, consisted of drug manufacturers

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[6] Mr. Gleason's report offered in supplemental opposition to Inland Washington's first Motion for Summary Judgment included the claim that the hose was placed flat, without any statement as to whether this even constitutes an improper configuration, much less an actual WISHA violation. As such the observation constitutes neither an opinion or evidence of negligence by Inland Washington.

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"using one another's marketing techniques, manufacturing a drug according to an agreed-upon formula, promoting its marketability as a generic drug, relying upon one another's testing, and encouraging one another not to perform adequate tests and not to provide adequate warnings." *Id. See also, One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 335, 61 P.3d 1094 (2002) ("*Black's Law Dictionary* defines the phrase even more broadly, stating: "A person is deemed to act in concert when he acts with another to bring about some preconceived result.").

In the construction worksite setting, the Court of Appeals held that a general contractor and its subcontractor could not have acted in concert because there was no evidence they "had a plan to violate safety regulations," or "consciously act [ed] together in an unlawful manner." *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 752, 912 P.2d 472, 476 (1996) (quoting *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 487, 878 P.2d 1246 (1994)). In *Kottler v. State*, 136 Wn.2d 437, 448–49, 963 P.2d 834, 841 (1998), the Washington Supreme Court elaborated on the *Moen* decision by stating:

> While this court has not examined the "acting in concert" exception contained in RCW 4.22.070(1)(a), we note the Court of Appeals has, concluding the exception requires the actors "consciously act together in an unlawful manner." *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 75 Wn. App. 480, 487–88, 878 P.2d 1246 (1994), *reversed on other grounds* 128 Wn.2d 745, 912 P.2d 472 (1996). We adopt the Court of Appeals' thorough analysis on this point and find ASL, the State, the Society of Foresters, and Weyerhaeuser were not "consciously act[ing] together in an unlawful manner."

Kottler, 136 Wn.2d at 448–49.

Here, there is not a shred of evidence that Inland Washington, Hilltop, Ralph's and Miles planned together in an unlawful manner to violate safety regulations or otherwise acted together in any manner to produce the preconceived result of the alleged harm to Plaintiffs. Inland Washington hired Hilltop to pour the concrete at the Project under a subcontract that expressly governs the roles and responsibilities of the parties. *See* Hilltop Subcontract. The subcontract,

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along with all other evidence obtained in this matter, is devoid of any reference or reasonable inference that the parties would take any joint action to harm anyone, especially given that Hilltop had been delegated sole responsibility for performing the work of the concrete pours and had a contractual responsibility to provide a safe workplace to its own employees.

Indeed, in response to a specific contention interrogatory requesting all facts supporting Plaintiffs' allegations of acting in concert, Plaintiffs were unable to supply a single substantive fact in support, but only were able to parrot back their bare allegations:

> INTERROGATORY NO. 15: Please state in detail all facts upon which base your contention, as alleged in paragraph 5.3 of Plaintiffs' Second Amended complaint, that Defendant Inland Washington, LLC was "consciously acting together in an unlawful and/or negligent manner with [the other defendants to this litigation] and with Plaintiff GILDARDO CRISOSTOMO VARGAS 's direct employer", and identify all witnesses who have knowledge of such facts.
>
> ANSWER:
>
> [Objections]
>
> Defendant Inland Washington admits that it was the general contractor on the project. As such, Inland Washington has *per se* control over the work performed on the jobsite, including the work performed by Hilltop and its employees. Inland employees including but not limited to Steve Miller, Norm Anderson, and Ed McElfresh were supervising and/or were involved in the work.
>
> Plaintiffs also allege that Inland Group was also acting as general contractor, and was acting in concert with it through employees and personnel who were working for and/or agents of both companies at relevant times. All defendants herein along with Hilltop Concrete Construction were acting together in a negligent and unlawful manner by their disregard of worker safety and violation of WISHA regulations.

Chawes Decl., Exhibit M (Defendant Inland Washington, LLL's Second Interrogatories and Requests for Production to Plaintiffs with Responses Thereto), Interrog. No. 15.

VI. CONCLUSION

Based upon the foregoing grounds, Defendant Inland Washington respectfully requests entry of an order granting this motion and dismissing Plaintiffs' claims against Inland

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Washington with prejudice. Also, Plaintiffs should be barred from asserting a theory of concert of action in regards to Inland Washington. A proposed order is attached.

DATED this 3rd day of March, 2017.

PREG O'DONNELL & GILLETT PLLC

By *s/David E. Chawes*
David E. Chawes, WSBA #36322
John K. Butler, WSBA #28528
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Attorneys for Defendant Inland Washington, LLC

I certify that this memorandum contains 5,499 words (8,400 words max) in compliance with the Local Civil Rules.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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DATED at Seattle, Washington, this 3rd day of March, 2017.

Mary R. Munson-Allen

Mary R. Munson-Allen

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Exhibit 10

Hon. Jeffrey M. Ramsdell
Hearing Date: Friday, October 28, 2016 at 9:00 a.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

WILLIAM DUSSAULT as Litigation Guardian ad Litem for GILDARDO CRISOSTOMO VARGAS, an incapacitated person; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children; Plaintiffs; vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' OPPOSITION TO DEFENDANT MILES SAND & GRAVEL COMPANY'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL

I. RELIEF REQUESTED

COMES NOW Plaintiffs in response to Defendant Miles Sand and Gravel Company's Motion for Summary Judgment of Dismissal and respectfully request that it be DENIED.

II. STATEMENT OF FACTS

The pleadings on file herein support the following statement of facts:

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1. Facts Regarding the Parties

Plaintiff GILDARDO CRISOSTOMO VARGAS was hit in the head by a pressurized concrete hose while working on a construction project on or near 1220 NE 175th Street, in Shoreline, Washington known as the North City Apartment complex. Due to his traumatic brain injury, WILLIAM DUSSAULT was appointed as his Litigation Guardian ad Litem and brings his claims on his behalf. Mr. Vargas' wife and children bring loss of consortium claims.

At the time of his injury, Mr. Vargas was working for Hilltop Concrete Construction, Inc. ("Hilltop"), his direct Title 51 RCW direct employer. Defendant INLAND WASHINGTON, LLC ("Inland WA") admits that it was the general contractor on the project who subcontracted with Hilltop to install concrete.[1] Defendant RALPH'S CONCRETE PUMPING, INC. ("Ralph's") was brought on by Hilltop to provide a concrete pump truck and pump operator to pump concrete into forms built by Hilltop to construct concrete walls. Defendant INLAND GROUP P.S., LLC ("Inland Group") is the parent company of Inland WA, but also provided the safety plan that general contractor Inland WA used on this project, which was not site-specific and was used on many Inland Group projects.

Defendant MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST ("Miles") provided the Redi-mix concrete, which it brought on site with concrete trucks. In order to build the concrete walls, Miles' operator would pour the Redi-mix concrete from Miles' truck into the hopper of Ralph's pump truck, which would pump the concrete through a 46 meter boom to a "whip" hose at the end, which Hilltop's workers including Mr. Vargas would use to pour the concrete into the forms where needed. Ralph's operator, Antony Howell, controlled the boom and the operation of the pump by remote control.

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[1] See Inland WA's Motion, page 1:22-2:4, and exhibits referred to therein, including the Subcontract Agreement.

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2. Facts of the Incident

Mr. Vargas was knocked unconscious and sustained a serious traumatic brain injury. According to the initial report of Hilltop's supervisor Matt Skoog, Mr. Vargas was injured when the concrete hose got clogged or plugged.[2] Matt Skoog's deposition has not yet been taken. Gordon Skoog, who testified as Hilltop's CR 30(b)(6) designee, believes that the incident happened because the hose got clogged or plugged.[3] Inland Superintendent Steve Miller also believes that there was a clog or plug, based in part on his observation of "the evidence of rock spread around the slab."[4] Tim Henson, Ralph's General Manager who reports 40 years' experience in the concrete industry,[5] testifies that he believes that the incident was caused not by a clog or a plug, but by air in the hose resulting from not having any concrete in the hopper.[6]

Ralph's concrete pump operator Anthony Howell was an eyewitness to the incident. Mr. Howell went to the site at about 7:00 a.m., checked in with Matt Skoog of Hilltop, who told him where to set up the pump and showed him the walls they were pumping that day.[7] It took Mr. Howell about 45 minutes to set up the pump, which included putting out his outriggers, unfolding his boom, and getting his slurry ready for the Redi-mix concrete truck from Miles to show up at 8:00.[8] Slurry is a material used to lubricate the lines before the concrete goes through.[9] The concrete truck operator then pours the concrete into the hopper of the pump truck, which is pumped through the boom and ultimately through the whip hose at the end. Mr.

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[2] Accident Investigation Report of Matt Skoog (Exhibit 6 to Moore Decl.)
[3] Deposition of Gordon Skoog, pages 53-64. (Exhibit 8 to Moore Decl.)
[4] Deposition of Steve Miller, page 37:2 and pages 60-61 (Exhibit 10 to Moore Decl.)
[5] Deposition of Tim Henson, pages 7-8 (Exhibit 5 to Moore Decl.)
[6] Id. pages 24-25 and 98-99.
[7] Deposition of Anthony Howell, page 16. (Exhibit 1 to Moore Decl.)
[8] Id., page 17
[9] Id., page 26

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Howell also hooked up the hose at the end of the boom, which is where the concrete comes out.[10] This hose is also called a "whip."[11] After slurrying the pump, Mr. Howell kinked the hose and put a "halo" ring on the hose to keep concrete from dripping out.[12] He then laid the boom out flat and laid the whip hose on top of the wall form, which he had to do because the boom he had wasn't long enough.[13] He indicates that Hilltop had ordered a 46 meter boom truck but hoped that Ralph's would provide a 55 meter boom truck.[14]

Then someone took the halo ring off and unkinked the hose, and Mr. Howell turned the pump on for the first time that day.[15] At this time, Mr. Howell was with Matt Skoog on the floor of the building. The three hilltop workers, including Mr. Vargas, were on the scaffolding by the hose.[16] Mr. Howell could not see the pump truck or the concrete truck at the time, since he was on the other side of the ten foot wall form.[17] At this point Mr. Howell was controlling the boom and the pump by a wireless remote control.[18]

According to Mr. Howell, after two strokes of the boom, the remote control signal to the truck was lost, resulting in an automatic shutdown of the pump.[19] At that time, Mr. Howell did not see the amount of concrete in the hopper.[20] Mr. Howell then walked to where he could get a connection with the truck.[21] After re-establishing the connection, Mr. Howell signaled to the

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[10] Id., page 22
[11] Id.
[12] Id., page 27
[13] Id., page 28
[14] Id.
[15] Id., page 28-29
[16] See Id., page 30, and Id., Exhibit 1, page 2 showing Mr. Vargas' location (Exhibit 2 to Moore Decl.)
[17] Id.
[18] Id., page 31
[19] Id.
[20] Id., page 34.
[21] See Id., page 34, and Id., Exhibit 1, pages 2 and 3 showing locations (Exhibit 2 to Moore Decl.)

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Hilltop workers that were going to start.[22] He "took one full stroke and it went off like a shotgun."[23] He reports that Mr. Vargas was wearing his hard hat when he was struck in the side of the head with the end of the hose.[24] Mr. Howell testifies:

> When it struck him in the side of the head, he looked right at me and his eyes rolled backwards and everything went into slow motion. He started slowly falling backwards where the two guys were standing, so they grabbed him and laid him down on top of the scaffolding, and from there we loaded him down to the ground, checked to make sure he was still breathing. He wasn't conscious.

Deposition of Anthony Howell, Pages 48:21-49:2. At that time, two of the workers were holding the whip hose on top of the wall.[25] Mr. Vargas was standing on the wall by the reducer, where the hose connects to the boom.[26] Mr. Vargas was about 12 feet from the end of the hose.[27] Mr. Howell states it was between 5 and 10 seconds between the time his remote lost contact and the time the pump was turned on again.[28] Although Mr. Howell reports the hopper was full when he saw it after the incident, he believes that air in the system was the cause, not a plug in the hose,[29] and that air in the system is caused by not enough mud in the hopper.[30] At the time of the incident, he could not see his truck and had no idea what was in the hopper at the time.[31] Mr. Howell testifies that there was no indication that there was a kink in the hose at the time.[32] He does not believe there was anything Mr. Vargas could have done to prevent his injuries.[33]

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[22] Id., page 39
[23] Id., page 39:7-8
[24] Id.
[25] Id., page 39
[26] Id., page 39-40 and Id., Exhibit 1, pages 2 and 3 showing locations (Exhibit 2 to Moore Decl.)
[27] Id., page 40
[28] Id., page 40
[29] Id., page 42-43
[30] Id., page 118
[31] Id., page 111
[32] Id., page 44; Id. page 98
[33] Id., page 32

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Derek Mansur was the driver of the Miles concrete delivery truck that poured concrete into the pump truck hopper at the time.[34] Mr. Mansur's account differs somewhat from Mr. Howell's. Mr. Mansur testifies that he was with both trucks at the time, on the other side of the wall.[35] Mr. Mansur testified he heard the RPMs of the concrete pump rev up twice, but that the actual amount of concrete pumped was less than one stroke.[36] Mr. Mansur testified that the hopper was full and he only saw the level of concrete fall less than an inch.[37] At that point, Mr. Mansur reports that the pump operator came back and told him to "put a hold on the trucks," after which point the ambulance showed up, which alerted Mr. Mansur that someone had been injured.[38] Mr. Mansur testified that he did not hear the shotgun sound, but he was also near the loud truck motors and was wearing ear protection.[39] He also did not go on the other side of the wall from where the trucks were positioned.[40] Mr. Mansur also reports he heard the pump operator say he had to replace the batteries in his remote control.[41]

Mr. Howell completed a Driver Equipment Report on May 24, 2013, the day after the subject incident of May 23, 2013 reporting the pump truck needed a new antenna for the radio receiver and that it needed a new vibrator installed for the hopper.[42] However, Mr. Howell denies that the loss of radio contact was caused by the broken antenna.[43] Mr. Howell testifies

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[34] Deposition of Derek Mansur, page 20. (Exhibit 13 to Moore Decl.)
[35] Id., pages 61-65
[36] Id.
[37] Id., page 62
[38] Id., page 63-65
[39] Id.
[40] Id., page 58
[41] Id., Page 80-84 and Derek Mansur's Witness Statement (Exhibit 17 to Moore Decl.)
[42] Deposition of Anthony Howell, pages 76-79 and Driver Equipment Report (Exhibit 3 to Moore Decl.)
[43] Id., page 76-79

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the truck was bought used by Ralph's, and that there was no vibrator on the hopper.[44] He explains the purpose of the vibrator as follows:

> you need the vibrator on the hopper to get the mud [concrete] to come through the grate because it only allows certain sized rock to go through the grate, then it will just sit and pile up on top of the grate and you can't pump the mud.

Deposition of Anthony Howell, Pages 95:20-24. He also testified that the vibrator "helps not to get air into" the concrete. Id. page 96:2

3. <u>Safety Requirements in the Putzmeister Pump's Manual</u>

The manufacturers' manual of the Putzmeister truck-mounted concrete pump that Ralph's was using at the time of the incident provides:

> Injury may be caused by the hose operator being struck by the end hose if this has become trapped in the reinforcement and suddenly jumps out on further movement of the boom. This danger also exists if a blockage is suddenly released. **<u>There is also a considerable risk of injury from the end hose striking out when starting to pump</u>** and during washing out as a result of entrapped air or sudden boom movements.

Putzmeister Manual, Sec. 2, page 14 (Exhibit 4 to Moore Decl.) (emphasis added). It defines a "danger zone" for the end hose as having a diameter of "twice the end hose length." Id.; Id. Sec. 2, page 36, and requires the pump operator "[e]nsure that no-one is standing in the danger zone." Id. Sec. 2, page 36. It specifically prohibits allowing workers to hold or be near the hose when pumping is started:

> The end hose must hang freely **<u>each time you start pumping</u>**, when you start pumping again after blockages, and during washing out procedures. No-one may stand within a radius of the end hose length. **<u>Do not guide the end hose when pumping is started.</u>** The end hose can swing out or stones may be ejected and cause an accident.

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[44] Id., page 95

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Id. Sec. 2, page 77 (emphasis added). It also requires that the end hose be secured, and recommended a hose guide be used. Id. Sec. 2, pages 77 and 78. The manual also requires the hopper be filled to prevent air from being sucked in, and provides that the machine operator must instruct the truck mixer driver to avoid this. Id. Sec. 2, page 73. It also addresses "lethal danger" from blockages. Id. page 75.

Ralph's pump operator Anthony Howell recognized the operating manual and testified that the operators "pretty much need to know everything" that's in the manual.[45] But despite the prohibitions in the manual, Mr. Howell testifies there are no procedures to be followed with regard to positioning the crew, and that the crew needs to be right next to the whip to place it.[46] When Gordon Skoog of Hilltop was asked if there was anything in the Putzmeister manual that "may pertain to Hilltop or the people at the other end of the hose, he responded:

> No. This is for the operators. It's not for the people on the hose. Our instructions, our training is more geared for the people on the hose, and it's much better than this.

Deposition of Gordon Skoog, pages 77:23-78:2. (Exhibit 8 to Moore Decl.)

4. <u>Facts Regarding Lack of Site-Specific Safety Plans on the Jobsite</u>

There was no site-specific safety plan on this project that addressed the hazards involved with pump hoses or how to prevent pump hoses injuries such as were detailed in the Putzmeister manual. The Washington Department of Labor and Industries ("L&I") investigated the incident and found that Hilltop's safety plan did not address the hazards of concrete hoses.[47] In response to L&I's post-incident inspection, Gordon Skoog typed up an "addition" to Hilltop's deficient

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[45] Deposition of Anthony Howell, page 88-89. (Exhibit 1 to Moore Decl.)
[46] Id., page 98-100.
[47] Deposition of Gordon Skoog, pages 76-77. (Exhibit 8 to Moore Decl.)

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safety book which he states put his previously verbal training in writing.[48] This "addition" addresses clogged hoses and counsels workers to "duck and cover" and to "yell clog and everybody immediately move away from the hose" whenever "you hear or sense a plug."[49]

Ralph's general manager Tim Henson reviewed Hilltop's post-incident addition and found it to be inadequate and that it did not address kinking of the hose or air in concrete.[50] For its part, Ralph's did not have a site specific safety plan, was not provided with any safety plans by either Inland or Hilltop, and was not required by either Inland or Hilltop to provide a site specific safety plan.[51]

Inland superintendent Steve Miller testified that he had no knowledge of safety plans or training that addressed the risks of pressurized concrete hoses on the project.[52] Inland WA used a safety plan provided by Inland Group.[53] However, Inland Group's safety plan was not site-specific, had not been updated since 2006, and did not include any sections regarding the risks of concrete hoses.[54] Ed McElfresh of Inland, who worked on the project, testified that Inland WA had no safety plans of his own and that he had no knowledge that anything in the Inland Group plan had been communicated to any subcontractor on the project.[55]

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[48] Id.; Id., Exhibit 78 (Exhibit 7 to Moore Decl.)(Hilltop's addition to safety book)
[49] Id., Exhibit 78 (Exhibit 7 to Moore Decl.)(Hilltop's addition to safety book) (underline in original); See also Deposition of Gordon Skoog, pages 42-47.
[50] Deposition of Tim Henson, pages 38:24-40:9 (Exhibit 5 to Moore Decl.) and Exhibit 7 to Moore Decl.
[51] Id., pages 19-20 and 36-40 (Exhibit 5 to Moore Decl.)
[52] Deposition of Steve Miller, pages 52-56 (Exhibit 10 to Moore Decl.)
[53] Deposition of Ed McElfresh, pages 28-31 (Exhibit 11 to Moore Decl.) and Inland Group Safety Plan excerpts (Exhibit 12 to Moore Decl.)
[54] Id.; See page INWA000885 of Exhibit 12 (Safety Plan Table of Contents does not include concrete as a topic.)
[55] Id.

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5. Construction Safety Expert Rick Gleason Describes How Hose Whip Injuries Can Be Caused By Plugs and By Air.

Construction safety expert Rick Gleason testifies that hose whip injuries can be caused by introducing air in the system by allowing the hopper to run low, by a clog or plug resulting in excessive pressure in the system that explodes when released, or a combination of the two.[56] Mr. Gleason explains:

> [I]t seems to me that either allowing the hopper to run low so air would be introduced there or that the pump truck had too much pressure on the hose and that somehow the hose got clogged and so that built up back pressure which caused the hose to whip and strike Mr. Vargas. So I think those are the two most possible or plausible explanations.

Deposition of Rick Gleason, page 63:1-9. This is also described in detail in the American Concrete Pumping Association ("ACPA") January 2010 Safety Bulletin: Hose Whipping. Exhibit 21 to Moore Decl. The ACPA bulletin includes a graphic on page 4 describing how air behind a plug can cause a violent hose whip incident. This graphic is also incorporated by Mr. Gleason on page 7 of his report.

6. Facts Supporting Miles' Role in Causing the Injury By Allowing Air into the Hopper, By Failing to Stop the Pump Truck or Alert its Operator, And By Supplying Aggregate That Was too Large.

Although Miles's driver Derek Mansur testifies that the pump truck hopper was kept full,[57] no other testimony or evidence corroborates this. Mr. Mansur was the only person near the trucks at the time the injury occurred.[58] Mr. Mansur's account differs from that of Ralph's pump operator Anthony Howell, who testifies that air in the system is caused by "the hopper

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[56] See Deposition of Rick Gleason, pages 44, 62-63, 75-78, and 105 (Exhibit 18 to Moore Decl.); See also May 1, 2015 Report of Rick Gleason (Exhibit 20 to Moore Decl.) and CV or Rick Gleason (Exhibit 19 to Moore Decl.)
[57] Deposition of Derek Mansur, pages 61-65.
[58] Id.

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being run low." Deposition of Anthony Howell, page 42. Mr. Howell testifies that a "big burst of air" caused Mr. Vargas's injuries as follows:

> I saw the big burst of air come out the end of the whip and I saw the whip come straight up off the wall and it curled back up and almost touched the three-inch reducer. At that time is when it struck Mr. Vargas in the side of the head.

Id., page 40:10-14.

Miles sent Dan Cox to investigate the incident.[59] Mr. Cox, at the direction of other Miles managers, had previously issued a Miles safety bulletin to its drivers, dated September 6, 2012.[60] The bulletin stated:

> While many factors can contribute to hose whip, one known issue is that if the hopper is allowed to run dry and the pump continues to run, air in the line can lead to violent hose whip which can cause serious accident or injury.

Concrete Nor'west Safety Memo dated September 6, 2012 (Exhibit 16 to Moore Decl.) The bulletin also directs drivers to keep pump truck hoppers full when pumping, to use the pump truck warning horn to alert the pump truck operator if the hopper starts to run dry, and to use the emergency stop to stop the pumping if the warning fails.[61] Despite knowing that an empty hopper is a likely cause of hose whip injuries, Mr. Cox failed to note the level of material in the hopper or take pictures of the material in the hopper as part of his investigation.[62]

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[59] Deposition of Dan Cox, pages 41-46 (Exhibit 14 to Moore Decl.)

[60] Id., Page 135; Concrete Nor'west Safety Memo dated September 6, 2012 as marked as Exhibit 25 to Deposition of Dan Cox (Exhibit 16 to Moore Decl.) Mr. Cox and other Miles managers drafted a subsequent safety bulletin of August 11, 2014, which directed Miles drivers to work with pump operators to make sure "required protective safety shields, shrouds or Kevlar blankets are being used at reducing elbow below the hopper as appropriate." Deposition of Dan Cox, Page 32:20-23; Id. Pages 32-33.

[61] Id. It is undisputed that Mr. Mansur did not use the warning horn and that he did not use the emergency stop. Though if it is true that the hopper did not run dry, he would have had no reason to have done so.

[62] Deposition of Dan Cox, pages 97-98, 135, and 141

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Miles driver Derek Mansur testified that he delivered 10.50 cubic yards of concrete to the jobsite,[63] and that he returned to the yard with ten yards.[64] He reports that only one half of a cubic yard was used, which is the amount needed to prime the pump.[65] He also testified that the Redi-mix concrete ticket marked as Exhibit 15 was the ticket that described his load.[66] This ticket describes the concrete material in detail, including the maximum size of the aggregate rocks, which for this load was specified at 7/8 of an inch.[67] Miles safety coordinator Dan Cox confirms this:

> Q. What is 7/8 No. 57 rock?
> A. It's 7/8ths dimensional measurement, 7/8ths of an inch rock. It's an aggregate specification.
> Q. Does that mean that the rocks are 7/8ths of an inch in diameter?
> A. Yes. Typically, that would be the largest size in that pile of rocks.

Deposition of Dan Cox, page 68:20-69:1. However, the aggregate rocks shown in the photos of the scene show that the aggregate rocks are much larger than 7/8 of an inch. Computer based analysis and measurement of the photographs show that "many of the aggregate rocks had dimensions exceeding 7 / 8 of an inch, with some of the largest rocks having dimensions over 1.5 inches." Declaration of Thomas Sandor, ¶ 6; See photograph of aggregate rocks filename P5230737.jpg (Exhibit 16 to Moore Decl.)

Ralph's pump operator Anthony Howell testified that the pump configuration at the time of the incident had the flow of concrete going through two reducers.[68] The first reduced the

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[63] Deposition of Derek Mansur, pages 21-22.
[64] Id., pages 81-82.
[65] Id.
[66] Id., pages 21-22; Redi-mix concrete load ticket (Exhibit 15 to Moore Decl., which was also Exhibit 15 to the depositions of Derek Mansur and Dan Cox.)
[67] Id.; Id., Pages 26-27
[68] Deposition of Anthony Howell, pages 18-21

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diameter of the pipe through which the concrete flowed from five inches to four inches.[69] The second reducer reduced the flow from four inches to three.[70] An aggregate rock exceeding 1.5 inches in diameter would take up more than half of the diameter of the last pipe segment that had been reduced to a diameter of three inches.

III. STATEMENT OF ISSUES

1. Whether defendant Miles Sand and Gravel Company's motion should be denied when the cause of Mr. Vargas's injury is consistent with air being introduced in the system from an empty hopper, when Ralph's pump operator testified that he saw "a big burst of air" causing the hose to whip, and when photographs of the aggregate rock show that many of the aggregate rocks exceeded the mix specification of 7/8th of an inch, with some exceeding half the diameter of the three inch pipe and hose.

IV. EVIDENCE RELIED UPON

In support of their Response, Plaintiffs rely on the pleadings on file in this matter including Defendant Miles Sand and Gravel Company's motion, with declarations in support and exhibits thereto, Plaintiffs' Response thereto, with the Declaration of Derek K. Moore in Support of this Response, and the exhibits thereto, and the Declaration of Thomas R. Sandor.

V. AUTHORITY AND ARGUMENT

On a motion for summary judgment, the moving party has the burden of showing the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law. CR 56. "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 803, 23 P.3d 477 (2001). The facts

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[69] Id.
[70] Id.

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and reasonable inferences from those facts are considered in a light most favorable to the nonmoving party. *Babcock v. Mason County Fire Dist. No. 6.*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001). If the moving party makes this initial showing, the burden shifts to the nonmoving party to set forth specific facts evidencing a genuine issue of material fact for trial. *Shaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). In an action for negligence a plaintiff must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause. *Tincani v. Inland Empire Zoological Soc'y*., 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). "A duty can arise either from common law principles or from a statute or regulation. A duty can also arise contractually." *Kennedy v. Sea-Land Service, Inc. 62 Wn. App. 839, 816 P.2d 75 (Div. 1, 1991) citing Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982), Doss v. ITT Rayonier, Inc., 60 Wn. App. 125, 129, (Div. 2, 1991), and Kelley v. Howard S. Wright Const. Co., 90 Wn.2d 323, 330, 582 P.2d 500, 505 (1978).* The existence of a legal duty is generally a question of law. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). But where duty depends on proof of certain facts that may be disputed, summary judgment is inappropriate. *Sjogren v. Props. of Pacific NW, LLC.*, 118 Wn. App. 144, 148, 75 P.3d 592 (Div. 2, 2003)

1. <u>There are Genuine Issues of Material Fact Regarding Whether Miles Breached its Duty of Ordinary Care By Allowing the Pump Truck Hopper to Run Dry</u>

It is well established that negligence is the failure to exercise reasonable or ordinary care, and that reasonable or ordinary care is that degree of care which a reasonably careful and prudent person would exercise under the same or similar circumstances or conditions. *Mathis v. Ammons*, 84 Wn.App. 411, 415–16, 928 P.2d 431 (1996); *Gordon v. Deer Park School Dist. No. 414*, 71 Wn.2d 119, 122-123, 426 P.2d 824, 826 (1967); *System Tank Lines v. Dixon*, 47 Wn.2d 147, 286 P.2d 704 (1955); *Chadwick v. Ek*, 1 Wn.2d 117, 95 P.2d 398 (1939); *LaMoreaux v.*

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Fosket, 45 Wn.2d 249, 273 P.2d 795 (1954); *Olmstead v. Olympia*, 59 Wash. 147, 109 P. 602 (1910); WPI 10.01; WPI 10.02.

It is, or should be, undisputed that ordinary care of a concrete truck driver requires that he keep the pump truck hopper full of concrete during pumping operations. This is established by Miles' own safety memo and the testimony of its drivers, as well as the testimony of Ralph's personnel, the ACPA safety bulletin, and the opinion of safety expert Rick Gleason. All of which indicate that air in the system from an empty hopper is a common and likely cause of hose whip injuries.

The question here is whether Miles driver Derek Mansur kept the hopper full as he says he did. While Mr. Mansur provides direct evidence though his testimony in this regard, the jury may find this testimony refuted by Ralph's pump operator Anthony Howell's testimony that he saw "a big burst of air" causing the hose to whip and hit Mr. Vargas. Mr. Howell and Ralph's general manager Tim Henson testify that the most likely cause of the injury was air in the system, and the most likely cause of air in the system is an empty hopper. While some of this evidence may be circumstantial, "The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other." WPI 1.03; *Kemp v. Leonard*, 70 Wn.2d 643, 424 P.2d 660 (1967); *McKay v. Seattle Elec. Co.*, 76 Wash. 257, 136 P. 134 (1913). Miles' own safety memo and the testimony of Mr. Cox show that in the event of a low hopper, the Miles operator should use the pump truck's emergency horn to warn the pump operator and to use the pump truck's emergency stop if the pump operator does not stop the pump.

Also, *res ipsa loquitur* may apply, under which negligence may be inferred "if (1) the accident or occurrence that caused the plaintiff's injury would not ordinarily happen in the

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absence of negligence, (2) the instrumentality or agency that caused the plaintiff's injury was in the exclusive control of the defendant, and (3) the plaintiff did not contribute to the accident or occurrence." *Curtis v. Lein*, 169 Wn.2d 884, 891, 239 P.3d 1078 (2010). Here the jury may find that hose whip injuries don't happen in the absence of a low hopper. The Miles driver was in control of the hopper's concrete level at the time of the injury, and Mr. Vargas obviously had nothing to do with the hopper level.

While Gordon Skoog of Hilltop and Steve Miller of Inland believe the incident was caused by a clog or a plug in the system, this does not exclude air as a proximate cause of the injury. The ACPA bulletin and the testimony and report of Rick Gleason show that hose whip injuries are typically caused by the pressure of compressed air building up behind a plug, and then violently releasing. Though it may also be possible for such an event to occur as a result of excessive pressure of concrete rather than air behind a plug, a reasonable jury may determine that pressurized air was the cause, which is supported by Mr. Howell's testimony.[71]

2. <u>Defendant Miles is Concurrently Liable For Breaches of Duties Under WISHA and the Retained Control Doctrine Within the Scope of its Control</u>

While the general contractor has the "primary responsibility for compliance with safety regulations" under *Stute v. P.B.M.C. Inc*., 114 Wn.2d 454, 464, 788 P.2d 545 (1990), subcontractors owe concurrent duties to workers within the scope of their control. The Washington Supreme Court held duties of more than one party under RCW 49.17.060(2) and *Stute* are "concurrent responsibilities to workers" and that the "'independent negligence' of one

---

[71] Note that "there may be more than one proximate cause of an injury or event." WPI 15.01 "An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation." Comment to WPI 15.01 citing *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 709 P.2d 774 (1985) and *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 667 P.2d 78 (1983).

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entity should not be equated with "sole negligence." *Gilbert H. Moen Co. v. Island Steel Erectors, Inc.* 128 Wn.2d 745, 757, 912 P.2d 472 (1996). The *Moen* Court explained:

> The subcontractor, despite the general contractor's workplace safety duty, retains **concurrent responsibility** to meet workplace safety standards in the areas under its control. … In recognition that the duty to observe safety standards is a shared duty, *Stute* referred to the general contractor's duty in this regard as a "prime" or "primary" responsibility. **However, each employer must comply with WISHA requirements.**
> …
> **The duties of the general and subcontractor are concurrent. …** Accordingly, while Moen as the general contractor may not delegate away its general duty to ensure safety on the jobsite, **[subcontractor] Island is not thereby relieved of its concurrent workplace safety duty.**

Gilbert H. Moen Co. v. Island Steel Erectors, Inc., 128 Wn.2d at 757-758 (emphasis added)(internal citations omitted). *See also Weinert v. Bronco Nat. Co.*, 114 Wn.2d 454, 788 P.2d 545 (1990) (duties of owner / developers and mid-tier subcontractors within scope of control.) For duties under the retained control doctrine to apply, a defendant must have retained control over the manner and instrumentalities of the work. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 296 P.3d 800 (2013).

In this case, admitted general contractor Inland Washington is responsible for breaches of duties under WISHA and the retained control doctrine that occur on its jobsite, over which it has *per se* control.[72] However, Miles is concurrently liable for injuries resulting from breaches of such duties within the scope of its control. Miles may not have retained control over Mr. Vargas or over some aspects of Ralph's pumping operation. But the evidence shows that Miles retained control over the instrumentalities of the concrete truck and the pump truck hopper, was well as the pump truck's emergency horn and emergency stop. Thus Miles is liable for injuries resulting

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[72] Defendant Inland Group is the parent company of Inland Washington, and remains in the case on that basis, among other grounds. See Plaintiff's Response to Inland Group's Motion for Summary Judgment, and this Court's Order denying Inland Group's Motion.

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from violations of WISHA regulations and also from breaches of safe workplace duties that occur within the scope of its control.[73]

Specific WISHA regulations implicated include WAC 296-155-682 which pertains to concrete construction, including WAC 296-155-682 (8)(b)(iii) prohibiting unsafe condition of equipment (which would include an empty hopper) and WAC 296-155-682 (8)(b)(xv)(C) which mandates that "Aggregate should not exceed 1/3 the diameter of the delivery system." The latter requirement would limit the size of the aggregate to 1 inch in a three inch pipe, which the photographs show was exceeded here by rock sizes exceeding 1.5 inches.[74] The jury may infer that the excessive aggregate size was a proximate cause of the clog or plug, and thus of the injury, regardless of whether air in the system was a cause.

3. Defendant Miles is Subject to Strict Liability under Washington's Product Liability Act for Delivering Concrete with Aggregate that Exceeded the Design Specifications of the Redi-mix.

In addition to violating WAC 296-155-682 (8)(b)(xv)(C), Miles is strictly liable under Washington's Product Liability Act ("PLA") for injuries caused by the aggregate size exceeding the specifications of the mix. The PLA provides:

> (2) A product manufacturer is subject to **strict liability to a claimant if the claimant's harm was proximately caused by the fact that the product was not reasonably safe in construction** or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.
>
> (a) A product is not reasonably safe in construction if, when the product left the control of the manufacturer, **the product deviated in some material way from**

---

[73] Specific WISHA regulations implicated include

[74] Other WISHA regulations pertaining to construction work may be implicated as well:
WAC 296-800-11005 Provide a workplace free from recognized hazards.
WAC 296-800-11010 Provide and use means to make your workplace safe.
WAC 296-800-11035 Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.
WAC 296-155-040 Safe place standards.

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> **the design specifications** or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.

The design specifications for Miles' mix called for maximum aggregate size of 7/8 inches, yet the photographs of the aggregate rocks at the scene show many of them were much bigger, with some exceeding 1.5 inches. Miles is strictly liable for injuries caused by this deviation, and a reasonable jury could find that this deviation caused or contributed to the clog or plug in the pumping system.

VI. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully requests that Defendant Miles Sand and Gravel Company's Motion for Summary Judgment of Dismissal be DENIED, and for any other such relief the Court deems fair and just.

I certify that this memorandum contains 5,924 words, in compliance with the Local Civil Rules.

Dated this 17th day of October, 2016

BISHOP LEGAL

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Exhibit 11

Honorable Jeffrey M. Ramsdell
Hearing: March 31, 2017; 1:00 p.m.
With Oral Argument

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

GILDARDO CRISOSTOMO VARGAS, et al., Plaintiffs, v. INLAND GROUP P.S., LLC, et al., Defendants.	NO. 13-2-32219-6 SEA **INLAND WASHINGTON, LLC'S REPLY RE: SECOND MOTION FOR SUMMARY JUDGMENT OF DISMISSAL**

A. There Is No Evidence to Support a Finding of a Duty Based on a Common Work Area under Inland Washington's Control

Inland Washington's motion for summary judgment should be granted because Plaintiffs have failed to create a genuine issue of material fact regarding Inland Washington's lack of control over the non-common work area where Mr. Vargas was allegedly injured. There is no dispute that all of the employees standing upon the scaffolding at the time of the concrete pour on May 23, 2013, were Hilltop employees. Even if, as the Plaintiffs incorrectly suggest, the relevant "work area" is redefined to include the entire concrete pouring operation (*i.e.*, to include Miles' Redi-mix concrete supply truck operated by Derek Mansur, and Ralph's concrete pump truck operated by Anthony Howell), there is still no dispute that every person and all equipment

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involved in the concrete pouring operation itself was under the direct supervision and control of Hilltop. There is no dispute Hilltop itself ordered the raw concrete from Miles, and hired or rented the pump truck and its operator from Ralph's.

In *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), the Washington Supreme Court was quite emphatic that a general contractor's safety responsibility is limited to "common work areas" of the construction site:

> Placing ultimate responsibility on the general contractor for job safety **in common work areas** will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
>
> > We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers **in common work areas** which create a high degree of risk to a significant number of workmen.
>
> *Funk v. General Motors Corp.,* [392 Mich. 91, 104, 220 N.W.2d 641, 646 (1974)]. We believe the approach taken by the Michigan Supreme Court is sound. It recognizes the authority the general contractor has to require safety precautions on the job site. **This authority over work conditions clearly falls within the rubric of "control" as an exception to the common law rule of nonliability. The area in which respondent Kelley's accident occurred was one in which four different contractors had worked within a short period of time.** Wright had supervisory and coordinating authority over them all. We hold appellant had a duty to see that proper safety precautions were taken **in that area** to provide the employees with a safe place of work.

Kelley, 90 Wn.2d at 332 (emphasis added); *see also, Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 278, 635 P.2d 426 (1981) (citing *Kelley, supra*) ("the general contractor on a multi-employer project, retained control over the common work area and thus had the duty, within the scope of that control, to provide a safe place to work for all employees"). Unlike *Kelley's* "common work area", here only Hilltop was present at the scaffolding. Even if the relevant "work area" is defined as the entire scope of the concrete pour, then only Hilltop and its sub-subcontractors/suppliers were present in the single continuous operation.

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In *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990), there was no evidence "to support a finding that the place of Weinert's fall was a 'common area,' as that term is defined in *Kelley* ....". *Weinert*, at 693–94. That is the sole mention of "common work area" in the entire case, and the court did not mention whether a common work area was raised by a party as an issue on appeal. Because the court did not tie its holding of liability of the owner/developer and of the upper-tier contractor to the issue of a common work area, it would be incorrect to apply *Weinert* as overturning the *Kelley* and *Tauscher* requirement for a common work area to find general contractor liability.

In a case where the "common work area" was further defined as an area with multiple contractors working in close proximity, the general contractor Lockheed directly controlled all activities performed in "common work areas" below decks on ships under construction, where "multiple contractors" worked "in close quarters." *Arnold v. Saberhagen Holdings, Inc.,* 157 Wn. App. 649, 666, 240 P.3d 162 (2010), *rev. den'd*, 157 Wn. App. 649. In contrast, here there is no evidence Inland Washington directly supervised or controlled Hilltop as the single subcontractor working with its sub-subcontractors/suppliers on the discrete concrete pour operation.

Importantly, Plaintiffs concede that the *Afoa* cases do not apply to Inland Washington:

> [T]he analysis as applied in *Kamla*, *Afoa*, and *Arnold* ... as to whether the defendant retained sufficient control to be comparable to that of a general contractor **does not apply here**. The defendants in *Kamla*, *Afoa*, and *Arnold* were not general contractors on construction sites.

Plaintiffs' Opposition, at p.15 (emphasis added). Even if the Court is inclined to apply *Afoa* here, there can be no dispute that Mr. Vargas' injury occurred in a non-common work area, unlike Mr. Afoa's injury, which occurred in an area of SeaTac Airport where the property owner had "a duty to maintain safe common work areas." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 475, 296 P.3d 800 (2013); *see also, Afoa v. Port of Seattle*, 75951-5-L, 2017 WL 1049671, at *4 (Wash. Ct. App., Mar. 20, 2017, "*Afoa II*") (both citing *Kelley*, 90 Wn.2d at 331-32) ("principal has a duty to

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maintain safe common workplaces for all workers on the site"). If the duty of a general contractor to provide a safe workplace actually extended to every portion of the site regardless of circumstances, the express language in *Kelley*, *Afoa* and other similar cases would certainly not reference a duty to maintain safe "common work areas." Indeed, a finding of unequivocal liability for a general contractor would in effect make it the guarantor of everyone working at the site, a rule which does not apply in Washington.

Gordon Skoog's testimony that electricians and other trades were present at the site does not create a material factual dispute, because the initial questions involved the general presence of other subcontractors at the site when Hilltop was there. *See Chawes Decl.*, Exhibit C, Gordon Skoog Depo., at 34:2-24. However, Mr. Skoog clarified no other subcontractors were present at the specific time of the Incident: "Q. But you don't know of anybody other than Hilltop people who were in the vicinity of the incident when it happened? A. No." *Id.* at 34:25-35:2.

Because Hilltop exercised exclusive supervisory control over all portions of the concrete pour, Inland Washington may not be held liable for the Plaintiffs' damages as a matter of law.

B. Inland Washington Is Not Vicariously Liable for the Acts or Omissions of Others

Plaintiffs have no legal basis to assert Inland Washington, as the general contractor, is vicariously liable for the acts or omissions of others at the construction site. Plaintiffs failed to bring a timely motion for reconsideration or vacation of Judge Schapira's June 26, 2015 Order (*Sub #122*) regarding the absence of any vicarious liability on the part of Inland Washington. CR 59, 60. As addressed in greater detail in Inland Washington's *Motion to Strike Embedded Motion of Plaintiffs to Vacate Order on Vicarious Liability*, and *Motion for Order Confirming Court's 6/26/2015 Summary Judgment Order*, filed March 23 and 24, 2017, respectively, Inland Washington is not vicariously liable for the acts or omissions of others working at the site. *Afoa II*, cited by Plaintiffs as support for their theory of vicarious liability, is inapposite, as that case

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deals with application of RCW 4.22.070 to a property owner in control of an existing operational facility (*i.e.,* SeaTac Airport) with established workplace safety rules for its on-site equipment operators. The holding in *Afoa II* regarding vicarious liability of the Port of Seattle relates only to exclusion of four non-party airlines as empty chairs on the jury verdict form, and does not extend to a finding of vicarious liability of a non-possessory general contractor at a construction project, such as Inland Washington in the instant matter, where the verdict form has not even been discussed. *See Afoa II*, at p. 26 ("Consistent with the Port's vicarious liability, it is not entitled to proportionately reduce its liability based upon an allocation of fault to the four nonparty airlines."). The holding in *Afoa II* does not apply here where Inland Washington does not presently assert the existence of non-party empty chairs. See *Inland Washington's Answer to Second Amended Complaint*, Aff. Def. No. 6, at p.7 (Sub #336).

C. Inland Washington Did Not Engage in Concerted Action with the Other Defendants

Plaintiffs' theory of liability of concerted action fails as a matter of law. There is no record evidence showing "a tacit agreement among defendants to perform a tortious act." *Martin v. Abbott Labs.*, 102 Wn.2d 581, 596, 689 P.2d 368 (1984). Indeed, the record here is devoid of a single instance where Inland Washington or its employees directly communicated with defendants Ralph's, Miles, or Inland Group, P.S., LLC[1] regarding performance of "a tortious act in concert with the other defendants or pursuant to a common goal". *Id.* Absent any such evidence, Plaintiffs' claim of acting in concert fails as a matter of law.

D. Inland Washington Did Not Violate Any WISHA Safety Regulations Causing Plaintiffs' Damages

There is no record evidence that Inland Washington violated any regulation promulgated under WISHA at the Project which proximately caused Gildardo Vargas' damages. The purported "violations" listed by Plaintiffs' are all speculative testimony by counsel. Plaintiffs are

[1] Inland Group, P.S., LLC has no employees. *See Scott Morris Decl.* (Sub #97).

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unable to find a single expert who was willing to file a declaration opining that Inland Washington violated a specific WISHA regulation that more probably than not proximately caused Plaintiffs' damages. While Plaintiffs' safety expert, Rick Gleason, is critical of portions of the defendants' respective safety programs, he never states an opinion on the record that Inland Washington violated a specific WISHA regulation that more probably than not proximately caused Plaintiffs' damages.

Because Plaintiffs are unable to create a material factual dispute, the Court should grant Inland Washington's motion for summary judgment and dismiss all claims against it with prejudice.

DATED this 27th day of March, 2017.

PREG O'DONNELL & GILLETT PLLC

By *s/David E. Chawes*
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I certify that this memorandum contains 1,747 words (1,750 words max) in compliance with the Local Civil Rules.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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DATED at Seattle, Washington, this 27th day of March, 2017.

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Exhibit 12

Hon. Jeffrey M. Ramsdell
Hearing Date: Tuesday, April 18, 2017
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING INLAND WASHINGTON LLC'S MOTION FOR SUMMARY JUDGMENT

I. RELIEF REQUESTED

Plaintiffs respectfully request the Court reconsider and vacate its Order of March 31, 2017 granting Defendant Inland Washington LLC's Motion for Summary Judgment, that Defendant Inland Washington LLC's motion be Denied, and that the Court vacate its findings that the general contractor's liability is not vicarious.

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II. STATEMENT OF FACTS

The facts are described and supported by the papers on file herein, including Plaintiffs' Response to Defendant Inland Washington LLC's Motion for Summary Judgment, and the Declaration in Support and Exhibits Thereto, which are hereby incorporated by reference herein. In addition to the previously submitted facts and evidence, Plaintiffs submit the following facts and expert opinions from the March 16, 2017 deposition (Volume 2) of Putzmeister America training manager Alan Woods, the March 17, 2017 deposition of concrete construction operations expert Albert Hockaday, and the March 8, 2017 deposition (Volume 2) of Redi-mix concrete truck operations expert Glenn Murphy; the transcripts were not obtained until after Plaintiffs filed their Response to Inland Washington's Motion on the March 20, 2017 due date. Plaintiffs also submit the declaration of Oscar Flores, who has not been deposed in this case.

1. Alan Woods, Putzmeister America training manager

Putzmeister America training manager Alan Woods testified as to facts regarding the use of Putzmeister concrete pumping equipment.[1] He testified that a missing vibrator could result in a "bridge" of concrete that allows air to get into the hopper and cause the air to "release explosively"[2] Mr. Woods testified that a plug can form with any size aggregate. Putzmeister representative Thomas Hurley pointed out in his testimony that oversized aggregate rock makes plugs more likely.[3] Mr. Woods testified that workers should be kept out of the danger zone when starting to pump, which is any time the pump starts as opposed to just the first pumping operation of the day.[4] He testified to other issues, including bending of the end hose, use of

---

[1] Deposition of Alan Woods, March 16, 2017 (Volume 2) (Moore Decl. Ex. 1)
[2] Id., Pages 176-194; Page 192:12-14 ("release explosively.")
[3] Id., Pages 195-199
[4] Id., Pages 226-231 and 248-249

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reducers, and responsibilities of the pump operator.[5] He also testified that "duck and cover" was not an adequate safety plan:

> Q. Based on your experience, why wouldn't you use those words [duck and cover]?
> A. Because you cannot get away from it fast enough when it happens.
> Q. How fast does it happen, if you know?
> A. Instantly.
> Q. When you say "instantly," less than a second?
> A. Yes.

Deposition of Alan Woods, 207:13-23 (objections omitted); Id., Pages 200-207.

2. <u>Al Hockaday, concrete construction operations expert</u>

Al Hockaday is Plaintiffs' expert in concrete construction operations. He is currently a Senior Safety Manager for Dragados and Seattle Tunnel Partners on the Seattle SR 99 viaduct replacement tunnel project, and his previous experience includes having responsibility for safety oversight for all the concrete pump operators and all the equipment at Conco Pumping.[6] Mr. Hockday testified as to the need for coordination between the Redi-mix driver, the concrete placement contractor, and the general contractor,[7] and the importance of these safety issues to be part of the Accident Prevention Program.[8] He described how violations of WAC 296-155, Part O, and the WISHA health workplace standards caused Mr. Vargas's injury.[9] When asked about the general contractor's contribution to the injury, he explained:

> A. There's multitude of things that contributed.
> Q. Such as?
> A. Such as the general contractor is required to ensure that their subcontractors have procedures in place so they can conduct safe work.
> Q. How does the general contractor go about requiring subcontractors to have procedures in place, as far as you understand that role of a general contractor?

---

[5] Id., Pages 232-241 (bending and reducer issues); Id., Pages 242-247 (responsibilities of pump operator)
[6] Deposition of Al Hockaday, March 17, 2017, Pages 1-37 (Moore Decl. Ex. 2)
[7] Id., Pages 148-150; Pages 172-189
[8] Id., Pages 156-157
[9] Id., Pages 124-129

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A. My understanding of the role of general contractor -- because I've been a general contractor safety manager for most of my career -- is that it's not just the general contractor's employees that have to be managed for their safe work practices. There are risk assessment of hazards in the workplace. But the general contractor has to ensure that the subcontractors also meet or exceed the general contractor's safety-accident prevention plan. They have to make sure that they have received proper training. They have to receive -- they have to make sure that the subcontractors are performing risk assessment, identify the hazards, so to speak, and they implement the plan and they train them to make sure that they understand, in any language, what needs to be done to complete that work in a safe manner.
Q. You said they. Who is they?
A. The general contractor. The general contractor has to ensure that the subcontractor has adequate, effective, safe practices and training in place [including safety orientations and pre-task planning]

…

Safety orientations. Those safety orientations dictate what hazards are on the job site, what scopes of work are on the job sites, what other trades are going to be doing on the job sites. Simultaneous operations planning, so that all subcontractors understand that if they're doing work that could cause an impact or a hazard to another contractor, that they communicate that.

Pre-task planning. Execution of the safety plan or program. Evaluation of the safety plan and program, auditing activities to make sure that they are in conformance with site plans for safety, for work plans. That goes for quality, too, and production. Making sure that the training is documented, and also evaluating the process. Once they have evaluated the processes, they have the responsibility of doing a gap analysis and making any prudent improvements to the safe work plans, job hazard analysis, activity hazard analysis, whatever it is called.

Deposition of Al Hockaday, March 17, 2017, Pages 125:16-127:22. He testified as to how Inland's inadequate safety practices caused the incident, including the following:

Q. As you sit here today, do you have any opinions as to what aspects of the role of a general contractor relating to safety Inland failed to perform, if any, at this particular site that caused the hose whip incident?
A. Yes, there are many that I have looked at. The main -- the main one that I look at for this particular case is that they did not ensure that there was a safe practice in place for -- not the hose whip, but for the crew to be hose whipped. A member of the crew that would receive an injury from a hose whip. There was no safe procedure -- written procedure in place by Inland. They didn't ensure that.
Q. Okay.
A. Not an adequate one.
Q. Have you looked at the safety plans and programs for Inland in this case?
A. Yes, I have.

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Id. Pages 128:23-129:14.

3. Glenn Murphy, Redi-mix concrete truck operations expert

Glenn Murphy is Plaintiffs' Redi-mix concrete truck operations expert, who testified regarding a number of issues pertaining to the operations and responsibilities of concrete pump drivers.[10] Mr. Murphy also discussed the "negative safety culture" on the subject project.[11] Although his testimony was mostly focused on Red-mix truck operations, he also addressed the role and responsibilities of the general contractor Inland in coordinating operations between the driver, the pump operator, and the pouring crew, including the following:

> A. It depends on what Inland's specific role was in the decision process that led to somebody taking the wrong size pump, showing up to do a job where a big one had been before and was now needed and sending a mixer driver there who sees three-inch hook-up on that pump and can't tell the guy what size rock he's carrying.

Deposition of Glenn Murphy, March 8, 2017, Page 127:5-11. He also explained:

> Q. What is the general contractor's responsibilities regarding safety at a construction project in general?
> A. All of them. It's your ass. It's your contract. It's your people on the ground. It's, I think, a little bit why we're here.

Id., Page 137:25-128:5

4. Declaration of Oscar Flores

Oscar Flores is the son of plaintiffs Gildardo Crisostomo Vargas and Lucina Flores. He also worked for hilltop for 2 ½ years prior to the incident.[12] He had worked on the North City Apartment job during previous concrete pouring operations involving Ralph's Concrete

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[10] Deposition of Glenn Murphy, March 8, 2017 excerpts and report (Moore Decl. Ex. 3 and Ex. 4)
[11] Id., Page 11
[12] Declaration of Oscar Flores, ¶ 5

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Pumping, as well as on another job for Inland and Ralph's.[13] He testifies that the Inland superintendent would often meet with the concrete pumper and the Hilltop foreman to decide how pumping operations should be conducted.[14] He testifies that the Inland superintendent and other Inland people would be on site telling Hilltop people what work to do and how to do it, and that Inland people would tell people what do on the job generally, and especially regarding safety.[15] However, Inland people did not tell anyone about how to avoid hose whip injuries.[16] He also reports that Inland people saw people too close to the end hose when pumping was started and did nothing to keep them away.[17]

III. STATEMENT OF ISSUES

1. Whether the Order granting Defendant INLAND WASHINGTON, LLC's motion for summary judgment for dismissal should be reconsidered and reversed. **Answer: Yes.**
2. Whether the denial of Plaintiffs' request to vacate the previous finding of no vicarious liability for breaches of non-delegable duties should be reconsidered and reversed under Washington law including *Millican* and the recent Court of Appeals decision in *Afoa II*. **Answer: Yes.**

IV. EVIDENCE RELIED UPON

In support of their Response, Plaintiffs rely on the pleadings on file in this matter including Plaintiffs' Response to Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, with declarations in support and exhibits thereto, the Declaration of

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[13] Id.
[14] Id., ¶ 6
[15] Id., ¶ 6-9
[16] Id., ¶ 9-11
[17] Id.

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Derek K. Moore in Support of this Motion for Reconsideration, and the exhibits thereto, and the Declaration of Oscar Flores in Support of this Motion for Reconsideration.

V. AUTHORITY AND ARGUMENT

CR 59 provides for "vacation and reconsideration" of any "decision or order" on any one of several grounds including "(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law," or "(9) That substantial justice has not been done." CR 59. With respect to this motion, Plaintiffs ask that the Court reconsider and vacate its Order granting summary judgment of dismissal to general contractor Inland WA in this matter.

The Court indicated that it granted Inland WA's motion because it did not see "much in the way of substance from the Plaintiff in terms of what the actual violation and what non-delegable duty we're talking about."[18] Regarding breaches of the common law duty, there is evidence showing Inland WA's direct liability by failing to coordinate the concrete delivery, pumping, and pouring operations on the jobsite. Regarding violations of statutory duties under WISHA, there is evidence showing Mr. Vargas was injured as a result of at least one violation of a WISHA regulation including WAC 296-155-682 (requirements for concrete equipment) and WAC 296-155-110 (requirements for accident prevention program). Regarding non-delegable duties, a general contractor's control is *per se* under *Stute v. P.B.M.C. Inc*., 114 Wn.2d 454, 788 P.2d 545 (1990), under which general contractors have non-delegable duties to provide a safe workplace free of WISHA violations. To the extent the Court's ruling was based on a finding of an insufficient showing of retained control, such a basis is contrary to law including *Stute* and its progeny. Finally, the Court's determination that general contractor Inland WA is not vicariously

[18] Report of Proceedings, March 31, 2017 (Oral ruling from the bench)

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liable for breaches of non-delegable duties is contrary to Washington law including *Millican* and the recent Court of Appeals decision in *Afoa II*.

1. <u>There is evidence showing Mr. Vargas was injured by breaches of common law duties and violations of WISHA regulations</u>

As previously briefed, Inland superintendent Steve Miller testified that his job duties included "coordinating the job" and required him to "play babysitter when somebody cries, solve problems that arise."[19] Hilltop foreman Matt Skoog also testified that Steve Miller was involved in the decision as to where to park the pump truck that morning:

> Q. Do you know who made that decision as to where to park the pump truck that morning?
> A. I believe we all did in order to find the best spot for the pump to sit to pour.
> Q. When you say "we all", who was involved in that?
> A. Steve Miller and I and possibly Don from Ralph's Concrete Pumping.

Deposition of Matthew Skoog, Pages 59:22-60:3. In his declaration, Oscar Flores also describes how Inland people were constantly on the site and directing the work, including safety aspects. But despite their constant presence and awareness that Hilltop people were often in the danger zone holding the hose when pumping started, Inland did nothing to stop this practice, did not address it in its own Accident Prevention Program, and did nothing to ensure this was addressed in the Accident Prevention Program of Hilltop or anyone else.

From these facts alone, a jury could find that Inland breached its common law duty "to take reasonable care to provide a safe place of work." *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500, 505 (1978). Although a general contractor's control is *per se* as discussed below, to the extent that evidence of retained control is required, a jury could find that

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[19] Deposition of Steve Miller, page 42:2-8

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Inland retained and exercised control of the "manner and instrumentalities" of the work being performed. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 472, 296 P.3d 800 (2013) ("*Afoa I*")

Also as previously briefed, a jury could find that one or more WISHA regulations were violated, including the following:

Core Rules and Safe Place Standards:

WAC 296-800-11005 Provide a workplace free from recognized hazards.
WAC 296-800-11010 Provide and use means to make your workplace safe.
WAC 296-800-11035 Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.
WAC 296-155-040 Safe place standards.

It is undisputed that hose whip injuries are a recognized hazard. A jury could find that Inland violated or allowed to be violated these regulations requiring a workplace to be safe and free of recognized hazards.

Requirements for Concrete Equipment:

WAC 296-155-682 (8)(b)(iii) Unsafe condition of equipment:
WAC 296-155-682 (8)(c)(iii)(G) Operators must be familiar with applicable safety requirements.
WAC 296-155-682 (8)(b)(xv)(C), which provides: "Aggregate should not exceed 1/3 the diameter of the delivery system."

There is evidence that the broken antenna or the missing vibrator caused the incident. There is evidence the pump operator was unfamiliar with the safety requirements set forth in the Putzmeister manual. It is undisputed that 1.5 inch rocks were forced through a 3 inch end hose.

Accident prevention programs that are effective in practice:

WAC 296-155-110 Accident prevention program.
WAC 296-800-140 Accident prevention program.
WAC 296-800-14005 Develop a formal, written accident prevention program.
WAC 296-800-14020 Develop, supervise, implement, and enforce safety and health training programs that are effective in practice.
WAC 296-800-14025 Make sure your accident prevention program is effective in practice.

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A jury may find that the accident prevention programs that were in place were inadequate, not enforced, and not effective in practice because they failed to address the hazards of hose whips, failed to conform to ACPA standards and the Putzmeister manual regarding keeping workers out of the danger zone. A jury may agree with the Putzmeitser representative and find that the "duck and cover" plan, even if it existed, was ineffective and dangerous.

Safety Meetings:

WAC 296-800-130 Safety committees/safety meetings -- Summary.
WAC 296-800-13020 Establish and conduct safety committees.
WAC 296-800-13025 Follow these rules to conduct safety meetings.

A jury may find that the safety meetings did not comply with these regulations because workers were not properly trained to stay out of the danger zone when starting to pump.

Statutory duties under WISHA as set forth in *Stute* and its progeny are derived from the holding in *Goucher v. J.R. Simplot Company*, 104 Wn.2d 662, 709 P.2d 774 (1985). *See Stute v. P.B.M.C. Inc*., 114 Wn.2d 454, 457, 788 P.2d 545 (1990). The *Goucher* court adopted the reasoning of the federal Sixth Circuit case of *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799 (6th Cir.1984) in finding statutory duties under 29 U.S.C. § 654(a), the federal OSHA[20] counterpart to WISHA's RCW 49.17.060. The *Goucher* court, echoed in its progeny including *Stute* and *Afoa*, quoted and examined RCW 49.17.060 as follows:

> Each employer:
>
> (1) Shall furnish **to each of his [or her] employees** a place of employment free from recognized hazards that are causing or likely to cause serious injury or death **to his [or her] employees**: Provided, That no citation or order assessing a penalty shall be issued to any employer solely under the authority of this subsection except where no applicable rule or regulation has been adopted by the department covering the unsafe or unhealthful condition of employment at the work place; and

[20] Occupational Safety and Health Act of 1970

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> (2) Shall comply with the rules, regulations, and orders promulgated under this chapter.

> Under this act an employer's duty is twofold. The first is a "general duty" imposed on an employer to protect its employees from hazards that are likely to cause death or serious bodily injury. The second is a "specific duty" imposed on employers to comply with the WISHA regulations.

Goucher at 671 quoting RCW 49.17.060 (emphasis added).[21] The *Goucher* court explained:

> When a party relies on the general duty clause, only those parties who are employees of the employer are protected. On the other hand, when a party relies on the specific duty clause on the ground that the employer failed to comply with a particular OSHA standard or regulation, then all of the employees who work on the premises of another employer are members of the protected class.

Goucher at 672-673. Thus the distinction between the "general duty clause" and the "specific duty clause" is whether or not the legislature (or the Department of Labor and Industries by delegation) promulgated a regulation under WISHA that applies. Thus the test of whether a duty arises is whether a regulation promulgated under WISHA was violated, not whether the language of the regulation was "specific enough" or "sounds too general." If the legislature chose to protect workers by incorporating language from the general duty clause into a particular regulation promulgated under WISHA, as it did in WAC 296-155-040, then general contractors have a statutory duty to ensure that regulation is followed, including ensuring that all workers are provided with "a place of employment free from recognized hazards."[22]

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[21] RCW 49.17.060 was amended in 2010 to add "or her" as shown in the brackets above to make it gender neutral.

[22] Note also that the level of protection and regulations varies by industry, with the dangerous occupation of construction being extensively regulated under Chapter 296-155 WAC - Safety standards for construction work. Other occupations are much less regulated, such as the laundry industry under Chapter 296-303 WAC. Other occupations, perhaps most occupations, do not have a dedicated chapter, though the WISHA Safety Core Rules "affect all employers." WAC 296-800-100

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2. <u>General contractors have *per se* control under *Stute*, and owe non-delegable duties to provide a safe workplace free of WISHA violations</u>

In support of its motion, Inland WA argued that it was entitled to summary judgment because Plaintiffs did not show that Inland WA had sufficient control of the work performed for the duties to attach. As discussed in Plaintiff's Response, this is the wrong legal standard. The retained control analysis is only appropriate in jobsite owner or landowner cases where the defendant is <u>not</u> a general contractor on a construction site. As previously briefed, under *Stute v. P.B.M.C. Inc*., a "general contractor's supervisory authority is *per se* control over the workplace, and the [non-delegable duty to provide a safe place to work for employees of subcontractors] is placed upon the general contractor as a matter of law." *Stute v. P.B.M.C. Inc*., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990). The *Stute* Court explained:

> A general contractor's supervisory authority places the general in the best position to ensure compliance with safety regulations. For this reason, the **prime responsibility for safety of all workers should rest on the general contractor**.
> …
> Thus, to further the purposes of WISHA to assure safe and healthful working conditions for every person working in Washington, RCW 49.17.010, we hold the **general contractor should bear the primary responsibility** for compliance with safety regulations **because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.**

Stute v. P.B.M.C. Inc., 114 Wn.2d at 463-4. (emphasis added)

Since control is established *per se*, the analysis as applied in *Kamla*, *Afoa*, and *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 666, 240 P.3d 162 (2010) as to whether the defendant retained sufficient control to be comparable to that of a general contractor does not apply here.

Even if Inland WA was not the general contractor and control had to be established under the same standards that apply to jobsite owners who are not general contractors, the plaintiffs would only need to establish the right to control, a showing of actual control is not required. The

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"test of control is not the actual interference with the work of the subcontractor, but the **right** to exercise such control." *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330-331, 582 P.2d 500, 505 (1978); *Kamla v. Space Needle, Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002)

In *Weinert v. Bronco Nat'l Co.*, Division One found *Stute* duties applied to an owner / developer where "[t] he owner/developer's position [was] **so comparable to that of the general contractor** in *Stute* that the reasons for the holding in *Stute*" applied. *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (Div. 1, 1990) (emphasis added); *Kamla*, 147 Wn.2d at 121. Again, the retained control analysis does not apply to general contractors, who have *per se* control of their job sites. This was recognized in *Afoa I*:

> In *Kamla*, we held that although **general contractors and similar employers *always* have a duty to comply with WISHA regulations**, the person or entity that owns the jobsite is not per se liable for WISHA violations. Rather, jobsite owners have a duty to comply with WISHA only if they retain control over the manner in which contractors complete their work.

Afoa I, 176 Wn.2d at 472 (italics in original, bold added), citing *Kamla* at 125, 52 P.3d 472.

3. <u>General contractors are vicariously liable for breaches of non-delegable duties as described in *Millican* and *Afoa II*.</u>

The Court's previous finding that "Inland WA is not vicariously liable" must be vacated under *Afoa v. Port of Seattle (II)*, which found that vicarious liability applies to both the common law and statutory duties:

> The Port maintains that even if it had a nondelegable duty, RCW 4.22.070(1) still requires allocation of fault. But "[n]ondelegable duties involve a form of vicarious liability." As Division III of this court noted in *Millican v. N.A. Degerstrom, Inc.*, "'The label "nondelegable duty" does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity.'" Therefore, when it comes to breach of common law duties arising from **<u>retained control and violations of WISHA, a jobsite owner has vicarious liability</u>** for breach of duties that are nondelegable.

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Afoa v. Port of Seattle (II), __ Wn. App. __, __ P.3d __ (Div. 1, March 20, 2017), No. 75951-5-I, Slip Op. page 23 (emphasis added). *Afoa II* affirmed Division II's holding in *Millican*, which examined general contractors' duties under *Stute* and explained that general contractors are vicariously liable for damages caused by breaches of non-delegable duties by subcontractors such that independent negligence of the general contractor need not be shown. *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215, (2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014). This comports with longstanding Washington law as affirmed by the Washington Supreme Court in *Afoa v. Port of Seattle (I)*, 176 Wn.2d 460, 296 P.3d 800 (2013). The *Afoa I* Court cited the 1951 case of *Myers v. Little Church by the Side of the Road* with approval *Afoa I* at 475, citing *Myers v. Little Church by the Side of the Road*, 37 Wn.2d 897, 901-2, 227 P.2d 165 (1951).

VI. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request the relief requested above.

I certify that this memorandum contains 4,170 words, in compliance with the Local Civil Rules.

Dated this 10th day of April, 2017

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Exhibit 13

Honorable Jeffrey M. Ramsdell
Hearing Date: April 22, 2017

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

GILDARDO CRISOSTOMO VARGAS, et al., Plaintiffs, v. INLAND GROUP P.S., LLC, et al., Defendants.	NO. 13-2-32219-6 SEA **DEFENDANT INLAND WASHINGTON LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING INLAND WASHINGTON LLC'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION/REQUEST FOR RELIEF

Defendant Inland Washington, LLC ("Inland Washington") respectfully requests the Court deny Plaintiffs' *Motion for Reconsideration of Order Granting Inland Washington LLC's Motion for Summary Judgment* ("Motion for Reconsideration"), because there is no admissible evidence Inland Washington owed a duty to Mr. Vargas, or that it breached a duty that it may have owed, or that any such breach caused the Plaintiff's injuries. Inland Washington, as a general contractor, is not vicariously liable for workplace injuries under any case law cited by Plaintiffs. There is no expert opinion that Inland Washington violated any WISHA regulation which proximately caused Plaintiffs' damages. No additional case law has been provided

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supporting reversal of the *Order Granting Inland Washington LLC's Motion for Summary Judgment* (Dkt. 604) ("Order"), which dismissed Plaintiffs' claims against Inland Washington as a matter of law. Plaintiffs improperly supplement the record with additional evidence, but regardless, it cannot change result of the Court's ruling. No evidence shows that Inland Washington breached any safety regulation; indeed, the evidence shows that it met all requirements. Plaintiffs' putative evidence that workers violated the safety regulations and procedures in place (which violations were indisputably not known to Inland Washington) do not establish any proof of Inland's negligence—any other result would require the Court to apply vicarious liability to Inland Washington.

II. RESTATEMENT OF FACTS

The Court is familiar with the facts of this litigation. Inland Washington incorporates by reference the Statement of Facts sections of Inland Washington's (First) Motion for Summary Judgment, dated February 13, 2015 (Dkt. 74); and (2) Inland Washington's (Second) Motion for Summary Judgment, dated March 3, 2017 (Dkt. 450).

Plaintiffs improperly attempt to supplement the record on reconsideration by introducing additional evidence not previously briefed to the Court. Regardless, such new evidence does not compel reversing the Court's ruling on summary judgment; rather, it supports dismissal.

First, Plaintiffs and their "experts" repeat the false claim that Inland Washington did not have a written safety plan as they knew and reviewed Inland Washington's Written Safety Plan. *Butler Dec. Ex. A.* As noted repeatedly, Inland Washington's subcontract with Hilltop *Id. Ex. B (Subcontract)* that required compliance with **all safety regulations (including concrete)**, and required written plans from Hilltop and anyone it hired below it—which both Hilltop and Ralphs provided. *Butler Dec. Ex. C (Hilltop Safety Plan) and D (Putzmeister Manual).*

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Second, the Putzmeister manual that was on site with the truck covers virtually **every** one of Plaintiffs' alleged negligent acts or omissions, including: **repeated** warnings throughout the manual about hose whips and the danger zone issue (*Id. Ex. D,* e.g., pp. 2-36, 2-77,5-85 and elsewhere), hose blockages, (e.g. 2-75), the reach of the boom—and the fact that it can be extended flat horizontally, (3-8 & 5-89), requiring all mechanical systems to be in proper working order (2-89 & §7), the definition of "start up" (5-91); electrical line clearances (e.g., 2-61,though wholly irrelevant for this case). On this last point, Mr. Gleason **concedes** the Putzmeister manual allows for a distance of 1 meter between the boom and the electrical lines (which were only 240 volts). *Id. (Gleason Dep Vol. 2). Ex. E, p. 243.*

Third, Inland also required ongoing training of Hilltop which was done—specifically on the issue of hose whip "blow outs. " *Id. Ex. F (Gordon Skoog Dep) 62-63; Ex. G (Brian Skoog Dep) 43; Ex. G (Matt Skoog Decl. p. 3).* Plaintiffs' expert Mr. Gleason admits that, setting aside the 10 foot rule (which is exhaustively covered in the Putzmeister manual), the only safety practice a concrete crew faced with a blow out can follow is to effectively "duck and cover." *Butler Dec. Ex. D (Gleason Dep Vol. 2 Ex. E).* On a related issue, Plaintiffs rely upon evidence that the hose whip in this case was "instantaneous," (*Motion p. 3 l. 5*) which would render any training to the concrete placement crew moot and superfluous, as no such training or lack thereof could have caused the injury of an instantaneous whip.

Fourth, Ralphs trained its pump operators; in fact, Mr. Howell (the pump operator for this job) was specifically and repeatedly trained on clogs, whips and all related hazards, and signed off on such training. *Butler Dec. Ex. I, J and K.* There is no aspect of this case in which Plaintiffs have shown that Mr. Howell was not trained or did not have access to safety direction. As the person in charge of running the pump, he was indisputedly in the **best—if not the exclusive**—position to know when startup was occurring and thus when to clear workers from

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the area around the hose. Regardless, the safety plan was undisputedly in place, known to the worker, and effective—**if followed by the operator**.

Fifth, Miles driver Derek Mansur knew that he needed to keep the hopper full. *Butler Dec. Ex. L.* His unrebutted testimony says that he did. *Id.* Again, actual knowledge of the duty to keep the hopper full shows an effective plan in practice known to the worker, **if followed**.

Sixth, despite disclosing his brand new opinions concerning Inland's liability for the alleged aggregate/hose issue (and a host of other opinions) for the first time at his deposition on March 8, Mr. Gleason ultimately conceded that the **only** issues remaining regarding Inland Washington involved the 12 foot danger zone, and the aggregate size/hose dimension issues. *Id. Ex. E, p. 258-59.* All other issues—including electrical lines, the horizontal aspect of the boom, everything—were conceded.

Seventh, regarding the aggregate size issue, Mr. Gleason **conceded** that the WISHA regulations regarding hose dimension and aggregate size are **not mandatory**, are suggestions only, and **would not constitute a WISHA regulation violation.** *Id. p. 249-252.* Regardless, Inland Washington's safety requirements for Hilltop explicitly referred to such WISHA regulations, and were thus known to Hilltop.

Eighth, all subs including Hilltop conducted weekly safety meetings where items were discussed with employees. *Butler Dec. Ex. M (weekly safety meetings).* This would, according to the Skoogs, include hose whips, as it was continuing on the job training.

With these undisputed items of evidence, Mr. Hockaday and Mr. Murphy (opinions disclosed early March) are baseless. The sole opinion of Mr. Hockaday (*Motion p. 4*) is that the Inland plan did not cover hose whips. But he utterly fails to consider all other incorporated safety plans.

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Similarly, the testimony of Glenn Murphy, cited by Plaintiffs (whose opinions were also produced for the first time in March of this year), is also irrelevant and unhelpful: his testimony does not even attempt to specify **any** specific violation.

Moreover, Plaintiffs' last-ditch effort to offer the previously undisclosed April 6 declaration of Oscar Flores (Plaintiff's son) only provides testimony that he was not on site the day of the accident, did not participate in certain meetings, yet offers hearsay about non-specific topics that may have been discussed on other jobs, on other days. Lacking competence, offering hearsay, and having been produced for the first time ever after dismissal of Inland Washington, it should not be considered and be stricken. CR 26, LCR 26 (late disclosure past deadline), CR 59(a)(4)(re: new evidence), ER 801-803, 601. Regardless, it does not create a fact issue concerning (1) the unrefuted fact that Mr. Vargas did in fact receive training on hose whips while employed at Inland Washington, (2) Inland Washington did not retain control over Hilltop's work, (3) the undisputed evidence that Hilltop workers attended safety meetings, as their signatures show, (4) **confirms** that Inland Washington was performing periodic safety inspections and issuing warnings, (5) by plaintiffs' own theory and evidence, the instantaneous nature of the hose whip rendered the safety training of Hilltop workers moot.

III. EVIDENCE RELIED UPON

Inland Washington relies on the Declaration of John K. Butler in Support of Inland Washington's Opposition to Plaintiffs' Motion for Reconsideration, with attached exhibits; the declarations, with attached exhibits, filed in support of Inland Washington's two above-referenced Motions for Summary Judgment; and the pleadings and papers in the Court Clerk's file.

IV. ISSUES PRESENTED

Should Plaintiffs' Motion for Reconsideration be **denied** where Plaintiffs fail to raise a genuine issue of material fact or supportive case law on Inland Washington's duty or breach?

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Answer: **YES.**

V. ARGUMENT

A. Standard for Deciding Motion for Reconsideration

A motion for reconsideration may only be granted where there is "no evidence or reasonable inference from the evidence to justify . . . the decision, or that [the decision] is contrary to law." CR 59(a)(7). A trial court in its discretion may grant or deny a motion for reconsideration, and its decision will be maintained unless it is "manifestly unreasonable or based on untenable grounds." *Sligar v. Odell*, 156 Wn. App. 720, 733–34, 233 P.3d 914 (2010). The Washington Supreme Court states:

> While generally a question of fact is properly left to the jury, the guidelines as to what is a question of fact or law are not precise. "Whether the case goes to the jury or the judge dismisses the claim for a failure to make a case for causation may depend on the actors and the circumstances involved." Thus, when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.

Hartley v. State, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). A motion for reconsideration does not provide litigants with an opportunity for a second bite at the same apple, or merely re-argue issues already addressed. *Anderson v. Farmers Ins. Co. of Wash.*, 83 Wn. App. 725, 923 P.2d 713 (1996).

At the Summary Judgment hearing, the Court noted the lack of substance in Plaintiffs' proffered evidence attempting to show that Inland Washington violated any safety rule. *Butler Dec. Ex. N p. 77.* The Court properly scrutinized whether Plaintiffs had met their burden of production. *Young v. Key Pharmaceuticals, Inc.,* 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Inland Washington repeatedly pointed out a lack of evidence creating a fact dispute concerning duty, breach and causation, and did so for its motion. The Court noted that Plaintiffs failed to

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produce sufficient evidence to create a fact issue, *Id.*, and further ruled that it would not overturn Judge Schapira's prior rulings.

B. Reconsideration Should Be Denied Because Inland Washington Is Not Vicariously Liable Nor Is It a Guarantor of Safety at the Site.

Inland Washington is not a guarantor/insurer of site safety, nor can it be held vicariously liable for the negligent actions of other parties at the site. Judge Schapria's order held "Inland Washington was not vicariously liable". (Dkt. 122). Plaintiffs present this Court with no sound reason to change that decision.

Vicarious liability is the polar opposite of a nondelegable duty. This distinction has been noted by courts, commentators and treatises:

> General contractors may be held liable for the torts of either their independent contractors or the independent contractor's employees, if the general contractor either negligently supervised the work or violated a nondelegable duty. The liability imposed upon contractors, or owners who exert similar control over a jobsite, is based upon workplace safety rules that are imposed by statute. *Millican*, 177 Wn. App. 881 (trial court erroneously permitted jury to hear evidence regarding general contractor's delegation of duty to subcontractor). **However, the liability in either case is direct rather than vicarious.** *Pettit v. Dwoskin*, 116 Wn. App. 466, 68 P.3d 1088 (Div. 1 2003) (trial court properly refused to instruct jury that an owner who received the building permit in their name had a nondelegable duty to ensure building code compliance; owner was liable only if his general contractor was negligent); *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 29 P.3d 50 (Div. 3 2001), aff'd and remanded, 148 Wn.2d 911, 64 P.3d 1244 (2003) (independent contractor's illegal dumping could subject generator of organic waste to liability since duty for safe disposal was nondelegable); *Tauscher v. Puget Sound Power and Light Co.*, 96 Wn.2d 274, 635 P.2d 426 (1981) (trial court properly granted summary judgment to utility where specific statute did not impose duty on utility to safeguard employees of independent contractors).

16 Wash. Prac., Tort Law and Practice (4th ed.) § 4:15 (emphasis added). Liability for the breach of a nondelegable duty as a direct liability—as distinct from indirect, vicarious liability—has been further explained as follows:

> **[T]he establishment of liability under a nondelegable duty does not give rise to vicarious liability.** Under vicarious liability, one person, although entirely

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> innocent of any wrongdoing and without regard to duty, is nonetheless held responsible for harm caused by the wrongful act of another.... **We reject any coupling of the concept of vicarious liability and nondelegable duty.**
>
> ....
>
> The liability for a nondelegable duty that we impose directly upon the employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions. **The test of liability is the presence or absence of reasonable precautions;** and direct liability is not dependent upon any apportionment to an employer of his or her concurrent negligence in failure to ensure that an independent contractor takes necessary precautions.

Saiz v. Belen Sch. Dist., 113 N.M. 387, 827 P.2d 102, 114–15 (1992) (emphasis added); *see also Kirkland v. City of Gainesville*, 122 Fla. 765, 166 So. 460, 464 (1936) (stating that under the applicable statute, "[t]he legal duty of the city was to exercise care to maintain the poles of its system in a reasonably safe condition for all who had duties to perform on the poles; and this duty could not be so delegated as to relieve the city of liability for negligence in maintaining the pole in the service for which it was used").

To hold that a non-delegable duty means vicarious liability would improperly require Inland Washington to the insurer/guarantor of <u>all</u> worksite accidents and injuries—no matter who caused them, or whether the general contractor could possibly have known of the allegedly negligent behavior. That is not what Washington precedent (*e.g, Stute* & progeny) has ever held. Such a policy would only result in increased jobsite accidents, as observed by the Washington Supreme Court in *Tauscher*.

Under the common law of the State of Washington, a general contractor only owes a duty under *Kelley* to provide a workplace free of recognized safety hazards. Under our statutory scheme, a general contractor only owes a duty under *Stute* to employees of subcontractors to avoid its own violations of specific WISHA safety regulations which can proximately cause an injury to such employees. No evidence supports this.

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A general contractor's common law duty, spelled out in *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978), is to maintain safe common workplaces for all workers on the site. *Id.* at 330-31. *See also, Tauscher v. Puget Sound Power & Light Co.*, 96 Wn.2d 274, 278, 635 P.2d 426 (1981) (the decision in *Kelley* holding general contractor liable was primarily based on the fact that "the general contractor on a multi-employer project, retained control over the common work area and thus had the duty, within the scope of that control, to provide a safe place to work for all employees").

A general contractor's statutory duty under *Stute v. PBMC, Inc.*, 114 Wn.2d 454, 788 P.2d 545 (1990), is similar, but "only extends to employees of independent contractors when a party asserts that the **employer did not follow particular WISHA regulations**". *Id.* at 457 (emphasis added). Hence, there is nothing in the language of *Kelley* or *Stute* whereby a general contractor's non-delegable duty transforms into an assertion that a fault-free general subcontractor is vicariously liable where a <u>subcontractor</u> did not follow a particular WISHA regulation. In effect, Plaintiffs seek a novel ruling whereby a general contractor becomes a guarantor of safety, contrary to *Kelley*, *Stute* and progeny. In effect, the general would be automatically liable for the momentary, transitory violations of such regulations and safety rules by workers, no matter if there was no reasonable care or precaution that could prevent such momentary lapse by a worker. This is not, and cannot reasonably be, the standard.

C. Settled Law Limits Inland Washington's Duty to Common Work Areas, and Not to Areas Where It Did Not Retain Control over the Means and Manner of the Work Performed

Inland Washington did not perform work on or supervise the actual pour at the time of the Incident. Ralph's was hired by Hilltop to supply the concrete pump truck and pump operator, pursuant to the specific requirements of Hilltop. Miles was hired by Hilltop to supply the Redi-Mix concrete pursuant to the specific requirements of Hilltop. Miles' concrete truck necessarily

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pulled up next to Ralph's pump truck and discharged concrete into the hopper of the pump truck. Ralph's pumped the concrete from the hopper though a 5-inch tube on an extensible boom into a series of reducers, ending in a 3-inch diameter rubber hose. The choice of pump equipment and its layout were all decisions made by Hilltop and/or Ralph's. The pump hose was handled only by Hilltop employees, including Mr. Vargas, standing on a Hilltop scaffold. The decisions regarding the training, experience and placement of all Hilltop employees were made by Hilltop.

By contract and practice, Inland Washington did not and could involve itself in any aspect of the means or manner Hilltop chose for performing the concrete pour operation. All of Hilltop's work was performed in a non-common work area under the direction and control of Hilltop. Consequently, Inland Washington is not liable, nor is it vicariously liable, for the actions of Hilltop and its subcontractors/suppliers. To rule otherwise would implicate Inland Washington as the guarantor of the safety of everyone working at the site, which is an entirely different role than was set forth in *Kelley* and *Stute*.

Plaintiffs offer no new admissible evidence suggesting that Inland Washington controlled the means and manner of the work performed by Hilltop at the Project. Because it is undisputed that Hilltop's work took place in a non-common work area of the site, where it exercised full control over the means and manner of the concrete pour, summary judgment was correctly granted to Inland Washington.

D. There Is No Evidence that Inland Washington Violated any WISHA Regulation Which Proximately Caused the Incident

Even assuming *Kelley* and *Stute* can be construed to mean a general contractor owes a non-delegable duty of care to employees working under the sole control of a subcontractor in a non-common work area, such a duty would be limited to Inland Washingtons obligation to comply with WISHA regulatory requirements. *Stute, supra.* Here, Plaintiffs just assert a litany of

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unsubstantiated purported WISHA violations, without the necessary expert opinions tying such violations to proximate causation. As noted in the Statement of Facts above (and in both MSJ briefings by Inland)

There is further no evidence any WISHA violations occurred which proximately caused the Incident. Inland Washington required and provided top-level safety training that went to all workers. The evidence cited above clearly demonstrates **not** that Inland Washington failed to provide safety plans; rather, it confirms Inland did. Inland Washington fulfilled all its duties under *Kelley*, *Stute* and their progeny to provide a safe workplace free of WISHA safety violations. The Court correctly decided that dismissal of Inland Washington was appropriate under the circumstances, and Plaintiffs have presented no new basis for reversing that decision on reconsideration. Plaintiffs present no evidence at all of causation arising from Inland Washington's site safety plan. They submit no expert opinion that Inland Washington proximately caused the Incident. Without any such evidence, Inland Washington cannot be found liable. Plaintiffs only offer vague and conclusory allegations of WISHA violations, but no evidence that Inland violated them

Plaintiffs' safety expert Rick Gleasons final opinions were that (1) Hilltop employees were improperly in 12-foot zone around the end of the whip hose; and (2) the discrepancy between the aggregate size and the hose. Neither opinion rises to a WISHA violation actionable under Stute. First, the "12-foot zone" is not a WISHA regulation, but regardless, the Putzmeister manual covers this as does Mr. Howell's training, Second, Gleason concedes the hose size is not a WISHA violation.

The Court expressly ruled that Alan Woods, an employee of Putzmeister, is "not as an expert", but rather is a lay witness whose testimony is "limited to Mr. Woods' experience and knowledge explaining Putzmeister's safety materials and training customers on the safe use of

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Putzmeister Equipment". *Order Denying Motion for Protective Order*, dated Nov. 29, 2016, (Dkt. 252A) (double underline emphasis in original). Consequently, the Court should disregard all opinion testimony of Mr. Woods cited by Plaintiffs in their Motion.

Given the complete absence of any new record evidence challenging the fact that the work area where the Incident occurred was a non-common area under the direct supervision or control of Hilltop, and not Inland Washington, then it cannot be the responsibility of Inland Washington to have a representative stand next to each and every Hilltop, Ralph's and Miles employee to constantly tell them what to do. These employees were all experienced and trained in their respective trades, and Inland Washington would not have been able to improve safety by interfering with them as they performed their respective tasks during the pour. Any of the alleged momentary deviations are not and cannot properly be the responsibility of Inland Washington. Not only is such supervision not a WISHA requirement, there is no expert opinion that closer supervision by anyone would have made a difference in causation of the Incident.

VI. CONCLUSION

Based on the foregoing grounds, this Court should deny Plaintiffs' Motion for Reconsideration. A proposed order is attached.

DATED this 20th day of April, 2017.

PREG O'DONNELL & GILLETT PLLC

By *s/David E. Chawes*
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This memorandum contains 3,642 words (4,200 words max.), in conformance with the applicable provisions of the Local Civil Rules.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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Exhibit 14

Hon. Jeffrey M. Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' REPLY TO INLAND WASHINGTON'S RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING INLAND WASHINGTON LLC'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs reply to Inland Washington's Response to Plaintiffs' Motion for Reconsideration as follows:

A. <u>Plaintiffs' Motion for Reconsideration properly included newly discovered evidence and addressed issues previously raised.</u>

CR 59 provides for "vacation and reconsideration" of any "decision or order" on any one of several grounds including "(7) That there is no evidence or reasonable inference from the

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evidence to justify the verdict or the decision, or that it is contrary to law," or "(9) That substantial justice has not been done." CR 59. Reconsideration can also be granted on "newly discovered evidence" under CR 59 (4). Also, "where an issue does not depend on new facts and is closely related to an issue previously raised, it may be raised in a motion for reconsideration." *Anderson v. Farmers Ins. Co. of Wash.*, 83 Wn. App. 725, 734, 923 P.2d 713 (Div. 2, 1996) citing *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (Div. 3, 1986). In this case, the testimony transcripts submitted in support of Plaintiffs' motion for reconsideration were not available when Plaintiffs' response to Inland WA's summary judgment was due. Oscar Flores, son of plaintiffs Gildardo Crisostomo Vargas and Lucina Flores has been disclosed and known to Defendants for years; Defendants simply chose not to depose him. All the issues raised in Plaintiffs' motion for reconsideration were closely related to the issues raised in Plaintiff's Response, which involve the duties of the general contractor and facts supporting breached of those duties. Finally, Inland WA's argument that litigants should not be provided "with an opportunity for a second bite at the same apple, or merely re-argue issues already addressed" is sanctimonious,[1] because Inland WA brought substantially the same summary judgment motion back in 2015, which was denied on much less evidence than is presently before the Court.

B. <u>Settled Washington law including *Stute*, *Kelley*, and *Millican* holds general contractors ultimately responsible for job safety</u>

Washington law places the ultimate responsibility for jobsite safety on general contractors; the duties are concurrent and non-delegable, and flow upstream to the top. The trial Court's dismissal of Inland WA desecrates the general contractor's ultimate responsibility for jobsite safety as forged in decades of Washington law and crystalized in *Stute* and *Kelley*:

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[1] Inland WA's Opposition to Plaintiffs' Motion for Reconsideration, Page 6:14-16

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> Regarding the duty of a general contractor, in Kelley we approved of the approach taken by the Michigan Supreme Court in *Funk v. General Motors Corp.*, 392 Mich. 91, 220 N.W.2d 641 (1974). "Recognizing the authority a general contractor has to influence work conditions on a construction site, the Michigan Supreme Court has moved forthrightly to place ultimate responsibility for job safety in all common work areas on the general contractor." *Kelley*, 90 Wn.2d at 331, 582 P.2d 500. The Michigan Court determined that the best way to assure that safety precautions are taken is to make the general contractor responsible. *Kelley*, 90 Wn.2d at 331, 582 P.2d 500. The Michigan Supreme Court stated:
>
> > The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury.
>
> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.

Stute v. P.B.M.C. Inc., 114 Wn.2d 454, 461, 788 P.2d 545 (1990) quoting *Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 582 P.2d 500 (1978).

Inland WA's "common area" argument fails under *Stute* and *Weinert v. Bronco Nat'l Co.*, 58 Wn. App. 692, 795 P.2d 1167 (1990) and the facts of this case. The *Weinert* court specifically held that that the owner / developer and the siding subcontractor both owed duties under *Stute* despite its finding that the fall did not happen in a "common area." *Id.* The subject incident occurred in a common work area, with at least four employers involved in the concrete pouring operations.

Inland WA's argument that it discharged its duty by contractually requiring its contractors to follow safety regulation fails under *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215 (Div. 3, 2013), which held such provisions were irrelevant to a general contractor's non-delegable duties to workers and found admission of the contract provisions to be reversible error.

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C. General contractors are vicariously liable for breaches of non-delegable duties as described in *Millican* and *Afoa II*; *Petit v. Dwoskin* and out of state cases do not apply.

The comment to the Washington Pattern Jury Instruction on Nondelegable duties recognizes: "Nondelegable duties involve a form of vicarious liability." Comment to WPI 12.09. Inland WA misleadingly cites *Pettit v. Dwoskin* as discussed in the Washington Practice series for the proposition that liability is "direct rather than vicarious." Inland WA's Response, Pages 6-7, quoting 16 Wash. Prac. Tort Law and Practice (4th ed.) § 4:15 citing *Pettit v. Dwoskin*, 116 Wn. App. 466, 68 P.3d 1088 (Div. 1, 2003). This is misleading because unlike Inland WA, the defendant in *Pettit v. Dwoskin* was not a general contractor on a construction site. The defendant was a homeowner holding a party when a deck collapsed, injuring the plaintiff, who was a guest at the party. The plaintiff sought a nondelegable duty jury instruction on the following facts:

> The home was constructed for Donelson and Dwoskin in 1984–85. Dwoskin personally obtained the building permit from the Seattle building department. The permit was granted "subject to compliance with the ordinances of the City of Seattle." Dwoskin participated in designing the home, but employed a structural engineer and a construction contractor.

Pettit v. Dwoskin, 116 Wn. App. at 469 (Footnotes omitted). Division I held:

> The [trial] court did not err in refusing to instruct the jury that Respondents had a nondelegable duty to ensure compliance with the code. Rather, Dwoskin was liable only if his contractor was negligent.

Id. at 475. The code in question was the Seattle building code, not WISHA regulations. *Pettit v. Dwoskin* had nothing to do with injuries to a worker on a construction site, nothing to do with WISHA, and nothing to do with duties under *Stute* and the retained control doctrine.[2]

This Court's reliance on *Dwoskin* in dismissing this case is contrary to law.

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[2] Even if the *Pettit* case did involve a worker injured while building the deck for the homeowners' personal use, the homeowner would likely have been found to owe no duties under *Rogers v. Irving*, 85 Wn. App 455, 933 P.2d 1060 (Div. 1, 1997) and *Smith v. Myers*, 90 Wn. App. 89, 950 P.2d 1018 (Div. 2, 1998)

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Inland WA also quotes and cites non-applicable cases from other jurisdictions, including the 1992 New Mexico case of *Saiz v. Belen Sch. Dist.*, 113 N.M. 387. 827 P.2d 102 (1992) and the 1936 Florida case of *Kirkland v. City of Gainesville*. 122 Fla. 765. 166 So. 460 (1936). Inland WA's Response, Page 7. Obviously these cases do not control over the recent Washington cases and mandatory authority of *Millican* and *Afoa v. Port of Seattle (II)*, __ Wn. App. __, __ P.3d __ (Div. 1, March 20, 2017), No. 75951-5-I.

D. <u>Evidentiary facts show Mr. Vargas was injured by breaches of common law duties and violations of WISHA regulations.</u>

WISHA requires that employers in construction "develop a formal accident-prevention program, tailored to the needs of the particular plant or operation and to the type of hazard involved." WAC 296-155-110 (2). All employers must "[d]evelop, supervise, implement, and enforce training programs" that are effective in practice under WAC 296-800-14020. It is not enough to have a safety plan. The safety plan must address the type of hazard involved, and it must be **<u>implemented</u>** and **<u>enforced</u>**. The safety plans of Inland WA and Hilltop were inadequate, as they did not require workers to be out of the danger zone when pumping started. There are fact questions as to whether Hilltop's "duck and cover" plan, which was written after the fact, existed or was ever communicated. Even if it were, "duck and cover" does not prevent hose whip injuries because hose whips occur in "less than a second" with no time to react.[3] Even if the Putzmeister manual is considered to be a safety plan, Inland WA had a duty to make sure that plan was followed, which it was not.

There was also a clear violation of WAC 296-155-682 (8)(b)(xv)(C), which provides that "Aggregate should not exceed 1/3 the diameter of the delivery system." Inland WA contends

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[3] Deposition of Alan Woods, 207:13-23

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that this WISHA standard is not applicable because of the use of the word "should." At the very least, the regulation should be presented to the jury in accordance with WPI 60.03, which provides for the jury to be instructed that non-mandatory government policies and private industry standards, as well as statutes and rules, may be considered as evidence of negligence.

Inland WA invents a new rule that expert testimony is required to show that Inland WA proximately caused the incident. Inland WA cites no authority for this proposition because none exists.[4] Even so, Plaintiffs have presented the testimony of several experts in support of their claims. Any alleged "concessions" of Rick Gleason or any other experts are not conclusive, as the jury is not required to accept an expert's opinion. WPI 2.10 Alan Woods and other witnesses in this case who have not been retained as experts can provide testimony under ER 702 if the witness has the requisite qualifications, and may also provide lay opinion testimony under ER 701.

I certify that this memorandum contains 1,659 words, in compliance with the Local Civil Rules.

Dated this 21st day of April, 2017

BISHOP LEGAL

Derek K. Moore, WSBA No. 37921
Raymond E.S. Bishop, WSBA No. 22794
Attorneys for Plaintiffs

[4] In contrast, there is authority requiring expert testimony to prove medical treatment. *Patterson v. Horton*, 84 Wn. App. 531, 929 P.2d 1125 (Div. 2, 1997). Plaintiffs have provided such evidence through the expert testimony of Jared Olson, M.D., among others.

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Exhibit 15

Hon. Jeffrey M. Ramsdell
Hearing Date: Thursday, April 20, 2017
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' MOTION TO CERTIFY ORDER GRANTING INLAND WASHINGTON LLC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL TO THE COURT OF APPEALS

I. RELIEF REQUESTED

In the event that the Court denies their Motion for Reconsideration of the March 31, 2017 Order Granting Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, which has been noted for April 18, 2017, Plaintiffs respectfully request the Court certify the following orders to the Court of Appeals pursuant to RAP 2.3 (b)(4):

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- The dismissal of Plaintiffs' claims against general contractor Inland Washington in this action and denial of Plaintiffs' request to vacate the Court's previous finding that the general contractor's liability was not vicarious, as set forth in the Court's March 31, 2017 Order Granting Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, and the Court's Order on or about April 18, 2017 Denying Plaintiffs' Motion for Reconsideration thereof;

II. STATEMENT OF FACTS

The facts are described and supported by the papers on file herein, including Plaintiffs' Response to Defendant Inland Washington LLC's Motion for Summary Judgment, and the Declaration in Support and Exhibits Thereto, which are hereby incorporated by reference herein. The underlying facts of the incident and the parties have been extensively briefed. Plaintiffs recite the following procedural facts relevant to this motion:

Inland Washington, LLC admits that it was the general contractor on the subject project. This fact was established as a matter of law by this Court's order of March 17, 2017 on Plaintiffs' Motion for Summary Judgment. Inland Washington first moved for Summary Judgment for dismissal in 2015. This was denied in the Court's Order of June 26, 2015, in which Judge Carol Schapira found that "Inland Washington LLC owes non-delegable duties under *Stute*." However, she also found that "Inland WA is not vicariously liable." In March of 2017, Inland Washington brought another motion for summary judgment for dismissal. Although more discovery had been conducted and more evidence had been submitted, the Court granted Inland Washington's motion for complete dismissal in its March 31, 2017 order. In response to Inland's March 2017 motion, and following the Court's decision in *Afoa II* regarding vicarious liability, Plaintiffs also requested the Court vacate its previous finding that Inland WA

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was not vicariously liable. In response to a procedural objection brought by Inland WA in a motion to strike, plaintiffs filed a separate motion to vacate the previous vicarious liability finding. In the March 31, 2017 hearing, the Court declared that this motion was moot given its granting of Inland WA's motion for dismissal.

III. STATEMENT OF ISSUES

1. Whether the Court's orders granting Defendant INLAND WASHINGTON, LLC's motion for summary judgment for dismissal, denying reconsideration thereof, and implicitly denying Plaintiffs' request to vacate the previous finding of no vicarious liability for breaches of non-delegable duties involve controlling questions of law for which discretionary review is appropriate under RAP 2.3.

IV. EVIDENCE RELIED UPON

In support of their Response, Plaintiffs rely on the pleadings on file in this matter including Plaintiffs' Response to Defendant Inland Washington, LLC's Motion for Summary Judgment of Dismissal, with declarations in support and exhibits thereto, Plaintiffs' Motion for Reconsideration thereof, with declarations in support and exhibits thereto.

V. AUTHORITY AND ARGUMENT

Plaintiffs seek certification to the Court of Appeals under Rule of Appellate Procedure 2.3 (b)(4), which provides for discretionary review where:

> The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3 (b)(4).

This case involves controlling questions of law with substantial grounds for differences of opinion as to the duties of a general contractor under WISHA and the retained control

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doctrine, whether a showing of a general contractor's actual control of the manner of the work must be made under *Stute*, and whether a general contractor is vicariously liable for breaches of non-delegable duties under *Millican* and *Afoa II*, and what WISHA regulations must be implicated for the purposes of statutory duties under WISHA.

In support of its motion, admitted general contractor Inland WA argued that it was entitled to summary judgment because Plaintiffs did not show that Inland WA had sufficient control of the work performed for the duties to attach. Plaintiffs argued that a general contractor's control was *per se* under *Stute v. P.B.M.C. Inc*., 114 Wn.2d 454, 463-464, 788 P.2d 545 (1990), and that the retained control analysis is only appropriate in jobsite owner or landowner cases where the defendant is not a general contractor on a construction site, such as *Kamla* and *Afoa I*. *Kamla v. Space Needle, Corp.*, 147 Wn.2d 114, 121, 52 P.3d 472 (2002); *Afoa v. Port of Seattle*, 176 Wn.2d 460, 472, 296 P.3d 800 (2013) ("*Afoa I*")

Plaintiffs also contend that the Court erred in finding that a general contractor was not vicariously liable for breaches of non-delegable duties under WISHA and the retained control doctrine under *Millican* and *Afoa II*. *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215, (2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014); *Afoa v. Port of Seattle (II)*, __ Wn. App. __, __ P.3d __ (Div. 1, March 20, 2017), No. 75951-5-I.

The Court indicated that it granted Inland WA's motion because it did not see "much in the way of substance from the Plaintiff in terms of what the actual violation and what non-delegable duty we're talking about."[1] Plaintiffs contends they submitted evidence to support their claims that their damages resulted from at least one violation of a WISHA regulation including WAC 296-155-682 (requirements for concrete equipment) and WAC 296-155-110

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[1] Report of Proceedings, March 31, 2017 (Oral ruling from the bench)

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(requirements for accident prevention program), among others. Thus there appear to be questions of controlling law regarding whether certain WISHA regulations apply or do not apply with respect to the general contractor's duties under WISHA.

Immediate review of the orders would likely materially advance the ultimate termination of the litigation. As it sits now, if Inland WA's dismissal stands and is not reviewed, trial will proceed in a *Stute* based case where the general contractor is not a party. Defendant Miles Sand and Gravel will argue that its driver did not let the hopper get low and that it otherwise had no liability. Defendant Ralph's Concrete Pumping will continue to argue that its operator was a borrowed servant of Hilltop and thus immune under Title 51 RCW, and that it is otherwise not liable. Plaintiffs are faced with the prospect of a zero recovery if the jury agrees with these arguments, which they would certainly appeal. In the meantime, there would have been a trial estimated to last 8-12 weeks, which would likely need to be tried again if Plaintiffs prevail on appeal. Also, if the remaining defendants see a high likelihood of a defense verdict, they have no incentive to offer any acceptable settlement, making trial all the more likely.

VI. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the aforesaid orders be certified for discretionary review.

I certify that this memorandum contains 1,179 words, in compliance with the Local Civil Rules.

Dated this 12th day of April, 2017

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Exhibit 16

Honorable Jeffrey M. Ramsdell

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

GILDARDO CRISOSTOMO VARGAS, et al., Plaintiffs, v. INLAND GROUP P.S., LLC, et al., Defendants.	NO. 13-2-32219-6 SEA **DEFENDANT INLAND WASHINGTON, LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY ORDER GRANTING INLAND WASHINGTON LLC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL TO THE COURT OF APPEALS**

I. RELIEF REQUESTED

Defendant Inland Washington LLC ("Inland Washington") respectfully requests that the Court deny *Plaintiffs' Motion to Certify Order Granting Inland Washington LLC's Motion for Summary Judgment of Dismissal to the Court of Appeals*, filed April 12, 2017 ("Motion to Certify"), because the motion is premature, given that the Court is still considering whether to grant or deny *Plaintiffs' Motion for Reconsideration of Order Granting Inland Washington LLC's Motion for Summary Judgment*, filed April 10, 2017 ("Motion for Reconsideration"). If the Court decides to reconsider the *Order Granting Inland Washington's Motion for Summary Judgment* ("subject Order"), then the Motion to Certify would be rendered moot. If the Court decides not to

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reconsider the subject Order, then the instant Motion to Certify also will be rendered moot, as Plaintiffs will need to revise and refile their motion to certify to address the Court's Order Denying Reconsideration, which necessarily encompasses the subject Order. In short, the instant Motion to Certify is moot under any possible circumstance.

To require Inland Washington to respond to a moot Motion to Certify at this time, based solely on a speculative denial of reconsideration, is a waste of the Court's very limited time, and is harassing and highly prejudicial to Inland Washington, which has been entirely dismissed from this matter as of the date of filing the instant brief in opposition.

If the Court is inclined to consider the moot Motion to Certify prior to entry of an order deciding reconsideration, then the motion should still be denied because Plaintiffs fail to meet any of the criteria under RAP 2.3(b)(4) for certification to the Court of Appeals.

II. RESTATEMENT OF FACTS

Inland Washington incorporates by reference the Fact sections of its two Motions for Summary Judgment.

III. ISSUES PRESENTED

Whether under RAP 2.3(b)(4), the Court should certify for discretionary review the Order Granting Inland Washington's Motion for Summary Judgment of Dismissal?

ANSWER: **NO**

IV. EVIDENCE RELIED UPON

This memorandum relies upon the Declaration of John K. Butler and exhibits, and the declarations, with attached exhibits, supporting Inland Washington's two Motions for Summary Judgment, and the related motions papers and pleadings in the Court Clerk's file.

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V. AUTHORITY

A. Standard of Review

RAP 2.3(b) provides four grounds by which an appellate court may accept discretionary review of a superior court order not appealable as a matter of right. Plaintiffs request certification under the following ground:

> [T]he order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b)(4). The drafters of RAP 2.3(b)(4) did not contemplate that a trial court's granting of a motion to dismiss is an appropriate and valid reason to certify an order for review. Rather, certification under RAP 2.3(b)(4) is more appropriate when a motion to dismiss is denied or the summary judgment is strictly a question of law:

> [W]here the trial judge was willing to certify, or the parties to stipulate, that immediate review might "materially advance the ultimate termination of the litigation," this amendment would increase the likelihood of acceptance of review in circumstances that are effectively dispositive of the case. Examples are **denials of motions to dismiss or summary judgments dealing with questions of law** . . .

2A Washington Practice, RAP 2.3, Drafters' Comment, 1998 Amendment to RAP 2.3 (adding RAP 2.3(b)(4)) (emphasis added). RAP 2.3(b)(4) was adapted from 28 U.S.C. sec. 1292(b). *See* 2A Karl B. Tegland, Washington Practice: Rules Practice, at 161 (6th ed., 2004).

B. Summary Judgment Was Not Based on a Pure Question of Law

> We think [the framers of section 1292(b)] used "question of law" in much the same way a lay person might, as referring to a "pure" question of law rather than merely to an issue that might be free from a factual contest. The idea was that **if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case**.

Ahrenholz v. Board of Trustees of University of Illinois, 219 F.3d 674, 676-77 (7th Cir., 2000) (emphasis added). An abstract issue of law, the resolution of which could head off protracted,

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costly litigation, is suitable for interlocutory determination by an appellate court without a trial record. *Id.* at 677; *see also, Emily Lane Homeowners Ass'n v. Colonial Development, L.L.C.*, 139 Wn. App. 315, 317, 160 P.3d 1073 (2007), *affirming in part, reversing in part on other grounds by Chadwick Farms Owners Ass'n v. FHC LLC,* 166 Wn.2d 178, 207 P.3d 1251 (2009) (certification for discretionary review, pursuant to RAP 2.3(b)(4), was appropriate on the issue of whether an amendment to the LLC Act, ch.25.15 RCW, which provides a three-year survival period within which to commence actions against a member-dissolved LLC, applies retroactively to permit actions against that LLC).

In contrast to *Ahrenholz* and *Colonial Development*, *supra*, here the Court's summary judgment decision was not based on interpretation of a pure question of law, but rather based on the Court's review of specific factual circumstances applicable to the existing undisputed law governing liability of general contractors for safety at the worksite.

This is exemplified by the fact that Inland Washington's first motion for summary judgment, filed and decided in 2015, was denied (after the Court allowed additional time for Plaintiffs to produce expert opinions of Mr. Gleason. After lengthy discovery, when Plaintiffs were given full opportunity to develop the factual record, its second motion for summary judgment, filed and decided in 2017, was granted. This was due in part to additional evidence indicating Inland Washington's lack of control over the specific non-common area of the worksite where the entire concrete pour operation was supervised and managed from start to finish solely by subcontractor Hilltop, and that Inland Washington's conduct did not violate any specific safety requirement. The Incident occurred because of a variety of issues, none of which implicated any WISHA violation or failure by Inland Washington. The Court made this point in oral argument, noting that there was a "lack of substance" showing a violation. *Id. 77.* In granting Inland

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Washington's Motion, the court was finding the lack of a disputed issue of material fact, such that judgment as a matter of law was proper.

There is no dispute that Inland Washington not cited by Labor & Industries inspectors following the Incident for any violation. Plaintiffs' safety experts, of whom there appear to be several, have not offered a single opinion stating, on a more probable than not basis, that a WISHA violation by Inland Washington was a proximate cause of the Incident. While there is no dispute that Inland Washington was the general contractor, and that it owed a non-delegable duty to provide a safe common work area for all employees at the site, there is also no factual dispute that the concrete pour occurred in a non-common work area under the control and supervision, not of Inland Washington, but of its subcontractor, Hilltop. Had the Incident occurred in a common area of the site, caused by a violation of a WISHA safety regulation by Inland Washington, then Inland Washington would potentially be liable for Plaintiffs' damages and an order of summary judgment dismissal would not had been issued. Further, even assuming *arguendo* that Inland Washington owes a duty under *Stute* to comply with WISHA regulations for the non-common area, Plaintiffs did not offer sufficient evidence to create a fact issue as to whether such a duty was breached. *See Id. p. 77.* This means that the determinative issue on which summary judgment was granted was not a dispute over a pure question of law, but rather a dispute over the application of a specific set of facts to the undisputed legal standards governing the liability of a general contractor at a construction site. As the foregoing demonstrates, Plaintiffs would necessarily require the court of appeals to delve into the factual record to determine whether a factual dispute exists. RAP 2.3(b)(4) cannot apply in such a case.

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C. Plaintiffs' Attempt to Re-Assert Vicarious Liability Runs Contrary to the Court's Longstanding Prior Ruling in This Case, and Does Not Properly Apply.

As the Court is aware, Judge Schapira ruled on the issue of vicarious liability two years ago. As the Court made clear at oral argument, the recent Court of Appeals decision in Afoa II did not mandate reversing this ruling. *Butler Dec. Ex. A. 44-45; 76.* That is because vicarious liability is actually the logical opposite of nondelegable duty. Plaintiffs' analysis conflates and confuses non-delegable duties and vicarious liability, rendering Plaintiffs' motion incorrect both legally and factually.

Vicarious liability is a form of indirect liability that is imputed, unlike liability based on the breach of a non-delegable duty, which is a form of direct liability and not imputed. For example, when an employer is burdened with the liability resulting from the negligence of its own employee, the employee's liability is imputed to his employer. See, e.g., *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) ("Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability on an employer for the torts of an employee who is acting on the employer's behalf.").

In contrast, liability for the breach of a non-delegable duty arises from direct—rather than imputed—liability:

> General contractors may be held liable for the torts of either their independent contractors or the independent contractor's employees, if the general contractor either negligently supervised the work or violated a nondelegable duty. The liability imposed upon contractors, or owners who exert similar control over a jobsite, is based upon workplace safety rules that are imposed by statute. *Millican*, 177 Wn. App. 881 (trial court erroneously permitted jury to hear evidence regarding general contractor's delegation of duty to subcontractor). **However, the liability in either case is direct rather than vicarious.** *Pettit v. Dwoskin*, 116 Wn. App. 466, 68 P.3d 1088 (Div. 1 2003) (trial court properly refused to instruct jury that an owner who received the building permit in their name had a nondelegable duty to ensure building code compliance; owner was liable only if his general contractor was negligent); *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 29 P.3d 50 (Div. 3 2001), aff'd and remanded, 148 Wn.2d 911, 64 P.3d 1244 (2003) (independent contractor's illegal dumping could subject

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> generator of organic waste to liability since duty for safe disposal was nondelegable); *Tauscher v. Puget Sound Power and Light Co.*, 96 Wn.2d 274, 635 P.2d 426 (1981) (trial court properly granted summary judgment to utility where specific statute did not impose duty on utility to safeguard employees of independent contractors).

16 Wash. Prac., Tort Law and Practice (4th ed.) § 4:15 (emphasis added). Liability for the breach of a nondelegable duty as a direct liability—as distinct from indirect, vicarious liability—has been further explained as follows:

> **[T]he establishment of liability under a nondelegable duty does not give rise to vicarious liability.** Under vicarious liability, one person, although entirely innocent of any wrongdoing and without regard to duty, is nonetheless held responsible for harm caused by the wrongful act of another.... **We reject any coupling of the concept of vicarious liability and nondelegable duty.**
>
> ....
>
> The liability for a nondelegable duty that we impose directly upon the employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions. **The test of liability is the presence or absence of reasonable precautions;** and direct liability is not dependent upon any apportionment to an employer of his or her concurrent negligence in failure to ensure that an independent contractor takes necessary precautions.

Saiz v. Belen Sch. Dist., 113 N.M. 387, 827 P.2d 102, 114–15 (1992) (emphasis added); *see also Kirkland v. City of Gainesville*, 122 Fla. 765, 166 So. 460, 464 (1936) (stating that under the applicable statute, "[t]he legal duty of the city was to exercise care to maintain the poles of its system in a reasonably safe condition for all who had duties to perform on the poles; and this duty could not be so delegated as to relieve the city of liability for negligence in maintaining the pole in the service for which it was used"). .

D. Summary Judgment Was Not Based on Interpretation of a New Statute

Discretionary review is particularly appropriate in cases involving the interpretation of a new statute. *See Hartley v. State*, 103 Wn.2d 768, 773, 698 P.2d 77 (1985). Plaintiffs do not invoke a new statute as their reason for seeking interlocutory review.

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E. Immediate Review Will Not Prevent a Useless Lawsuit

Interlocutory review may also be appropriate where "a useless lawsuit would be prevented by a decision in favor of dismissing the . . . defendants." *Hartley*, 103 Wn.2d at 774. Here, just the opposite is the case, in that the decision of dismissal of one defendant would not result in a useless trial, as the actual parties whose active conduct is at issue remain defendants.

F. Immediate Review Will Not Materially Advance the Termination of the Lawsuit

Immediate review will not materially advance the ultimate termination of this litigation because there currently remain other defendants against which Plaintiffs may seek to recover all of their damages. Immediate review would do nothing to change the ultimate result. In other words, a trial will not be avoided by immediate review and Plaintiffs recovery will be the same regardless of the outcome of review. Indeed, if Plaintiffs prevail at trial against the defendants currently before the Court, Plaintiffs will not need to seek review afterwards. The only post-trial (non-appellate) litigation in that circumstance would include the liable defendants' efforts to seek recovery from Inland Washington in a contribution or indemnity action, which would not involve Plaintiffs at all.

G. Denial of Summary Judgment Is Not Generally Appealable

To the extent Plaintiffs are seeking discretionary review of the denial of their improperly embedded "motion for summary judgment" on the issue of vicarious liability, the Motion to Certify should be denied. Denial of a motion for summary judgment is generally not an appealable order, and discretionary review of such orders is not ordinarily granted. *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999). "An order denying summary judgment is interlocutory in nature and "not a final judgment for the claim still remains pending trial. The issue can be reviewed after trial in an appeal from final judgment." *Id.* at 949, 977 P.2d 1231 (*quoting Rodin v. O'Beirn,* 3 Wn. App. 327, 332, 474 P.2d 903 (1970), *rev. den'd,* 78 Wn.2d 996 (1970).

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VI. CONCLUSION

Based on the foregoing grounds, the Court should deny Plaintiffs' Motion to Certify. A proposed order is attached.

DATED this 18th day of April, 2017.

PREG O'DONNELL & GILLETT PLLC

By *s/David E. Chawes*
John K. Butler, WSBA #28528
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I certify that the foregoing memorandum contains 2,502 words (4,200 words max) in conformance with the Local Civil Rules.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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DATED at Seattle, Washington, this 18th day of April, 2017.

Helen Van Buren

Helen Van Buren

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Exhibit 17

Hon. Jeffrey M. Ramsdell
Hearing Date: Thursday, April 20, 2017
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO CERTIFY ORDER GRANTING INLAND WASHINGTON LLC'S MOTION FOR SUMMARY JUDGMENT OF DISMISSAL TO THE COURT OF APPEALS

Come now Plaintiffs in strict reply to Inland Washington's Response to Plaintiffs' Motion to Certify Order Granting Inland Washington LLC's Motion for Summary Judgment of Dismissal to the Court of Appeals, as follows:

Plaintiffs agree that their motion to certify would be moot in the event the Court grants reconsideration and reverses its dismissal of Inland WA from this action. In that event Plaintiffs

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would respectfully request the motion be struck. However, in the event that Plaintiffs' motion for reconsideration and reversal is denied, Plaintiffs motion to certify is not moot for the reasons discussed in Plaintiffs' opening brief. The Court also indicated in the April 5, 2017 hearing that a motion to certify would be appropriate.

In its response, Inland WA cites the Washington Division I case of *Colonial Development* and the federal *Ahrenholz* case for the proposition that interlocutory review is only appropriate where the decision is "based on interpretation of a pure question of law." Inland WA's Response, Page 4:10, Id. Pages 3-4, citing *Emily Land Homeowners Ass'n v.Colonial Development, L.L.C.*, 139 Wn. App. 315, 317, 160 P.3d 1073 (Div. 1, 2007) and quoting *Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676-77 (7th Cir., 2000).

First, Inland WA's contention is incorrect under RAP 2.3 (b)(4), which provides for review where "the order ***involves*** a controlling question of law." RAP 2.3 (b)(4) (emphasis added). The presence of factual issues does not preclude certification or acceptance of a decision for review. The Court of Appeals will determine whether in the interest of judicial economy or otherwise if it will review factual issues, as the appellate court "determines the scope of discretionary review." *Colonial Development*, 139 Wn. App. at 318, citing RAP 2.3(e). Of course if there are genuine issues of material facts in dispute then summary judgment in Inland WA's favor was inappropriate under CR 56.

Second, although there are fact issues involved, there are controlling questions of law for which discretionary review is appropriate. These controlling questions of law include the following:

- Whether Plaintiffs must show evidence that the admitted general contractor actually controlled the work performed despite the holdings in *Stute v. P.B.M.C. Inc.*, 114

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Wn.2d 454, 788 P.2d 545 (1990) and its progeny that a general contractor has per se control over the work on its jobsite;

- The meaning and scope of "common area" discussed in the pre-*Stute* case of *Bozung v. Condo Builders, Inc.*, 42 Wn. App. 442, 711 P.2d 1090 (1985), including whether there is a distinct "common area" requirement after *Stute*, and if so, whether that requirement is satisfied in this case, when there were at least four companies involved in the concrete pour.
- Whether a violation of one or more of the WISHA regulations as alleged by Plaintiffs constitute a violation of a general contractor's statutory duties under *Stute*, including but not limited to the safe workplace standards (WAC 296-800-11005 et seq.), requirements for accident prevention programs (WAC 296-155-110 and WAC 296-800-140 et seq.), and requirements for concrete equipment (WAC 296-155-682) including the requirement of WAC 296-155-682 (8)(b)(xv)(C) which provides: "Aggregate should not exceed 1/3 the diameter of the delivery system."
- Whether a general contractor is vicariously liable for breaches of non-delegable duties under *Millican* and *Afoa II*. *Millican v. N.A. Degerstrom, Inc.*, 177 Wn. App. 881, 313 P.3d 1215, (2013) *review denied,* 179 Wn.2d 1026, 320 P.3d 718 (2014); *Afoa v. Port of Seattle (II)*, __ Wn. App. __, __ P.3d __ (Div. 1, March 20, 2017), No. 75951-5-I.

On the issue of vicarious liability, Inland WA misleadingly cites to *Pettit v. Dwoskin* as discussed in the Washington Practice series for the proposition that liability is "direct rather than vicarious." Inland WA's Response, Pages 6-7, quoting 16 Wash. Prac. Tort Law and Practice (4th ed.) § 4:15 citing *Pettit v. Dwoskin*, 116 Wn. App. 466, 68 P.3d 1088 (Div. 1 2003). This is

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misleading because unlike Inland WA, the defendant in *Pettit v. Dwoskin* was not a general contractor on a construction site. The defendant was a homeowner holding a party when a deck collapsed, injuring the plaintiff, who was a guest at the party. The plaintiff sought a nondelegable duty jury instruction on the following facts:

> The home was constructed for Donelson and Dwoskin in 1984–85. Dwoskin personally obtained the building permit from the Seattle building department. The permit was granted "subject to compliance with the ordinances of the City of Seattle." Dwoskin participated in designing the home, but employed a structural engineer and a construction contractor.

Pettit v. Dwoskin, 116 Wn. App. at 469 (Footnotes omitted). Division I held:

> The [trial] court did not err in refusing to instruct the jury that Respondents had a nondelegable duty to ensure compliance with the code. Rather, Dwoskin was liable only if his contractor was negligent.

Id. at 475. *Pettit v. Dwoskin* had nothing to do with injuries to a worker on a construction site, or duties under *Stute* and the retained control doctrine,[1] and simply does not apply.

Inland WA also quotes and cites non-applicable cases from other jurisdiction, including the 1992 New Mexico case of *Saiz v. Belen Sch. Dist.*, 113 N.M. 387. 827 P.2d 102 (1992) and the 1936 Florida case of *Kirkland v. City of Gainesville*. 122 Fla. 765. 166 So. 460 (1936). Inland WA's Response, Page 7. Obviously these cases do not control over the recent Washington cases of *Millican* and *Afoa II*. But Inland WA's argument on the substance of vicarious liability goes to show this to be a question law for which discretionary review is appropriate.

For the aforementioned reasons, Plaintiffs respectfully request that the subject orders be certified for discretionary review.

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[1] Even if the *Pettit* case did involve a worker injured while building the deck for the homeowners' personal use, the homeowner would likely have been found to owe no duties under *Rogers v. Irving*, 85 Wn. App 455, 933 P.2d 1060 (Div. 1, 1997); *Smith v. Myers*, 90 Wn. App. 89, 950 P.2d 1018 (Div. 2, 1998)

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I certify that this memorandum contains 1,000 words, in compliance with the Local Civil Rules.

Dated this 19th day of April, 2017

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Exhibit 18

Hon. Jeffrey M. Ramsdell
Hearing Date: Thursday, April 20, 2017
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' MOTION TO CERTIFY IMMIGRATION DISCOVERY ORDERS TO THE COURT OF APPEALS

I. RELIEF REQUESTED

Plaintiffs respectfully request the Court certify the following orders to the Court of Appeals pursuant to RAP 2.3 (b)(4):

- The Court's orders allowing Defendants to depose Plaintiffs on their immigration status and denying Plaintiffs' leave to depose non-party employer Hilltop Concrete

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Construction and Defendant Inland Washington, LLC on their use of undocumented labor and the ability of undocumented workers to find employment on their jobsites. These decisions were set forth in the Court's Order of January 24, 2017 Granting in Part Motion for Protective Order to Prevent Defendants from Inquiring into the Immigration Statuses of Witness and Parties, the March 7, 2017 Order Granting Inland Washington's Motion to Compel Continued Depositions of Plaintiffs, the March 20, 2017 Order Denying Plaintiffs' Motion for Reconsideration thereof, and the March 20, 2017 Order Denying Plaintiffs' Motion for Leave of Court to Depose Inland Washington, LLC and Hilltop Concrete Construction.

II. STATEMENT OF FACTS

The facts are described and supported by the papers on file herein, including Plaintiffs' Response to Defendant Inland Washington LLC's Motion for Summary Judgment, and the Declaration in Support and Exhibits Thereto, which are hereby incorporated by reference herein. The underlying facts of the incident and the parties have been extensively briefed. Plaintiffs recite the following procedural facts relevant to this motion:

Plaintiffs Gildardo Crisostomo Vargas and his wife, Lucina Flores were first deposed in this case on January 19, 2015 by Inland Washington's counsel. Plaintiff objected and instructed Mr. Vargas not to answer Inland's immigration questions at that time. Inland deposed Mr. Vargas's daughter, plaintiff Rosario Crisostomo Flores in November 17, 2016 and questioned her immigration status, at which point Plaintiffs' counsel objected. Inland then began questioning Mr. Vargas's non-party co-workers and eyewitnesses about their immigration status, starting with Pedro Campos Cruz. At that point Plaintiffs filed their Motion for Protective Order to Prevent Defendants from Inquiring into the Immigration Statuses of Witness and Parties. In

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its January 24, 2017 Order, the Court granted Plaintiffs' motion with respect to non-party witnesses but denied with respect to parties. Inland then moved to compel Plaintiffs' depositions including questioning regarding their immigration status, which was granted in this Court' order of March 7, 2017. Plaintiffs' unsuccessful opposition to this motion included the Declaration of Lucina Flores in which she testified that "No proceedings for deportation, removal, or any other immigration related action has been taken" against any Plaintiff "and no such proceedings are pending."[1]

In the meantime, Juan Crisostomo Vargas, brother of plaintiff Gildardo Crisostomo Vargas, who also worked for Hilltop and was a key eyewitness to the incident, was detained by Immigration and Customs Enforcement ("ICE") just two weeks after he had testified in a deposition against the Defendants in this matter. Plaintiffs moved for reconsideration of the order compelling Plaintiffs' second depositions, which was denied on March 20, 2017.

Plaintiffs also moved to depose Inland WA and Hilltop to inquire about their use of undocumented labor, the ability of undocumented workers to find employment on their jobsites, and any knowledge they may have regarding the reporting of Juan Crisostomo Vargas to ICE. This motion was also denied on March 20, 2017.

The second depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores were taken on March 20, 2017. At that time, their immigration attorney was present, and instructed them not to answer based on their Fifth Amendment rights.[2] This ongoing issue was discussed at the April 5, 2017 hearing in this matter as follows:

---

[1] Declaration of Lucina Flores in Support of Plaintiffs' Response to Defendant Inland Washington, LLC's Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores, March 2, 2017.
[2] March 20, 2017 Deposition of Gildardo Crisostomo Vargas (Vol. 2), Pages 128-138; March 20, 2017 Deposition of Lucina Flores (Vol. 2), Pages 73-80, and 87-91

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> **Court:** But the plaintiffs - There was an issue about the plaintiffs' immigration status. There was a request to go into that in depositions because it might affect the issue of damages. So, I'm just wondering: Is there an issue with regard to his immigration status or was that settled as a practical matter in the deposition.
>
> **Plaintiffs' Counsel Raymond Bishop:** What has transpired is that Mr. Vargas', the plaintiff's—I'll use his name, Gildardo, he had his second deposition—the one that was ordered by the Court—that permitted questions to be asked concerning his immigration status. Those questions were asked by Mr. Butler. And present was Mr. Vargas' immigration attorney, an individual named Kabbie Konteh, and he plead the fifth with respect to each and every question.
>
> **Court:** OK, that's what I needed to know. So it's still out there percolating. Because I know there's coming like a freight train, is the issue of what did Hilltop know and how might that effect any consideration of the Plaintiff's immigration status. I see that. I know it's coming, and I wanna be prepared for that when it does come.
>
> **Plaintiffs' Counsel Derek Moore:** Your honor, if we do end up having to appeal for any reason […] we would consider also bringing the discoverability of Plaintiffs' immigration status as an issue as well […]
>
> **Court:** That's fine counsel. I ruled on it based on what I think the law requires me to do. Investigation of it as a part of discovery is different from admissibility, obviously, but I think this is a new area that's getting murkier and murkier as we go along. I don't have any quarrel with that. The bottom line is that it's still an issue out there awaiting resolution in this case.

Declaration of Ruby Aliment

III. STATEMENT OF ISSUES

1. Whether the Court's orders allowing the discovery of Plaintiffs' immigration status and preventing Plaintiffs from obtaining discovery of the ability of undocumented workers to find employment on Defendants' jobsite involve controlling questions of law for which discretionary review is appropriate under RAP 2.3.

IV. EVIDENCE RELIED UPON

In support of their Motion, Plaintiffs rely on the pleadings on file in this matter including the Declaration of Ruby Aliment in Support of this Motion, and the exhibits thereto.

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V. AUTHORITY AND ARGUMENT

Plaintiffs seek certification to the Court of Appeals under Rule of Appellate Procedure 2.3 (b)(4), which provides for discretionary review where:

> The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3 (b)(4).

This case involves a controlling question of law as to whether the immigration status of Plaintiffs' is discoverable in a personal injury action where the plaintiff had testified by declaration that there were no pending removal proceedings or deportation orders against them. Under CR 26, discovery must be "reasonably calculated to lead to the discovery of admissible evidence." CR 26 (b)(1). The Supreme Court in *Salas v. Hi-Tech Erectors* found such evidence to be inadmissible:

> We recognize that immigration is a politically sensitive issue. Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation. In light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great. **Consequently, we are convinced that the probative value of a plaintiff's undocumented status, *by itself*, is substantially outweighed by the danger of unfair prejudice.**

Salas v. Hi-Tech Erectors, 168 Wn. 2d 664, 672, 230 P.3d 583 (2010) (bold and italics added).

The *Salas* Court explained:

> It should be noted that Salas' immigration status is the only evidence in the record that suggests he may be deported. Salas has resided in the United States since 1989 and has lived without a visa since 1994. He has worked, purchased a home, and had three children in the United States. **The record furnishes no evidence of pending removal proceedings or a deportation order.** Based solely on his immigration status, the risk of Salas being deported is exceptionally low.

Salas v. Hi-Tech Erectors, 168 Wn. 2d at 669 (emphasis added).

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Defendants argued that *Salas* did not address the discoverability of immigration evidence, and that such evidence is discoverable under Division III's holding in *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 75, 265 P.3d 956 (Div. 3, 2011). However, unlike *Salas* and this case, *Diaz* did not involve a personal injury action for a construction site incident. *Diaz* was an employment law case where a central issue was whether the illegal immigration status of a Washington nonprofit corporation board member could compromise the defendant Migrant Council's future funding, and whether Mr. Diaz was fired for insisting that undocumented board members resign. Division II upheld the trial court's order allowing discovery of board members' immigration status on the following basis:

> Although questioning any basis for Mr. Diaz's claim that illegal immigrants could not serve on the board of a Washington nonprofit corporation, it found that the information requested was relevant at a minimum to Mr. Diaz's claim that he was discharged in retaliation for insisting that board members illegally in the United States resign.

Diaz v. Washington State Migrant Council, 165 Wn. App. at 67. No such claims or policies are implicated in this case, where the only potential relevance under *Salas* is the ability of an injured worker to have earned future wages in the United States, where the *Salas* court found to be inadmissible without any evidence of pending removal proceedings or a deportation order.

The discoverability of immigration status in this context is an issue of first impression. The Court acknowledged in the April 5, 2017 hearing that the question is "a new area that's getting murkier and murkier as we go along" and that "it's still an issue out there awaiting resolution in this case."

VI. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the aforesaid orders be certified for discretionary review.

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I certify that this memorandum contains 1,689 words, in compliance with the Local Civil Rules.

Dated this 12th day of April, 2017

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Exhibit 19

Honorable Jeffrey M. Ramsdell
Hearing Date: Thursday, April 20, 2017
Without Oral Argument

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

GILDARDO CRISOSTOMO VARGAS, et al., Plaintiff(s), v. INLAND GROUP P.S., LLC, et al., Defendant(s).	NO. 13-2-32219-6 SEA DEFENDANT INLAND WASHINGTON, LLC'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY IMMIGRATION DISCOVERY ORDERS TO THE COURT OF APPEALS

I. RELIEF REQUESTED

Defendant Inland Washington, LLC ("Inland Washington") does not consent to certification, and further objects to Plaintiffs' Motion to Certify Immigration Discovery Orders under RAP 2.3(b)(4).

Inland Washington respectfully requests the Court deny Plaintiffs' Motion to Certify because defendants' right to discover relevant information regarding plaintiffs' work authorizations in relation to plaintiffs' loss of wages and earning capacity is not a "controlling issue of law." Plaintiffs were not allowed to depose Inland Washington's and Hilltop's corporate

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designees regarding hiring practices, employment of undocumented workers, if any, or if they had any involvement in Juan Vargas' apprehension because Plaintiffs simply had no good cause or relevant basis to further extend discovery limits for this information. Plaintiffs' burdensome deposition requests did not involve a "controlling issue of law." Plaintiffs also failed to provide any argument as to the two remaining factors required under RAP 2.3(b)(4) regarding any "substantial difference of opinion" or any likelihood that immediate review would materially advance the termination of litigation.

Plaintiffs offer nothing this Court has not previously considered and correctly rejected. Rather, Plaintiffs rehash and reargue its arguments from the four prior motions, which the Court has already rejected. Inland Washington urges this Court to deny certification of these discovery orders.

II. RESTATEMENT OF FACTS

As part of their alleged damages in this worksite injury litigation, Plaintiffs alleged that Gildardo Crisostomo Vargas was injured at a construction site. Mr. Vargas' wife, Lucina Flores, alleged loss of spousal consortium. Plaintiffs' Second Amended Complaint, Dkt. 219, ¶¶ 8.1 – 8.2. Plaintiffs alleged Mr. Vargas has and will suffer past and future loss of wages and earning capacity. *Id.*, ¶ 7.3.

Mr. Vargas and Mrs. Flores appeared for their depositions on January 19, 2015. During their depositions, Plaintiffs refused to answer questions regarding their immigration status and Mr. Vargas' social security number. *Inland Washington's Motion to Compel Continued Depositions*, Dkt. 437, at 2. Defense counsel pointed out that his questions were related to Mr. Vargas' economic loss claim, which related to his ability to work in the United States. *Id.* Because Plaintiffs' counsel instructed Plaintiffs not to answer, defense counsel was unable to

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complete Plaintiffs' depositions regarding these issues as this information pertained to Plaintiffs' claims in this case and reserved the right to continue their depositions. *Id.* at 2.

On January 5, 2017, Plaintiffs moved for a protective order preventing all defendants from discovery and inquiry into the Plaintiffs' and nonparty witnesses' immigration statuses. *Plaintiffs' Motion for Protective Order*, Dkt. 297. Inland Washington argued that Washington favors liberal and extensive discovery under CR 26 to afford the parties equal opportunities to either pursue their claims or defend themselves. *Inland Washington's Opposition*, Dkt. 310, at 2. Plaintiffs relied solely on the Salas case to argue that the Washington Supreme Court created a blanket prohibition on the inquiry into a witness' immigration status, yet "[t]here is nothing in Salas that supports cutting off inquiry at the outset of discovery." *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 75, 265 P.3d 956 (2011). Other defendants either filed their own Opposition or joined in Inland Washington's Opposition. Dkt. 309, 314-16. The Court agreed that Plaintiffs' immigration statuses and forms of work authorization were relevant to their damages claims and applied Washington precedent to allow Defendants to conduct discovery into these issues. *Order*, Dkt. 345. However, the Court did not allow Defendants to inquire into the immigration statuses of nonparties. *Id.*

After two years of discovery after Plaintiffs' initial depositions, the nature and complexity of Plaintiffs' claims, evidence, and Mr. Vargas' alleged physical and mental conditions changed significantly. *Id.* at 3-4. Plaintiffs' refusal to respond to Inland Washington's questions regarding their immigration status and forms of work authorization, plus the increasingly complex nature of Plaintiffs' claims, warranted their continued depositions. Plaintiffs refused to submit to continued depositions, and Inland Washington was forced to file its Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores on February 24, 2017. The Court granted Inland Washington's Motion to Compel their continued depositions. *Order*,

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Dkt. 460. Plaintiffs moved for reconsideration of the Court's Order regarding the continued depositions, but the Court denied the motion. *Order*, Dkt. 539D. Their continued depositions occurred on March 20, 2017, during which Plaintiffs pled the Fifth Amendment and refused to answer questions regarding immigration status and other forms of work authorization again. *See Aliment Declaration in Support of Motion to Certify*, Dkt. 624, at 2.

On March 9, 2017, Plaintiffs also moved for leave to depose Inland Washington and Hilltop Concrete Construction relying solely upon coincidence and insinuation to suggest that Inland Washington and Hilltop had something to do with a nonparty witness', Juan Crisostomo Vargas', detainment by Immigration and Customs Enforcement ("ICE"). *Plaintiffs' Motion for Leave of Court to Depose Inland Washington and Hilltop Concrete Construction,* Dkt. 470. Inland Washington argued that Plaintiffs simply had no good cause or relevant basis to further extend discovery limits beyond the ten allowed under King County Court Rule 26(b)(3) or to depose Inland Washington's and Hilltop's corporate designees regarding their hiring practices, employment of undocumented workers, if any, or if they had any involvement in Juan Vargas' apprehension. *Inland Washington's Opposition,* Dkt. 512, at 1-2. There was no indication in Juan Crisostomo Vargas' deposition transcript or anywhere else in the case or court record that Juan Vargas is an undocumented worker. During his deposition, no one asked Juan Vargas questions relating to his immigration status in accordance with the Court's Order. *See generally Pham Dec. in Support of Inland Washington's Opposition*, Dkt. 513, Ex. 2. Plaintiffs relied solely upon coincidence and their insinuations in an improper effort to launch a full-fledged inquisition into all of Inland Washington's and Hilltop's hiring practices, employee files, wages, and benefits, and any reporting of employees to ICE. The Court denied Plaintiffs' Motion for Leave to Depose Inland Washington and Hilltop. *Order,* Dkt. 539E.

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The four immigration discovery orders at issue in Plaintiffs' Motion to Certify all relate to discovery issues that should not be certified for interlocutory appeal.

III. ISSUE PRESENTED

Whether the Court should decline to certify the Court's immigration discovery orders for interlocutory appeal under RAP 2.3(b)(4) when these discovery rulings do not involve controlling questions of law, and Plaintiffs failed to provide any argument regarding two of the three remaining factors for certification under RAP 2.3(b)(4)?

ANSWER: **Yes.**

IV. EVIDENCE RELIED UPON

Inland Washington's Opposition relies upon the following:

1. Inland Washington's Opposition to Plaintiffs' Motion for Protective Order to Prevent Defendants From Inquiring into the Immigration Statuses of Witnesses and Parties; the Declaration of John Butler, and its attached exhibits; Defendant Ralph's Concrete Pumping's Response; Defendant Inland Group, P.S., LLC's Joinder; Defendant Miles Sand & Gravel's Joinder;

2. Order Granting in Part Motion for Protective Order to Prevent Defendants from Inquiring into the Immigration Statuses of Witnesses and Parties;

3. Inland Washington's Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores; the Declaration of John Butler, and its attached exhibits; Inland Washington's Strict Reply;

4. Order Granting Defendant Inland Washington, LLC's Motion to Compel Continued Depositions of Plaintiffs Gildardo Crisostomo Vargas and Lucina Flores;

5. Inland Washington's Opposition to Plaintiffs' Motion for Leave of Court to Depose Inland Washington and Hilltop Concrete Construction; Declaration of Michelle Q. Pham, and its attached exhibits;

6. Order Denying Plaintiffs' Motion for Reconsideration of Order Granting Inland WA's Motion to Compel Continued Depositions of Plaintiffs; and

7. The papers and pleadings in the court file.

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V. AUTHORITY

A. Plaintiffs' Motion to Certify Should be Denied Because This Court's Discovery Rulings Regarding Plaintiffs' Immigration Status Or Other Work Authorization Information Are Not Proper Subjects for Discretionary Review.

Discretionary review of interlocutory orders is disfavored because it lends itself to piecemeal, multiple appeals. *See, e.g., Right-Price Recreation, LLC v. Connells Prairie Community Council,* 105 Wn. App. 813, 21 P.3d 1157 (2001); *Hartley v. State,* 103 Wn.2d 768, 773, 698 P.2d 77 (1985); *Maybury v. Seattle,* 53 Wn.2d 716, 721, 336 P.2d 878 (1959). *See also Minehart v. Morning Star Boys Ranch, Inc.,* 156 Wn. App. 457, 462, 232 P.3d 591 (2010) ("Interlocutory review is disfavored. Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business."). A party seeking discretionary review bears a "heavy burden" of meeting the RAP 2.3 criteria, which are strictly applied. *In re Grove*, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995) (noting that fewer than 10% of motions for discretionary review filed in the court of appeals are granted).

Here, Plaintiffs are seeking extraordinary relief from the Court. Orders regarding discovery matters are interlocutory in nature and are generally not appealable orders. *See, e.g., State Bank of Goldendale v. Beeks,* 119 Wash. 42, 45, 204 P. 771 (1922) (holding that a discovery order, such as one refusing to strike interrogatories, is interlocutory and "not appealable in advance of an appeal from the final judgment in an action"). The Court's Orders relate solely to discovery issues, particularly whether Inland Washington may seek information regarding Plaintiffs' immigration status and other forms of work authorization when Plaintiffs placed their loss of wages and earning capacity claims at issue. These discovery orders are not appealable prior to the entry of final judgment.

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B. Plaintiffs' Motion to Certify Should be Denied Because Plaintiffs Fail to Establish the RAP 2.3(b)(4) Criteria.

To overcome the final judgment rule for appeal and obtain RAP 2.3(b)(4) certification for discretionary review of a discovery order, Plaintiffs must show that the "order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that immediate review of the order may materially advance the termination of the litigation." RAP 2.3(b)(4). Thus, Plaintiffs must establish three elements: (1) a controlling question of law, (2) substantial ground for difference of opinion, and (3) likelihood that immediate review would materially advance the termination of litigation. Here, even if the Court's discovery orders were a proper subject for certification, which Inland Washington denies, Plaintiffs fail to establish any of the requirements for certification.

1. The discoverability of Plaintiffs' immigration status and other forms of work authorization does not involve a controlling question of law.

The Court's discovery rulings regarding Plaintiffs' immigration status and other forms of work authorization do not involve questions of law, let alone "controlling" questions of law. The Court must first find that the orders involve questions of law. Questions of fact do not qualify for interlocutory review. A question of law "has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine." *Ahrenholz v. Board of Trustees,* 219 F.3d 674, 676 (7th Cir. 2000) (interpreting 28 U.S.C. § 1292(b), which employs the identical standard set forth in RAP 2.3(b)(4) and on which RAP 2.3(b)(4) is based). It refers to "'pure' question[s] of law rather than merely to an issue that might be free from a factual contest." *Id.* at 676-77. The test for a question of law generally excludes orders on discovery rulings from certification. *See, e.g., White v. Nix,* 43 F.3d 374, 377-78 (8th Cir. 1994); *Standard v. Stoll Packing Corp.,* 315 F.2d 626 (3rd Cir. 1963). The Court's immigration orders are discovery rulings that allowed defendants to depose Plaintiffs to determine their immigration status and forms of work authorization in relation to their loss of wages and earning capacity claims. The

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Court also refused to extend Plaintiffs' deposition limits to depose Inland Washington and Hilltop's corporate designees when Plaintiffs far exceeded the deposition limit and the Court had given Plaintiffs authority to depose over 13 additional witnesses beyond the 16 Plaintiffs had already deposed and when Plaintiffs had no relevant basis to depose Inland Washington or Hilltop. The Court's immigration discovery orders did not involve pure questions of law.

Even if the Court's discovery rulings involved questions of law, which Inland Washington denies, any question of law from the Court's Orders would not be "controlling." A legal question is controlling if reversal of the court's order would terminate the action. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria,* 921 F.2d 21, 24 (2nd Cir. 1990). A question of law is controlling when "its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). "A legal issue is controlling if it could materially affect the outcome of the case." *West Tenn. Chapter of Assoc.Builders and Contractors, Inc. v. City of Memphis,* 293 F.3d 345, 351, (6th Cir. 2002). Here, the Court's Orders relate solely to discovery issues. As such, reversal of these Orders would not materially affect the outcome of the case or effectively terminate the action.

2. Plaintiffs fail to present any argument that the Court's Orders involved issues substantial difference of opinion.

Plaintiffs fail to provide any argument to show that the Court's immigration discovery orders involve issues involving a substantial difference of opinion. *See Plaintiffs' Motion,* at 4 (stating that the only issue in its motion was whether the "Court's orders ... involve controlling questions of law for which discretionary review is appropriate under RAP 2.3" without referencing the other elements required by RAP 2.3(b)(4)).

Here, the *Salas* and *Diaz* cases are not in conflict with each other. Nowhere in *Salas* did the court limit a party's discovery regarding immigration status to whether or not deportation

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proceedings have been initiated against Plaintiffs. *See generally Salas v. Hi-Tech Erectors,* 168 Wn.2d 664, 230 P.3d 583 (2010). In *Salas*, the Washington Supreme Court addressed the narrow issue of whether a plaintiff's undocumented status, when used by itself with regard to loss of future earnings, was admissible at trial. *Id.* In balancing the relevance versus prejudicial impact of plaintiff's undocumented status, the court considered the "exceptionally low likelihood" of deportation as one in many factors to determine admissibility at the trial stage. *Id.* at 669-71. The *Salas* court only addressed undocumented status at trial, after the parties had a chance to inquire into immigration status in discovery.

Once again, Plaintiffs take the *Salas* court's consideration of deportation out of context. The *Salas* court did not address the relevance of immigration status at the discovery stage, whereas the *Diaz* court did. *Diaz v. Wash. State Migrant Council,* 165 Wn. App. 59, 75, 265 P.3d 956 (2011) (holding that "[t]here is nothing in *Salas* that supports cutting off inquiry at the outset of discovery"); *see also Salas,* 168 Wn.2d at 670 (holding that, even in determining relevance at the trial stage, "immigration status is relevant to the issue of lost future earnings"). The *Salas* court certainly did not go as far as to hold that the only possible legitimate immigration question in discovery regarding immigration status is whether any deportation proceedings have been initiated against Plaintiffs. *Diaz* is not distinguishable from this case. Regardless of whether *Diaz* involved employment law rather than personal injuries, the *Diaz* court directly addressed a party's ability to perform discovery and obtain information regarding immigration status and forms of work authorization if it met the broad relevance standard of CR 26. *Diaz,* 165 Wn. App. at 72-75. This Court has already considered the applicability of *Salas* and *Diaz* to Defendant's discovery and held that Defendant is not prohibited from asking any questions about Plaintiffs' immigration status and other forms of legal authorizations to work in the United States.

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The Court chose to follow the precedent in Washington that immigration status is discoverable as long as it meets the broad relevance standard under CR 26. There is no substantial ground for a difference of opinion on whether a defendant is entitled to perform discovery to determine plaintiffs' immigration status and their ability to be paid for work when they placed loss of wages and earning capacity at issue. The Court did not arbitrarily select between two equally applicable approaches; instead, the Court selected the approach which it deemed most consistent with settled Washington law and applicable to the issues at hand. Federal commentary to 28 USCA § 1292(b) states that "just because counsel contends that one precedent, rather than another, is controlling, does not mean that there is such a substantial difference of opinion as will support an interlocutory appeal." 4 Am. Jur. 2d Appellate Review § 128 (citations omitted).

The discoverability of Plaintiffs' immigration status and forms of work authorization is not an issue of first impression because the *Diaz* court addressed whether immigration status is relevant and discoverable. Even if this was an issue of first impression, "just because a court is the first to rule on a particular question, does not mean that there is such a substantial difference of opinion as will support an interlocutory appeal." 4 Am. Jur. 2d Appellate Review § 128 (citations omitted).

Furthermore, to the extent Plaintiffs attempt to argue that they disagree with the Court's rulings, "[d]isagreement with the Court's ruling does not create a 'substantial ground for difference, the proponent of an appeal must make some greater showing.'" *See Kern-Tulare Water Dist. v. City of Bakersfield,* 634 F.Supp. 656, 667 (E.D. Cal. 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987). A party's strong disagreement with the state of the law or interpretation of the facts does not establish a substantial ground for

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difference of opinion. The proponent of an appeal must make some greater showing. *See Hanson v. Schubert*, 459 F.Supp.2d 973, 1000 (E.D. Cal. 2006).

The Court's orders do not involve issues with substantial ground for a difference of opinion and should not be certified for appeal.

3. Immediate review would not materially advance the ultimate termination of the litigation.

Plaintiffs fail to present any argument as to how immediate review would materially advance the ultimate termination of the litigation. RAP 2.3(b)(4) states that the immediate review should materially advance the ultimate termination of the litigation. Certification of an interlocutory order for appeal is warranted only in exceptional cases, where early appellate review might avoid protracted and expensive litigation. *Martens v. Smith Barney, Inc.*, 238 F.Supp.2d 596, 599-600 (S.D.N.Y. 2002); *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004) (considering efficiency in cost and time, and declining certification because the question at issue would not speed or streamline the case).

Here, certification of an interlocutory appeal based on the Court's discovery immigration orders will not advance the ultimate termination of the case. The Court's Orders relate to discovery matters about Plaintiffs' immigration status and forms of work authorization. In relation to the entire context of this already protracted and expensive litigation that has lasted over four years, certifying discovery matters for appeal would only serve to delay the litigation further. Defendants Miles and Ralph's remain parties to this action, therefore, the litigation will continue regardless of the outcome of the appeal, if review is granted. Plaintiffs fail to meet their burden of showing that immediate review would materially advance the ultimate termination of the litigation.

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VI. CONCLUSION

The Court should deny Plaintiff's Motion to Certify Immigration Orders to the Court of Appeal. Interlocutory appeals should be certified only in exceptional circumstances. The Court's discovery immigration orders are discovery rulings that do not involve controlling questions of law. Plaintiffs failed to provide any argument as to why the Court's Orders involved a substantial ground for difference of opinion, or that there is any likelihood that immediate review would materially advance the termination of litigation. Plaintiffs failed to meet their burden to set forth reasons entitling them to the exceptional remedy of immediate interlocutory review, therefore, Plaintiffs' Motion to Certify Immigration Discovery Orders to the Court of Appeals should be denied.

DATED this 18th day of April, 2017.

PREG O'DONNELL & GILLETT PLLC

By *\/s Michelle Q. Pham*
John K. Butler, WSBA #28528
David E. Chawes, WSBA #36322
Michelle Pham, WSBA #44286
Attorneys for Defendant Inland Washington, LLC

I certify that the foregoing memorandum contains 3,291 words (4,200 words max) in conformance with the Local Civil Rules.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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DATED at Seattle, Washington, this 18th day of April, 2017.

Helen Van Buren

Helen Van Buren

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Exhibit 20

Hon. Jeffrey M. Ramsdell
Hearing Date: Thursday, April 20, 2017
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian, Plaintiffs, vs. INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 13-2-32219-6 SEA PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO CERTIFY IMMIGRATION DISCOVERY ORDERS TO THE COURT OF APPEALS

Come now Plaintiffs in strict reply to Inland Washington's Response to Plaintiffs' Motion to Certify Immigration Discovery Orders to the Court of Appeals, as follows:

Although Plaintiffs' discovery was limited by King County Local Court Rule 26(b), they sought and received, leave of Court to take additional depositions of deponents specified in the Order of February 9, 2017. This Order also left it open for Plaintiffs to seek Court approval for

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additional depositions. It should also be noted that to the extent the KCLCR 26(b) prohibits or restricts discovery beyond the limitations set forth in the statewide Civil Rules including CR 26, those restrictions are invalid under *Jones v. Seattle,* 179 Wn2d. 322, 314 P.3d 380 (2013).

Importantly, when taking the depositions of various employees and representatives of Hilltop Concrete Construction ("Hilltop") and Inland WA, Plaintiffs operated under the understanding that any inquiry into immigration issues would not lead to the discovery of admissible evidence. Accordingly, Plaintiffs did not ask these witnesses any questions about the employability or wages of people without legal work status at their depositions, relying on the inadmissibility of such evidence under *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 666, 230 P.3d 583 (2010).

Inland WA made the discovery of Hilltop and Inland's hiring practices central to discovery when it sought the continued depositions of Plaintiffs on the immigration issue, ostensibly as potentially relevant to Mr. Vargas's claims for future wage loss. Plaintiffs contend that the discovery of information regarding immigration, in context with the evaluation of future lost wages, must involve discovery of Hilltop and Inland WA's hiring practices. Fairness and justice require that if defendants are allowed to discover evidence of Plaintiffs' immigration status as potentially relevant to future wage loss, Plaintiffs must be permitted discovery of the employers and general contractors involved to determine if and to what extent immigration status affects the ability of a worker to earn wages in construction work in Washington.

In seeking certification to the Court of Appeals under the Rules of Appellate Procedure ("RAP"), the Court must certify that the orders involve controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of the order

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may materially advance the ultimate termination of the litigation. RAP 2.3(b)(4). Plaintiffs contend that these orders provide a basis for certification that meets this requirement.

First, the discovery orders involve a controlling question of law. The Court in this matter admitted that this issue involves questions of law at the April 5, 2017 hearing when Honorable Judge Ramsdell said "I ruled [on these motions] based on what I think the law requires me to do. Investigation of [immigration status] as a part of discovery is different form admissibility…" *See* Plaintiffs' Mtn. to Certify Immigration Discovery Orders to the Court of Appeals 7 ("Plaintiff's Mtn"). Moreover, Inland WA's complete reliance on foreign case law misstates Washington Court's approach to the certification of discovery orders. The case Inland WA relies upon most heavily, *Diaz v. Washington State Migrant Council*, was an interlocutory appeal to review discovery orders. 165 Wn. App. 59, 64, 265 P.3d 956 (2011).

Second, there is substantial ground for a difference of opinion. At trial, ER 403 allows the exclusion of relevant evidence where its "probative value is substantially outweighed by the danger of unfair prejudice." During discovery, CR 26 allows parties to obtain discovery regarding any unprivileged and relevant matter "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The Supreme Court of Washington held that in construction worksite personal injury cases where the record is devoid of any evidence of pending removal proceedings or a deportation order, evidence of immigration status—even if relevant—must be excluded because of its prejudicial impact. *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 666, 230 P.3d 583 (2010).[1] Later, in *Diaz*, Division III of the

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[1] In *Salas*, the plaintiff sued for negligence, including lost future income, after slipping from scaffolding the defendants erected. *Id*. The Supreme Court reasoned that where "the record furnishes no evidence of pending removal proceedings or a deportation order" the risk of deportation or removal is exceptionally low and, therefore, evidence of immigration status has little, if any, probative value in countering future lost wages. *Salas*, 168 Wn.2d at 670.

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Washington Court of Appeals found that "there is nothing in *Salas* that supports cutting off inquiry [into immigration status] at the outset of discovery." *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 75, 265 P.3d 956 (2011).[2]

In this case, as in *Salas*, the plaintiff brought suit for construction worksite personal injuries and the record is not only devoid of evidence of pending removal proceedings, the plaintiffs actually testified by declaration that there were no such proceedings or deportation orders rendered against them. Further, Inland WA knows that the information sought is not reasonably calculated to lead to the discovery of admissible evidence, contrary to CR 26, yet this court ruled information regarding immigration status was discoverable. In interpreting and applying ER 403, CR 26, *Salas*, and *Diaz*, Courts could logically adopt differing and conflicting conclusions.

Third, and finally, immediate review would materially advance the ultimate termination of the litigation. Last month Chief Justice Mary E. Fairhurst of Washington's Supreme Court published a letter to the U.S. Department of Homeland Security to express concern regarding the Department's enforcement of federal immigration laws. Letter from Justice Fairhurst, Chief Justice, Washington Supreme Court, to John F. Kelly, Secretary of Homeland Security, U.S. Dep't of Homeland Security (Mar. 22, 2017).[3] Justice Fairhurst addressed the Department's

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[2] The facts in *Diaz* differ greatly from this case and from *Salas*. In *Diaz*, the plaintiff pressed fellow board members to provide proof of their legal status to work in the United States, so as to avoid the loss of funding, or—if they could not provide that proof—to resign. *Id.* at 66-67. After pressuring board members, including the chair of the board, to provide this information, the plaintiff was fired. *Id.* The plaintiff alleged he was discharged in retaliation for pressuring board members to resign if they did not have proper work authorization. *Id.* To bolster his retaliation claim, the plaintiff sought discovery of the board members' immigration statuses. *Id.* The board members then sought a protective order to prevent discovery of that information, and the trial court denied the order. *Id.* at 67-73. On appeal, Division III affirmed the trial court's conclusion that evidence that the director did not legally reside in the United States would make it more probable that he would be motivated to fire the plaintiff in retaliation than if he were legally residing in the United States. *Id.* at 73.

[3] Exhibit 1 to Aliment Dc. In Support of this Reply.

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growing practice of sending immigration agents to courthouses to obtain information regarding immigration status and to apprehend individuals charged with civil immigration violations. *Id.*

This letter speaks to the issues raised in Plaintiffs' Motion for Protective Order to Prevent Defendants from Inquiring into the Immigration Statuses of Witnesses and Parties (granted, in part, Jan. 24, 2017) ("Mtn for Protective Order"). In that motion, Plaintiffs asserted that continued inquiry into highly prejudicial and minimally probative evidence has a profound chilling effect on individuals' willingness to participate in proceedings and obstructs access to justice. Mtn. for Protective Order 12; *see also Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004).[4] The powerful implications of delving further into these issues impact the ultimate termination of a multitude of cases, including this one. Those implications alone justify certification. *See Diaz*, 165 Wn. App. 59, 64-65 (choosing to review discovery issues even where the parties settled and requested dismissal of the appeal because the issues were "likely to recur").

As towards this case, this Court admits that questions regarding immigration status are still at large because of Plaintiffs' rightful invocation of their privilege against self-incrimination. *See* Plaintiffs' Mtn. 4; *see also Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 64, 265 P.3d 956 (2011) ("[t]he trial court correctly recognized that [...] the board members had the right, individually, to invoke their privilege against self-incrimination when deposed").As a

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[4] "[T]he protective order at issue bars discovery into each plaintiff's immigration status on the basis that allowing [the defendant] to use the discovery process to obtain such information would chill the plaintiffs' willingness and ability to bring civil rights claims. By revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation. Although [the defendant] has promised not to disclose the plaintiffs' immigration status to any outside party, the district court found that requiring the plaintiffs to answer such questions in the discovery process would likely deter them, and future plaintiffs, from bringing meritorious claims" *Rivera*, 364 F.3d at 1057.

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result, certification of an interlocutory appeal based on the Court's discovery immigration orders will advance the ultimate termination of this case by simplifying it for trial.

Overall, though Plaintiffs provided justification for certifying these orders based on (1) the controlling question of law, (2) the substantial ground for difference of opinion, and (3) the likelihood that immediate review would materially advance the ultimate termination of the litigation, no Washington cases treat RAP 2.3(b)(4) as a strict factor-test. Should the Court decide to review the discoverability of immigration status as towards plaintiffs, it should also review the discoverability of hiring practices as towards employers involved in the suit. Therefore, Plaintiffs respectfully request that both orders be certified for discretionary review.

I certify that this memorandum contains 1,590 words, in compliance with the Local Civil Rules.

Dated this 19th day of April, 2017

BISHOP LEGAL

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Exhibit 21

EXHIBIT 2
WIT: Hernan
DATE: 1-20-15
ELAINE RIPPEL, CCR

ACCIDENT INVESTIGATION REPORT

316802644

Supervisor Employee

MPLOYEE'S NAME: Matt Skoog Gildardo Vargas DATE: 5-23-13

CCIDENT LOCATION: 1220 NE 175th ST DATE: 5-23-13 TIME: 12:15

YPE OF ACCIDENT: Hose on concrete pump hit employee on the head

ITNESSES: Matt Skoog, Juan Vargas, Enrique Cruz, Juan Sanchez,

JURY OR PROPERTY DAMAGES: Gildardo Vargas was taken to the hospital Via Ambulance. He was breathing but unconcious with a head injury.

OW DID ACCIDENT OCCUR: Pump truck had to much pressure on the hose and the hose was clogged. Pressure caused the whip to whip Gildarde in the ~~head~~ head and immediately was unconcious.

HAT CAUSED THE ACCIDENT: Clogged hose and to much pressure in the pump.

OW COULD THE ACCIDENT HAVE BEEN PREVENTED: When pump clogs, it needs to back off the pressure and fix the clog.

nployee Date

Safety Administrator Date

PG 26 OF 59

5-23-13

ipervisor Date

Management Date

PRR 97551 57

ACCIDENT INVESTIGATION REPORT

INJURY TRACKING INFORMATION: 316802644

Type of Body Injury: Serious Head Injury

Treatment Given : Taken by ambulance to Harbor view

Is the employee able to return to normal work? No

Types of work restrictions: ?

Employee's (estimated) return to work: ?

Employee's (actual) return to work: ?

SAFETY PROCEDURES REVIEWED:

Is this the employee's normal job? Yes

Was employee trained on job safety procedures? Yes

Was employee using safety equipment? Yes

What safety rules were violated? None

SEE ATTACHMENTS:

- Medical Statements
- 6 → Witness Statements
- Drawings or Photos of Accident Location
- Hazardous Condition Report
- Other Official Statements

ACCIDENT INVESTIGATION RESULTS: Upon reviewing this accident, I feel that Hilltop concrete followed all safety precautions and that we could not have done anything to prevent this accident.

PG 27 OF ~~58~~ 66

PRR 97551 58

Exhibit 22

WASHINGTON STATE SUPERIOR COURT FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 13-2-32219-6 SEA
	)	
INLAND GROUP P.S., LLC, et al.,	)	
	)	
Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION OF GORDON SKOOG

VOLUME I

10:00 a.m.
Monday, February 24, 2014
800 Fifth Avenue, Suite 3810
Seattle, Washington

ELAINE K. RIPPEN, CCR

NORTHWEST COURT REPORTERS

1415 Second Avenue, Suite 1107

Seattle, Washington 98101

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18
On behalf of Miles Sand & Gravel d/b/a Concrete Nor'West
19
DIRK J. MUSE
20 Lee Smart
701 Pike Street
21 1800 One Convention Place
Seattle, WA 98101
22

23 Also present: BRIAN SKOOG

24

25

A I don't remember if that's the correct address, but it sounds good.
Q Is that known as the North City Apartment job?
A Yes.
Q Was it known by any other name?
A Not that I'm aware of.
Q What work was being done on the North City Apartment job by Hilltop?
A Concrete work.
Q What was the scope of work?
A To build parking garages.
Q How many garages?
A There's two buildings.
Q How big were they?
A If you're going to ask for square footages, I do so many takeoffs and stuff that I don't remember now.
Q Just an estimate or a ballpark?
A There could have been 70 or 80,000 square feet of parking area.
Q Each garage or combined?
A Combined, total.
Q How many levels or floors?
A One building was one floor, the other building was two floors.
Q Who was the general contractor on this project?

A That was Inland.
Q Inland Group or Inland Washington?
A You probably have the contract that would say which one. I don't really remember.
Q Do you know if there's a difference between Inland Group or Inland Washington?
MR. HANSEN: Object to the form.
A I don't know.
Q When you refer to Inland, do you know who you're referring to?
A When I refer to Inland on this job, I'm referring to Steve Miller.
Q So Steve Miller is somebody that you worked with at Inland?
A Yes.
Q Do you know if he works for Inland Group or Inland Washington?
A I don't have any idea about all that.
Q Did you know that there were two different companies starting with Inland?
A There could be three or four or five. I don't know.
Q Other than Inland, whichever company that may be, were there any other companies acting as general contractors on this project?
A No.
Q Were there any other companies that had control of Hilltop's

work on the project?

MR. HANSEN: Object to the form.

A No.

Q So how did you get the North City Apartment job?

A We had done several jobs with Inland and they called us and asked us to bid on it.

Q Who called you?

A I don't remember. Somebody from their office.

Q Was it Steve Miller or somebody else?

A Steve Miller was the superintendent on the job site.

Q What was his role on the job site? What kind of things did he do on the job site?

A He managed the job site.

Q When you say manage, what does that mean?

A He's got an office that he sits in and he answers the questions that we have about plans, he organizes the job site, he takes care of the paperwork, he goes outside and looks at what we're doing to make sure it's all done right. He just manages the job site.

Q Did he have any role as far as safety on the job site?

A Well, he managed the safety on the job site, yes.

Q How so?

A Well, each subcontractor manages their own safety, and he manages the overall safety of the whole project, makes sure that the meetings are held, everybody has their own safety

1 plan. All the typical.
2 Q Other than Steve Miller, who else at Inland have you worked
3 with?
4 A Well, Inland has a safety guy that comes out every so often
5 and does the safety check and inspection.
6 Q And this is somebody different from Steve Miller?
7 A It is.
8 Q Do you know his name?
9 A I don't.
10 Q Is there anybody else that you worked with at Inland?
11 A Just project managers.
12 Q Do you know any names of the project managers?
13 A The project manager on this job was -- I forgot his name. I
14 just drew a blank.
15 Q Do you know if the Inland safety guy, do you know if he
16 worked for Inland Group or Inland Washington?
17 A I would have no idea on that.
18 Q How about the project managers, were they from Inland Group
19 or Inland Washington?
20 A I think I've answered that, that I don't know.
21 Q You mentioned somebody called you from Inland's main office.
22 Is that somebody different?
23 A Well, when I said they called, more specifically they send
24 me an invitation to bid. They didn't specifically call me.
25 Q Is this by a letter or by an e-mail?

(Recessed 11:06 a.m. to 11:13 a.m.)

Q Other than Hilltop, how many other subcontractors were on the North City Apartment job that you know of?

A I would have no idea to how many.

Q How many can you think of?

A There could be ten or more. How many contractors does it take to build a house? You've got plumbers, electricians. I have no idea.

Q How many do you recall being on the site at the same time that Hilltop was working?

A Well, you would have a plumber, an electrician, you'd have sprinkler, depending on what you put in the slab whether you have conduits for securities. I have no idea.

Q How about in May of 2013 around when the incident happened?

A I'm going to give you the same answer. I don't have a clue. I don't know.

Q But there were several other contractors for different trades on the site at that time; is that accurate?

A When the accident happened it was pretty much just our company in that area.

Q Do you know of any other companies that were near that area at that time?

A I'm sure there's people from the plumbers, electricians, things like that. I just don't know.

Q But you don't know of anybody other than Hilltop people who

1 were in the vicinity of the incident when it happened?
2 A No.
3 Q Did Hilltop hire any subcontractors on this project?
4 A We did.
5 Q Who?
6 A We hired Ralph's to pour the concrete, we hired Bulwark to
7 place the rebar and tendons, and we hired a finisher named
8 LangCo, L-a-n-g-C-o.
9 Q So what did Bulwark do?
10 A They placed the rebar and tendons.
11 Q And what did LangCo do?
12 A They were the flat workers. They poured the slabs.
13 Q Other than Ralph's, did any other Hilltop subcontractor do
14 any work on the project at the time of the incident?
15 A Well, the supplier was Concrete Nor'West, I don't know if
16 you think of them as a subcontractor, and Inland was there,
17 and then the inspection agency.
18 Q Did the supplier have people on the site at the time?
19 A Yes.
20 Q Do you know who was there?
21 A I don't know names.
22 Q The inspection agency, who was that?
23 A I don't know.
24 Q Was that somebody from L & I?
25 A No, this is an independent inspection agency that inspects

a job. Is that what you're asking?
Q Was he given any training regarding the risks of pump hoses?
A Every time we pour.
Q And what training does that consist of?
A Our people do not hold the hose, operate the hose, I'm not sure what word you want to use, without lots of experience as a vibrator and without lots of experience on how to do it.
Q Who instructed him on how to do it?
A Whoever is the foreman on that particular job.
Q Who was the foreman on the North City Apartment job?
A Matt Skoog.
Q Did Hilltop have an accident prevention program in place that covered the dangers of pump hoses?
A Of course.
(Exhibit 72 marked for identification.)
Q Before we get into this, what is your understanding, what is Hilltop's understanding of what happened on or about May 23rd, 2013 to cause Gildardo's injury?
A Boy, I think we've answered that several times, but the hose on the concrete pump got clogged up and then it exploded and the hose whipped and hit him in the head.
Q What caused the hose to explode?
A I said it got clogged up and then the pressure pushed it through.

1 Q Do you know why the hose got clogged up?
2 A Specifically, no. There's all kinds of reasons, but I don't
3 specifically know. It's not possible to specifically know
4 that.
5 Q Did Hilltop ever conduct an investigation of any kind?
6 A Yes, and I think you have all those records.
7 Q Did Hilltop come to any conclusion as to what happened as a
8 result of its investigation?
9 A Well, like I said, the hose got plugged up and then the
10 pressure pushed the clog out.
11 Q What are possible causes for the hose getting clogged up?
12 MR. WALLACE: Object to the form.
13 MR. MUSE: Join.
14 MR. HANSEN: Same here.
15 A Hoses get clogged up every pour we make. It's a very normal
16 thing. You've got tons of concrete you're pushing through.
17 It can -- if it sits for a length of time, it can get
18 clogged up, it's possible to get some air in the line.
19 There's just a lot of reasons.
20 Q So you're saying that hoses get clogged up. Is that a daily
21 occurrence or more than daily?
22 A Every time you pour. If you pour on a daily basis, it's
23 going to get clogged up. It also depends on what size hose
24 you use, but every time you pour. If you're pouring four or
25 five yards, it might not happen, but with any amount.

Q Do you know what size hose was being used in this case?
A I do not. Most likely just a normal size for the wall pour.
Q What would a normal size be?
A Four- or five-inch. I don't know. It just depends on what they come out with or what they want.
Q Who's they?
A The people that are running the pour.
Q Who is they in this case? Is that Ralph's?
A Hilltop.
Q Who chooses the hose size?
A Hilltop would have.
Q Were you personally involved in that decision?
A Well, I think you're confusing the size of the hose. The size that comes is the normal size that you would pour in the walls. The only time you would have a different size is like if you were pouring a large slab you could have like a six-inch or something like that, five-inch hose.
Q Which size is more likely to be clogged?
A Well, common sense would be the smaller hose.
Q So you believe a four- to five-inch in diameter hose was being used at the time of the incident?
A I don't know, but I would guess because that's the size that's normally used for a situation like that.
Q Do you think use of the wrong size hose contributed to the incident in any way?

A No.

MR. WALLACE: Object to form.

MR. HICKS: Objection; assumes facts not in evidence that they used the wrong sized hose.

Q Do you believe that the proper sized hose was used for what Gildardo was doing or about to do?

A Yes.

Q So what would cause the hose to explode? What are potential causes of hoses exploding?

A Explode might not be the correct word. It clogged up and then it unclogged, so you can pick the word.

Q Well, you said exploded before.

A And I just said that exploded might have been the wrong word.

Q So I'm asking you to pick a word. What would be the most accurate word?

A There is no accurate word. It got plugged up and then it unplugged.

Q In what manner did it become unplugged?

A Pressure behind the plug blew out the concrete that was causing the clog.

Q Is this what happens every time a clogged hose gets unclogged?

A Not every time. It just depends. Sometimes -- it depends on where it's at. But if it gets clogged up, the guy that's

1 holding the hose throws it away and ducks, and then the
2 operator -- he could do it several ways. He could move the
3 hose away, turn the pressure up a little bit to try to
4 unclog it. If that doesn't work, he can turn the pressure
5 down and take the parts apart and use a hammer to try to
6 unclog it.
7 Q So let me ask this: When a hose does get clogged -- well,
8 how is one alerted to that fact when the hose gets clogged?
9 Who would know first, the operator of the pump or the person
10 in Gildardo's position?
11 A Everybody around would know.
12 Q How would they know?
13 A When the pump is running it's very loud. Everybody around
14 that's in the process of pouring concrete has earplugs on or
15 something like that and it's very loud and you hear all of a
16 sudden it's plugged, it's clogged, and you hear this thud
17 and you know that it's clogged.
18 Q After the thud, does the pump get louder or quieter when the
19 hose is clogged?
20 A I don't know. I'd probably say it stays the same. The
21 operator will back off the pressure, so I guess that would
22 mean that it would get quieter.
23 Q Is there a word that you would use for what Gildardo was
24 doing before the hose was clogged?
25 A At that point, from what I understand, because I wasn't

there, he wasn't doing anything because they hadn't started the pour yet.

Q Do you know where he was?

A I came there afterwards and they kind of showed me where it was.

Q Who conducted Hilltop's accident investigation?

A Matthew.

Q Were you involved in it in any way?

A In the investigation?

Q Yes.

A I was not there. I had no input on it.

Q So prior to Gildardo's injury you said he wasn't doing anything. But where was he, what was he about to do? Does Hilltop know anything about that?

A The only thing I know is from what was told to me is that he was standing on the scaffolding and holding the hose and at that point no concrete had come out yet.

Q And then what happened?

A Turned the pump on.

Q Who turned the pump on?

A Who turned it on?

Q Yes.

A The operator.

Q And this is the operator with Ralph's?

A Right.

Q Do you know his name?
A I do not.
Q Now, is there a procedure by which there's any communication between someone at the end of the hose like Gildardo was and the operator as to when the pump is to be turned on?
A There's hand motions.
Q How does that work?
A (Demonstrating.)
MR. MOORE: So for the record he's taking his index finger, holding his hand up as being sworn in, and turning it around.
Q Is that accurate?
A That's accurate, yes.
Q And who would make that hand motion? The operator?
A You just asked me what motion that Gildardo would have made.
Q So that would be a motion that Gildardo would make when he's ready for the pump to be operated, to be turned on?
A Right.
Q Now, what does Hilltop believe happened -- well, does Hilltop have any information as to whether Gildardo had made that hand motion before the pump was turned on in this instance?
A I would have no idea.
Q Now, if you say a clogged pump is a common experience, based on Hilltop's investigation why did this clogged pump result

in injury, whereas on a daily basis they usually don't?
A Well, when you operate a hose and a pump, you're either going to get knocked off the wall or hit or something. I've been doing it for 45 years and I've been hit a lot. I think the pressure was probably too high on the pump.
Q Do you know how high the pressure should be?
A I don't know.
Q In terms of psi or any other measure?
A I have no idea.
Q Did Hilltop make any determination as to how this injury could have been avoided?
A No, we didn't.
Q Why not?
A Well, when you get a clog, like I mentioned before, there's different ways to unclog it, and I think the pressure was put on a little too high and that's probably what caused it.
Q So when the hose gets clogged, when you hear that thud, what is the proper way to unclog the hose?
A Well, like I said, there's a couple of ways to do it. You back down the pressure, you move the hose to the side or to someplace where you're not going to harm anything, and then you can either try to blow it out with a little more pressure there or you can lower it down and take a hammer and bang on it to try to get the clog out.
Q So the first thing that you should do is back down the

pressure; is that accurate?
A I think that's what most of them do.
Q So first you back down and reduce the pressure?
A Well, I'm not an operator, but that's what most of them do.
Q What should a worker in Gildardo's position do when he hears that thud or when he has notice that the --
A What we train the guys to do, and nobody is in that position unless they've had a lot of experience around and by it and been talked to and explained, as soon as you hear the thud, you duck, you throw the hose away and duck.
Q You were present when Brian Skoog was testifying in his deposition; right?
A Correct.
Q You remember when he was talking about duck and cover and getting out of there and running, that sort of thing?
A Yeah. You don't usually have time to run, but that's probably just a phrase that he was using.
Q Looking at Exhibit 72, can you identify these materials?
A This is our safety.
Q Is this Hilltop's safety plan?
A That's what I said, yes.
Q Was this the safety plan for the North City Apartments?
A Yes. We usually have -- we also have another page or two which is site specific. You should have received that.
Q I don't believe I did. Is there anything in Exhibit 72 that

1 pertains to safety regarding clogged hoses?
2 A Not specifically clogged hoses.
3 Q Anything even generally?
4 A Well, it talks about training and only doing the operations
5 that you're trained for.
6 Q What provision are you pointing to?
7 A Number nine on the second page. Number six on the first
8 page, we try not to allow people to do things that they're
9 not trained for.
10 Q Anything else?
11 A Do you want me to go through this whole thing?
12 Q Just go through and point out any provisions that apply to
13 the risk of clogged hoses.
14 A Well, I don't think there is anything in here based on the
15 risk of clogged hoses.
16 Q You said that you thought that you did have a site-specific
17 safety plan?
18 A Yeah, it's usually all with one piece. Why it's not here, I
19 don't know, but I'm sure you were given it.
20 Q Do you know if the specific safety plan had any provisions
21 regarding the risk of clogged hoses?
22 A We don't have anything with risk of clogged hoses.
23 Q Why not?
24 A We also don't have anything on the risk of going to a
25 Sani-Can. There is a limit to how many pages you can have.

For clogged hoses, the best safety plan is to observe and be talked to. If you put it down here, that's all nice, but it's not going to solve the thing. You have to have on-the-job training. You do not -- we don't ever let anybody operate -- operate's the wrong word. Hold the hose, pour concrete without specific training, and that does not happen on paper. That must happen on the site.

Q Was Gildardo provided any specific training regarding the risks of clogged hoses?

A Most definitely.

Q By whom and when?

A By whoever the manager is. Every manager on the job site gives explanations, examples, talks of how, not just to operate the hose, but the people doing the vibrating are close enough where it can affect them, and they are also trained on what to do when you hear that thud. And you never operate the hose unless you've had an enormous amount of experience on the vibrator. By the time you've had a lot of experience doing that, you know what to do with the hose. It's just an automatic -- you've done it so many times and you've been talked to so many times. It's just like pounding a nail. You know if you miss the nail once in a while, you're going to hit your thumb. So if you're going to run a hose and when it gets clogged up, it's going to bang around a little bit if you don't throw it away.

Q So is the procedure for somebody in Gildardo's position when he hears a thud to throw the hose away and duck; is that accurate?
A That's accurate.
Q Is there anything else?
A Well, we don't help to unclog the hose. That's not our job. But as for the specifics, we teach them how to hold the hose to get the concrete in the wall properly, but you're probably not going to care about that. We teach them a lot on how to pour concrete properly. But as far as clogs, there is no other thing to do but duck and throw the hose.
Q So whose job is it to unclog the hose?
A It's always the operator's.
Q So this would be Ralph's; is that accurate?
A Yeah.
Q Does Hilltop believe that Gildardo did anything wrong that may have contributed to his injury?
A Well, he didn't cause the hose to clog. Is that what you're asking?
Q Anything at all. Is there anything that he did wrong that contributed to his injury?
A He probably should have ducked.
Q Do you have information that he didn't duck or didn't duck fast enough?
A I wasn't there. But I think when Matt chatted with his

Q Do you know what size hose was being used in this case?
A I do not. Most likely just a normal size for the wall pour.
Q What would a normal size be?
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Q Who is they in this case? Is that Ralph's?
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Q Were you personally involved in that decision?
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A That's accurate.
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A It's always the operator's.
Q So this would be Ralph's; is that accurate?
A Yeah.
Q Does Hilltop believe that Gildardo did anything wrong that may have contributed to his injury?
A Well, he didn't cause the hose to clog. Is that what you're asking?
Q Anything at all. Is there anything that he did wrong that contributed to his injury?
A He probably should have ducked.
Q Do you have information that he didn't duck or didn't duck fast enough?
A I wasn't there. But I think when Matt chatted with his

1 brother, and it might have been some other relatives,
2 apparently the guys doing the vibrating ducked, but Gildardo
3 did not.
4 Q Do you know if there were any reports that Gildardo was
5 doing anything other than ducking?
6 A Like I said, I was not there, so what I'm telling you is
7 just kind of hearsay. I probably shouldn't have done that.
8 I should have said I don't know.
9 Q Hearsay, we'll deal with that in motions in limine and so
10 forth. I'm just trying to find out what information there
11 is and, if possible, where you got it from, you being
12 Hilltop, as well as personally.
13 A The only information I got was from the report, and Matt got
14 all that information from the guys on site.
15 (Exhibit 73 marked for identification.)
16 Q Exhibit 73, is that the accident report you were referring
17 to?
18 A It is.
19 Q And that one was made by Matt Skoog?
20 A It was.
21 Q And the last paragraph on the second page, is this Hilltop's
22 position: Upon reviewing this accident, I feel that Hilltop
23 Concrete followed all safety precautions and that we could
24 not have done anything to prevent this accident?
25 A Yes.

Q And on the first page, the question, How could the accident have been prevented? When pump clogs, it needs to back off the pressure and fix the clog. Is that Hilltop's position on how the accident could have been prevented?

A Well, like I said, I wasn't there. This was filled out by him, he was there, so I'm going to go with whatever he said.

Q And then above that, What caused the accident? Clogged hose and too much pressure in the pump. Is that Hilltop's position on what caused the accident?

A The same answer.

(Exhibit 74 marked for identification.)

Q Exhibit 74, do you recognize those?

A It's the safety meeting minutes.

Q Do you know who prepared those?

A I do not know if this was Matt that did this or whether -- well, it kind of looks like all our people, so I would say Matt probably did it. I don't know, actually.

Q Are there any in here that pertain to clogged hoses?

A That I don't know. It doesn't appear to be. I can't read most of it. I just can't read what is written down here.

Q I think counsel was advising you that the last page may apply.

A Well, it says, Struck By and Crushing Hazards. I see that part, but it's hard to read. I certainly can't read the handwriting. I'm just going to say that I can't read it.

Q It's a poor copy.
A But it does talk about crushing or something. It says pay attention, understand what's going on around you, don't get caught between a rock and a hard place. Well, I think that's what happened.
Q And the bullet points to the left, one says don't -- well, the first says don't position yourself in the swing radius of a crane. The other says don't stand behind a dump truck out of the driver's line of sight. The third is don't jump into an unprotected trench. The fourth is don't stand under a load people being lifted by a crane. The next is don't climb onto a storage rack to try to reach materials. The next is don't stick your head in a construction elevator shaft. The next is don't place yourself between a fixed object and any piece of equipment. And the next is don't stand in front of a load of reinforced concrete pipe that is being unloaded.
Do any of those apply to clogged concrete pipes?
A You mean hoses?
Q Hoses.
A Well, if anything, it would be the top one, but it's just not possible to list everything that you could possibly be hit with.
Q How often are people hit with concrete hoses?
A I think we talked about this earlier. Usually every time

you pour you have a clog. How often are you hit by the hose because of the clog? Quite often.

Q Would you agree that being hit by a concrete hose is a hazard recognized to potentially result in injury or death?

A Not to the point of what happened here, because you can bump into a two-by-four more often than you are going to get hit by a concrete hose. So I don't see anything in there about bumping into a two-by-four. We have to use common sense. You cannot list everything that's going to possibly happen, and getting knocked off of scaffolding by a hose isn't one of the top ones.

Q Do you know if there were any safety meetings conducted on this North City Apartment job that addressed the hazard of clogged concrete hoses?

A How many times are you going to ask me that?

Q I just want to make sure.

A I've answered that now.

(Exhibit 75 marked for identification.)

Q Have you seen the documents included in Exhibit 75 before?

A I have.

Q And what is your understanding of what these documents are?

A Citations by the Labor and Industry. I thought it was 300, but it's only 200. I guess I saved some money.

Q It looks like violation item 1-1a and 1-1b --

A Where is that?

(Exhibit 78 marked for identification.)

Q Do you know what this is, what's been marked as Exhibit 78?

A I do.

Q What is this?

A This is an addition that I made up for our safety book.

Q And was this in response to the L & I inspection?

A This is what I mentioned a while ago that he asked me to put down in writing what we formally tell -- how we train our people.

Q And where did you get this information from? How was this document created?

A Out of my head. It was exactly what I've said. He wanted me to formally put down in writing what we use, what we say to train our people.

MR. WALLACE: When you say "he", I'm sorry to interrupt, you're talking about the guy from L & I?

THE WITNESS: Yes, Kyle.

MR. WALLACE: Thank you.

Q Was this copied from some other book or manual or did you type this out yourself?

A No, I even did that all by myself. Like I said, it's in writing what we -- how we train our people.

Q Now, this says October 8th, 2013, Production Services, that stamp. Do you know what that is?

A I'm sure that's the L & I stamp.

Q Does that date mean anything to you?
A That was the time that he asked me to put it in writing. Or that day's probably a little after the time.
Q Was this document created in October of 2013 then?
A September or October, something like that.
Q But well after May, well after the incident; is that right?
A Yes.
Q Turning your attention to what's been marked as Exhibit 12 and Exhibit 13, have you seen those before?
A No.
Q Do you think anything contained there is something that Hilltop and its employees should be concerned about?
A Hilltop and its what?
Q Employees.
A I haven't read this whole thing, but it doesn't look -- no, because our training is much better than this. This is a lot for the operator. There's some in here for the employees holding the hose, but this is -- I think it's more for the operator.
Q What in there do you think --
A And it looks like something that Putzmeister puts out for the operators.
Q Is there anything there that you think may pertain to Hilltop or the people at the other end of the hose?
A No. This is for the operators. It's not for the people on

the hose. Our instructions, our training is more geared for the people on the hose, and it's much better than this.

Q Did you ever have any safety meetings that also involved the operators?

A You mean where the operator of the pump was in the safety meeting?

Q Right.

A That's got nothing to do with us. Nothing to do with us. The operator comes out a half hour, an hour before the pour to set up the hose. That's got nothing to do with us. That's the operator's employer.

Q Do you ever coordinate safety practices, particularly when unclogging clogged hoses, with the operator?

A We talk to them about it.

Q When you say "we", who is we?

A Anybody in charge at the time.

Q So would that be Matt Skoog at this time?

A At this time.

Q At the time of the incident?

A I don't know if he had any words with the operator. I would not suspect that he did. The operator's been highly trained in how to do this. We don't tell him how to operate his machine. He's the one that sets the pump up, turns it on, operates it. If there's any issues, then he makes us aware of the issues. He unclogs the hose. We don't have anything

1 to do with the pump except to hold the hose, to guide the
2 hose to where the concrete goes.
3 Q How about Inland, did Inland do anything to help coordinate
4 safety procedures in the event of clogged hoses?
5 A Well, you're asking questions that don't make any sense.
6 Q Regardless of what you think of the questions, if you
7 understand it, I do request that you answer.
8 A I was not on site and I have not been on site at the safety
9 meetings. They usually cover everything imaginable of any
10 kind of possibility of accidents on a job site, so I would
11 say I'm sure they covered that, but I won't know because I'm
12 not on site at the safety meetings.
13 (Recessed 3:48 p.m. to 3:55 p.m.)
14 (Exhibit 79 marked for identification.)
15 Q You've been handed Exhibit 79. Do you recognize this?
16 A Yes.
17 Q What is this?
18 A A contract with Inland.
19 Q Is that a true and correct copy?
20 A Well, I'm going to assume so. My signature is on it.
21 Q Which one is your signature?
22 A The one that says Gordon Skoog.
23 Q On what page?
24 A Two.
25 Q The third line from the bottom on the left, that says Gordon

1 Skoog?
2 A Yes.
3 Q Let's look at page 16. Did Inland ever do anything to make
4 sure that Hilltop was obeying the safety requirements?
5 MR. HANSEN: Object to the form.
6 A Like I said, they have a guy that comes out every once in a
7 while. I don't remember how often. They have their own
8 in-house safety inspector.
9 Q Do you know the name of that person?
10 A I don't.
11 Q Look at page 20 of 20. At the bottom it talks about
12 job-specific requirements. One, subcontractor shall attend
13 all safety meetings?
14 A Okay.
15 Q Do you remember any safety meetings that were held by Inland
16 on this job or do you know of any?
17 A I would not know that, but I was told that they hold them
18 every week.
19 Q Who were you told that by?
20 A I believe I was told that by Matt and I believe I was told
21 that by Steve Miller. That's just a normal process for
22 them.
23 Q But you wouldn't be able to talk about the substance or the
24 content of that meetings; is that right?
25 A I didn't attend them. I was in the office.

EXHIBIT 12
WIT: G. Skog
DATE: 2-24-14
ELAINE RIPPEN CCR

Injuries caused by falling boom arms if isolators are opened without first ensuring that the appropriate boom arm is secured.

Injury may be caused by the hose operator being struck by the end hose if this has become trapped in the reinforcement and suddenly jumps out on further movement of the boom. This danger also exists if a blockage is suddenly released. There is also a considerable risk of injury from the end hose striking out when starting to pump and during washing out as a result of entrapped air or sudden boom movements.

2.4.2 Danger zone

The danger zone when starting to pump and during washing out procedures is the area around end hose in which the end hose can strike out. The diameter of the zone is twice the end hose length.

1 Maximum end hose length 4 m
2 Danger zone = 2 × end hose length = 8 m

Injuries caused by the pump rolling because of brakes or support legs releasing.

EXHIBIT 13
WIT: G Koop
DATE: 2-24-17
ELAINE RIPPEN, CCR

2.8.3 End hose

The danger zone when starting to pump and during washing out is the area around the end hose in which the end hose can strike out. The diameter of the zone is twice the end hose length.

1 Maximum end hose length 4 m
2 Danger zone = 2 × end hose length = 8 m

Danger

There is a risk of injury in the area around the end hose if the end hose strikes out when starting to pump, after a blockage has been freed or during washing out. This zone is twice the end hose length in diameter.
The end hose must be allowed to hang freely.
Ensure that no-one is standing in the danger zone. Keep the danger zone under constant observation.
You must halt work immediately and press the EMERGENCY SHUT-DOWN button if anyone enters the danger zone.

EXHIBIT 42
WIT: G. Akong
DATE: 2-24-14
ELAINE RIPPEN, CCR

Inland Group

Comprehensive Multifamily
Construction & Development Services

>>STEVE MILLER
Superintendent

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>>ED MCELFRESH
Warranty Punchlist

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Exhibit 23

WASHINGTON STATE SUPERIOR COURT FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 13-2-32219-6 SEA
	)	
INLAND GROUP P.S., LLC, et al.,	)	
	)	
Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION OF STEVE MILLER

9:00 a.m.
Tuesday, January 20, 2015
19743 First Avenue South
Normandy Park, Washington

ELAINE K. RIPPEN, CCR

NORTHWEST COURT REPORTERS

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25

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Q When did you work for Inland?
A I gave them notice the first of January of this year when I left, and I was there about two-and-a-half, three years.
MR. CHAWES: If I may just intervene and ask for clarification? The beginning date of this year, did you mean this year 2015 or last year 2014?
THE WITNESS: January 2014, correct.
Q Not nineteen days ago?
A No, a year ago.
Q So you gave notice January 1st, 2014; is that correct?
A Yes.
Q Why?
A Money and go home at night, close to home.
Q What was your job in May of 2013?
A Superintendent.
Q And who were you working for?
A Inland Construction.
Q Do you know who Inland Group, PS, is?
A I know the Inland Group. I don't know the PS.
Q Do you know Inland Washington, LLC?
A Yes.
Q Can you tell me the relationship, if any, between Inland Construction, Inland Group, and Inland Washington?
MR. CHAWES: Object to the form of the question.
A Inland Group is the parent company.

Q Is the parent company of who?
A Inland Washington.
Q And who is Inland Construction?
A The same guys.
Q Who are the same guys you're referring to?
A The guys in Spokane. I don't know all their names.
Q How many names can you remember?
A Right now I'm drawing a blank. Reed Dickenson, he was my project manager. I don't remember offhand.
Q Do you know who Reed Dickenson worked for?
A Inland something. I don't know what it says on his paycheck.
Q And who did you work for in May of 2013?
A Inland. It's probably Inland Washington, not Inland Construction.
Q Were you also an employee of Inland Group at that time?
A Well, they're the parent company. I would think so. I don't know.
Q Who did you get your paychecks from?
A Inland. I don't know if it said Inland Washington or Inland Group or what on it.
Q Operationally was there a difference between Inland Washington and Inland Group?
MR. HANSEN: Object to the form; foundation.
A I don't know.

Q Do you know who owns Inland Group and Inland Washington?
A Tom. I don't know his last name.
Q Do you know if there's any differences between Inland Washington and Inland Group?
MR. HANSEN: Object to the form and foundation.
A Yes.
Q What are the differences, if any?
A Inland Group is the parent company and Inland Washington is a subsidiary of that.
Q You mentioned you'd had training in concrete before. What training have you had in concrete construction?
A Dealing with mix designs, hot and cold weather situations, how to deal with it. That's pretty much it.
Q Have you had any training in how to pour concrete?
A No.
Q Have you had any training in the operation of pump trucks for concrete?
A No.
Q Have you ever had any training in WISHA regulations?
A In WISHA?
Q Yes.
A Yes.
Q What training have had you in WISHA?
A I have an OSHA 30.
Q Are you familiar with OSHA or WISHA regulations regarding

A Yes, Hilltop Construction, not Skoog Construction. Thank you.
Q And do you know who the Skoogs are?
A Yes.
Q Who are the Skoogs?
A They own Hilltop Construction.
Q Do you remember the first names?
A There's Gordon Skoog, the owner. Matt Skoog was his foreman on my project.
Q Do you know Brian Skoog?
A Yes.
Q What was his role on this project, if any?
A He's worked on it part-time.
Q And what was Hilltop's role in this concrete pour on the day of the incident?
A Their role is to supply and install concrete, rebar, form, pour.
Q Do you know who else was involved in the concrete pour on the day of the incident?
A There was the concrete supplier, the pump supplier, Hilltop, concrete testing lab.
Q Anyone else?
A That's all I can think of.
Q Do you know who with Inland was on the site on the day of the incident?

A Yeah, myself, Norm Anderson. That's all I can think of.
Q What was Norm Anderson's job at the time?
A Assistant superintendent.
Q And you were the superintendent?
A Correct, yes.
Q Do you know where he was when the incident happened?
MR. CHAWES: Did you say "he"?
Q Do you know where Norm Anderson was at the time of the incident?
A No.
Q Do you know if he was -- well, you said he was on the site that day; is that right?
A Yes.
Q Do you know what he was doing that day?
A No.
Q Do you know if he witnessed the incident?
A No.
Q Have you ever spoken with him about the incident?
A Yes.
Q When did you talk to him about the incident?
A The day of the incident and a few weeks after that. Or months after that, I suppose.
Q Do you remember what was said between you and Norm Anderson on the day of the incident?
A No.

Q How many people did you interview?
A I don't recall.
Q Do you remember anything about the interviews that you conducted as part of your investigation into this accident?
A No.
Q Do you remember how many reports you got?
A No.
Q Do you remember the people whom you got the reports from?
A No.
Q Did you take any measurements of anything of the scene as part of your investigation?
A To the best of my knowledge, no.
Q Did you examine any of the equipment involved in your investigation?
A Repeat that?
Q Did you examine any of the equipment involved in the incident at part of your investigation?
A I don't recall.
Q You said that your understanding was that the concrete pump plugged. Do you have any information as to how that happened?
A No.
Q Do you know how you found out that the concrete pump had plugged?
A I was told.

Q Do you remember who told you?
A No. Plus the evidence of the rock spread around the slab.
Q Is that a common occurrence?
MR. CHAWES: Object to form.
A Is what a common occurrence?
Q Concrete pumps being plugged.
A Yes.
Q How often does it happen?
A I don't recall it ever happening on this project before that.
Q Generally how often does it happen?
MR. CHAWES: Object to form.
A I don't know.
Q Does it happen at least once on every project?
A No. It may happen every thousand yards of concrete poured, something like that.
Q Do you remember how many yards of concrete pours were being done on the North City Apartments?
A No.
Q What was your job as superintendent of this project?
A Oversee the project, coordinate, coordination.
Q Were you involved in the planning of the project?
A No.
Q Do you remember when ground was broken on this project?
A No.

A I have a sense.
Q What is your sense, your best estimate?
A I was probably there six months, give or take.
Q And that's six months prior to the date of the incident?
A Yes.
Q And in the six months that you were there prior to the date of the incident, can you describe the phases of the project that you were overseeing?
A The phases? I don't know what you mean by phases.
Q Basically what work had been done between the time that you arrived and the date of the incident?
A We kept going through the process of Building A, finishing up the concrete and the framing and so on, all the way through the finishes. On Building B we had to move a lot of dirt, export dirt, dig the hole, basically construction, put the foundation in, and the incident happened towards the end of the foundation.
Q So what was your role as superintendent with respect to the foundation construction work?
A Just coordinate time and quality.
Q What does that mean?
A It means I make schedules and we expect them, the subcontractor, to follow them, I inspect their work when they're done, if the quality's good enough.
Q While the foundation work is being done, what are your

1 duties on a day-to-day basis?
2 A Just coordinating the job. Most of my time is sitting at a
3 desk with a computer working out schedules, making sure all
4 the parts and pieces fit, the plumber can get through the
5 slab at a certain point and all that, scheduling all these
6 pieces to come together, have a safety meeting every
7 Tuesday, a subcontractor meeting every Tuesday, play
8 babysitter when somebody cries, solve problems that arise.
9 Q What kind of problems?
10 A Oh, for instance, if there's no hole in the slab and we've
11 got to get an electrical conduit through it, figure out how
12 we get the hole in there, a dimension doesn't match, the
13 structural drawings versus the architectural drawings, got
14 to figure out those issues. Things like that.
15 Q So you've had safety meetings every Tuesday. Did you
16 personally hold these?
17 A Yes.
18 Q Who attended?
19 A The foremen, the subcontractors' foremens and my staff.
20 Q So other than Norm Anderson, who was on your staff?
21 A There was another guy, but I can't remember his name. Ed
22 McElfresh.
23 Q What was Ed's role on the project?
24 A He was Norm's assistant.
25 Q And what were his duties on the project?

A Whatever Norm wanted him to do.
Q Did he have any responsibilities regarding safety?
A Yes, we all have responsibilities.
MR. CHAWES: Can you clarify who you meant by "he"? It wasn't clear who he was in your question.
Q Ed McElfresh, did he have any specific role or specific duties regarding safety?
A Other than watching the people, make sure they're dressed properly, got the right PPs on, jumping guys that don't have their hard hat, don't have their safety glasses, whatever.
Q Do you remember any instances on this project where any of the subcontractors were disciplined for safety concerns in any way?
A Verbal disciplines, yes.
Q What do you recall?
A I recall a guy cutting rebar without safety glasses.
Q Do you remember who that was?
A No. One of Hilltop's people.
Q Do you remember when this was?
A No.
Q So the safety meetings that you held, you would attend and your staff, being Norm Anderson and Ed McElfresh; is that right?
A Yes.
Q And the foreman of the subcontractors would attend as well;

is that correct?
A Yes.
Q Who, if anyone, at Hilltop would attend your Tuesday safety meetings?
A Matt Skoog.
Q Anyone else from Hilltop?
A No.
Q Any of Hilltop's workers, would they attend these safety meetings?
A No.
Q And you had another subcontractors' meeting every Tuesday; is that right?
A Yes.
Q And what happened at these meetings, the subcontractors' meetings distinguished from the safety meetings?
A It was a combination meeting. It was a meeting that we coordinate what's going on on the site, coordinate schedules, work out any problems that one sub might have with another, had a safety meeting, they turn in their safety minutes from their weekly safety meeting they have with all their employees. That's pretty much it.
Q So every Tuesday there would be one meeting and it would be coordination plus safety; is that accurate?
A Yes.
Q Not two separate meetings every Tuesday?

MR. HANSEN: Object to form; foundation.

MR. CHAWES: Join.

A Yes.

Q Do you know how much pressure is involved in these pump hoses?

A No.

Q Do you agree that there should be some communication between the pump operator and any workers who are near the hose before the pump operator tries to force the clog out?

A Yes.

Q Do you know if on this project anybody held any safety meeting discussing the risk of injury from a clogged hose?

A I don't recall.

Q Do you know if anyone on this project had a safety plan or an accident prevention program that covered the risk of injury from a pump hose clog?

A I don't recall.

Q Did Inland require Hilltop or Ralph's to submit a safety plan to it that covered this risk?

MR. HANSEN: Object to the form.

MR. CHAWES: Join.

A There was a safety plan site-specific from Hilltop. I don't recall anything from the concrete company or the pump company and I don't recall any of the contents.

Q Did Inland Group have a site-specific safety plan that

1 included this kind of risk?
2 MR. HANSEN: Objection; form, foundation.
3 MR. CHAWES: Join.
4 A I don't know.
5 Q Did Inland have any site-specific safety plans regarding
6 this project that addressed the risks of clogged hoses on
7 concrete pours?
8 MR. CHAWES: Object to form.
9 MR. HANSEN: Join.
10 A I don't know.
11 Q Did it have any that you know of as you sit here today?
12 MR. CHAWES: Same objection.
13 MR. HANSEN: Join.
14 A I don't know if it specifically relates to pumps. It was a
15 safety plan.
16 Q Do you know if this safety plan was ever communicated to
17 Hilltop's workers?
18 A I don't know.
19 Q Did Inland do anything to make sure that Inland's safety
20 plan was communicated to Hilltop's workers?
21 A I don't know.
22 MR. HANSEN: Object to form.
23 MR. CHAWES: Join.
24 Q Did Inland Group do anything to make sure that Hilltop's
25 safety plan or the contents thereof was communicated to its

workers?

MR. HANSEN: Object to form; foundation.

MR. CHAWES: Join.

A Don't know.

Q None that you know of?

MR. HANSEN: Same objection.

A None that I know of.

Q With respect to Ralph's, did Inland do anything to make sure that Ralph's had a safety plan in place that covers the risks of concrete hoses?

A Not that I know of.

MR. HANSEN: Object to form.

MR. CHAWES: Join.

Q Did Inland do anything to make sure that Ralph's Concrete had properly trained its employees in preventing injuries from pressurized concrete hoses?

MR. CHAWES: Object to form and foundation.

MR. HANSEN: Join.

MR. WALLACE: Same.

A No.

Q Do you know if Gildardo Crisostomo Vargas had an orientation of any kind when he was brought on to this job site?

A No.

Q Did Inland take any steps to make sure that Hilltop provided orientations to its employees prior to starting work on this

job site?

MR. HANSEN: Object to form.

MR. CHAWES: Foundation.

MR. WALLACE: Join.

A No.

Q Do you know Gildardo Crisostomo Vargas?

A No.

Q To your knowledge have you ever met him or spoken with him?

A No.

Q Do you know any of his family members?

A No.

Q To your knowledge have you ever spoken with or met Oscar Vargas?

A No.

Q That's Gildardo's son. Do you know Gildardo's son?

A No.

Q How about his brother Juan?

A No.

Q Do you know anything about Mr. Crisostomo Vargas's injuries?

A No, other than he got hit in the head and it was bad.

Q Other than when you last saw him in the ambulance?

A No.

Q Is that when you last saw him?

A That's when I last saw him.

(Exhibit 4 marked for identification.)

Q You've been handed what's been marked Exhibit 4. Do you recognize any of the these pages in Exhibit 4?
A Yes.
Q What are these?
A These are weekly safety meeting minutes.
Q How do you recognize them?
A It says weekly safety meeting minutes on the heading.
Q Do you know who provided these?
A Matt Skoog. Check that. I supplied a copy of this blank form. Matt Skoog would take this and have his safety meeting with his people and he would bring back to me a copy of this that I filed in my safety book.
Q So looking at the first page it says Weekly Safety Meetings and there's a headline that says Digging Safely, and then there's some printed text and blanks. At the bottom it says the Safety Meeting Outlines, Inc.; is that right?
A Yes.
Q Are these forms that you obtained from Safety Meetings Outlines, Inc.?
A Repeat that?
Q Well, I'll strike the question. In what form did you provide these to Mr. Skoog?
A A blank copy.
Q And by blank, what do you mean by blank?
A That none of the -- well, I shouldn't say blank because I

wrote this, Railing must be placed immediately, when railings are removed, harnesses are required. That's one of the notes that I put on there. Under company name, that was blank. And I also put in North City Apartments and the date and they would fill out the rest.

Q And "they" being Hilltop?

A In this case it's Hilltop, yes.

Q And the actual text of the front page, Digging Safely, who provided that, the printed material?

A The weekly safety meeting minutes company, Safety Meeting Outlines, Inc.

Q And is this true with all of the pages in this exhibit?

MR. CHAWES: Object to form.

A Yes.

Q Do you know if you ever provided a weekly safety meeting minute form such as these to Hilltop that addressed the risk of pressurized concrete hoses?

A I don't recall.

Q Did you ever to your knowledge?

A No.

(Exhibit 5 marked for identification.)

Q You've been handed what's been marked Exhibit 5 to your deposition here today. Please flip through it and let me know if you recognize this.

A No.

specific knowledge -- you were not out there until the aid car came; is that a fair statement?

A That's correct.

Q You didn't get out there when the pump truck arrived?

A No.

Q Or when the Hilltop crew arrived?

A No.

Q Or when the concrete truck arrived?

A No.

Q Did you ever on that morning greet or have any interaction before the incident with the concrete, the person from the concrete testing lab?

A I don't recall.

Q And since you were not there at the time that this incident actually occurred, you don't have any firsthand knowledge of any communication between the pump operator and the person holding the end of the hose?

A That's correct, I do not.

Q Earlier you talked about some of your observations after. Specifically looking at aggregate rock, I believe. Do you recall that testimony?

A Yeah.

Q I was a little unclear. What's the significance of that to you?

A The significance is it's made very obvious that there was a

clog that blew out because the rock was spread all around without the concrete. I mean, a hundred feet away there were rocks laying around on the slab. That's not normal.

Q And is that something that should have been mixed by the concrete company?

A Yes.

Q So, in other words, what I'm trying to figure out is in your opinion this aggregate rock, it should have been not as big as it was or what?

MR. WRAITH: Object to the form.

Q How should it have been different?

A I don't know if should have been different. To the best of my knowledge it was the proper size of rock that was in the cement truck, that came out of the cement truck. Somewhere between there and coming out of the end of the hose, rocks gathered up. Whether it's how it rolls through the hose and the pump, I don't know that portion, but it clogs up at the end and that's usually the clog.

Q You were asked by counsel about your investigation and the conclusions that you came to as a result, so I just wanted to follow up on that a little bit. First of all, in terms of your actual investigation, you don't recall who you spoke to; correct?

A No, I spoke to a lot of people, but I don't recall specifically who.

Exhibit 24

WASHINGTON STATE SUPERIOR COURT FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 13-2-32219-6 SEA
	)	
INLAND GROUP P.S., LLC, et al.,	)	
	)	
Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION OF TIM HENSON

1:00 p.m.
Tuesday, January 20, 2015
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Normandy Park, Washington

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A The office is [redacted].

Q What is your date of birth?

A [redacted]

Q Do you speak Spanish?

A No.

Q Do you speak any language other than English?

A No.

Q Where do you currently work?

A Ralph's Concrete Pumping.

Q How long have you worked for Ralph's?

A Since March of 1992.

Q What is your current title?

A General manager.

Q How long have you been general manager at Ralph's?

A Since March of 1992.

Q Have you ever held any other position with Ralph's other than general manager?

A No.

Q Where did you work before Ralph's?

A I owned a concrete pumping company called Olympic Concrete Pumping.

Q What happened to that company?

A It merged with Ralph's in 1992.

Q How long had you worked for Olympic Concrete Pumping?

A I think I formed it in 1986, I think.

Q How many years of experience do you have in the concrete industry?
A This is my fortieth year in the concrete pumping industry.
Q Have you ever been involved in a lawsuit before?
MR. WALLACE: Let me object. You mean him personally or as GM for Ralph's?
Q Involved in any way as a party, as a witness.
A Yes.
Q How many other lawsuits have you been involved in?
A I can't answer that. I don't know for sure. A number of them.
Q Do you have a ballpark of how many?
A No. I've been doing this 40 years and there's a lot of you guys out there. I'm sorry. I honestly do not even know how to number them. A few.
Q Are you currently involved in any lawsuits other than this one?
A Yes.
Q How many?
A Once again I'm not sure. I believe one or two. They go on for a long time and I don't know the present status of the litigation. Oftentimes they settle and I'm not made aware of it, so I think one or two.
Q Let me limit my question this way. How many lawsuits have you been involved in that involved claims for on-the-job

1 Q Is that an accurate way of stating it?
2 A They rented a piece of equipment with operator, yes.
3 Q Was Inland involved in Hilltop's decision to retain Ralph's
4 for these services and equipment?
5 MR. HANSEN: Object to the form.
6 MR. CHAWES: Join.
7 A I have no knowledge if they did or not.
8 Q Were you involved in this contract for Ralph's equipment and
9 services on the project?
10 A There was no contract.
11 Q Was there an agreement of any kind between Ralph's and
12 Hilltop for Ralph's involvement on the job?
13 A Just our daily rental agreements.
14 Q Did Hilltop ever provide Ralph's with a safety plan of any
15 kind for this job?
16 A Not to my knowledge.
17 Q Did Hilltop ever require Ralph's provide a safety plan of
18 any kind for this job?
19 A No.
20 Q Did Ralph's have a safety plan of any kind specific to this
21 job?
22 A Job-specific safety plan?
23 Q Yes.
24 A No, we did not.
25 Q Did Inland ever require that Ralph's provide it with a

job-specific safety plan for this job?

MR. CHAWES: Object to form.

A I don't believe so, no.

Q Did Inland ever require Ralph's provide any kind of safety plan for this job?

MR. CHAWES: Same objection.

A Not to my knowledge, no.

Q Did Inland ever provide Ralph's with a safety plan for this job?

MR. CHAWES: Same objection.

A No.

Q Did Ralph's ever provide anybody with a safety plan on this job?

A Not to my knowledge, no.

Q When did you first hear about this incident involving Mr. Vargas?

A At some point shortly after it occurred.

Q On the same day?

A Yes.

Q Do you remember how you were first informed of the incident?

A I don't recall who told me, whether one of our dispatchers came in and told me or Josh Gribble came and told me or Josh could have called me. I'm sorry, I don't recall who told me.

Q Do you know where you were when you heard about it?

Q I'm asking you what Ralph's did, if anything, to make sure its operations were safe.

A Well, we inspect our equipment as per all required OSHA and federal regulations, we inspect our trucks for all that. When we arrive on the job site, we set it up in accordance with all manufacturers' specifications and regulations. As we're pumping the concrete we do the same. When we clean the machine up we do the same. When we leave the job site we do the same. But if you want me to get into the exact specifics of all of that, we would have to have manuals and stuff here. That's really broad, sir.

Q Okay.

A But the general answer is, yes, we do everything we can to ensure the safety of the people around us.

Q Do you have an understanding of how Mr. Vargas was injured?

A Yes.

Q What is your understanding of how he was injured?

A My pump operator -- they were going to pump concrete into the wall. My operator put the hose where they directed him to put it. They laid the hose down on top of the wall because the boom they'd ordered was too short to reach all the way into the wall, which is not an uncommon occurrence. He turned the pump on when they directed him to turn it on. His concrete pump shut off because he lost radio control with the concrete pump. He walked over to where he regained

1 radio control of the pump and turned the machine back on.
2 At that point something caused the hose to come off the top
3 of the wall striking Mr. Vargas, as I understand it, in the
4 head.
5 Now, as to the specifics of why that occurred, I don't
6 know. I don't know if one of the workers kinked the hose, I
7 don't know if there was air in the system, nor do I think
8 anybody knows or will ever be able to know exactly what
9 caused that to occur.
10 Q You said that the boom was too short. Did I understand
11 that? What did you mean by the boom being too short?
12 A Well, the concrete pump has a boom on it that reaches a
13 certain distance. And as far as he could reach, it was
14 still 10 or 15 feet from reaching the end of the wall they
15 were attempting to pour, so they had to lay the hose down on
16 top of the wall to get the additional 15 foot of length to
17 reach the end.
18 (Exhibit 1 marked for identification.)
19 Q You've been handed that which has been marked Exhibit 1 to
20 your deposition today. Do you recognize the pictures shown
21 in Exhibit 1?
22 A It looks to be the job site where this incident occurred.
23 Q All of those pictures on both pages of Exhibit 1?
24 A Well, it's difficult to tell. There's no identifying
25 surrounding stuff, so it's hard for me to be 100 percent

1 occurred. Name, rank, and serial number is kind of what I
2 provided.
3 Q Now, I understand the material was provided by Miles Sand &
4 Gravel d/b/a Concrete Nor'West; is that accurate?
5 A I believe so.
6 Q Did Ralph's have any role in selecting the material vendor?
7 A No.
8 Q Do you know who did?
9 A No.
10 Q Now, in this kind of pumping operation whose job is it to
11 make sure that the hopper is full?
12 A The Ready Mix driver.
13 Q What is Ready Mix?
14 A That's Concrete Nor'West in this case.
15 Q So it would be Concrete Nor'West, its driver is responsible
16 for keeping the hopper full?
17 A Correct.
18 Q Do you know if there were any problems with the mix itself
19 in this incident?
20 A No, not to my knowledge.
21 (Exhibit 2 marked for identification.)
22 Q You've been handed that which has been marked Exhibit 2 to
23 your deposition today. Have you seen this before?
24 A No, I don't believe so.
25 Q It appears to be the accident investigation report of Matt

1 Skoog.
2 A Yes.
3 Q Did you talk to Matt Skoog about this incident?
4 A Briefly at the scene.
5 Q Does anything in this report differ from what he told you at
6 the scene?
7 A I don't think he had any opinion of what happened or what
8 caused it or anything about the specificity of what went on.
9 Everybody was pretty upset and shook up, and there was no
10 conversation about what had occurred.
11 Q After you left the scene, at any time after you left the
12 scene, but not including any conversations with your
13 attorneys, have you spoken with anyone about what caused
14 this incident or what may have caused this incident?
15 A Yes.
16 Q Can you describe those conversations?
17 A I've only had conversations with employees inside of our own
18 company. I have not spoken to the Skoogs or anybody at
19 Inland. I don't believe even our attorney and I have talked
20 about what I think occurred.
21 Q Who within Ralph's have you spoken to about this?
22 A Most of my pump operators, all of the Gribbles. Kind of
23 like everyone. Anybody that's been at a safety meeting we
24 have discussed this incident.
25 Q What about this incident have you discussed in these

1 meetings?
2 A Well, we've discussed the air in concrete issue repeatedly,
3 we have discussed the kinking of concrete hoses by the
4 people that are placing the concrete, which is one or the
5 other of the issues I believe that occurred here. We talk
6 about plugs in concrete and stuff all the time, but I don't
7 think that that's what occurred here.
8 Q Now, in this accident report that's been marked as Exhibit 2
9 it appears that Matt Skoog writes, Clogged hose and too much
10 pressure in the pump caused the accident. Do you see where
11 he wrote that?
12 A Yes.
13 Q Are you saying that you would be inclined to disagree with
14 that?
15 A Absolutely, with all due respect. I don't think Matt Skoog
16 has any idea about anything to do with any concrete pump.
17 He doesn't have any knowledge to base that conclusion on.
18 Q Does anyone else at Hilltop have the requisite knowledge?
19 A I don't believe so, no.
20 Q Do you know if anybody at Hilltop has any greater knowledge
21 than Matt Skoog does regarding this issue?
22 A No.
23 (Exhibit 3 marked for identification.)
24 Q You've been handed what's been marked Exhibit 3 to your
25 deposition today. Have you ever seen this before?

A I don't believe so.
Q It states it's Safety Practices for Pouring Concrete with a Concrete Pump, and I will represent that this is something that was provided to L & I by Hilltop after the incident.
A Okay.
Q I'm interested in the content of it. Do you agree that these are adequate safety practices for pouring concrete with a concrete pump with respect to prevention of the injury that happened to Mr. Vargas or injuries of that type?
A I'm sorry, you're going to have to repeat that. I was reading. I've got to know what it says before I can answer what it says.
Q I'll give you some time to read through it. Have you read through it?
A I think so. Go ahead.
MR. MOORE: Could you read back my question?
(Pending question read back.)
A No.
Q Why not?
A It doesn't address kinking of the hose, it doesn't address air in concrete. I mean, I guess there are some that would think that it's adequate instructions to help the workers from being injured, but I think it falls short of being -- encompassing enough items.
Q What would you add to this to make proper safety practices

that would have prevented an injury such as Mr. Vargas's?
A Well, one would hope that this isn't just a handout that somebody give workers without any instruction, first of all. And, as I stated, giving it to them and teaching them this stuff would certainly be helpful. I would recommend that they add the kinking of the hose and I would recommend that they add some instruction on air in concrete. But certainly this makes a greater attempt at helping the worker stay safe than anything I've seen from any other contractor, I think.
Q Are there any other deficiencies you see with this practice?
A Not that readily come to mind as relates to this incident.
MR. MOORE: Well, I believe that's all the questions I have. Other counsel may have some for you, but thank you very much for your time.
(Recessed 2:13 p.m. to 2:17 p.m.)
(Exhibit 4 marked for identification.)
EXAMINATION
BY MR. CHAWES:
Q Mr. Henson, my name is David Chawes and I represent Inland Washington in this case, as distinguished from Inland Group.
My first question to you is: Referring to the photograph you've been handed marked Exhibit 4, do you recognize that photograph?
A Yes.
Q Can you tell us what it represents or depicts?

behind that; is that what we're talking about?

A Yes. As it goes up the boom you're shoving more and more together to where it's got 3500 pounds of pressure on it when it exits the end.

Q It's kind of like a scuba tank blowing up?

A It's extremely violent, yes. And it sounds like a gun going off, actually. That's why all these guys, I think, heard this boom when it happened. A plug wouldn't make that noise either.

MR. MOORE: Now I do have some follow-ups.

FURTHER EXAMINATION

BY MR. MOORE:

Q Can you list all the possible causes of air being in the concrete in sufficient amounts to cause an incident such as this one?

A Well, in my mind, really the only way that it can actually happen is if it's injected at the back of the pump by not having any concrete in the hopper. There is the one incident that we were involved in where the gentleman was injured fatally that air was introduced into the concrete as an add mixture. But something went really wrong that day because it doesn't make air like that. But concrete has air put in it as an add mixture because it's like for expansion and contraction on outdoor concrete, it allows it to expand and contract without breaking. So lots of concrete has air

as an additive injected into it. Not in sufficient amounts to do this, though. In fact, if you get too much air in concrete, generally it will not pump because you put pressure on all that air and it shoves against the sidewalls of the pipe to the degree that we can't push it anymore.

Q So is it accurate to say that the only two causes of air in the concrete sufficient to cause this incident would be either excess air in the additive and a low hopper? Are those the only two causes?

A Correct. That's the only causes I've ever seen. And the first, the additive thing, I've only seen that occur once and I don't even know how it happened.

Q So if it were the case that it's established that the hopper was not low in this case, what would you think caused this incident?

MR. WALLACE: Calls for speculation.

A I think somebody kinked the hose.

MR. MOORE: That's all I have.

MR. CHAWES: Just to follow up on that.

FURTHER EXAMINATION (Continued)

BY MR. CHAWES:

Q That someone who kinked the hose would have been somebody from Hilltop, not from Ralph's?

A It would have had to have been somebody not from Ralph's. I don't know who all the other guys were employed by.

Exhibit 25

WASHINGTON STATE SUPERIOR COURT FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 13-2-32219-6 SEA
	)	
INLAND GROUP P.S., LLC, et al.,	)	
	)	
Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION OF ANTHONY HOWELL

1:00 p.m.
Thursday, February 12, 2015
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A No.
Q How long did you work for Conco Pumping?
A A little over a year, I think.
Q So when did you first start working for Ralph's?
A I think it's September 2012 or August 2012. I don't remember.
Q What was your first job with Ralph's?
A Operator.
Q What is your current job with Ralph's?
A Operator.
Q Have you had any other jobs with Ralph's other than operator?
A No.
Q So when did you work for Conco?
A Like five years ago.
Q And when did you work for Reliable?
A Previous to that. Conco actually bought Reliable, so they merged.
Q How many years did you work for reliable?
A Twelve, I believe.
Q And what was the other concrete company you worked for?
A Skagit.
Q How long did you work for Skagit?
A Six years, I think it was.
Q What jobs did you hold at Conco and Reliable?

A Operator.
Q And at Skagit?
A The same.
Q What are the duties of an operator?
A You're responsible for the machine anywhere from inspecting at the yard to setting it up at the job site for your clients.
Q When was your first job as an operator?
A Honestly, I don't remember.
Q Was it at Skagit Pumping?
A Oh, yes.
Q How did you learn to be a operator?
A Back then? They just took you out and threw you in the seat.
Q No formal training?
A Not at that time, no.
Q Have you had any formal training in pump operations since working at Skagit?
A Yes.
Q What training have you had?
A They merged the ACPA training. That was done at Reliable.
Q What is ACPA?
A American Concrete Pumping Association.
Q And what did that training entail?
A There was classes followed by tests followed by

Q Starting from the day of the incident on May 23rd, 2013, can you tell us when you first arrived at the job site?
A It was about seven o'clock in the morning.
Q And how did you get there?
A I drove from the yard in Maltby.
Q How long a drive is that?
A Probably 35 minutes that time of day.
Q And what did you do when you got to the job site at seven a.m.?
A I checked in with Matt, Matt Skoog.
Q And what do you mean by checked in with him?
A When you pull into the site you get ahold of the superintendent, whoever is running that job site, to find out where they want you to set up and what they want you to do that day.
Q And what did he tell you?
A He told me where to set up the pump and showed me the walls we were pumping that day.
Q Anything else?
A I believe he told me where to slurry the pump up.
Q What is slurry?
A Slurry is the product you put ahead of the concrete so you can prime up your pump with concrete without plugging up.
Q Did he tell you anything else?
A Not that I recall.

Q After checking in with Matt Skoog, did you talk to anybody else?
A No. It takes about 45 minutes to set the pump and we had mud at eight.
Q What do you mean by had mud at eight?
A The Redi-Mix shows up for their scheduled time and that was at eight o'clock.
Q So that's when the materials would be delivered; is that correct?
A Yes, the Redi-Mix truck will show up at eight.
Q Do you know who the Redi-Mix provider was?
A Concrete Nor'West, I think.
Q After checking in with Matt, can you tell me to the best of your memory exactly what you did to set up that day?
A Just to set up the pump?
Q Yes.
A It entails putting the pump where he told us to put it, and you put out your outriggers, you unfold your boom, you get your slurry ready to go, and you put a whip on the end of the boom for placing the concrete.
Q What is the whip?
A The whip is the rubber hose at the end of the last section of the boom.
Q Did you do anything else to set up?
A Not that I recall. That's pretty much what you do on every

job.

(Exhibit 1 marked for identification.)

Q You've been handed that which has been marked Exhibit 1 to your deposition today and it's a set of photographs marked with numbers on them 1 through 12 for your reference.

A Okay.

Q Can you identify what's shown in these photographs?

A What's shown in them?

Q Yes.

A There's a fire response vehicle in front of my concrete pump.

Q So page one, is that the Putzmeister truck that you're talking about?

A Yes, sir.

Q And that's the 46-meter Putzmeister?

A Yes, sir.

Q And can you identify what's shown in the second page of Exhibit 1?

A The second page shows walls and columns being formed, and it shows the last section of my pump with the reducers on the end of it and you can barely see my whip hanging on the outside of the wall.

Q So what is a reducer?

A Reducers, they reduce the size of the placement. It goes from five to four, and then four to three. Sometimes you

have a three and a half, so you'd go five to four and four to three and a half.

Q And are those measurements in inches?

A Yes.

Q How many reducers were used on this 46 Putzmeister at the time?

A On the end of the jib, two.

Q What is the jib?

A The last section of the boom. Sorry.

Q And what measurements did these reducers reduce the flow to?

A Meaning what? I'm pumping through a five-inch line on the boom and it cones it down to a three-inch line so the guys can place it.

Q So the first reducer would reduce it from five inches to four inches; is that correct?

A Yes, sir.

Q And the second reducer would reduce it from four inches to three inches; is that correct?

A Yes, that's correct.

Q Are you sure it was a three-inch and not a three-and-a-half inch?

A No, it was a three-inch.

Q And looking back to Exhibit 1, page three, can you tell us what that shows?

A It shows the same exact thing, except it has a little bit of

the third section in it.
Q And page four of Exhibit 1, what does that show?
A It shows the side view of my concrete pump.
Q And that's the 46 Putzmeister we're talking about?
A Yes, sir.
Q Is that the position that the Putzmeister was in at the time of the incident?
A Yes, it is.
Q And the boom and reducers shown in, I guess, pages one, two and three, were those also where they were at the time of the injury?
A Yes.
Q Do you know who took these pictures, by the way?
A No, I do not.
Q Did you take them?
A No, I did not.
Q Did you take any pictures at the scene?
A No, sir.
Q On page five of Exhibit 1, can you tell us what that shows?
A That shows dropping my hopper. That's the rock and sand and dirty water that comes out the bottom of the hopper when you clean out your concrete pump.
Q And what does page six show?
A The same thing.
Q And seven?

A The same again, and eight and nine and ten.
Q And 11?
A Yes, it's the same.
Q And what is shown in photo number 12 of Exhibit 1?
A Number 12 just shows the transition in the back of the concrete pump so I can drop the hopper.
Q What is a transition?
A A transition is what comes out of the back of the pump and it reduces it quick from eight inches down to six.
Q And what is the hopper?
A The hopper is also on the back of the pump and that is where the concrete goes in to be pumped through your system.
Q So the concrete goes in the hopper and then through the transition; is that accurate?
A Yes.
Q And where does it go from the transition?
A It goes from the transition up to the deck pipe.
Q And what is a deck pipe?
A It's just a pipe that is mounted to the truck.
Q Where does it go from there?
A It transfers up into the boom.
Q And then it goes through the reducers we talked about before?
A Yes, sir.
Q And the last reducer reducing it to three inches, what is

that connected to?
A The five to four.
Q What is a five to four?
A Reducer.
Q I'm sorry. So it goes to a five to four reducer; is that right?
A Yes, at the end of the boom.
Q And then it goes to a second reducer that goes from four to three; is that right?
A Yes.
Q And where does it go from the three-inch reducer?
A You hook a whip, which is a rubber hose with a metal clamp on the end of it to hold them together.
Q On the day of this incident who did that, who hooked up the hose?
A I did.
Q And the hose is also called the whip?
A Yes.
Q And the end of this whip is where the concrete comes out; is that correct?
A That is correct.
Q So did the Concrete Nor'West truck come at eight o'clock as expected?
A Yes, they did.
Q What happened then?

1 up and moving the boom, was there any other preliminary
2 procedure that you went through that day?
3 A No, that's what we do every day.
4 Q And when did you slurry the pump?
5 A Shortly after the mix showed up, mixer.
6 Q And could you describe that process for us?
7 A You put your slurry in the hopper, and then you add concrete
8 to the hopper pushing the slurry up into the jug, turn your
9 pump on, it changes over, and you have slurry in front of
10 the mud which slicks the lines preventing a plug while
11 you're slurrying up.
12 Q You said you put slurry into the jug?
13 A It's the material cylinder. That's where the concrete goes
14 in before it goes into the system.
15 Q Who provided the slurry?
16 A Ralph's.
17 Q And who performed this operation of slurrying the pump?
18 A I did.
19 Q Was there anybody else involved?
20 A No. Well, the mixer driver because he has to put the
21 concrete in the hopper for pushing through. As far as the
22 pump operation, that's solely the operator.
23 Q Was there anything unusual that day when you slurried the
24 pump?
25 A No.

Q After slurrying the pump, then what happened?
A I kinked the hose off and put the boom up in the air, and then I went up on the deck where the pour crew was also with Matt.
Q You said you kinked the hose off. What does that mean?
A You kink the hose. It's a rubber hose. You kink it in half and you put a halo on it, that way the concrete doesn't keep dripping out so it doesn't fall on anybody's head or anywhere you don't want it to. It's a safety issue.
Q And what is a halo?
A A halo is any ring that holds the hose together.
Q So then you went to where the pour crew was?
A Yes.
Q And then what happened?
A As far as?
Q Did you talk to them, have any conversations?
A I was talking with Matt.
Q What did you say to Matt at that time?
A Asked him if we were ready to go and swung the boom over to the wall.
Q Did you tell him that you were ready to go or did he tell you?
A I told him I'm ready to go, asked him if his crew's ready to go. They're Hispanic and I don't speak Spanish.
Q So you told each other you were ready to go. Then what

1 happened?
2 A So I took the boom, I laid it out flat, and we were short,
3 so we ended up pushing the reducers out and laying the whip
4 on top of the wall.
5 Q When you say that we were short, what does that mean?
6 A The boom that I had wasn't long enough to make it all the
7 way to the end of the forms. It happens quite a bit.
8 Q And what do you do when the boom's not long enough?
9 A We usually push out on the reducers and lay the whip on the
10 wall.
11 Q What you say push out the reducers, what does that mean?
12 A If you go to Exhibit 1, page two, you'll see the reducers
13 straight down while the two 90 elbows swivel, so you can
14 push the reducers straight out and then lay the whip on top
15 of the wall so you gain another 15, 16 feet with the
16 reducers flat on the wall.
17 Q And that's what you did at this time; right?
18 A Yes. But before we laid it out, the pour crew unkinked the
19 hose where there was some material fell down inside the
20 walls. It came out of the whip. You slurry up, you've got
21 two sections up, two sections down, and gravity pulls the
22 concrete that's still in the other sections.
23 Q So when you take the halo off, then the material comes out?
24 A Yes.
25 Q Do you know who took the halo off?

A I don't recall which one of them it was.
Q Were you there when that happened?
A Yes.
Q Is the halo Ralph's equipment?
A Yes.
Q And did somebody give it back to you?
A No, they usually hang onto it because they'll put a lift in the wall and then they'll kink the hose, that way we can swing back to the other side and put another lift in the walls, which means you can't fill the wall up all at once, there's too much pressure, so they'll do a lift at a time, usually two to three feet.
Q So after the halo was taken off, then what happened?
A We laid the boom down, laid the reducers out on the wall, and laid the whip out on the wall.
Q When you say out on the wall, how is the hose laid out on the wall?
A The reducers, you get a guy pushing on the reducers, they'll come straight out. You set the reducer down on the top of the wall, the three-inch, the very end of the three to four, you put the three-inch just on top of the wall and you lay the hose on top of the wall, that way you get all that extra length and it'll get you from here to there.
Q So after it was in that position, then what did you do?
A Everybody was ready to go, so I turned the pump on.

Q Now, when you saw Matt Skoog and the pour crew, how far was that meeting, for want of a better word -- strike that.

When you spoke to Matt telling him that you were ready to go, where were you in relation to the pump truck?

A We were up on the deck. I couldn't see the pump truck. If you'll notice your Exhibit 1, picture one, there's a great big, huge wall, and I'm inside that wall on the deck. You can't see your truck.

Q Now, the deck, does picture two in Exhibit 1 show where the deck is?

A Yes, it's the concrete slab that the forms are sitting on.

Q So the slab at the bottom, not anything up at the top of the wall; is that right?

A Yeah, it's the slab on the bottom.

Q So then after the whip was laid on the wall -- well, where were you when that was done?

A Standing right pretty close to where the wheelbarrow is on picture two and Matt was standing next to me. His three guys were up on the wall scaffolding.

Q All three of them were on the scaffolding?

A Yes.

Q Was Matt on the scaffolding or was he on the deck where you were?

A He was standing next to me on the deck.

Q So how did you get back to your truck to start pumping?

MR. WALLACE: Object to the form.

MR. MOORE: Well, strike that.

Q What did you do next after speaking with Matt?

A This is a radio-operated machine, so it's wireless, cordless, kind of like Bluetooth, so it does everything you tell it to do. You can control the boom, you can control the pump on/off, you can control how fast it pumps. The whole function of the truck is ran with remote control.

Q So you had the remote control with you when you were talking to Matt?

A Yes.

Q So when he told you to start pumping --

Well, strike that.

After you told each other you were ready to go, then what happened?

A They gave me a thumbs up to start pumping and I started pumping. And I had two strokes in through the boom and my radio remote lost signal to the truck, which shuts the truck down. Or shuts the pump kit down, not the truck, actually. So it stops all activity for the boom, concrete pumping, all of it stops.

Q When you say two strokes of the boom, what does that mean?

A Two strokes. A stroke is a full cycle of a cylinder, which I said jugs earlier. It's the material cylinders. You have two big pistons and they suck the mud back into the material

cylinders and then it changes over and it pushes the mud up and through the transition and then up and out the boom, and one stroke is one complete up and down of that cylinder.

Q How much material is put through with each stroke?

A I honestly don't know on that particular model.

Q Now, before you went to the other side of the wall to talk to Matt, did you observe the hopper?

A Just at the time I was putting slurry in and began pouring the concrete in so I can get the slurry ahead of the concrete. Other than that, it's up to the mixer driver.

Q Did you see how much concrete the mixer driver put into the hopper?

A When we slurry up I have them put it in real slow so it pushes the slurry up into the material cylinders, and then I'll change it over and I'll tell them to go ahead and fill it up. You go out to the whip where you slurry up to make sure everything comes out fine.

Q Were you able to see how much concrete that he put in the hopper?

A Not at that time, no. I just know he did.

Q How do you know he did?

A Because I was standing there when we first starting putting concrete in the hopper to get the slurry ahead of the concrete.

Q So when the slurry was coming out, was it coming out on the

other side of the wall from where the truck was?
A Yes, sitting next to the wall. If you go to picture four, the slurry pile is right behind the rear outrigger. Actually, it's a small picture of that. There was like a half a yard there, quarter to a half a yard.
Q Is that that white patched area to the lower left of picture four in Exhibit 1?
A Yes.
Q That's the slurry?
A Yes. And the gray is actually the concrete with the rocks in it.
Q Do you know if the hopper was completely full?
A No, I do not.
Q Do you know how much concrete was in the hopper when you started pumping?
A I know there was a cycle. I mean, there was enough to get the slurry ahead of the concrete, so there was at least one stroke.
Q When you were on the other side of the wall and you started the pump with the remote and you said that there were two strokes to the boom, before those two strokes did you know how much concrete was in the hopper?
A I could not see my truck, so no.
Q Did you ever see the level of the concrete in the hopper before you started pumping?

A Up on the wall or slurry up?
Q Up on the wall.
A No. I was behind the wall. I couldn't see the hopper.
Q Between the time it was slurried up and between the time you started pumping, did you ever see the amount of concrete in the hopper?
A No. I just know I had seen the Redi-Mix coming out of the back of the Redi-Mix truck. As far as how much was in there, I could not tell you.
Q Did you ever talk to the Redi-Mix guy regarding whether the hopper was full?
A No.
Q So after there was the two strokes of the boom, you said the remote control stopped?
A Yes, it shut off. Or lost communication to the truck, I should say.
Q Do you know why?
A No, I do not. It's a radio remote and works on radio waves.
Q Did you ever find out why later?
A No.
Q So when the remote control wouldn't work, then what did you do?
A I turned and walked from where I was standing with Matt to where -- next to the first column after the wall on page three, the lower left corner, that's when I got the remote

to start talking to the truck again and that's when we turned the pump back on.

Q How do you know if there's a connection?

A You can hear your truck. You reset your remote and then you hit the horn button, and if the horn goes off, you know it's communicating with the truck.

MR. BUTLER: Can I ask a clarification?

MR. MOORE: Sure.

MR. BUTLER: On the photograph number three, could you indicate again where you were standing?

THE WITNESS: Right next to the first column on the lower left corner.

MR. BUTLER: So photo three has three columns shown, one is cut off by the extreme left side of the photograph. Is that the one you are referring to?

THE WITNESS: Yes, sir.

MR. BUTLER: Could you do me a favor, if that's an exhibit? Could you make an "x" as to where you were at the time that the remote control reacquired connection?

(Recessed 1:55 p.m. to 2:03 p.m.)

Q So you were asked to mark an "x" on photograph three showing the position where you were when you re-established contact between the remote and the pump truck?

A Yeah. Actually that very first column between the column and the wall.

1 Q And I just want to make sure it shows up now that we have a
2 Sharpie.
3 A It's right there.
4 Q Do you know where the pour crew members were at that time
5 when you re-established contact with the boom truck?
6 A They were still up on the scaffolding.
7 Q All three of them?
8 A Yes.
9 Q Where were they in relation to the whip?
10 A They were -- the very first one was sitting right at the
11 three-inch mark on the very last reducer, and then the other
12 two were holding the hose out on the wall. You need to
13 establish that this isn't where the boom was. The concrete
14 mix right here is where the boom extended over to. They
15 allowed us to swing it over for L & I reasons on the outside
16 of the wall to keep from dripping more concrete down on the
17 slab.
18 Q So we're looking at page two. Using the Sharpie could you
19 mark where the boom actually was?
20 A The end of the boom was right there.
21 Q And the red arrow shows where the end of the boom was?
22 A Yes. See the pile on the deck? That's exactly where the
23 hose was hanging straight down dribbling after the incident.
24 Q And prior to the incident, the hose was laid on top of the
25 wall extending to the right of the red arrow on that

1 picture; is that accurate?
2 A Yes.
3 Q And how long was the hose?
4 A I want to say that one was a 12-footer.
5 Q Are you sure it was a 12-footer?
6 A No.
7 Q What other lengths could it have been?
8 A The end of the whips wear out, so we cut them off from time
9 to time. They could be all the way up to four-foot long,
10 but the max is 12-foot.
11 Q Now, when you use the remote control to start pumping, how
12 does that control work? Is it just an on/off switch or is
13 there --
14 A No, there's a series of switches. You have to do a sequence
15 to get everything to come online.
16 Q Could you describe that sequence for us?
17 A You have to clear your E-stop, which is a red button on top
18 of your remote, turn the box off, then back on, then there's
19 another switch that you hit to get it to start communicating
20 with the receiver. At that point you flip up on it to hit
21 the horn button. That tells you that the receiver's talking
22 back to the remote, and from there you throttle up, which is
23 on a different switch, and you turn the pump on, which is
24 another different switch, and there's another switch for
25 volume control, as well as joy sticks to run the boom.

Q When you say throttle up, what does that mean?
A Bring the RPMs of the truck from idle to max.
Q What does the volume control do?
A It controls how fast it pumps, it controls how fast the concrete comes out the end of the whip.
Q And what are the ranges?
A You can slow it down to where it is just barely coming out or you can crank it up to where it's coming out pretty good.
Q Do you know what the maximum volume is?
A No, I do not. I know the max pressure of the pump kit is 3500 PSI.
Q Can you describe the volume control switch or mechanism?
A On that particular remote I think it was just a toggle switch, a momentary switch where you hit up on the switch and it'll bring your volume control up, but it centers back out so it doesn't keep going up, and then if you want to bring the volume back down you tap down on the switch.
Q Is this a button or a knob?
A It's a toggle switch. They can be knobs. The 61-meter has a knob on it.
Q So when you toggle it, you would push the switch up to increase the volume?
A Yes.
Q Do you know how much volume increases per each time you switch the toggle?

A No, I do not. It's very gradual because you don't hold on the switch, you just tap up on it.

Q So when you re-established contact with the remote, what happened next?

A We signaled to the guys we are going to start the pump kit back up and took a stroke and that's when the incident occurred. Took one full stroke and it went off like a shotgun.

Q Did it sound like a shotgun?

Well, strike that.

What did you hear?

A You could definitely hear it sounded like a poof of air coming out and it sounds pretty good. It's close to a shotgun sound.

Q So when you signaled to the pour crew, where were they in relation to the whip?

A Two of the guys were holding the whip on top of the wall. Mr. Vargas was standing right where the three-inch reducer was laid on top of the wall because the end of the three-inch reducer was on the wall and then they just ran the hose down.

Q Could you indicate with the Sharpie where Mr. Vargas was when it happened? Go with a "V".

And was he holding the end of the hose when it happened?

A No.

Q How far away from the end of the hose was he when it happened?
A Well, he was at the beginning of the whip, the hose, which is at the bottom of the reducer of that three-inch, so he was approximately 12 feet from the end of the hose.
Q Where were the other two people in relation to Mr. Vargas?
A Standing to the right of him right next to him.
Q And did you see it happen?
A Yes.
Q What did you see?
A I saw the big burst of air come out the end of the whip and I saw the whip come straight up off the wall and it curled back up and almost touched the three-inch reducer. At that time is when it struck Mr. Vargas in the side of the head.
Q How long did this take to happen?
A A split second. It doesn't take -- it's crazy.
Q Do you know what Mr. Vargas was wearing at the time?
A No, I do not. I remember it knocked his hard hat off.
Q So he was wearing a hard hat at the time?
A Yes.
Q When it happened was the hose kinked in any way?
A I do not know.
Q Were you able to see the hose?
A The end of the hose, no, because the workers were in the way.

Q Between the time that you lost contact with the remote and the time you re-established contact and then started the pump up again, do you know if any of the workers handled the hose in any way?

A I don't believe so. I think they were just still holding it on top of the wall.

Q How long did that take between the time that contact was lost and the pump was turned on again?

A Five, ten seconds.

Q In that time did any of the workers move?

A I don't believe so. They just kept looking at me.

Q Prior to hearing the shotgun sound, did you hear a thud of any kind?

A No.

Q Did you hear any sounds?

A I could hear the concrete moving down to the system above my head.

Q And what did that sound like?

A It sounds like rock going through a pipe. It's a weird sound. It's kind of like a scraping, rubbing sound.

Q Was there anything unusual that you heard prior to the shotgun sound?

A No.

Q Were there any indications of any problems at all prior to the shotgun sound?

A No.
Q Do you know what caused this to happen?
A I could only speculate.
Q What do you think happened?
A There was air in the system. When you push on air it compresses, and by the time it gets out the end of the boom, whatever is front of the air is going to go very quickly.
Q Do you know what possible causes of air in the system are?
A The hopper being run low.
Q Any other causes of air in the system?
A No, that one's pretty common. That's the one that does it, the hopper being low. That's how you get air in the system.
Q At any time after the incident did you check to see how much concrete was in the hopper?
A After the incident?
Q Afterwards.
A Afterwards when I went down to the mixers, it was full. In fact, I had backed it up a stroke just trying to keep it from dribbling out the end of the boom on the guy, so it was over-full.
Q So if the hopper was full, are there any other possible causes of air in the system?
A Other than air in treatment in the mix, no, not really.
Q Was it possible this was caused by a plug in the system?
A Not of this caliber, no.

Q Why not?

A Usually when it plugs, it stops and the pump will only come up to pressure of 3500 PSI before it starts pumping back to its tank. It's got a pop-off relief valve on it, so at that point you find out where the plug is, back the pump off, clear the plug, start the pump back up, and go ahead with the project.

Q So what makes you think that there was not a plug or what didn't happen here that you would expect to see if there was a plug?

A When we unkinked the hose, material fell in the wall. When I started pumping, we could hear the rocks falling into the wall. And when it shut down, there were still rocks falling into the wall. When I got it started back up, you could hear it going into the wall and then it just let go. If it had plugged you wouldn't hear the rocks falling down into the forms.

MR. HANSEN: Can I ask a question? When you say rocks, is that the concrete and rock mixture?

THE WITNESS: Yes. There's rebar and stuff inside the form so it hit the bar and bounced off the forms. It's kind of like playing Plinko. Kind of the same sound.

Q Now, if there had been a kink in the system, would that be consistent or inconsistent with your observation of what happened? A kink in the hose specifically.

A A kink in the hose? No.
Q Was there any indication that there was a kink in the hose?
A Not at that point, no.
Q At any time?
A Only when I slurried up and put it up on the deck.
Q But not at any time close to the time of the incident?
A It was sitting on top of the wall where I couldn't see it, but I wouldn't guess, no. You've got to be pretty strong to hold it if you're going to kink that hose, and you're going to go for a ride because it will straighten out.
Q Do you know what a zone of danger is pertaining to the area around a hose?
A A zone of danger?
Q Have you heard of that?
A We have a zone that protects you when you're slurrying up and when you're blowing the boom out. That's a 25-foot buffer both times.
Q But you've never heard anything described as a zone of danger?
A No. We've got the guys hanging onto the whip placing it, so it wouldn't be -- I've never heard it put that way before.
Q Do you know if there's anything describing the distance that a worker needs to stay away from a hose when the pump is turned on?
A You have to have a nozzle man to place the concrete, so

they're right on the hose. There's no buffer, there's nothing. They are hanging onto the hose.

Q Had you inspected the pump that day prior to the incident?

A We did our walk-around, yes, I did before we left the yard.

Q Did you inspect the hoses that day?

A You always look at your whip before you put it on.

Q When did you look at the whip?

A When I was setting the pump up.

Q Were there any recent repairs made to the pump truck?

A Honestly, I don't know. We just had it for a few days before, or a couple weeks, it might have been, but I don't know what repairs were made to it. It wasn't my normal truck.

Q Had you ever had any trouble with air in the system prior to this incident?

A On that job site or any job site?

Q On this job site.

A No.

Q At any time using this truck?

A Not that I know of, no.

Q On any job site?

A Yes.

Q When?

A It's usually when a mixer lets the hopper go down for whatever reason, they're standing back there talking with

hurting anybody up to that point. I can't say that no more.
Q Have you ever heard of it happening on any other job?
A You hear stories. But do I know for sure? No, I don't.
Q Has it ever happened on any other job that you were on?
A Air bursts?
Q Yes.
A Yes. With injury? No.
Q How common are air bursts?
A They're fairly common. You'll have it happen once or twice a week, usually.
Q Do you know what was different about this one, why this one caused injuries and others don't?
MR. WALLACE: Object to form.
MR. MUSE: Join.
A I can only speculate because it was sitting on top of the wall it only had one direction to go. Usually it's hanging, so it just kind of flips around, but this one only had one way to go. So it's laying on the top of the wall, it came straight back up at the workers.
Q Does Ralph's have a procedure to deal with air bursts or possible air bursts?
A Only if you can catch them. That's when you try to back it up and get the air out of the system through the hopper. Most of the time the hopper will get low and you'll take a half a stroke of air and you don't know it because the flow

is still the same at the end of the hose.

Q Is there anything that Mr. Vargas could have done to prevent the injury?

A No.

MR. BUTLER: Object to the form.

Q Do you think there's anything that you could have done to prevent his injury?

A No. I wish there was.

Q Do you think there's anything that anybody at Hilltop could have done to prevent his injury?

A No, not that I know of.

Q Do you think there's anything that the Redi-Mix guy could have done to prevent the injury?

A I can only speculate if he let the hopper go down, he should have kept the hopper full. I don't know what else he could have done. That's his sole job is to keep the hopper full of mud.

Q So what happened after Mr. Vargas was hit?

A Immediately?

Q Immediately.

A When it struck him in the side of the head, he looked right at me and his eyes rolled backwards and everything went into slow motion. He started slowly falling backwards where the two guys were standing, so they grabbed him and laid him down on top of the scaffolding, and from there we loaded him

1 down to the ground, checked to make sure he was still
2 breathing. He wasn't conscious. That's when the first
3 responders were called.
4 Q How long did it take the first responders to get there?
5 A Minutes. It wasn't very long.
6 Q Were you there when they arrived?
7 A I was on site, yes.
8 Q Did you ever see him regain consciousness?
9 A No. When we set him down on the deck and they called the
10 first response, Matt asked me to go down to stop the
11 concrete trucks from keep batching because there was an
12 incident and we didn't want to have to send back a whole
13 bunch of mud, so we were just trying to...
14 Q So you stopped the future deliveries of concrete?
15 A Yes, put all the mud on hold. And then I was instructed not
16 to go back up because there was too many -- we had first
17 response, we had police officers, we had fire department.
18 There was all kinds of people up there.
19 Q How long did you remain at the scene?
20 A I was there probably until noon or so, if I recall right.
21 Parts of that day are kind of foggy. It was pretty intense.
22 Q Do you know if anybody else actually saw it happen?
23 A I don't know. There was other workers on the deck.
24 Q Now, at the time when it happened there was Mr. Vargas and
25 the two other workers and Matt Skoog; is that correct?

MR. WALLACE: That's what I just gave you this morning.

A Pre-trip's on the top, your post-trip's on the bottom.

Q Let me see if I understand this. There's one dated 05/12 of '13.

(Exhibit 3 marked for identification.)

MR. WALLACE: Just so we're clear what Exhibit 3 is, these are just copies. The originals are front and back, so I just copied front and back. So there's one from 05/13, one from 05/23, and one from 05/24, and then the back is on a separate page of the copies.

MR. BUTLER: Thank you. So Exhibit 3 then is single-sided copies of a two-sided document in serial form so that the back is the immediate following page of the front page document; right?

MR. WALLACE: Yes.

MR. BUTLER: Sorry to be so literal.

(Discussion off the record.)

Q So turning to May 23rd, taking a look at that, is this your handwriting?

A Yes.

Q And then is this looked over or reviewed by Isaac or any of his crew before you roll out that morning?

A No, you do your pre-trip, that's what you do in the morning, and then you do the post-trip and you write any flaws for

the equipment underneath your post-trip.
Q So help me through in looking at this. And not to put too fine a point on this, what has any impact whatsoever on the proper operation of the pump and boom that you are noticing here that could be of issue?
A An issue? If I mark down okay after a post-trip, that means it's good to go for the next day or the next operator. There's not really any real issues here.
Q The check-off means that they're okay?
A The check-off on the top means that they're there. The checkmarks on the post-trip are needs addressed.
Q So let's turn to the concrete pump that's page three of the exhibit, the post-trip checked indicates the concrete pump has a small hydraulic leak. Did you experience that while you were pumping up until the point of the incident in any way?
A Yes, I assume so.
Q Because you had to find --
A That was the very first day on that machine, so yeah, but it was there.
Q So how did that impact your pumping ability?
A Nothing. It didn't.
Q But was there a drop-off in pressure? What was the thing that caused you to say, hey, there's a hydraulic leak?
A You get hoses that weep all the time. It doesn't contribute

to a malfunction or anything, unless you blow the hose, then you have an issue. If you've just a leak or a seal is leaking, it doesn't.

Q Knowing it was while ago, how did you diagnose hydraulic leak?

A When you're on the job site it leaks on the ground.

Q That's how that got diagnosed?

A Yes.

Q And then how about the engine oil leak? It says a small leak.

A The same.

Q Just dripping on the ground?

A Yeah. We have to contain it so we put diapers down.

Q You put what?

A Oil pads.

Q So it says needs new antenna for remote receiver?

A Yeah.

Q Is that relative to the loss of contact that you received?

A No.

Q What does that mean?

A That means the antenna was broke. It may be an issue if you're got 300 feet of gear on the end of your boom and you're 400 feet from your truck, but when you're right next to the pump like we were up there, it's not an issue at all. It just means you've got a six-inch antenna and half of it

is broke off and it doesn't affect you up close.
Q But did you determine why you lost the signal? Is that the antenna to make sure the signal between the truck and the remote is working?
A Yes. But you lose radio waves all the time and it doesn't have nothing to do with that antenna, because, like I said, I was just on the other side of that wall next to that column and I fired it up, and it's only 15 feet, 20 feet closer than when I originally set it.
Q Going to the next one on 05/24/13, is that your writing, too?
A Yes.
Q Were you out on another job or the same job?
A A different job.
Q A different job?
A Yes.
Q It looks like the work still needs to be done; is that right?
A Yes. Most of these items they'll take care of at a service and an inspection.
Q Sort of a regularly scheduled thing?
A Yes.
Q Is any of this work that typically would be required to taking this thing off line and fixing it immediately?
A No.

Q Showing you Exhibit 6, do you recognize that document?
A Yes, it's a safety operating manual.
Q Is this for the specific Putzmeister?
A It is for a 46-meter, but if it's for the specific -- normally you would have the pump number right on the front of the paperwork.
Q Is this something that you recall reviewing and consulting during your time at Ralph's prior to the incident?
A With Ralph's, probably not. It's something I would have read years and years ago.
Q Did you ever think that you need to review this to refresh your recollection, by chance?
A We have separate classes to bring on anything new that has come out on the pump line. If they've changed things, we have meetings for that and classes. When I worked for Reliable they even sent me to Putzmeister school. Putzmeister puts out a school of their pumps and safety.
Q And you did attend that?
A Yes.
Q Now, is it your responsibility to ensure that this manual is complied with for Ralph's or is that somebody else's job and you follow it to the degree that you are an operator, but things like service, inspection, that kind of thing is done by someone else at Ralph's?
A Yes.

Q So to refresh your recollection, if you can, is there any aspect of this that you as the operator would you need to be mindful of?

A Well, running the machine you pretty much need to know everything that's in here.

Q Except for, and again not to belabor the point, everything except for the servicing and mechanical and maintenance type things; right?

A Yeah, from a safety standpoint.

Q Got it. Let me ask you: When you reacquired control of the boom and pump, were you actually manipulating the joy stick to move the boom?

A No, it was already down on the wall.

Q It was already down on the wall?

A The reducer was already sitting on the wall.

Q But you weren't manipulating the boom itself when you reacquired connection?

A Not at the point of the blow-out, no.

Q Just so I'm sure I understand, when you reacquired, everything had been shut off, so you re-turned on the pumping mechanism at a time of your choosing; right? It didn't just all of sudden switch back on?

A No, you have to turn it off, and after you reset it, if your switch is still in the on position, you have to shut it off for it to clear its own emergency stop, and then you turn it

Q There's no chin strap on a hard hat; right?
A No.
Q For good reason; right?
A Well, some of them have chin straps. If you're working on the top of this building and you're bending over, you don't want it falling down 40 stories and hitting somebody.
Q But this isn't a highrise, is it?
A No.
Q So sometimes it's not good to have a chin strap because it actually causes more harm, doesn't it?
A I suppose.
Q If there's an incident that happens where a chin strap would actually cause, for example, the helmet to cause -- if it were affixed to the guy's head with a chin strap, it would wrench his neck, for example?
A I would not know how to answer that. I know I've never had a hard hat with a chin strap. I know I wear a chin strap when I wear my helmet to ride a bike.
Q That stands to reason.

MR. BUTLER: I'll let you guys go and ask questions

(Discussion off the record.)

EXAMINATION

BY MR. HANSEN:

Q Mr. Howell, my name is David Hansen. Do I understand this was a new truck?

A New truck to Ralph's. It's not a brand new truck. It was bought used.

Q Okay. Because a new truck wouldn't have oil leaks or hydraulic leaks?

A No.

Q And would you look at Exhibit 4, sir? And if you go to, I guess it's the front page of the record of 05/24/13?

A Okay.

Q And where you see at the bottom of the page where there's handwriting that says, Needs a vibrator installed for the hopper, do you see that?

A Yes.

Q Was there a vibrator on the hopper on the 23rd?

A No.

Q Why did you write on the 24th that it needs a vibrator installed for the hopper?

A Because there wasn't one on it. And on the 23rd I didn't pump very much concrete, obviously, because of the accident. The 24th we had some stiff mud and there's no vibrator on the hopper, and you need the vibrator on the hopper to get the mud to come the through the grate because it only allows certain sized rocks to go through the grate, and without that vibrator vibrating that grate, then it will just sit and pile up on top of the grate and you can't pump the mud.

Q Does the vibrator have any effect as to the amount of air

that gets mixed into the concrete?
A No. In fact, it helps not to get air in it.
Q We've talked about this slurry. What is it?
A It's mostly a mixture of bentonite, but I don't know all the chemicals that are in it. It's just a gray dust that you mix with water in a five-gallon bucket and you pour it into the hopper.
Q And so then is it sort of like a creamy texture?
A Yeah, you could say that or like oatmeal or cow snot, to be more precise. It's slimy. You can stick your hand in it and you can pull it and it strings. It's slimy.
Q So it's some portion of powder and some portion of water?
A Yes.
Q And then you it stir it up. Does it make five gallons of slurry then?
A One bag is for five gallons of water, yes.
Q And do you just use that one five-gallon amount for the priming?
A For that machine, yes. Now, if I had a system on the end of the boom, which is another however much system you've got, I'd add another five gallons at the beginning of the system so you can push through all the gear.
Q What do you mean another system?
A You can add as much gear on the end of the boom as you want.
Q Are you talking about piping?

A Hose.
Q But not whip hose. Metal piping; correct?
A No, hose. Double-ended hose. A whip is a single-ended hose.
Q This industry has its own terminology for equipment, I take it?
A I guess, yeah.
Q So then with this particular pump, would five gallons fill that cylinder that we've talked about?
A Yes.
Q So from that we can kind of figure out that it's a five-gallon volume in the cylinder?
A Five gallons is enough to slick up the boom. Five gallons will not fill the entire material cylinder. I guess I wasn't very clear about that. The material cylinder is ten inches, almost the same size as the bucket, and it's like 15 feet long, so all you need is the amount of slurry ahead of the concrete for the system.
Q And the slurry acts as like a lubricant on the inside of the piping?
A Yes.
Q Just before the blow-out, as you've described it, was the hose kinked or unkinked?
A I already said I couldn't see the end of the hose. I couldn't say for sure. I know we unkinked it to put it on

1 top of the wall. I don't know. I couldn't see the end of
2 the hose, but you could hear the rocks in the wall like we
3 already talked about.
4 Q And so does that tell you that the hose was in an unkinked
5 status at that point?
6 A Yes.
7 Q Should the hose have been unkinked at that stage?
8 A Yes. We were trying to pump concrete, so yes, it needs to
9 be unkinked so it don't plug. You're going to kill somebody
10 if you do that.
11 Q Are there any procedures that you're aware of that address
12 the issue of where the crew should be when you are getting
13 that initial flow of concrete to run? You've primed it,
14 you've run the lubricant through it, and that's before the
15 boom is lifted onto the job site. Are there any procedures
16 that should be followed as far as where the crew should be
17 positioned when you're having that first flow of concrete
18 run through?
19 A No. You've got to control the hose, so you just turn it on
20 slow, like I said, but the guys have to control where
21 they're placing the mud so that there's no -- they've got to
22 be right next to the whip to place it.
23 Q In this situation, though, when the hose was laid down on
24 the -- it was on the top of the wall, and is the rebar
25 holding the hose from falling down into the wall?

A No, the top clips are.
Q On the forms?
A Yes.
Q And was the idea that the hose would just lay on the top of those clips and then it would just come out and then fall down into the two-sided wall for the form?
A Yes.
Q Was it anticipated that there would be one of the crew holding onto the hose while that's going on?
A Yes, there would be one holding the hose.
Q Why do you need to hold it down if it's just laying down on the clips?
A It starts moving as soon as the concrete starts coming through it. You have to control it.
Q Do you have any idea how much the hose weighs when it has concrete in it?
A No, I don't. It would be -- I think one three-meter piece of three-inch is 120 pounds, I think.
Q So 120 pounds for every roughly three feet?
A Three meters.
Q So closer to nine feet?
A Yeah.
Q And how long was this hose?
A I think that was a 12-footer.
Q So less than maybe 150, 170, somewhere in that range?

A I wouldn't say it was any more than 150.
Q And even with that weight, the concrete can move the hose?
A Yeah.
MR. HANSEN: I don't have any other questions.
EXAMINATION
BY MR. MUSE:
Q My name's Dirk Muse and I represent Concrete Nor'West. If you could pull out Exhibit 1, please, and turn to page four? Like everyone before me, I also apologize for asking these questions ad nauseam. It'd probably be better for us to just put on a hard hat and have you go out and show us how it all works. But that being said, I need to just fill in a couple of things.
A Okay.
Q If you're looking here at picture four, Exhibit 1, what is the materials cylinder that you were just describing?
A The materials cylinder is actually inside the pump.
Q So you can't see it?
A You can see the hydraulic rams that control the piston heads inside the material cylinder, but you cannot see the material cylinder itself. If you look right at the center of the truck you'll seed two rams and those are pointed to the materials cylinders and they are what control the concrete coming in and out of the material cylinders.
Q So if you keep that picture on top, but if you look at

A You actually have to walk the job site and come in from the east side.

Q How long did that take for you to get from where you extended the boom to the edge of the wall until you where you climbed around on the deck to be able to see where to put the end of your boom?

A It was a pretty good-sized building, so a minute, minute and a half.

Q Couple minutes?

A Yeah, maybe.

Q And then you're on the deck and now you have to extend the boom all the way out. Why didn't you use the bigger truck that had the longer boom?

A My truck was broke down, it was in the shop. It had a safety issue, so it was shut down.

Q Did you know you were going to have to extend this boom as far as you were this day?

A No.

Q Are there other trucks at Ralph's that you could have brought instead of this one that would have been able to reach out?

MR. WALLACE: Object to form.

A Normally when a client calls and says they want a 46-meter, you bring a 46-meter. If they need a 55-meter and they order a 46 hoping to get the 55, then yes. But whatever the

1 client orders is what they get.
2 Q Do you know what was requested by the client?
3 A The 46-meter.
4 Q Then you extended the boom out to where the pour was going
5 to happen. And how long did that take from moving the boom
6 to the edge of the wall to extending it out fully to where
7 it was going to be?
8 A Fifteen seconds. It doesn't take long.
9 Q And then you lowered the boom onto the wall; is that right?
10 A I lowered the reducers onto the wall, yes.
11 Q And is that those two 90-degrees? Do they just rotate
12 simultaneously?
13 A One's stationary to the end of the boom and the other one
14 rotates.
15 Q Does that have to be manually done or is it mechanically
16 done?
17 A Manually done.
18 Q So who rotated the reducers at the top of the wall in order
19 to lay the boom down on the frame?
20 A Mr. Vargas and his two helpers.
21 Q How long did that process take?
22 A Three seconds, five seconds. It doesn't take long.
23 Q You don't want to do it too fast, do you? I mean, you don't
24 want to knock someone off or --
25 A No, it's just a gradual thing, one thousand one, one

1 thousand two. It doesn't take long.
2 Q And then did they extend the house out the length of the
3 remaining part of the wall?
4 A They're extending the hose as the reducer lays down. They
5 laid the whole unit down as one.
6 Q So I believe your testimony is that at this point you have
7 no ability to see your truck; is that correct?
8 A No, I could not see my truck.
9 Q You have no idea what's in the hopper or not in the hopper;
10 correct?
11 A Correct.
12 Q You have no idea whether it was full of concrete or not?
13 A I do not.
14 Q And you're told now we're going to start, they unkink the
15 hose; correct?
16 A Yeah, they unkinked the hose before we extended it out.
17 Q Did concrete start pouring into the wall then at that point?
18 A It fell out at that point, yes.
19 Q And then you pushed the button to start the pump?
20 A After we got the reducers down on the wall and the hose
21 stretched out, yes, I turned the pump on.
22 Q And you're standing there with Matt at that column that's by
23 the wheelbarrow in the picture --
24 A Yes.
25 Q -- when you pushed the button to start it?

A The first time, yes.
Q How many strokes do you believe occurred before you lost radio signal?
A Approximately two strokes.
Q How can you tell that?
A You can hear the surge. You can hear -- it's a weird sound. It's like concrete going through a pipe. It's got its own distinct sound. So you hear it move and then it'll stop, so that's one stroke, and then you'll hear it move and it'll stop. It stops briefly as that S-tube in the back is shifting over. So it moved once, it moved twice, shut off.
Q And you don't know how much concrete is actually pumped out, what the quantity is in a stroke; is that right?
A Not at that point, no.
Q At any point?
A At any point, no.
Q When you had kinked the pipe after the slurry and then all the way up until you had placed it and it was unkinked, was it fully loaded with concrete that entire time?
A For the most part, yes.
Q Then when it turned off, you walked -- it looks like in the picture, what would you estimate to that column to the two columns over? Like 30 feet?
A Yeah, that's about right because I think they were 15 feet apart.

BY MR. MOORE:

Q Now, the incident as described is consistent with being caused by air in the system; is that correct?

A Yes.

Q And is your testimony that nearly or a hundred percent of the time that air is in the system that it's caused by not enough mud being put in the hopper?

A Yes.

Q Are you speculating in those two statements?

A No, I pretty much can say without a doubt that that's most of the problem.

MR. MOORE: That's all the questions I have. Thank you very much.

FURTHER EXAMINATION

BY MR. HANSEN:

Q Where does the concrete truck operator, where does he or she stand when they're operating the truck to have concrete flow down the chute?

A They're standing at the back of their truck right next to the hopper.

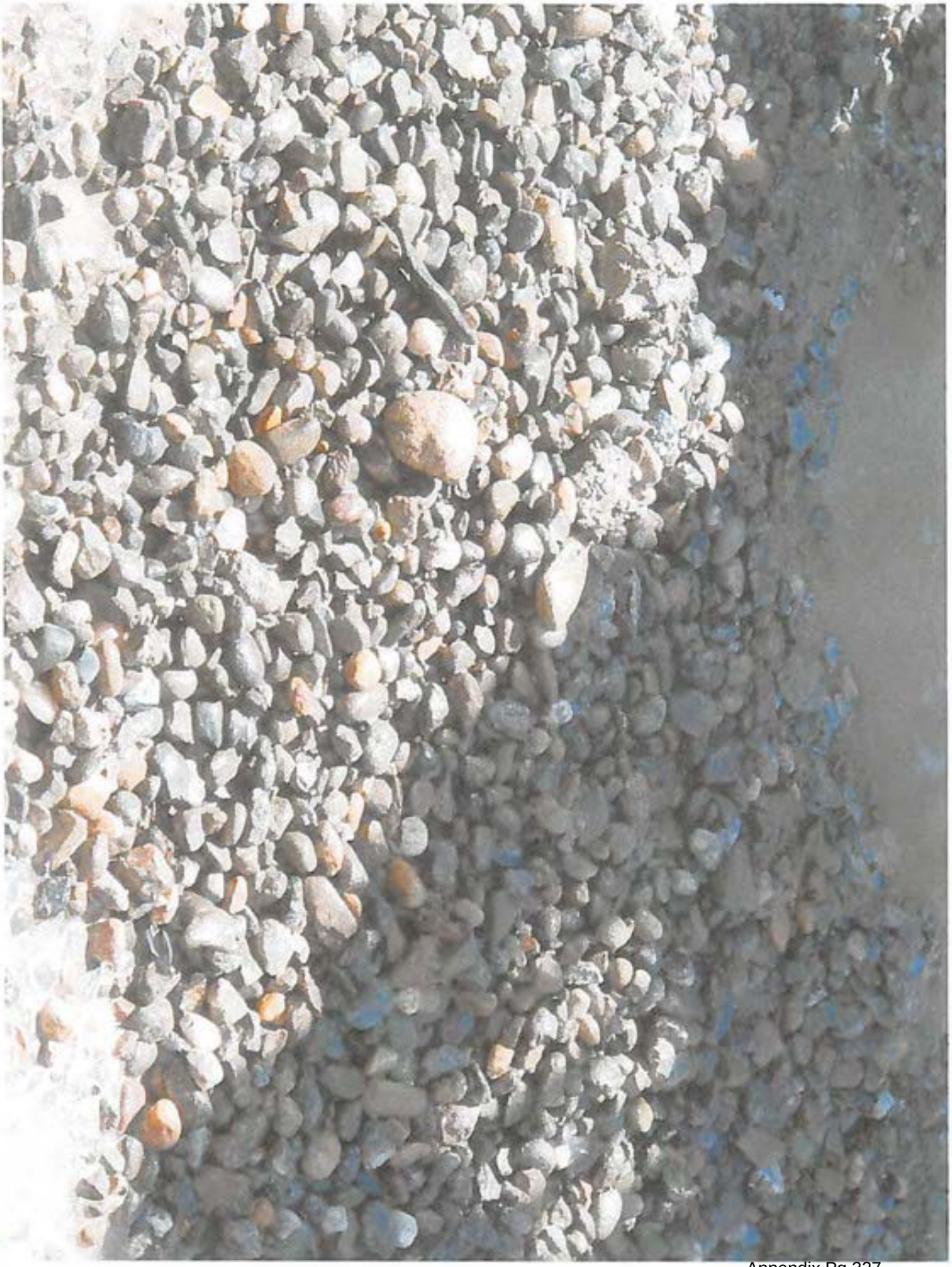
Q And what kind of controls do they have?

A Every mixer is different. Some of them have remote controls, some of them have a wire control remote, some of them have the old-fashioned lever kinds. They're all different.

Exhibit 26

EXHIBIT 1
WIT: Howell
DATE: 2-12-15
ELAINE RIPPEN, CCR
LANDAVAZO
United
BATMAN

4



b

12

Exhibit 27

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children,	)	
Plaintiffs,	)	
vs.	)	No. 13-2-32219-6 SEA
INLAND GROUP P.S., LLC, a Washington limited liability company,	)	
(Caption continued on next page.)	)	

DEPOSITION UPON ORAL EXAMINATION OF

DEREK MANSUR

1:00 p.m.
Thursday, September 29, 2016
663 Pease Road
Burlington, Washington

BRANDICE L. PIVAR, CCR
NORTHWEST COURT REPORTERS
1415 Second Avenue, Suite 1107
Seattle, Washington 98101
(206) 623-6136
www.northwestcourtreporters.com

(Caption cont'd)

INLAND WASHINGTON, LLC, a)
Washington limited liability)
company, RALPH'S CONCRETE)
PUMPING, INC, a Washington)
corporation, and MILES SAND &)
GRAVEL COMPANY, d/b/a CONCRETE)
NOR'WEST, a Washington)
corporation,)
)
Defendants.)

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(206) 624-7990

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21	Handwritten notes, 1 page	6

A Um-hmm.
Q And what jobs have you worked from February '16 to now?
A I want to CalPortland.
Q And what is CalPortland?
A They are a ready-mix company. Well, aggregates, and they supply a lot of the ready-mix plants with concrete powder. They're up and down the West Coast.
Q And where were you based out of when working for CalPortland?
A Everett.
Q And how long did you work there?
A I worked there for, goodness -- until this last July.
Q And then where did you work?
A Then I got my job with Stanwood Redi-Mix.
Q And that's where you work for now, right?
A Yes.
Q Okay. All right. And as you know, we're here today to talk about Gildardo Crisostomo Vargas's injury at the North City apartment job in May of 2013. Do you have any recollection of that?
A Yeah. I remember the day and the situation, yes. It was three years ago, so it was a good refresher to go through the exhibits on what I had written down because these were written down the day of.
Q Now, generally, what do you know about that incident?

A That I showed up on the job; I was the first truck on the job and that where the pump was set up was out of view of where I could be seeing what was going on, on the job site. And my sole responsibility for being on the job that day was to provide the concrete and make sure the pump got the concrete to the pumping into the walls.

Q Now, do you remember when you found out you were going to be going to this location?

A For the deposition? I guess --

Q That's good.

Yeah, if, if I -- my question's confusing.

A Oh --

Q Yeah.

A Sorry.

Q No, no, let me rephrase. Thank you.

So I have the address on or near 1220 Northeast 175th Street in Shoreline, King County, Washington. Is that accurate to the best of your recollection?

A Yes.

Q Okay. So when I refer to the job site, that's the job site that I'm referring to. Okay?

A Okay.

Q Okay. So my question now is, when did you first find out that you were going to that job -- that job site?

A We don't find out the jobs we go to until a ticket is

printed off. So our day is not preplanned.
Q Now, when you're referring to a ticket, we have a couple of exhibits marked 15 and 16. Is this the ticket you're referring to?
A Yes.
Q Which one was yours?
A My ticket is the one with Truck 140. It should have my name on it, as well. But I don't see it. If you need another example of which ticket was mine, I also mark on my Redi-Mix tickets if there's extra concrete, what I do with it. And the top ticket on this exhibit it says (As read): Pour full load at topsoils.
That one is mine.
Q Okay. So that's my -- that's if you look at the official copy, which is in your stack there.
MR. WRAITH: I think it's 15.
Q Probably under the pictures.
A Yeah. Oh, yes, there we go.
Q All right. So Exhibit 15, that's the ticket you're talking about, right?
A Correct.
Q Okay. And is this your handwriting, where it says (As read): Pour full load at topsoil?
A Yes.
Q And what does that mean?

A Pacific Topsoil. It's just to save the handwriting. It's a company that's next to Miles Sand & Gravel. And we were taking extra concrete there instead of dumping it at the plant.

Q So could you kind of decode this ticket for us and tell us what -- I guess, what this means, starting from the top line?

A The top line, that's the -- how many yards of concrete I took, which is 10 1/2. And the second line looks to be the same thing, except it says, "Environmental compliance," I'm not sure exactly what the numbers on the top line mean, that would be some sort of code that dispatch follows. Then the third line down, it's a fuel surcharge that the company charges the customer. And then there's a box below, there's a liability statement. Those are to be signed by residential customers, usually, the ones that are paying in cash.

It says what I'm doing, and it says "WALL." And the type of slump, which is how wet the concrete is what they're expecting. When you get into that box on the right-hand side, there's different boxes. It has an amount which is not shown because it's a contractor. That's between the company and the contractor. It has time of when I left the plant on the lines below, which is 7:03, and then the other boxes I have to fill out when I arrive at the job, when I

leave the job, and when I return to the plant.
Q Okay. Let me -- hold up.
So this would say that you left the plant at 7:03 a.m.; is that correct?
A Correct.
Q And the next time is 8:10, is that arrived at job?
A Yes.
Q So you arrived at the job site at 8:10 a.m.?
A Correct.
Q And then the next one is leave job at 8:55 a.m.?
A Yes.
Q And then 10:15 a.m. is when you returned to plant?
A Correct.
Q What kind of concrete is slump?
A That's not a type of concrete. That is how wet the concrete is. So the higher in number means the drier the concrete is. A 4 is a standard for a slump on concrete.
Q Now, what is the range?
A You can measure concrete up to a seven-inch slump, I would say. Anything beyond that is almost unmeasurable because the way they measure concrete is how high it stands on the ground. If it gets too wet, it's just going to flatten out.
Q So slump 4 means -- how is that measured? Could you describe that for me?

A Usually, a inspector will test concrete with a cone. They will take it out of -- as it drops down the chute, they will take scoops of it, put it in a five-gallon bucket, bring it over to a flat surface area. And then from there, they will put this concrete in the cone; they'll flatten out the top, make sure it's all in the cone. How should I say it? There's no air pockets in it so they'll kind of tap on the cone around it and then they'll lift the cone up to see how far it stands up and then they'll measure that to see what type of slump it is.

Q So in this case, it was four inches measured -- where is the measurement from?

A Can you specify?

Q Yeah. You mentioned there was a -- there was -- a seven-inch slump is kind of the max that they could measure; is that right?

A I would say so.

Q So where would the seven inches be measured from? Is this from the bottom of the cone --

A From the bottom up.

Q Okay.

MR. CHAWES: Can I just interject a real quick question? Is slump an inches measurement, or is it some other scale?

THE WITNESS: Yes, it's an inches measurement.

MR. CHAWES: Okay. Thank you.

Q So they fill the five-gallon bucket with, with the concrete and then they put it up, upside down; is that right?

A The -- I'm not -- I haven't spent a whole lot of time watching inspectors take the measurements because usually after they take the measurement, I'm pouring concrete and they're off by their work truck or something to do it. But from what I've seen, is that -- how do they do it? They fill up this cone -- I think the cone is -- they either dump out the concrete out of the five-gallon bucket and then they set the cone over it or they set the cone down and fill it up, fill the cone all the way up. It's like a metal cone, and it has two handles on it and it sets down onto the concrete.

Q In this case, the four-inch slump measurement, is, is four inches how high it stands after the cone, or is four inches the reduction from the top?

A It's the reduction from the top, from what I understand.

Q And four inches is, is normal?

A Yes. That is a standard slump that usually will go on a ticket for almost anything because it holds together well. From a four-inch slump, if they want something wetter, it's easier to add water to that and gauge what the water's going

to be.
Q Does anything here tell you the kind and amount of aggregate that was used?
A Let me look. Where you would find what type of aggregate and what type of concrete you would get in this load, you would look at the mix code, which drivers were not told what mix codes meant. If you wanted to know what the mix code meant, you would have to ask dispatch. They have certain codes that they put in there. But -- another reference as to what kind of mix you do have would be in that secondary box I was talking about with the times and it says it's a wall that we're doing.
Q So what kind of aggregate do you believe would be used in this wall on the job site?
A I think it was a three-eighths? No. There is a three-eighths or a seven-eighths. They didn't really provide a whole lot of information as to what the codes meant for the drivers. That was more for the batch guys to batch up the load correctly and what the specifications were. The part of the ticket that we paid attention to, especially, like, on jobs like this, was what type of slump they wanted because there was usually, for jobs like this, an inspector on site and they -- you know, they're looking for that four-inch slump and how many gallons of water that we were allowed. And you would find the gallons of water

that were allowed at the bottom ticket on the very far right-hand corner as -- it says to add 16.1 GL. Those were the main areas that I needed to pay attention to for delivering concrete.

Q Okay. So what is the one -- the 16.1 gallon to add mean to you?

A That means that's how many gallons of water is allowed to go into the load once I show up on job. Once -- while you're in travel, concrete will dry up if it doesn't have a chemical to hold it at its current slump. So when you get there, they will use that to add mark to bring it back up to the slump that they would want.

Q Now, let's go back up to the top. So where it says, "10.50 YD," is that yard?

A Yes.

Q Okay. And the next line down, it says, "10.50 CY." Is that cubic yard? What is that?

A Yes.

Q Is there a difference between yard and cubic yard?

A Not to my knowledge.

Q Do you know why they have different letters here?

A I think the first one is their -- for their mix code. And the second one would be for the customer and it says, "Environmental compliance" on there. I'm not quite exactly sure what that means for me as the driver. But I'm sure for

wall. From that point, he went into the job site, which I -- at that point, I couldn't even see him or anything else that was going on. And I saw the boom go up over the wall. And from that point, it's, it's whatever anybody else saw. It's -- anything I would say would be a guess of what was going on behind the wall because it was out of sight of me.

Q Okay. At any time this day, the date of the incident, May 23, 2013, did you ever go on the other side of that wall?

A No.

Q Or were you ever able to see anything on the other side of that wall?

A The only time I was ever able to see anything on the other side of that wall is months earlier when that wall did not exist.

Q Now, was the pump operator using a remote control of any kind?

A Yes.

Q Now, when did you first see him start to use that?

A I had seen him use it when we started to pump because that controls when the pump goes into operation and it starts pumping the concrete. And a little bit when he raised it up high enough that it would clear the wall. Any more use of the control I did not see because he was on the other side out of sight.

Q Do you know if there's a way to control the pump truck, including the boom and the pump speed, from the truck itself as opposed to using the remote?

MR. CASEY: Object to form.

A No, I have never seen that. I've seen remotes with wires connected to them that will have, like, 50 feet of wire so they can walk into a job site with it. And this particular pump had a radio controlled -- controller for it.

Q Okay.

A So I've never seen one that's worked at the truck itself.

Q All right. So after he primed the pump and he raised the boom to go to the other job site -- sorry. After he moved the boom to the other side of the wall, where did you see him go, the pump operator?

A If I remember correctly, there's an entrance to this job site through -- I think there was a entrance to it on the right of Exhibit 1, but I'm not exactly sure how he got into the job site. I think that was the way that he had taken.

Q And how far away was that entrance from the truck?

A I would say 30 feet. I don't remember exactly where that entrance was.

Q Now, he went -- now, when he went to the other side at that time, were you in communication with him in any way?

A No, there's no -- the only way to communicate with a pump truck driver when he's away and out of sight is through a horn that is located at the back of the pump truck or an emergency stop switch. So he can sound that horn, or I can press the button for the horn.

Q So he can sound the horn from the remote?

A Yes.

Q And it's a horn like a horn in a car?

A No, it's louder. It's not quite an air horn. I would say it's more like something you would hear from an alarm almost. But it's quick. It's not an extended period of sound; it's more like if you would press on a horn and let your hand off right away.

Q So it's a loud alarm; is that right?

A I would say so, yes.

Q As opposed to be something that you could -- you know, a speaker you could give verbal commands to?

A There's no speakers to communicate with him at all.

Q Okay. And the emergency stop, who has access to that?

A I do. And then there's an emergency stop on the -- I'm not -- I'm not exactly sure on this particular remote, but I would have to say that most of these remotes that I have seen have an emergency stop switch on them, as well. But there is an emergency stop switch next to the hopper. If something were to go wrong, you can hit that and it will

shut off all operation of the truck.
Q And this is something that you would do in case of an emergency?
A Yes. If there was something going on at the back of the pump truck, I could hit that switch and turn off the truck.
Q Okay. Under what circumstances would you hit the emergency stop?
MR. CASEY: Object to form.
A If there was something going wrong with my truck and it had stopped working and he was continuing to pump, that would be a scenario. If there's something going wrong with his truck and I needed to stop it because let's just say a hose blew out, one of the metal ones, or the truck caught on fire or something, I could hit that horn and shut everything down.
The other instance, I would say, too, is if I'm out of concrete and let's say I've hit the horn button to notify him that I am done pouring concrete and he doesn't hear that, then I can hit the emergency stop, as well.
Q Okay. So in this particular instance, so what happened after you saw him go to the other side of the wall?
A At that point, I'm waiting for the pump to start pumping concrete. And you can get an idea of when that's going to happen, because you can hear the RPMs go up on the

pump truck. That means that basically the engine's getting ready for that pump to be operating. He can't -- I mean, you can operate it at a low RPM, the concrete will just come out very slowly.

I heard the RPM's rev up. And what will happen is, these pumps take strokes that make not always a loud banging sound but a noticeable banging sound. And the concrete will go down maybe an inch at the most before that bang sound happens. I noticed the RPMs go up and the concrete go down just a slight and it shut off. And that was -- that was what happened next. Not even -- the concrete didn't even go down an inch.

Q And was the hopper full at that point?

A Yes.

MR. CASEY: Object to form.

A We were -- at that point, it was primed, hopper was full, and we were waiting. I was waiting for him to start pumping concrete.

Q And the concrete in the hopper went down an inch and then it stopped again; is that right?

MR. CASEY: Object to form.

A Yes. As soon as it started, it basically stopped. It didn't have enough time to even make that bang sound indicating that it even took one stroke.

Q So less than one stroke?

A Yes.
Q And how much time elapsed in that less than one stroke?
A Seconds. I mean, not even five seconds.
Q Okay. And then what happened?
MR. CASEY: Object to form.
A Waited -- I waited a little bit longer because, I mean, that's my main job. I'm there waiting, ready to pour concrete. The truck started. Like, it seemed it was going to be going again, and automatically it stopped again. So this happened twice without even taking one stroke.
Q And the second time it happened, again, was this a matter of seconds?
A Yes.
Q And what was the level of the concrete in the hopper at that time?
MR. CASEY: Object to form.
A I had hit the start button on it, so maybe a chute full of concrete had already gone into the hopper. Any more than that, the hopper would've been overflowing. The general rule for pouring concrete is, you want it to keep it at grate -- at the grate level. If you fill it up more than that, and the concrete -- and the boom plugs, what happens is they have to back up the pump, which would be putting concrete from the boom back into the hopper, which, if you were filling it up too much, would overflow and then cause a

bad attitude from the pump driver.
Q All right. So then after the second time it stopped, what happened?
MR. CASEY: Object to form.
A The pump operator came down. He said, "Hey, I need you to put a hold on the rest of the trucks," and that's -- I called into the office. I said, "Hey, put a hold on the trucks."
I'm not exactly sure how that conversation went. I just let them know, "Hey, don't send trucks until we call back." And then ambulances showed up, I would say, probably ten minutes after I had called in, possibly sooner.
At that point, I still hadn't known what was going on, on the job site. Like I said, my only point of view was my truck and the hopper. I was so close to the wall, you couldn't -- I mean, you couldn't see over the wall at all.
Q At any time during that instance -- strike that.
At any time before the pump operator came back and said put a hold on the rest of the trucks, did you hear any shotgun sounds or unusual noises?
A No unusual noises, no.
Q Did you hear anything that sounded like a shotgun?
A No. The only sound that I could hear was the motor of my own truck and the pump truck.
Q And how loud are they?

A They're loud enough to warrant using ear protection.
Q Did you have ear protection on at the same time?
A Yes.
Q What kind of ear protection?
A Standard ear plugs, not the earmuffs but ear plugs.
Q Do you remember the exact words that the pump operator said when he came back?
A "Hey, put a hold on those trucks." That's the best I can remember.
Q Did he say anything about anyone being injured?
A No.
MR. CASEY: Object to form.
Q When did you first find out that there'd been an injury?
A I think it was when our sales guy showed up, Dan Nelson. And I kind of came to that conclusion, as well, when the ambulances showed up.
Q And how long did the ambulance take to show up after you were told to put a hold on the truck?
A I think it -- I think it was ten minutes. It could've been sooner; it could've been a little bit longer. But ten minutes would be pretty close to what I can remember there.
MR. HANSEN: Derek, is there a good time to take a break somewhere in here?
MR. MOORE: Yeah, we can take a break now.

A Todd Carr.
Q And what do you remember about those conversations?
A Basically, they wanted to know what happened on the job. And I'm telling -- I told them exactly what I'm telling you today. I mean, there's not much I could see beyond that wall. It was just like any other time I've shown up to a pump and primed it up and waited for them to start pouring.
Q Do you know if -- strike that.
Did either Mr. Cox or Mr. Carr tell you what they thought happened?
A No. They just wanted to hear what had happened. And then, from my knowledge, there was pictures taken by our company of what everything happened and they came to their own conclusions from that, I would assume.
Q The pictures which have been marked as the exhibits in your deposition today, do you know who took those?
A As far as I'm aware, I think it was Dan Cox. I'm not sure.
Q Did you take any pictures at the scene?
A Not that I remember, no.
Q And this indicated that you left the scene at -- left the job site at 8:55. Again, I'm referring to Exhibit 15. Is that accurate?
A Correct.

Q So how long did you stay at the job site after the incident?

A From 8:10 to 8:55 is when I was there, so I was on-site for 45 minutes. During that 45 minutes, the incident occurred, and at that point, I was waiting to see what my boss said, or the company said, whether we were staying or going or waiting for more trucks.

So that 8:55 time frame, at the end of that time, I was told to head back to Concrete Nor'West and I called from there and asked them what they wanted me to do with the -- all the concrete I had on, which was -- I would say -- there's no way of measuring exactly how much it is, but priming a pump takes about a half of yard of concrete so -- and by looking in there and the pressure's set on my axles, I went back with ten yards.

Q Okay.

Now, did anybody else from Miles show up at the job site while you were there?

A Dan Nelson.

Q And who is he again?

A He's our main salesperson.

Q And when did he show up?

A I don't have an exact time frame. I think it was close to that 8:55 mark, because he was the one who said, "Hey, we're all done. We got to go."

Exhibit 28

Arrived on Job at 8:10 am had pump driver
back me up to pump he filled his hopper with
water to prime up. inspector was there
with pump operator. I discharged mud so they
could check slump they said it looked good
and to fill the hopper with mud I did and
pump driver had end of hose to passenger side
of truck and pumped mud until water was clear
of the line. At no time during this process
did the hopper run low. once pump was primed
the operator lifted the boom up over the wall.
The inspector and I were waiting for the
pump to start so he could take a sample.
The pump sounded like it was ready to go
and the mud started to go down in the hopper
and at the same time I hit the start
button to discharge. The pump didnt even have
time to take one strake and my barrell didnt
have time to make one turn before it shut
down. The hopper was still full. waited 5 min
and the pump once again sounded like it was
going to start then almost instantly stopped
no less than a minute later the pump operator
said to hold on more trucks. The whole time
I and truck 149 could not see anything because
whatever they were doing was behind the wall.
about 5 min later an ambulance showed up.
The pump driver was talking to 149 & 143 and I

EXHIBIT 17
WIT: Mansur
DATE: 09-29-16
Brandice L. Pivar, CCR

Caught the last part of the conversation
and heard that the pump driver had to replace
the battery in his remote control. waited 15 more
minutes and den nelson said the job shut down
I washed up and came back with at least
10 yards of concrete.

Derek Manser

5/24/13 10:15 am
Truck # 140

Exhibit 29

Operating Instructions

for machine operator and maintenance staff

always keep by the machine

Truck-mounted
concrete pump

BSF46

Machine no.

Boom no.

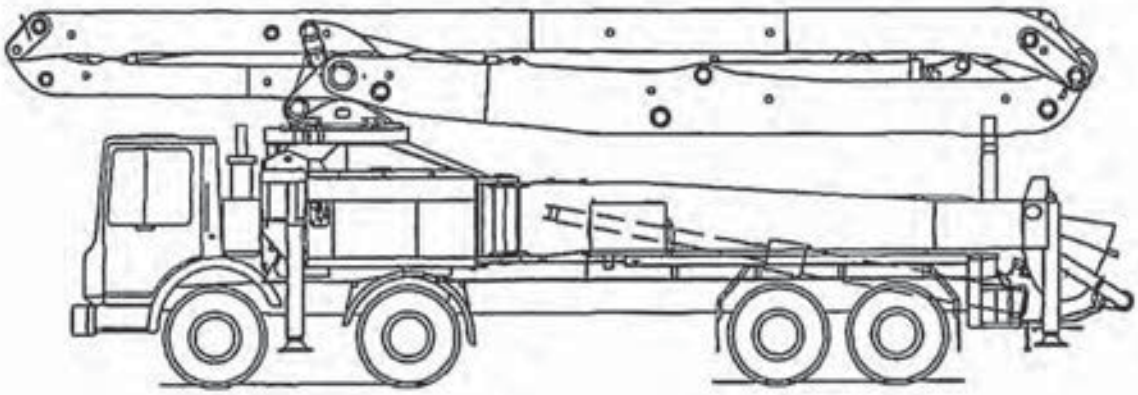


EXHIBIT 6
WIT: Harrell
DATE: 2-19-15
ELAINE RIPPEN, CCR

EXHIBIT 11
WIT: Henson
DATE: 1-20-15
ELAINE RIPPEN, CCR

P/N A820085
Rev. B
September 2002

Injuries caused by falling boom arms if isolators are opened without first ensuring that the appropriate boom arm is secured.

Injury may be caused by the hose operator being struck by the end hose if this has become trapped in the reinforcement and suddenly jumps out on further movement of the boom. This danger also exists if a blockage is suddenly released. There is also a considerable risk of injury from the end hose striking out when starting to pump and during washing out as a result of entrapped air or sudden boom movements.

2.4.2 Danger zone

The danger zone when starting to pump and during washing out procedures is the area around end hose in which the end hose can strike out. The diameter of the zone is twice the end hose length.

1 Maximum end hose length 4 m
2 Danger zone = 2 × end hose length = 8 m

Injuries caused by the pump rolling because of brakes or support legs releasing.

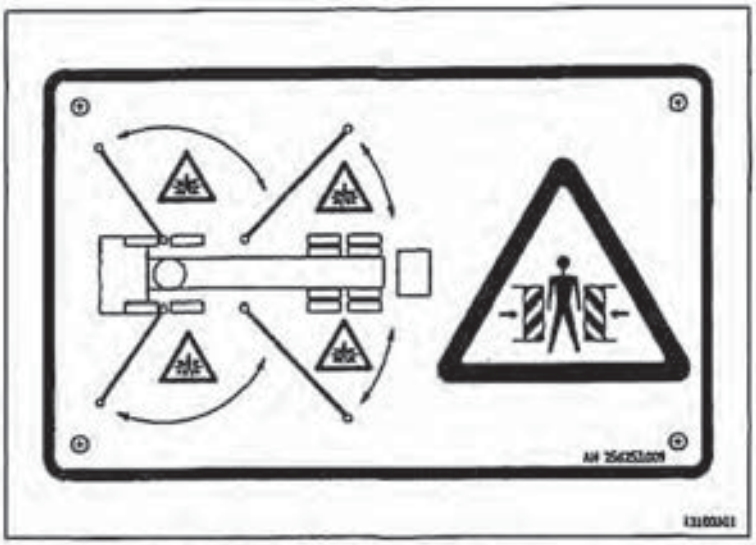
2.8 Danger zones

Unauthorized presence in the danger zone of the machine is forbidden. Warn persons present in the danger zone. Cease operations if such persons do not leave the danger zone despite a warning. The machine operator must be capable of seeing the danger zone at all times and under all circumstances. If necessary he must appoint an assistant to supervise the danger zone.

The machine operator is responsible for safety in the working area (danger zone) of the machine whilst the machine is in use.

The danger zone changes as the activities change.

2.8.1 Support legs



The danger zone when setting out the machine supports is the zone in which the supports are swung out or extended.

Danger of crushing

There is a danger of crushing in the area through which the supports may be swung out or extended.
You should therefore secure the danger zone.
Keep the danger zone under constant observation.
You must halt work immediately and press the EMERGENCY SHUT-DOWN button if anyone enters the danger zone.

2.8.3 End hose

The danger zone when starting to pump and during washing out is the area around the end hose in which the end hose can strike out. The diameter of the zone is twice the end hose length.

1 Maximum end hose length 4 m
2 Danger zone = 2 × end hose length = 8 m

Danger

There is a risk of injury in the area around the end hose if the end hose strikes out when starting to pump, after a blockage has been freed or during washing out. This zone is twice the end hose length in diameter.
The end hose must be allowed to hang freely.
Ensure that no-one is standing in the danger zone. Keep the danger zone under constant observation.
You must halt work immediately and press the EMERGENCY SHUT-DOWN button if anyone enters the danger zone.

2.14 Pumping operations

Make sure that nobody is at risk from the running machine before switching the machine on or setting it in motion.

Start machines from the driver's seat only. The driver's cab must be locked when you are operating the machine from the remote control to prevent unauthorized starting of the engine.

Always watch the control displays in accordance with the Operating Instructions during start-up and shut-down procedures.

2.14.1 Place of work

It is forbidden to climb onto the machine when it is in the ready mode

The place of work during pumping operations is at the remote control. It is forbidden to climb onto the machine when it is in operation.

2.14.2 Responsibility

The machine operator is responsible for the entire operational area while the machine is in use. It must be possible for him to observe this area in its entirety, otherwise a signaller is required.

Avoid any method of operation that might be prejudicial to safety.

Secure yourself agains falls by means of a safety harness and similar securing devices during any work on scaffolding, bridges and other parts of a building.

Avoid any method of operation that might be a risk to machine stability.

2.14.3 Noise

Keep all access covers, maintenance flaps, etc closed and locked during operation. There is a risk of injury on moving parts of the machine and a risk of damage caused by the increased noise stress.

Close access covers

2.14.13 Truck mixer drivers

As the machine operator, it is your role to instruct the truck mixer driver delivering the concrete to you. Only allow the truck mixer drivers to work alone once you are certain that the truck mixer drivers have understood your instructions.

Make sure that no-one stands between the approaching truck mixer and the machine, there is a danger of crushing.

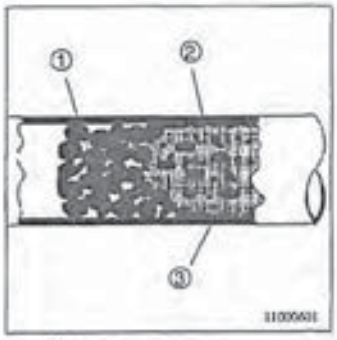
There is a risk of injury if persons become trapped by the truck mixer or parts of it (chute).

The agitator hopper must always be filled with concrete up to the mixer shaft to prevent concrete being sprayed because air has been sucked in.

Always fill the agitator hopper with concrete up to the mixer shaft.

2.14.15 Blockages

Avoid blockages. A properly-cleaned delivery line is the best insurance against the formation of blockages. Blockages increase the risk of accidents.



1 Wedged aggregate
2 Cement paste
3 Boundary layer

Danger

Never attempt to blast out a blockage with compressed air. There is a lethal danger as the delivery line might burst.

Injury may be caused by the force of bursting couplings, bursting pipes or plugs being rapidly ejected from delivery lines, end hose and pump hopper.

Always try to remove the blockage by reverse pumping and then re-starting forward pumping.

If the blockage is not removed, relieve the pressure on the entire system, and particularly on the delivery line, and then remove the section of delivery line concerned.

2.14.17 End hose

The end hose must hang freely each time you start pumping, when you start pumping again after blockages, and during washing out procedures. No-one may stand within a radius of the end hose length. Do not guide the end hose when pumping is started. The end hose can swing out or stones may be ejected and cause an accident.

2.14.18 Danger zone

The danger zone when starting to pump and during washing out is the area around the end hose in which the end hose can strike out. The diameter of the zone is twice the end hose length.

1 Maximum end hose length 4 m
2 Danger zone = 2 x end hose length = 8 m

Danger

There is a risk of injury in the area around the end hose if the end hose strikes out when starting to pump, after a blockage has been freed or during washing out. This zone is twice the end hose length in diameter.
The end hose must be allowed to hang freely.
Ensure that no-one is standing in the danger zone. Keep the danger zone under constant observation.
You must halt work immediately and press the EMERGENCY SHUT-DOWN button if anyone enters the danger zone.

Injury may be caused by the hose operator being struck by the end hose if this has become trapped in the reinforcement and suddenly jumps out on further movement of the boom. This danger also exists if a blockage is suddenly released. There is also a considerable risk of injury from the end hose swinging out violently when pumping is started.

A hose guide on the end hose makes the work easier and protects against injuries.

2.14.19 Bending

Never bend the end hose over. Never attempt to straighten a bent end hose by increasing the pressure.

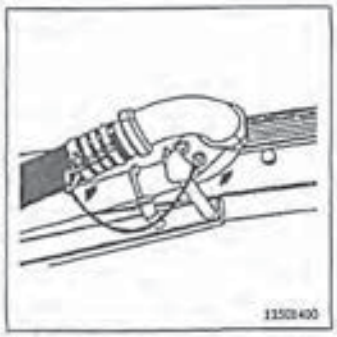
Do not bend the end hose

The end hose must not be inserted in the concrete.

End hose not inserted in the concrete

2.14.20 Securing

The end hose must be secured against falling.



Secure the end hose

Exhibit 30

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

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children,

Plaintiffs,

-vs- Case No. 13-2-32219-6-SEA

INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington Limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,

Defendants.

Video 30(b)(6) Deposition of PUTZMEISTER AMERICA, INC.
by THOMAS HURLEY
Friday, February 24th, 2017
10:10 a.m.
at
GRAMANN REPORTING, LTD.
740 North Plankinton Avenue, Suite 400
Milwaukee, Wisconsin
Reported by: Wendy L. Hanneman, RPR

Deposition of PUTZMEISTER AMERICA, INC. by, THOMAS HURLEY, a witness in the above-entitled action, taken at the instance of the Plaintiff, pursuant to the Applicable Rules of Civil Procedure, pursuant to notice, before WENDY L. HANNEMAN, Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at GRAMANN REPORTING, LTD., 740 North Plankinton Avenue, Suite 400, Milwaukee, Wisconsin, on the 24th day of February, 2017, commencing at 10:10 a.m. and concluding at 11:21 a.m.

A P P E A R A N C E S:

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A P P E A R A N C E S (Cont'd):

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CHRISTIE LAW GROUP, PLLC, by
Mr. Robert L. Christie
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Seattle, Washington 98109
Appeared telephonically on behalf of
Defendant, Ralph's Concrete Pumping.

von BRIESEN & ROPER, s.c., by
Mr. John G. Goller
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Milwaukee, Wisconsin 53202
Appeared on behalf of Putzmeister America, Inc.

ALSO PRESENT: Desmond Rodriguez - Videographer

I N D E X

EXAMINATION	PAGE
MR. MOORE	6, 48
MR. CHRISTIE	45
MS. PHAM	47

E X H I B I T S

NO.	DESCRIPTION	PAGE IDENTIFIED
Exh. 1	Operating instructions	12
Exh. 2	"Safety practices for pouring concrete with a concrete pump"	36
Exh. 3	Declaration of Tim Henson	
Exh. 4	Photographs	
Exh. 5	Photographs	
Exh. 6	Photographs	
Exh. 7	Photographs	
Exh. 8	Photographs	
Exh. 9	Video	38
Exh. 10	Amended notice of deposition	10

(Exhibits were retained by the court reporter. Originals attached to original transcript and copies to copy transcripts. Exhibits 3-8 were marked but not identified for the record.)

MR. MOORE: Counsel, Defense Counsel, per previous depositions, I will offer to stipulate that you object to form on every question that I ask, without having to interrupt the video and the court reporter. Would that be acceptable?

MR. CHRISTIE: This is Bob Christie. I'm not agreeable to that, because I don't object to many of the questions, and I don't want to be viewed as having a standing objection to every one of your questions. So I'm going to just object in short form when I deem it appropriate.

MR. MOORE: And could you read back the question?

(Question read back by the court reporter.)

THE WITNESS: All right. The definition of starting to pump, as far as Putzmeister's manuals are concerned, is any time you begin moving concrete with the -- with the concrete pump, until there is a continuous flow of concrete exiting the placing hose.

BY MR. MOORE:

Q Now, is starting to pump limited to the first time that -- the first time of the day that pumping operations are commenced?

A Short answer, no.

foundation to try to let you know where I'm going, and I think this is within the scope.

Q What does Putzmeister find to be causes of hose-whipping injuries?

MR. GOLLER: Object to the form.

MR. WRAITH: Join.

THE COURT REPORTER: Who was that?

MR. WRAITH: Steve Wraith.

THE COURT REPORTER: Thank you.

THE WITNESS: The primary cause of a hose-whipping situation is the forceful expulsion of concrete, rock, water, stone, air from the end of the hose.

MR. MOORE: And, again, both -- as the scope says, we're limiting this to the relevant time period, which I would represent would include the time of the manufacture of the 2002 Putzmeister vehicle and its use in May 23rd, 2013, which is the time of the subject incident. Is that agreeable to you, Counsel?

MR. GOLLER: Let's see where you go. I can't -- unless there's a question pending, I can't --

MR. MOORE: Okay.

MR. GOLLER: And, again, we have no --

MR. HANSEN: All right, thank you.

MR. GOLLER: And as a -- as a non-party, I suppose that does not cover me, but I don't have any objection to that.

THE WITNESS: The -- okay, may I answer?

MR. GOLLER: Yes.

THE WITNESS: Typically, the larger the aggregate based on the size or diameter of the pipeline, will have a higher tendency to plug than a smaller aggregate.

BY MR. MOORE:

Q And let's turn your attention to Number 60 in Exhibit 1. 2.83 End Hose. And, again, this shows that diagram or similar diagram that we talked about before.

And it states, "The danger zone when starting to pump and during washing out is the area around the end hose in which the end hose can strike out." Did I read that correctly?

A Yes, I believe you did.

Q And, again, what does "starting to pump" mean on this page?

A The same as it means --

MR. CHRISTIE: Object to the form, asked and answered. Bob Christie.

THE WITNESS: The term "starting to pump" is the same in all instances in this manual. It describes the time period from when you begin to move concrete with the pump, to the time you have a continuous flow of concrete from the end hose.

BY MR. MOORE:

Q And when starting to pump under that definition, the concrete workers who are pouring the concrete need to be outside of the danger zone; is that correct?

A That is correct.

Q And this defines the danger zone as two times the end hose length. Which if the end hose length was four meters, the danger zone would be eight -- eight meters; is that correct?

A The diameter of the danger zone is twice the length of any given discharge hose. So a four-meter hose would result in an eight-meter danger zone diameter.

Q So a 12-foot hose would result in a 24-foot diameter for the danger zone?

A That is correct.

Q Now, if the flow of concrete is stopped for any reason during a pour, and then started up again, would this danger zone apply?

MR. CHRISTIE: Object to the form. Beyond the scope. Calls for an opinion.

THE COURT REPORTER: Who was that?

MR. GOLLER: Christie.

MR. CHRISTIE: Bob Christie.

THE COURT REPORTER: Okay. Thank you.

THE WITNESS: Each time you begin to move concrete with a concrete pump, until there's a continuous flow of concrete from the end hose, is considered starting to pump.

BY MR. MOORE:

Q Let me turn your attention to Ralph's 65. And, actually, could you hold that picture up to the camera?

THE VIDEOGRAPHER: Hold there for just a second.

BY MR. MOORE:

Q Now, it references securing couplings on the top, and not removing the grill on the bottom. Do either of those -- strike that.

Does failure to secure the coupling result in a hazard of possible hose-whip incidents?

MR. GOLLER: Form.

THE WITNESS: The, um, hose whip has, or a improperly secured coupling would have no effect

A I'm -- I would -- I would say that this simply says that it's less likely to slip from his hands if there's some type of hose guide on the hose. Um, there is no recommendation or particular design of such -- of such a device that we offer.

Q And is it true that under no circumstances, with or without a hose guide, a pump man should be holding the hose when it's starting to pump?

MR. GOLLER: Object to the form.

THE WITNESS: Based on our definition of starting to pump and our cautions about being next to the hose during the time that we're -- we're going through the starting to pump sequence, no person should be near the hose, therefore, they should not be holding onto the hose, or a hose guide.

BY MR. MOORE:

Q And let's look at the next page, Ralph's 102. The -- under 2 dot 14 dot 19, "Bending." And you see where it says, "Do not bend the end hose"?

A Yes.

Q Now, could you hold that one up to the camera? Does bending the end hose make hose-whip incidents more likely to happen?

A The end --

MR. CHRISTIE: Bob Christie. Object to the form. Beyond the scope.

THE WITNESS: Bending a hose while you're pumping would put a significant blockage, create a significant blockage, which the concrete pump pressure would attempt to straighten. And, yes, that would result in a potential hose-whip incident.

BY MR. MOORE:

Q Now, is it acceptable to stretch the end hose out alongside the top of a form as opposed to letting it hang freely?

MR. CHRISTIE: Bob Christie. Object to the form. Beyond the scope. Calls for an opinion.

THE WITNESS: The -- the information that we provide in this manual indicates that during the procedures that we call priming, that we want the hose to extend vertical, downwards. The -- whether or not laying a hose down with, you know, while you're pumping, without -- without necessarily bending it, because there is a swivel joint, I'm not sure what the ramifications of that would be. I've never -- never pumped concrete, so I have no idea what that does to the system.

BY MR. MOORE:
Q So does Putzmeister have any recommendations, either against or permitting a -- an end hose to be laid out flat, other than the bending restriction?
A The -- it's not a desirable condition, but I'm not sure if there's anything in here that actually says you can't do that.
Q Okay.
MR. GOLLER: One thing that we didn't talk about prior to the -- starting this exam, is that if you need a break at any time, just let any of us know, so long as there's a question not pending. So, please, we've been going almost an hour, so if you need something, let us know.
THE WITNESS: I'm good.
BY MR. MOORE:
Q Okay. Actually, it might be a good time to take a break. But first, I just have a couple of questions about Exhibit 2.
And if you turn your attention to, I guess Item Number 3 in Exhibit 2, and I'll read it. "When the time comes to pour the concrete, take the halo off the hose carefully while moving away slightly from the hose, period. If at any time you hear or sense a plug, comma, duck and cover" --

underlined duck and cover -- period. "Do not try to unclog the hose. Move away from the hose. This includes the hose man, comma, vibrator operators and any other people near the hose."

Does this safety practice comply with Putzmeister's safety recommendations regarding avoiding hose-whipping incidents?

A No.

MR. CHRISTIE: Bob Christie. I'm going to object to the form as beyond the scope.

BY MR. MOORE:

Q Why not?

MR. CHRISTIE: Another objection. Beyond the scope, calls for an opinion. What section of the -- of the notice are you asking this based on, Derek?

MR. MOORE: Based on Number 2.

MR. CHRISTIE: I don't think it's under Number 2 at all. I'll maintain my objection.

THE WITNESS: And the specific question is?

(Question read back by the court reporter.)

THE WITNESS: Putzmeister's recommendation is that you be twice the length of a hose away from the hose when you're starting to

pump. This does not discuss any particular distance that you have to be away from the hose.

MR. MOORE: Thank you. And I think this is a good time for a break, if we may?

MR. GOLLER: Sure. Five minutes?

MR. MOORE: Five minutes should be good.

MR. GOLLER: Yep. Yeah.

THE VIDEOGRAPHER: All right. We are going off the record at 11:01 a.m.

(Short recess taken.)

THE VIDEOGRAPHER: We are back on the record at 11:07 a.m.

BY MR. MOORE:

Q Now, I'm going to -- I'm going to show you the video which has been marked and entered as Exhibit 9. I have it up on my iPad here.

And I'm just going to ask you if the procedure that you see being done here is being done in accordance with Putzmeister's safety recommendations for avoiding hose-whip injuries.

MR. CHRISTIE: This is Bob Christie. I'm going to object to that entire procedure. It's completely beyond the scope of the notice. Calls for an opinion. This is a fact witness under 30(b)(6), and this is a completely improper

procedure for which you have not obtained Court approval.

MR. GOLLER: I'm going to join.

MR. MOORE: And I'm, again, asking the fact, is this being done in accordance with Putzmeister's recommendations?

MR. CHRISTIE: Since you've engaged me, I will respond. You are not asking him for a fact, you are asking him for an opinion. You did not seek Court permission to solicit opinions. In fact, he shut you down on the effort to solicit opinions from Mr. Wood.

This is clearly an opinion question, it is not a fact question. And it's not proper, and your procedure is not proper. And it is not listed in either of the two items in the 30(b)(6) notice.

MR. GOLLER: I join the objection.

MR. MOORE: Okay. And -- well, again, I submit that this is within the scope of Number 2 and what we've been talking about so far. Since -- since I'm already here in Wisconsin, the witness is here, we'll just ask him the question. If you want to move to strike or exclude it before the Court, then we can have that done at another time. Is that okay?

MR. CHRISTIE: Well, it's not okay as far as I'm concerned. Because the purpose of a 30(b)(6) notice is to give advanced notice of very specific areas of testimony. And this was the notice placed before the Court prior to your motion that resulted in an order that permitted this deposition to go forward.

You cannot point to any language in your notice that gives you authority to ask opinion questions of a witness about an incident that is completely outside the scope of his knowledge. So this is one hundred percent improper.

MR. MMOORE: And, again, I submit this is a factual question as to -- regarding, you know, what is meant by continuous flow, and what -- and what is meant by starting to pump and being in the danger zone. I'm going to ask him these things. And this is, you know, Putzmeister's recommendations.

MR. CHRISTIE: With -- with all respect, Counsel, that is not at all consistent with the question that you just indicated you were going to pose. You are not asking him about the definition of start-up, which you've asked him about and he defined. Not asking him about anything in the

manual. You're not asking him about anything factual within the knowledge of Putzmeister.

You are asking him for an opinion about a situation of which he has no personal knowledge. You're going to provide partial information in the form of a video and solicit opinion. And you did not ask Court permission to do that.

We are going to seek sanctions from the Court if you engage in this process, because it is completely improper. And it's not simply a matter of you doing it and then asking -- we asking to have it stricken. This is not how you proceed with a 30(b)(6) notice, especially when you have to get a Court order to conduct an out-of-state deposition.

If you had done this, we would have sought -- we would have sought a Court order that would have prohibited this. You didn't seek this. And so now you put us in a situation where you're raising issues that are not proper.

MR. MOORE: Well, again, I disagree with your objection. And the other alternative is that I don't ask him the question, and that we bring a motion before the Court having us come -- having me, at least, come all the way to Wisconsin, having

the witness and his counsel come back. And then, um, having the Court order sanctions against you for impermissibly stopping this.

With that in mind, I think it would be more efficient and less wasteful to just ask him the question. So I will proceed with asking him the question, and if you want to move for sanctions for doing so, then your objection has been noted. But I will ask him the question. Okay?

MR. CHRISTIE: Why -- why would you -- why would you seek sanctions against me? I missed that.

MR. MOORE: For stopping me from asking permissible questions and occasioning having to either return to Wisconsin or bring him to Seattle.

MR. CHRISTIE: I'm not -- I'm not suggesting --

MR. MOORE: You're telling -- you're telling me that I should --

MR. CHRISTIE: You set up this scenario. This could be completely done remotely if the Court were to permit it. But you did not ask the Court for permission to do what you are now doing, and it is not listed in the notice. And I can't stop you from doing this, I'm making my record clear. And

I'm trying to persuade you about the error of your ways. But I understand that you may respectfully disagree with me.

MR. MOORE: I know that you really don't want this question asked, but I will ask it anyway. And if you want to bring a motion for sanctions, you've preserved your objection. I'm going to ask it.

MR. CHRISTIE: Your editorializing is not appropriate, and --

MR. MOORE: You've made your point.

MR. CHRISTIE: -- it has nothing to do with whether I want this asked or not.

MR. MOORE: You --

MR. CHRISTIE: My position is based on the rules, and based on your notice, and what the Court authorized you to do. Doesn't involve personal opinion.

MR. MOORE: And I respectfully disagree. This is a factual question. Please just let me ask it and we can be done today. Thanks. All right.

MR. CHRISTIE: I can't stop you.

BY MR. MOORE:

Q Again, and the question is, is what is seen shown in this one-minute video that has been marked as

Exhibit 9, is that being done in accordance with Putzmeister's instructions in the manual?

MR. GOLLER: And I am going to object to the form.

BY MR. MOORE:

Q And I'm playing it now.

(Video played for the witness.)

THE WITNESS: It's completed. The -- the video shows a, um, operation of several people placing concrete into a wall form, I believe. Um, based on what we have in our manual, this doesn't appear to comply with our recommendations.

BY MR. MOORE:

Q What particularly in the video is out of compliance with Putzmeister's recommendations?

A Several people appear to be in the area that we define as the danger zone, and they're there prior to the completion of the starting to pump sequence.

Q Thank you very much. And that's all the questions I have today. Unless I have some follow-up from the others.

MR. GOLLER: Any questions on the phone?

MR. CHRISTIE: This is Bob Christie. I'm happy to go. I've got just a couple of really brief questions.

MR. GOLLER: Go ahead, Bob.

E X A M I N A T I O N

BY MR. CHRISTIE:

Q Thank you. Good morning, sir. I just had a couple follow-up questions to your testimony. You gave a definition of the term "start-up" that you were asked about. I'm wondering, is there any language in the manual itself that speaks to the definition of that term?

A Yes, sir, there is.

Q What -- what page is that on?

MR. GOLLER: Take your time.

THE WITNESS: Yeah, I've got to find it.

MR. GOLLER: Yeah, take your time. It's a large document.

MR. CHRISTIE: Yeah, please, take your time.

THE WITNESS: Okay, I would direct everybody's attention to Ralph's document Page 321. I bet they want a picture of it.

BY MR. CHRISTIE:

Q What's the section number?

A It's Section 5.10.3.

Q Thank you.

A "Starting pumping."

Q Thank you. I'm just trying to catch up with you, sir, thank you.

So this page would contain that definition that you essentially provided to us earlier; is that --

A The --

Q -- my understanding, or is that an accurate understanding?

A That's an accurate understanding. Specifically, I would direct you to the first sentence on the top of the page.

Q Thank you, sir. Is the term defined anywhere else? This seems like quite a clear definition.

A No, I --

Q I'm just curious.

A As far as I'm aware, this is the only spot that we've actually defined it in this manual.

Q Thank you. That's all the questions I have.

A Thank you.

MR. GOLLER: Anybody else on the phone?

MR. WRAITH: This is Steve Wraith. I have no questions.

MR. HANSEN: David Hansen. I have no questions.

MS. PHAM: This is Michelle Pham. Can

you hear me?

THE WITNESS: Yes.

MS. PHAM: Okay. I do have a few questions.

MR. GOLLER: And, Michelle, who do you represent?

MS. PHAM: This is Michelle Pham, and I represent Defendant Inland Washington, who is the general contractor in the, ah, the work site at issue.

E X A M I N A T I O N

BY MS. PHAM:

Q Um, my first question is, does the Putzmeister -- Putzmeister manual address a procedure on a loss of signal?

A Um, your --

MR. GOLLER: Object to the form.

THE WITNESS: Your question regards the radio signal between the operator's control panel and the receiver on the truck?

BY MS. PHAM:

Q Yes.

A Um, other than discussing some places per -- perhaps that say you can lose the signal because of interference or obstructions, um, I don't think we

go into any detail. We do potentially say that the system will shut down under those conditions.

Q Just give me one second, please.

A No problem.

Q Okay, thank you. Those are all my questions.

A Very good.

MR. MOORE: I do have one follow-up on her question.

THE WITNESS: Okay.

E X A M I N A T I O N

BY MR. MOORE:

Q If the antenna on the Putzmeister truck is broken, would that make it more likely that the signal would be lost?

MR. GOLLER: Object to the form.

MR. CHRISTIE: Join. Bob Christie.

MS. PHAM: Join.

THE WITNESS: Yeah, it would be, in my opinion, radio signals would be more difficult to be transferred between the units, but I'm not the expert on the radio.

MR. MOORE: That's all I have. Thank you very much.

THE WITNESS: Thank you.

MR. GOLLER: Okay, this dep -- hearing

Exhibit 31

Safety practices for pouring concrete with a concrete pump

This will be safety practices for all employees involved with the concrete pump or in an area close to the pump. Not following these procedures could cause serious injury or even death.

1) Stay clear of the pump and the hose while the pump operator is priming the pump. Do not be involved in this process. You are not trained to prime the pump.
2) Do not allow the operator to prime out into the area where the concrete will be poured.
3) When the time comes to pour the concrete, take the halo off the hose carefully while moving away slightly from the hose. If at any time you hear or sense a plug, duck and cover. Do not try to unclog the hose. Move away from the hose. This includes the hose man, vibrator operators and any other people near the hose.
4) Never try to unclog the hose. That is the pump operators responsibility.
5) Any time you sense of hear a plug, yell clog and everybody immediately move away from the hose.

EXHIBIT 3
WIT: Henson
DATE: 1-20-15
ELAINE RIPPEN, CCR

OCT 08 2013
Production Services

Safety practices for pouring concrete with a concrete pump

This will be safety practices for all employees involved with the concrete pump or in an area close to the pump. Not following these procedures could cause serious injury or even death.

1) Stay clear of the pump and the hose while the pump operator is priming the pump. Do not be involved in this process. You are not trained to prime the pump.
2) Do not allow the operator to prime out into the area where the concrete will be poured.
3) When the time comes to pour the concrete, take the halo off the hose carefully while moving away slightly from the hose. If at any time you hear or sense a plug, duck and cover. Do not try to unclog the hose. Move away from the hose. This includes the hose man, vibrator operators and any other people near the hose.
4) Never try to unclog the hose. That is the pump operators responsibility.
5) Any time you sense of hear a plug, yell clog and everybody immediately move away from the hose.

OCT 08 2013
Production Services

EXHIBIT 78
WIT: G. Akoog
DATE: 2-24-14
ELAINE RIPPEN, CCR

Exhibit 32

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children,	)
Plaintiffs,	)
vs.	) No. 13-2-32219-6 SEA
INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,	)
Defendants.	)

DEPOSITION UPON ORAL EXAMINATION OF DAVE ENDERS

1:20 p.m.
Monday, December 12, 2016
663 Pease Road
Burlington, Washington

ELAINE K. RIPPEN, CCR
NORTHWEST COURT REPORTERS
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specifications. It's the mix design that will meet those specifications.

Q Do you know if there's another document showing exactly what the specifications are?

A The specifications I normally would get would be the Section 3300 from the plans, the specifications.

Q What information is included in the specifications?

A The p.s.i., slump, air content. Those are the most critical ones.

Q Anything else?

A There may be a minimum sack content of cement and also the water/cement ratio.

Q What is the sack content?

A Just how many sacks of cement there are per cubic yard.

Q How about aggregate size, is that included in the specifications?

A Depending on how the specifications are written, but usually they give you several options. There are several different gradings you can use normally.

Q And what are those options?

A Number 57 grading is the most common, and occasionally Number 67, and occasionally Number 4, and occasionally Number 8.

Q In Exhibit 1 it references mix 0260A. Do you see that?

A Yes, I see it.

Q What is that?
A It's a code number that describes what the mix consists of.
Q And this mix code, is that an industry-wide number or is it a Miles number?
A It's a Miles number.
Q And what does mix 0260A mean?
A 02 means that there's water reducer in the mix, 60 means that it's a six sack, and "A" means that it's air entrained.
Q What does air entrained mean?
A When concrete that's exposed to freeze/thaw, sometimes it would be requested to be air entrained by the contractor. That will help protect it against a freeze/thaw cycle.
Q And by freeze/thaw cycle, are you referring to the finished concrete product after it's cured and dried?
A No. Freeze/thaw means concrete when it gets wet and is exposed to the temperatures below 32 degrees, the water will expand, and if you don't have air entrainments in there, there will be small pop-outs. It's more of a looks thing, but it's related to the fact that it helps -- it creates buffers, if you will, in the concrete that allow the water to expand without popping the concrete off.
Q And what do you mean by a pop-out?
A A pop-out is a term where you have like maybe a quarter-sized piece of concrete that's a quarter of an inch deep and it will come off. It's a nonstructural problem,

but it doesn't look good.

Q Looking on the first page of Exhibit 1, could you kind of walk us through this data and kind of explain in lay terms what it means?

MR. WRAITH: Object to the form. Can you be more specific? Ask him a specific question, please.

Q Let's start with water. Water 4.09 and 255, what do those numbers mean?

A Water is the number of cubic feet -- mix designs are done in absolute volume, and the water at 4.09 means that there's 4.09 cubic feet of water. And specific gravity of water is 1.0 and the cubic foot of water weighs 62.4 pounds. So 4.09 times 62.4 will equal 255.

Q And does that represent the volume in cubic feet of water that's going to be in a cubic yard?

A It represents the maximum water allowed.

Q The maximum water allowed per cubic yard?

A Yes, which is also related to water/cement ratio.

Q And what is SSD?

A Surface saturated dry.

Q What does that mean?

A It means when you rock the sand or cement, or whatever the product is, when there's just enough water so that the surface is wet, damp, but it doesn't have any excess water on it, that's SSD.

Q So the next line is cement 2.87 and then SSD 564?
A Yes.
Q What does that mean?
A It means the same as what you just asked me there. It's 4.09 on the water times 62.4 is equal to how many pounds of water you're going to need to equal that. And then cement, that's 2.8 cubic feet. The specific gravity of cement is 3.15. 3.15 times 62.4 is equal to 196.6. 196.6 times 8.32 is 1390. Or 564, excuse me.

Let me back up. In a cubic foot of cement there's 196.6 and that's when the specific gravity is 3.15. So that 2.87 cubic feet equals 9.96 times 2.87 and gives you a total of 564 pounds.

Q So what does specific gravity mean?
A Specific gravity, everything needs to be related to the unit 1.0, which is water. So specific gravity of cement is 3.15, specific gravity of our Number 57 aggregate is 2.71, specific gravity of the sand is 2.67, and, of course, air is air so there is no specific gravity.
Q So the line below states fly ash, but it doesn't have any numbers. What does that indicate?
A It means we didn't use fly ash.
Q And what is fly ash used for?
A It's a supplementary cementitious product.
Q What is a cementitious product?

A It can be used as part of the Portland cement. It's a green thing.

Q A green thing?

A Well, fly ash is produced from the coal fire generators. The closest one is in Chehalis. And the fly ash is ground up, and when you mix fly ash with Portland cement, the fly ash will react with the free gypsum in the Portland cement and create a cement. It's a pozzolanic cement, not a Portland cement.

Q What's the difference between a pozzolanic cement and a Portland cement?

A Well, the easiest way to describe it is the Romans were the first ones to use cement and they used pozzolanic, which I believe they took volcanic rock and ground it up and mixed it with burned gypsum, and then when you added water, it would create a cementitious product. And then about in the 1850s, or thereabouts, there was Portland cement on the Isle of Portland was developed, and it's stronger and more effective. But by using a partial portion of the product being fly ash, then you can get -- you can use what otherwise would be a waste product and make it a usable product, hence the green thing.

Q So when there's fly ash, you're incorporating a byproduct of a power generator?

A Yes.

Q You're kind of recycling that to make useful concrete?
A Yes.
Q But there was no fly ash in this particular product; right?
A That's correct.
Q And the next line is coarse aggregate 10.65 and 1800. What does that mean?
A That means that if you have 1800 pounds of coarse aggregate, in this case this was using a Number 57 grading, and that 1800 divided by the specific gravity, which is 2.71, should come out to be 10.65 cubic feet.
Q And what is the next line, fine aggregate 8.32 and 1390?
A It's a variation of the same thing, only using fine aggregate is concrete sand. And the specific gravity of the sand is 2.67. Which means that if you divide that 2.67 times -- well, 2.67 times the water, which is 62.4, is going to give you about, I think, 167 pounds of sand. And for every 167 pounds of sand, you'll have one cubic foot of product.
Q And the next level, air 1.07, what does that mean?
A That means that we use an air entraining agent to create the voids that gives you the buffer zones I spoke of earlier.
Q What is the 1.07?
A That means that there's 1.07 cubic feet of voids.
Q And what are these entries under admix?
A There's two admixes there. One is Master Builder Pozzolith

200N. That's a water reducer that reduces the amount of water you need, because the less water you use in concrete, the stronger it will be. And the MB AE90 is what we use to create the air voids.

Q And what does 4000 p.s.i. of specified compressive strength mean?

A It means that this concrete will withstand 4,000 pounds of pressure per square inch without failing.

Q And under cement factor, sacks, what does that mean?

A It means there are six sacks, 6.0 sacks. A sack of cement weights 94 pounds. Six times 94 equals 564 which is in the column next to it.

Q And that's where the six in mix 0260A comes from?

A Yes.

Q And what is cement type I/II in Roman numerals?

A There's five types of cement. Type I, Type II, Type III, Type IV, Type V. Type I/II meets either Type I or Type II specs. And normally in this country they want the cement to meet Type II specifications. So it meets Type I and Type II.

Q And what are the differences between the types between I and V?

A Type I is a finer blaine, it's a little quicker setting. Type II has some sulfate resistance, which is a little bit more acid resistant. Type III is high early, which means it

will set faster and get seven-day strength in three days or three-day strength in one day. Type IV is low heat of hydration cement, which is what they use in dams. And Type V, I think, is very sulfate resistant.

Q And what is slump four inches plus or minus one inch?

A The concrete is put in an inverted cone, and when the cone is pulled away, the cone's 12 inches to begin with, it measures the amount of slump that the concrete will slump. In this case, four plus or minus one means they're looking for it to slump between three and five inches.

Q What is the air five percent plus or minus 1.5 percent?

A It's an arbitrary amount of air, but they've determined the more air you use, the weaker the concrete will be. So you want to use just enough air to give it some resistance and that's why they want the five percent plus or minus 1.5.

Q Do you know if any variations in the air content of a mix could lead to air getting into a system while pumping?

MS. COLUCCIO: Form.

A No, I wouldn't know that. Normally with the air in this amount -- we're only talking about between 3.5 and 6.5 percent air, and that's encapsulated within the concrete. It doesn't create any stereo void.

Q What is max agg number 57?

A In this case we used -- the biggest aggregate we used is what's called 57 gradation, ASTM C33.

Q And what does that mean?
A In this case I think there's five sieves that measures that the hundred percent passes the inch-and-a-half sieve, 95 to 100 passes the one-inch sieve, 26 to 60 passes a half-inch sieve, and then I believe it's 0 to 10 passes a number four, 0 to 5 passes a number eight.
Q What is a number four and a number eight?
A There's four openings per square inch or eight openings per square inch.
Q And what is the largest size of rock that can be included in a number 57 max aggregate?
A The largest rock would be that it has to go through at least an inch-and-a-half sieve.
Q Now, does Miles ever communicate with Ralph's regarding the final diameter of the hose that Ralph's will be using on a particular project?
MS. COLUCCIO: Object to form.
MR. WRAITH: Join. And also you're asking about his personal knowledge; right?
MR. MOORE: Yes.
MR. WRAITH: You used Miles again.
Q Well, to your personal knowledge does Miles ever communicate with Ralph's in that regard?
MS. COLUCCIO: Object to form.
A Only when it's brought up specifically. If there's a

1 situation that possibly could be touchy as far as pump
2 ability in the mix, they'll check to see what size rock
3 we're using.
4 Q When you say "they", who is they?
5 A The general contractor is the overall one in charge and he's
6 supposed to coordinate those type of things.
7 MR. HANSEN: Object to the form.
8 Q So typically who's job is it to make sure that the pump hose
9 size is large enough to accommodate a specified aggregate
10 size rock?
11 MS. COLUCCIO: Object to the form.
12 MR. HANSEN: Join.
13 A I don't know exactly who would be responsible for it. We're
14 asked the question sometimes what's the maximum size rock we
15 have in our mix, and then we respond.
16 MS. COLUCCIO: Move to strike nonresponsive
17 portions.
18 Q And who will ask you that in those circumstances?
19 MS. COLUCCIO: Form.
20 A Sometimes it's the concrete subcontractor, sometimes it's
21 the general contractor.
22 Q On this particular job did anyone coordinate with Miles, to
23 your knowledge, regarding the --
24 A The size of the orifice?
25 MS. COLUCCIO: Form.

Q Regarding the -- well, yeah, the size of the hose with respect to the size of the rock.

MS. COLUCCIO: Object to form.

MR. HANSEN: Join.

A I don't know of anybody that did that.

Q Let's look at Exhibit 2, which I believe from previous testimony has established that these are mix tickets for two separate loads on the day of the incident. Have you seen these before?

A During counsel with the defense, with my attorney and talking about the case.

Q Prior to that had you seen these?

A No.

Q Are you familiar with what these are?

A Yes, they're delivery slips.

Q And these are Miles delivery slips?

A Yes.

Q So are you familiar with what this data means?

A Yes.

Q But you just haven't seen --

A This particular one, that's right.

Q Just looking at the first page of Exhibit 2, this also shows that it's the mix code 0260A?

A Right.

Q And that's the same mix design that we were talking about?

A Right.
Q So if you haven't seen this -- well, I'll just ask you. Were you involved in any way in preparation of this ticket?
A The mix design is under my supervision. What we do is we send -- the mixes are sent to the different branches and they don't change anything. If any changes are made, the change is made in the main office here, so that's why I see them.
Q So do you know who actually created this mix ticket?
A This is created almost every time when a load of concrete is created. Sometimes we leave off the data down here because it doesn't mean anything to somebody, but on commercial jobs we usually put it on.
Q And can you describe the process for creating these tickets?
A Well, our dispatch will communicate via electronically with the batch plant. In this case it was -- I believe there's a 160 or 170 yards on this order, I think, or thereabouts. I'm not positive on that. They'll order down to the batch plant and say load number one is mix 0260A at this slump, and that's what tells them what to batch, and then they bring up the proper mix design on the computer, verify everything in the batch. When they batch, all the weighing actions are documented here.
Q Let's look kind of at the fine print. You see material, description, and I believe that's design quantity?

A Yes, it is.
Q And under Sand Class 2, what does that mean including the numbers?
A It means that there's -- the design quantity is 1340 pounds of type Class 2 sand, which is another classification.
Q What does Class 2 sand mean?
A In our state we either use WASDOT, W-A-S-D-O-T, or we use AASHTO gradations. And the Class 2 sand is a WASDOT specification, but it also basically meets the AASHTO gradation.
Q What does AASHTO stand for?
A American Association of State Highway, something, something.
Q And is WASDOT, is that the Washington Department of Transportation?
A Washington State Department of Transportation, yeah.
Q So the next line where it says 7/8 number 57, what does that mean?
A The number 57 is the critical gradation. That describes the size of the rock. The 7/8 is a nominal dimension.
Q And is 57 the same as the 57 we were talking about earlier?
A It is.
Q And what is the 7/8 nominal dimension?
A It means that the bulk of the rock will go through the 7/8.
Q And that's a 7/8-inch sieve?
A Yeah. There isn't a 7/8 sieve that's normally used. It's

just a generic term used -- in our industry we have so many products that are close to saying one inch, we call our bigger concrete rock 7/8 because it's easier to distinguish that on the radio. It's strictly an ease of -- what we're trying to say is we want number 57 rock.

Q So who uses the 7/8?

A Just our loader/operators. If they'll say -- perhaps they'll say to the batch person, Our bin's empty on the number 57. He'll just say, Bin's empty on 7/8. So that's easier for him to understand. That's the loader/operator. They're one in the same.

Q Does 7/8 have any relationship or information pertaining to the size of the aggregate rock in the mix?

A No, it doesn't, not specifically as far as creating sieve analysis. It's just a general term.

Q What does it mean?

A It means that most of the rock will be around 7/8 of an inch or less.

Q Do you know if the specifications provide for a maximum size for 7/8 number 57?

MR. WRAITH: Object to the form; asked and answered.

A Yeah, you asked me the question previously about number 57 and that's when I said an inch-and-a-half max. There is no sieve analysis associated with 7/8.

Q So there's no difference between 7/8 number 57 and just the number 57?

A Yes, that's correct. 7/8 doesn't mean anything.

MR. MOORE: I believe that's all the questions I have. The others may have some. Thank you.

MS. COLUCCIO: I have a couple. Hopefully this won't take too long.

EXAMINATION

BY MR. COLUCCIO:

Q My name IS Megan Coluccio. We met before going on the record and I represent Ralph's Concrete. I have just a couple of follow-up questions for you.

It's my understanding that you did not investigate the incident that's the subject of this lawsuit; is that correct?

A That's correct.

Q So you didn't visit the site the day of the incident; correct?

A I did not.

Q So is it fair to say that you have no personal knowledge of the site on the date of the incident?

A That's correct.

Q Is it also fair to say that you have no personal knowledge regarding the pump truck on the date of the incident?

A That's fair.

Exhibit 33

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children,	)
Plaintiffs,	)
vs.	) No. 13-2-32219-6 SEA
INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,	)
Defendants.	)

DEPOSITION UPON ORAL EXAMINATION OF MATTHEW SKOOG
VOLUME II

1:30 p.m.
Thursday, February 16, 2017
3232 Rockefeller Avenue
Everett, Washington

ELAINE K. RIPPEN, CCR
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On behalf of Miles Sand & Gravel d/b/a Concrete Nor'West

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A Yes.
Q And you've looked through every one of those pictures just now?
MR. CASEY: Object to form.
A I glanced at them, yes.
MR. BUTLER: I'll join in the form objections. If counsel needs clarification as to the form, please advise.
Q And there are no pictures in that exhibit that are from a different day or from a different job or different location?
A I don't know.
Q To the best of your knowledge and recollection, there are no pictures in that exhibit that you would point out and say, no, this was some other job or some other day?
A Correct.
Q Before I go further, and while everybody is present, I'm looking for your check. Did you already take it?
A Yes.
Q Just for the record, you have been paid for your attendance today as agreed?
A Yes.
Q Now, when we left off we were also talking about the size of the rocks that were used and we were referring to Exhibit 3, the mix code 0260A, which stated 7/8 #57. Do you remember when we were talking about that?
A Yes.

Q Now, do you have an understanding of the maximum rock size that was in this concrete that was being used at the time of the incident?

MR. BUTLER: Object to form.

MR. MUSE: Join.

A No.

Q So do you have any idea of the size of the rock that was being pumped that day?

MR. BUTLER: Same objection.

MR. MUSE: Join.

A I believe it's around 7/8.

Q And again, did you place this order?

A I don't recall.

Q But somebody at Hilltop placed this order?

A Possibly.

Q And did you have a sense of the rock size that was being ordered for this job?

MR. MUSE: Object to form.

MR. BUTLER: Join.

A Whatever is in the mix.

Q How was it determined what kind of mix you were going to use that day?

A The mixes are given to me and I order the number of the mix that is required for that pour.

Q Who gave you the mix?

A My boss.
Q Who was your boss at the time?
A Gordon Skoog.
Q And do you know if he decided what mix was going to be used or if it was somebody else?
A I do not recall.
Q When he gave you the mix, did he tell you that you needed to order that for a specific purpose?
A It's written on the paper.
Q Did he say we need this mix to pour slabs or walls or pillars or anything like that?
A The paper said it, yes.
Q What paper?
A The mix design paper.
Q And is this the mix design paper, Exhibit 3?
A No.
Q On the day of the incident did you have any knowledge of what kind of mix was going to be poured that day?
A A wall mix.
Q What does wall mix mean to you?
A It means the number that was designated for pouring walls, that I ordered it.
Q Is that number the mix code here, 0260A?
MR. BUTLER: Object to form.
A I think so, yes.

Q And that mix code was also marked 7/8 #57; is that right?
MR. MUSE: Object to form.
A I don't recall.
Q What is the maximum aggregate rock size that you would expect in wall mix of the type that you planned to use that day?
MR. MUSE: Object to form.
A I don't know.
Q Did you know at the time?
A No.
Q Do you know if anybody else at Hilltop knew what the size of the rocks were going to be used in the wall mix that day?
MR. MUSE: Object to form.
A I don't know.
Q Do you have any understanding of the size of the pipes, reducers, and end hose that were going to be used on the pump that day?
A I have an understanding of sizes of pipes, yes.
Q And what was your understanding of the pipes and end hose that were going to be used that day?
MR. CASEY: Object to form.
A I don't recall.
Q Did you know what size of end hose was going to be used that day?
A I don't recall.

pump operation?
A No.
Q And I mean including the hose whip on-the-job training.
A No.
MR. BUTLER: Thank you.
MR. MOORE: I do have a few follow-ups. I'll keep it short.
FURTHER EXAMINATION (Continued)
BY MR. MOORE:
Q Now, the pump operator for Ralph's, in this case Anthony Howell, when he was there, did you consider yourself to be his boss?
MR. CASEY: Object to form.
A It depends on the definition of boss.
Q You were asked when you're the foreman here for the Hilltop people. You considered you were their boss at the time?
A Yes.
Q Did you also consider yourself to be Howell's boss?
MR. CASEY: Object to form.
A No.
Q Did you have anything to do with telling Mr. Howell how to articulate the boom as it goes across?
A No.
Q Did you have anything to do with telling Mr. Howell what reducers, if any, to use?

A No.
Q Did Gildardo have anything to do with telling Anthony Howell how to operate the pumping operation of the truck in any way?
A No.
Q Did anybody else at Hilltop have anything to do with telling Mr. Howell how to operate the pump in any way?
A No.
Q They would just say, well, we want the mud to go here in this form, and that was about it; is that accurate?
MR. CASEY: Object to form.
A Yes.
Q And you were asked some questions about the dimensions of the 2-by-4 and what we talked about in your earlier deposition; right?
A Uh-huh.
Q And you would never actually take a ruler or a laser measurement tool and actually measure the measurements of the 2-by-4s and the other dimensions of the lumber that we talked about on the job; is that correct?
A Correct.
Q But do you agree that more likely than not a 2-by-4 is three-and-a-half by one-and-a-half inches?
MR. MUSE: Object to form.
A No.

Q Did I miss the measurement?
A It varies on every board.
Q Varies by how much?
A One-sixteenth, one-quarter one way or the other easy on the small boards.
Q So variation would be between one-sixteenth and one-quarter inch?
MR. MUSE: Object to form.
A On a 2-by-4.
Q On the small boards; right?
A Yes.
Q What would the variation be on 2-by-6 or some of the other lumbers that you talked about?
A I don't know for sure. It gets more and more different the bigger lumber you get.
Q Now, was Steve Miller on the job that day?
A Yes.
Q Was he on the job in the morning?
A I don't recall.
Q Now, if Steve Miller had come out and told the pump operator to stop pumping, do you think that he would have been able to do that?
MR. CASEY: Object to form.
A I don't know.
Q Did Steve Miller have the authority to tell the pumping

Exhibit 34

Exhibit 34

1 SUPERIOR COURT IN THE STATE OF WASHINGTON

2 FOR THE COUNTY OF KING

3 - - -

4

5 GILDARDO CRISOSTOMO)
VARGAS, et al.,)
6)
Plaintiffs,)
7)
vs.) NO. 13-2-32219-6 SEA
8)
INLAND GROUP, P.S., LLC,)
9 et al.,)
)
10 Defendants.)
_____)
11

12

13

14 DEPOSITION OF

15 RICHARD GLEASON, CIH, CSP

16 SEATTLE, WASHINGTON

17 June 5, 2015

18

19

20

21

22

23
Reported By:
24 JOSHUA W. SCOTT
CCR No. 3102
25 Job No. 338293

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23

24

25

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1 opinion on his accident investigation report. Again, I
2 probably should have said, you know, may in an attempt
3 to clear the blockage, the pressure and the system
4 increased; that the operator may have increased air to
5 the system. I don't think we really know. That seems
6 the most plausible but I don't know for sure.
7 Q. Well, I'm not asking if you know for sure.
8 I'm just wondering if it's a statement of your opinion.
9 You said no?
10 A. It's a statement of a possible opinion. It's
11 one of the possible reasons the hose whipped. But I
12 don't know for sure the actual reason the hose whipped.
13 Q. Now the sentence just before that talks about
14 the hopper getting low air being introduced into the
15 system and it talks about clearing the blockage. Do you
16 see those as two separate possible modes of the hose
17 whipping?
18 A. Yes.
19 Q. Are they mutually exclusive?
20 A. They both could be independent causes or they
21 could be combined. But they could be mutually
22 exclusive.
23 Q. You don't really have an opinion of which one
24 is more likely than not?
25 A. I do not know. That's correct. I do not have

1 Q. We haven't discussed kinking of the hose as a
2 possible cause of the accident up to now. What are your
3 thoughts about that?
4 A. It doesn't appear that Mr. Howell thought it
5 was kinked. It doesn't appear that Matt Skoog thought
6 it was kinked. There would have been no reason to kink
7 the hose because there was no concrete for the most part
8 coming out of it.
9 So while that's a possible cause, I don't see
10 that as -- because that could cause pressure backup and
11 build up and the hose to whip but it doesn't appear from
12 any specific testimony that I've seen of anybody that
13 that was the case.
14 Q. Other than Mr. Henson?
15 A. Well, Mr. Henson was theorizing there was
16 three ways that you could have the hopper go dry. You
17 could have air injected into the original slurry or you
18 could have the hose kinked. I think he came up with
19 three possibilities. I don't think he was speculating
20 that happened. He was just saying that's one of the
21 things that could happen.
22 Q. Now again we've talked alot about what other
23 people have said. Do you have any opinions about not
24 specifically what happened here but what are the
25 possible causes of hose whip?

A. While a kinking is a possibility, I don't see that as a probability at all. But it seems to me that either allowing the hopper to run low so air would be introduced there or that the pump truck had too much pressure on the hose and that somehow the hose got clogged and so that built up back pressure which caused the hose to whip and strike Mr. Vargas. So I think those are the two most possible or plausible explanations.

Q. Have you had any actual formal training on operation of concrete pumps?

A. No.

Q. Have you taken any classes, extra credit or advanced training of any kind about concrete pumping?

A. Not through the industry like the American Concrete Pumping Association. Within the 30-hour OSHA construction safety class that we teach as a one hour module on concrete safety, that covers a variety of aspects of workers that are pumping concrete. It's part of the overall safety program that we teach through our University of Washington OSHA training center. But it's just one hour out of a whole three and a half day class.

Q. Who prepared the one hour module on concrete safety for that class?

A. Federal OSHA.

1 that he lost contact with the pump through the remote?
2 A. I'd have to go back to his dep. But I think
3 he just said he lost contact, which one might define as
4 a malfunction. But I don't believe he did.
5 Q. But is it a malfunction in your opinion?
6 A. Yes.
7 Q. Why is that?
8 A. Well, if that signal is lost, then the
9 concrete pump truck stops operation totally and
10 completely. Then that's a hazardous time. Whenever you
11 restart the pump truck, that adds an additional safety
12 hazard of things getting back up again and maybe air
13 entering the system. So that's not a safe thing to have
14 happen.
15 Q. Then on the next page of your report, Page 7
16 at the top, you have included a diagram from another
17 document.
18 A. Yes.
19 Q. Why did you include that?
20 A. It's a good description of hose whipping and
21 air in the system and the consequences of that action.
22 Q. It's part of a much longer document, correct?
23 A. I think it's six pages. I brought a copy with
24 me. It's called "Safety Bulletin Hose Whipping: How to
25 avoid injury by a hose whipping from release of trapped

1 air."
2 (Exhibit 9 was marked for identification.)
3 BY MR. CHAWES:
4 Q. Mr. Gleason, is Exhibit 9 the document you
5 just described?
6 A. Yes.
7 Q. This is the very one you looked at and
8 excerpted into your report?
9 A. Yes.
10 Q. The actual diagram you took is on Page 4 of 6
11 of this bulletin, correct?
12 A. Yes.
13 Q. Let's go back a few pages, if you will. On
14 Page 3 of this exhibit, this is a section that says "How
15 Air Gets Into the Delivery System." Do you see that?
16 A. Page 3 of 6?
17 Q. Well, no. Page 3.
18 A. Oh, I'm sorry.
19 Q. Starting from the beginning.
20 A. Okay.
21 Q. It's the first full page of text.
22 A. Yes.
23 Q. "How Air Gets Into the Delivery System." Do
24 you see that near the bottom on the right?
25 A. Yes.

Q. Listed below are the ways air can be introduced into the delivery system. Do you see that it lists many different ways air can get into the system?

A. Yes.

Q. Do we have any understanding from this particular accident how air may have gotten into the delivery system, if it in fact did?

A. It may have been possibly restarting, which I would put in that same category as first starting. If the whole concrete shuts off, you have to restart it. So I would put that in there. The machine wasn't moved as far as we know so I wouldn't include that on 1.2.

On the next page, the hopper goes empty. That would be another possibility, which is number 2.3. The hopper goes empty because the pump continues to pump after the Ready Mix stops delivery or after it's discharged or doesn't pump fast enough.

Number 3, the air is introduced through the tip hose. We don't necessarily have any indication that the pump was operated in reverse but that the pump is shut off during pumping. So 3.2 is very significant. The pump is shut off during the pump. It's in a generally down position. That potentially could introduce air.

We don't know about a blockage on 3.3. That's

1 possible. That's something that was one of the
2 potential things listed in the accident investigation
3 reported of Matt Skoog.
4 It doesn't appear in 3.4 that the concrete was
5 unpumpable, meaning too thick. I don't think that was
6 the case.
7 I'm now flipping on Page 3 of 6. We don't
8 have any testimony that the pump was operating in
9 reverse or that a blockage had been manually removed. I
10 think that does a pretty good job of explaining some of
11 the possibilities.
12 Q. I was coming back to the first page you
13 started reading from. Point number 1 says that "The
14 delivery system is void of concrete, and is therefore
15 full of air. Examples: 1.1. When first starting."
16 It doesn't say "restarting," does it?
17 A. No, it does not.
18 Q. So you kind of added that yourself?
19 A. I did, yes.
20 Q. Do you have a basis for adding that?
21 A. Well, that totally stopping the system could
22 potentially because everything has to be restarted. In
23 fact, Mr. Howell went through a whole series of events
24 he had to do on his remote control to restart this. So
25 I'm saying if there's air when it's first started, there

THE WITNESS: It's my opinion as we go through some of the duties that each of them potentially failed in some aspect of a duty under their control. So yes.

BY MR. MOORE:

Q. Is it your opinion that any such failure was a cause of Mr. Vargas' injury, more probable than not?

MR. HANSEN: Object to the form.

MR. CHAWES: Join.

THE WITNESS: If we look at the root cause which is somehow air getting into the system causing the hose to whip, come back and strike Mr. Vargas who happened to be 12 feet away so he wasn't standing at the tip of the hose, it whipped back; that if any of the things we talked about that cause hose whipping in the last three hours here, if any of them had been prevented, the hose would not have whipped and would not have struck Mr. Vargas. So I have to say yes.

BY MR. MOORE:

Q. Now if Mr. Vargas had been further away than the 12 foot radius of the hose, would he have been injured regardless of the cause of the whip?

MR. CHAWES: Objection; calls for speculation.

THE WITNESS: It appears that the last section of the hose called the whip hose was 12 feet long. So I think for most of the testimony, he was standing right

Exhibit 35

EXHIBIT 2
WITNESS
DATE:
JOSHUA W SCOTT, CCR: #3201

May 1, 2015

Derek Moore
Bishop Legal
19743 First Avenue South
Seattle, WA 98148-2401

RE: **Gildardo Crisostomo Vargus et al v Inland Group PS, LLC et al**
King County Superior Court Case No. 13-2-32219-6SEA

Dear Mr. Moore.

At your request a review was made of safety issues in the above mentioned case. I was first contacted by your law firm on November 11, 2014.

I. Introduction

This case involves an accident that occurred on May 23, 2013. Concrete was being poured for a commercial construction project located at 1220 NE 175th Street, Shoreline, WA for concrete walls and other structural components. Mr Gildardo Crisostomo Vargus worked for Hilltop Concrete Construction. Inland Washington was the general contractor on the site. Ralph's Concrete Pumping, Inc was the concrete pumping subcontractor. Ralph's had leased a 46 meter Putzmeister Concrete Pumping Truck to Hiltop with Tony Howell as the operator. Miles Sand and Gravel d/b/a Concrete Nor'west was delivering the concrete. Inland Group provided the Safety Plan.

Mr. Vargus was standing near the end of the concrete pumping host assisting in pouring concrete. Material in the hopper was allowed to get low and air was introduced into the system. In an attempt to clear the blockage the pressure on the system increased, causing the hose to whip and strike Mr. Vargus in the head, causing severe injuries.

II. Documents Reviewed

Complaint For Damages
Amended Complaint
Inland group Answer to Complaint
Inland Group Answer to Amended Complaint
Ralph's Concrete answer to Complaint
Inland Washington's Responses to Plaintiff's First Interrogatories and Requests for Production, with Exhibits from a CD
L & I DOSH Investigative File
Deposition of Brian Skoog, with Exhibits
Deposition of Gordon Skoog, with Exhibits
Deposition of Anthony Howell, with Exhibits

Deposition of Edward McElfresh with Exhibits
Deposition of Steve Miller with Exhibits
Deposition of Tim Henson, with Exhibits
Deposition of Gilardo Crisostom Vargus, without Exhibits
Defendant Inland WA Responses to Plaintiffs First Rogs and RFPS
Boom Truck Manual (From Ralph's Discovery)
Defendant Inland WA Responses to Ralph's Concrete First Rogs and RFPS
Inland Group Safety Plan
Hilltop Subcontractor Agreement
Inland's Photos
Defendant Miles Sand and Gravel Co dba Concrete Norwest Responses to Defendant Inland WA First Set of Interrogatories and RFP
Basic Overview and Concrete Pouring Operation
"Safety Bulletin: Hose Whipping" by the American Concrete Pumping Association (ACPA), 1/22/2010
WAC 296-155, Part Q, Construction Work Concrete, Concrete Forms, Shoring, and Masonry Construction
Certification of Service
Declaration of Derek Moore in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment
Declaration of Greg Wallace
Defendant Inland Group Motion for Summary Judgment
Defendant Ralph's Concrete Motion for Summary Judgment
Facts and Notes
Order Denying Defendant Ralph's Concrete Motion for Summary Judgment
Order Denying Defendant Inland Group's Motion for Summary Judgment
Order Denying Defendant Inland Washington Motion for Summary Judgment
Second Declaration of David Hanson
Second Declaration of Scott Morris
Supplemental Declaration of Tim Henson

III. Background

Hilltop rented a concrete pump truck, with pump operator Tony Howell from Ralph's Concrete Pumping. Hilltop also ordered the concrete mix from Concrete Nor'West.

Concrete was poured into a hopper, at the back of the pump truck, by Concrete Nor'West. After the pump was primed with a slurry the concrete was ready to be pumped into the desired location to the wall forms on the construction site in Shoreline, WA. One of the members of the placing crew (Hilltop employees) held the end of the hose (or whip) and directed the concrete to its desired location. Tony Howell, the Pump Operator turned the pump on and off as directed by one of the members of the placing crew. The pump was controlled remotely by Mr. Howell

According to Tony Howell, the Ralph's Concrete Pump truck operator (Howell Dep. Pg. 110) he testified that nearly 100% of the time that air in the system is caused by not enough mud being put into the hopper.

According to Mr. Howell, the 3 meter length of whip hose would have weighed between 120-150 pounds. (Howell Dep. Pg. 99). Apparently air was introduced into the system when the hose became blocked. Mr. Howell increased the pressure in the system. Mr Gildardo Crisostomo Vargus was standing near the end of the hose when it whipped, striking him in the head and injuring severely.

There has been multiple incidents with Ralph's Concrete in the last 8 years where works were injured in hose whip accidents. According to the Interrogatory Number 15 answers from Ralph's Concrete the table below lists the dates and location of hose whip injuries:

Injured Person	Date of Incident	Nature of Injury	Location
Alan Cooper	6/26/2008	Fatality	Mulkiteo
Aaron McKerman	10/31/2008	Unknown	Lacey
Otto Douglas	9/10/2008	Stomach	Bothell
Michael Welch	5/22/2009	Back Injury	Pasco
Pete Wenger	2/22/2010	Broken Ribs	Edmonds
Brent Bohrer	7/14/2010	Unknown	Camas
Salvador Garcia	8/20/2011	Unknown	Portland, OR
Paul Guzman	6/4/2012	Unknown	Seattle
Martin Kellog	7/30/2012	Neck & Back	Seattle
Federico Garcia	1/8/2013	Back Contusion	Snohomish
Glen Bartholet	4/3/2013	Elbow Injury	Battleground

IV. Applicable Labor and Industries WISHA (DOSH) Standards of Care

The State of Washington has adopted minimum safety standards of care regarding Concrete Pumping Activities. The activity is covered under WAC 296-155, Construction Safety, Subpart O, Concrete, Concrete Forms, Shoring, and Masonry Construction. This section establishes the minimum standard of care for operating concrete pumper trucks in Washington and is regulated the Department of Labor and Industries (L & I), Division of Occupational Safety and Health (DOSH) under the Washington Industrial Safety and Health Act (WISHA):

Chapter 296-155 WAC Part O
Construction Work Concrete, Concrete Forms, Shoring, and Masonry Construction
WAC 296-155-682

(c) Qualifications and training requirements.

(i) Operator trainee-Qualification requirements. To be qualified to become a concrete pump operator, the trainee must meet the following requirements unless it can be shown that failure to meet the requirements will not affect the operation of the concrete pump boom.

(A) Vision requirements:
• At least 20/30 Snellen in one eye and 20/50 in the other. Corrective lenses may be used to fulfill this requirement;
• Ability to distinguish colors, regardless of position, if color differentiation is required;
• Normal depth perception and field of vision.
(B) Hearing requirements. Hearing adequate to meet operational demands. Corrective devices may be used to fulfill this requirement.

(ii) Operator trainee-Training requirements.
Operator trainee training requirements include,but are not limited to, the following:
(A) Demonstrated their ability to read and comprehend the pump manufacturer's operation and safety manual.
(B) Be of legal age to perform the duties required.
(C) Received documented classroom training and testing (as applicable) on these recommended subjects:
• Driving, operating, cleaning and maintaining concrete pumps, placing booms, and related equipment;
• Jib/boom extensions;
• Boom length/angle;
• Manufacturer's variances;
• Radii;
• Range diagram, stability, tipping axis; and
• Structural/tipping determinations.
(D) Maintain and have available upon request a copy of all training materials and a record of training.
(E) Satisfactorily complete a written examination for the concrete pump boom for which they are becoming qualified. It will cover:
• Safety;
• Operational characteristics and limitations; and
• Controls.

(iii) Operator-Qualifications requirements.
Operators will be considered qualified when they have:
(A) Completed the operator trainee requirements listed in (c)(i) and (ii) of this subsection.
(B) Completed a program of training conducted by a qualified person, including practical experience under the direct supervision of a qualified person.
(C) Passed a practical operating examination of their ability to operate a specific model and type of equipment. Possess the knowledge and the ability to implement emergency procedures.
(D) Possess the knowledge regarding the restart procedure after emergency stop has been activated.
(E) Possess the proper class of driver's license to drive the concrete pump truck.
(F) Demonstrate the ability to comprehend and interpret all labels, safety decals,

operator's manuals, and other information required to safely operate the concrete pump.
(G) Be familiar with the applicable safety requirements.
(H) Understand the responsibility for equipment maintenance.
(d) Concrete pump inspection worksheet criteria. Concrete pump trucks will be inspected using the following criteria: The manufacturer's required inspection criteria will be followed in all instances.
Note: DOT requirements for inspections-Ref. 49 C.F.R. 396.11, Driver Vehicle Inspections and 396.13, Driver Pre-Trip Inspections; and WAC 296-155-610.
(i) Hydraulic systems.
(A) Oil level;
(B) Hoses;
(C) Fittings;
(D) Holding valves;
(E) Pressure settings;
(F) Hydraulic cylinders;
(G) Ensure that the emergency stop system is functioning properly;
(H) All controls clearly marked.
(ii) Electrical.
(A) All systems functioning properly.
(B) All remote control functions are operating properly. Ensure that the emergency stop system is functioning properly.
(C) All controls clearly marked.
(iii) Structural.
(A) Visual inspection for cracks, corrosion, and deformations of the concrete pump with placing boom structure, and all load carrying components such as outriggers, cross frames, torsion box beams, and delivery line support structures that may lead to nondestructive testing.
(B) Visual examination of all links, pivots, pins, and bolts.
(C) Vertical and horizontal movement at the turret, turntable, rotation gear lash, bearing tolerances, not to exceed manufacturer's specifications.
(iv) Piping systems.
(A) Wall thickness must not exceed original manufacturer's specifications.
(B) Mounting hardware for attaching delivery system.
(C) Correct clamps and safety pins.
(v) Safety decals.
All safety decals shall be in place as required by the manufacturer.

WAC 296-155-100 Management's responsibility.
(1) It shall be the responsibility of management to establish, supervise, and enforce, in a manner which is effective in practice:
(a) A safe and healthful working environment.
(b) An accident prevention program as required by these standards.
(c) Training programs to improve the skill and competency of all employees in the field of occupational safety and health.

WAC 296-155-110 Accident prevention program.

(3) The following are the minimal program elements for **all employers**:
A safety orientation program describing the employer's safety program and including:
(a) How, where, and when to report injuries, including instruction as to the location of first-aid facilities.
(b) How to report unsafe conditions and practices.
(c) The use and care of required personal protective equipment.
(d) The proper actions to take in event of emergencies including the routes of exiting from areas during emergencies.
(e) Identification of the hazardous gases, chemicals, or materials involved along with the instructions
on the safe use and emergency action following accidental exposure.
(f) A description of the employer's total safety program.
(g) An on-the-job review of the practices necessary to perform the initial job assignments in a safe manner.

V. Discussion

All of the three defendants failed to properly maintain, inspect and operate the concrete pouring equipment safely and to instruct workers in the safe operation.

-Operator training requirements including completion of a written examination for the concrete pump boom for which the operator will be qualified. It must cover:

- Safety;
- Operational characteristics and limitations; and
- Controls.

This would also have to include the equipment manufacturer's operating instructions for the concrete pumper truck.

In addition, all of the controls must be checked out on a daily basis by the operator to ensure that they are functioning properly.

In a publication entitled "Safety Bulletin: Hose Whipping" by the American Concrete Pumping Association (ACPA), 1/22/2010, an illustration included below details how air compressing in the discharge hose can cause the hose to whip violently. (APCA Figure 4, Page 4 of 6). See Appendix 2.

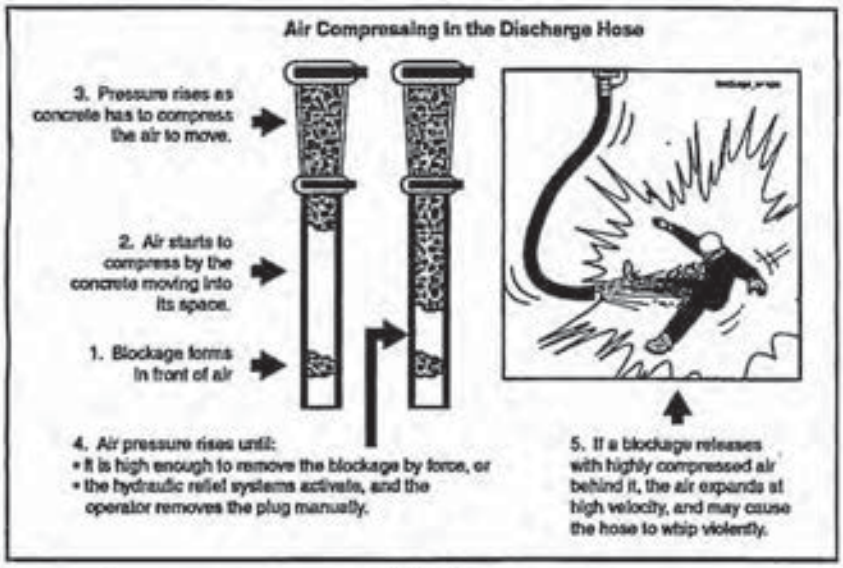

Figure 4
When air compresses in or near the tip hose

VI. Conclusion

It appears that there were no site specific safety plans for the project that addressed the risks of concrete hoses. It also appears that the Accident Prevention Programs did not address the hazards of introducing air into a concrete pumping line.

Inland Washington General Contractor

The General Contractor Inland Washington should have ensured that the entire jobsite was safe. As such they had a duty to ensure that all employees on the site were safe, not just their own employees. Inland Superintendent Steve Miller testified the circumstantial evidence of the rock spread around the slab shows there was a clog or lug in the hose. Gordon Skoog of Hilltop and Steve Miller of Inland Washington both testified of Steve Miller's Control and management of the jobsite. These safety duties are non-delegable.

The General Contractor has a duty to ensure that the overall site safety program recognizes the hazards and protects workers. WAC 296-155-100 establishes a standard of care that the contractors must ensure that the safety and health on the jobsite is effective in practice. WAC 296-155-110(3)(g) requires that the Accident Prevention Program of the General Contractor and Subcontractors provide for an on-the-job review of the practices necessary to perform the initial job assignments in a safe manner. One of the initial job assignments that requires assessment is concrete pumping safety. This would include ensuring that the concrete pump truck had a large enough reach to ensure that the hose was not layed flat. Additionally all means of keeping air out of the system should have been ensured. The General Contractor (Inland) should have ensured that the concrete deliver subs and the concrete pumping subcontractors had established safety procedures to perform the job safely and keep the concrete pumping hose from whipping.

The General Contractor has a non-delegable duty to ensure a safe worksite. While the General Contractor cannot be everywhere on site at all times, a good Site Specific Accident Prevention Program identifies hazards prior to the star of work and ensures that ALL of the employers under their control have established an Accident Prevention Program as specifed in the standard of care of WAC 296-155-110. This establishes that ALL Employers must have on-the-job review of the practices necessary to perform the **initial** job assignments in a safe manner (WAC 296-155-110 (3)(g). The standard of care would require Inland, where concrete construction is such a huge part of the project, should have ensured that all of the subcontractors such as Hilltop, Concrete Nor'West and Ralphs would be able to perform the initial concrete job safely. Hazards of hose whipping from introducing air into the lines should have been addressed, discussed and prevented.

Concrete Nor'West

Miles Sand and Gravel d/b/a Concrete Nor'west was delivering the concrete. Their concrete pump truck operator typically ensures that the concrete continues to fill the pumper truck hopper to ensure that no air is introduced into the system. Ralph's Concrete General Manager Tim Henson testified that the incident as described could only have resulted from air in the hose caused by not enough concrete in the hopper. Mr. Henson also testified that kinking of the hose was a possible cause, but eyewitness Anthony Howell testified that the hose was laid flat and not kinked at the time of the accident. Concrete Nor'west should have ensured that no air was introduced into the system.

Ralph's Concrete

Ralph's should have adequately trained its operator (Mr. Howell) to warn personnel to stay away from the discharge whenever air is known to be in the delivery system. Operators must know how air enters the delivery system, and the severity of the hazard to the placing crew. Operators must communicate the hazard and its severity to the placing crew and laborers.

Ralph's had leased a 46 meter Putzmeister Concrete Pumping Truck to Hiltop with Tony Howell as the operator. The 46 meter boom was not long enough to cover the whole wall. As a result, the whip hose had to be laid flat on the form instead of hanging freely as the Putzmeister manual requires. Either a longer boom such as the 55 meter boom should have been used or the plan should have called for moving the truck.

Mr Howell's driver equipment report the day after the accident showed that the remote control antenna was broken and that there was no vibrator. A vibrator helps keep air from getting into the concrete.

Ralph's should have adequately trained Mr. Howell in the safe operation of the equipment and trained Mr. Howell to have workers get away any time that there is even a remote chance of a plug in the system, If that were done, the Plaintiff would not have been injured, on a more probable than not basis. The concrete pump truck operator to keep all personnel clear of the hose until concrete is flowing smoothly and all air is out of the boom. Ralph's fell below the standard of care by not ensuring that Mr. Howell kept the area clear when first starting the pump. The pump operator is always in charge of his equipment and safety of those around his equipment. The remote control failed, but the pump was restarted while the workers were still in the danger

zone-which is twice the end (whip) hose length. The whip hose was 12 feet so Gildardo should have been 24 feet away from the hose when the pump started.

The employer (Ralph's) is responsible to ensure that all of their employees are adequately trained in the safe operation of a concrete pumping truck in accordance with WAC 296-155-682 (c). Ralph'swould have a duty to ensure that any operator of their equipment would have to meet at least the criteria for operator qualifications:

VII. Experience/Background

I have a Master's degree in Industrial Hygiene and Safety from the University of Washington. I have a Bachelors degree in Occupational Safety and Health form Montana Tech in Butte, MT. I am a Certified Safety Professional (CSP).

I worked for OSHA for 3 year and WISHA for 9.5 years as a safety and health inspector and safety engineering consultant. In this capacity I would visit jobsites to determine compliance with the OSHA and WISHA rules for occupational safety and health.

I teach in the Graduate Program at the University of Washington for students getting their Masters Degree in Industrial Hygiene and Safety. For the last 15 years I have been the course director for the University of Washington OSHA Training Center general industry and construction safety and health classes in Washington, Alaska, Oregon and Idaho. I routinely teach the safety sections of the OSHA Construction Safety Courses (OSHA 500, 502, 510).

I am currently employed at the University of Washington 90% and spend approximately 10% of my time as a safety and health consultant and expert witness. Over the last 35 years I have visited over 2000 general industry and construction sites to perform safety and health surveys in the Washington, both as a compliance inspector and safety engineering consultant.

I, Richard Gleason, at Seattle, Washington, declare under penalty of perjury under the laws of the State of Washington that the above narrative report is true and correct to the best of my knowledge and belief. All opinions expressed herein are on the basis of professional training and experience on a more likely than not basis. I expressly reserve the right to modify my opinions, or offer other opinions, as additional discovery is conducted or additional facts are made known to me. Please feel free to contact me if you have any questions or if I can be of assistance.

Sincerely yours,

Rick Gleason, CIH, CSP

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Exhibit 36

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

GILDARDO CRISOSTOMO VARGAS,	)	
et al.,	)	
Plaintiffs,	)	No. 13-2-32219-6 SEA
vs.	)	
INLAND GROUP P.S., LLC, et al.,	)	
Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION OF

RICHARD GLEASON

Volume II, Pages 113 - 341

10:10 a.m.

March 9, 2017

901 Fifth Avenue, Suite 3400

Seattle, Washington

REPORTED BY: MARGUERITE E. PRICHARD, CCR #2389

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all the material.

Q. That's the material that we're having -- that you put on your invoice that's being copied, correct?

A. Yes.

Q. So if you could, the May 1, 2015, report, Exhibit 2, your testimony a moment ago was that your opinions have changed, but you haven't put them in any written report, correct?

A. Correct.

Q. What opinions have changed from your May 1, 2015, report?

A. Sure. Nothing has changed, but I have additional information and additional opinions.

Q. Let's go through. What is it?

A. Sure. Particularly for Miles. At the time of my initial report, I didn't realize that the size of the concrete material that was delivered could potentially be up to a maximum diameter of 1.5 inches. As such, that would not allow a four or a three-inch concrete pumping hose to be used to deliver it, because it would be too large and the risk of plugging the hose would be too great, and that there's a standard of care in the Washington Administrative Code, WAC 296-155 on concrete pumping,

1 specifically section 682, that doesn't allow you to
2 deliver aggregate that's bigger than one-third the
3 size of the hose. So for three inches, you wouldn't
4 want to have anything greater than one inch.
5 It looks like from all the testimony that
6 there was indeed rocks that could have been up to 1.5
7 inches, both from the photographs. It also looks
8 like from the testimony that the ASTM standards that
9 were potentially used to order this material would
10 allow five percent of the size of the particles to be
11 between -- size of the rock between one inch and 1.5
12 inches. I think most folks in the case felt like
13 since the mix ticket talked about 7/8ths, that that
14 meant a minus 7/8ths size, that nothing greater than
15 that would be pumped. But it seems from all the
16 testimony that that's more of an average aggregate
17 size, and that there could be larger rocks than that,
18 up to 1.5 inches. And in fact, that was delivered
19 that day.
20 So my additional opinions above my original
21 report, my preliminary report of May 1st, 2015,
22 number one additional opinion would be that Miles
23 fell below the standard of care by not indicating the
24 maximum rock size delivered in that batch and what it
25 was; and that Ralph's fell below the standard of care

by not asking for the maximum size of that batch; and that Inland fell below the standard of care by specifying the type of concrete that would be delivered, but not understanding that it could be up to 1.5 inches in diameter, and that the code is pretty clear that aggregate should not exceed one-third the diameter of the delivery pumping system.

So I felt like all three of the parties should or could have known or found out and used this information to either order or deliver a concrete pump that could remain at the five-inch hose width delivery without reducers down to four or down to three. That would allow this mix, which could be up to 1.5 inches, to be safely pumped and delivered. So that's one of my new additional opinions regarding the size of the concrete delivered.

MR. MUSE: I'm going to keep letting you go on and tell all of your opinions and then go back and break them down. I am going to, right now on the record, lodge an objection that we haven't been notified of any of these change of opinions. None of this information was ever disclosed, that his opinions have changed. I didn't come prepared today to talk about, as far as exhibits, about some of the things having to do with aggregate size or the

that's new?

A. Yes.

Q. So going back to Exhibit 15, at the top it's, "Rick Gleason, Vargas case, March 8, 2017," at the top, right?

A. Yes.

Q. And then it appears that you have three columns essentially?

A. Yes.

Q. And you are now going to explain how you -- what those columns represent?

A. Yes. And some of this might be a summary of our 2015 deposition, particularly since most of that dep covered the general contractor responsibilities for Inland. But it was my opinion that Inland as the general contractor had a nondelegable duty for safety and health of everyone on the job site, not just their own employees, and that they should have identified in their site safety plan the hazards of concrete pumping as a specific element that needed to be addressed from the overall safety plan, and made sure that all the subcontractors were coordinating the plan initially in the concrete pumping job assignment to make sure there was an overall culture of safety that was developed for the

entire site. This would have included where the best place to set up the concrete pump would be, to have the right size -- ensure that the right size pump was ordered, to make sure the public wasn't endangered in any capacity, maybe flagging and traffic control would be necessary. And I listed a specific WAC code there, 296-155-110(3)(g), and that requires an on-the-job review of the practices to perform the initial job assignment safely.

So in this case, the initial job assignment is safely pumping concrete, involving three different subcontractors for Inland. And I felt like that wasn't adequately addressed either in the accident prevention plan or by Steve Miller, their superintendent. Also, there were power lines also nearby. And it seemed in the end that the aggregate was too big and the boom was too short, and too narrow, to go from five to a four to a three. And this was allowed because Inland wasn't effectively coordinating all of the safety elements that needed to be addressed and everything involving how important the start-up is of a concrete pumping operation. Mr. Miller wasn't out there, wasn't watching, wasn't involved when the accident occurred. He was in his office trailer. And that's the worst

case time, when the concrete pump truck arrives, when the setup is there, from everybody's exposure, when a problem could occur.

So those are my opinions on Inland at this point. And now I can move to the middle of the page if you'd like.

MR. BUTLER: Let me just lodge an objection to the prior testimony as not previously having been disclosed, and I'll move to strike from the trial.

MR. HANSEN: Join.

MR. CASEY: I'll join.

MR. MOORE: For the record, he just disclosed it. Also for the record, some of this information, you know, was provided by depositions which we just received I believe yesterday or the day before, and gave to him, so --

MR. BUTLER: I couldn't hear that.

MR. MOORE: What?

MR. BUTLER: What was your objection? I couldn't hear all of it.

MR. MOORE: I didn't have an objection. I had a response to yours, which was that some of these depositions we just received I believe two days ago and provided to him yesterday, or definitely

within the week, and he's disclosing his opinions as we speak.

A. So --

Q. Before you go on.

MR. CASEY: What's the question?

Q. I don't have a question pending right now, so I'm going to ask you a question, which is, as far as your left-hand column, I'm going to let John ask you questions about those when it comes around to his turn. So I don't really have anything to follow up on that except that when you said a moment ago, down at the bottom of the left-hand column, "Aggregate too big, boom too short and too narrow, five to three-inch" -- do you see that?

A. Yes.

Q. When you say, "Aggregate too big," what do you mean?

A. If a choice was made to deliver concrete with a three-inch diameter hose, from a five to a four to a three, then anything over one inch, or one-third of that diameter, would be too big.

Q. Who made that decision?

MR. CASEY: Object to form.

MR. BUTLER: Join. In fact, I'm going to ask for leave to make a standing objection as to

form, and if people need me to clarify the form objection, I will, but I'll just have a standing objection and leave it at that.

MR. HANSEN: Join.

A. It appears to me that Inland provided the mix number to Hilltop, and that Hilltop ordered that batch from Ralph's, or from, excuse me, Miles, and then Ralph's delivered it through their concrete pumping operation.

Q. So have you looked and reviewed the engineer's approval for the different mixes that were to be used at this site?

A. No.

Q. Why not?

A. I certainly can prior to trial, but it looks like there was a standard mix number that was provided by the engineers, but I've not gone back and reviewed that.

Q. Do you know what mix number was approved by the engineer for the wall pours?

A. 7/8ths No. 157, is my understanding.

Q. And that's your understanding, that's the mix?

A. Yes.

Q. Have you heard of 0620-A?

A. I have not heard of that. I also heard of ASTM C-33, but the other number you have, I am not familiar with that.

Q. The concrete mix that was specified by the engineers for the wall pours was mix No. 0620-A.

A. Okay.

Q. Okay?

A. Okay.

MR. MOORE: Objection, misstates prior testimony and prior evidence.

MR. CASEY: You juxtaposed a couple numbers.

MR. MUSE: Is it 0620? 0260?

Q. It's 0260-A. I'm sorry.

A. I wasn't aware of that exact mix number. Thank you.

Q. Do you know what went into that mix as far as what were the ingredients for 0260-A?

A. No.

Q. Do you know what No. 57 stone is?

A. I'd have to go back to the ASTM specification for No. 57 stone, and that's where I mentioned earlier that it looks like five percent of that could be between one and 1.5 inches, of that batch number.

Q. Do you know whether No. 57 stone was part of the mixture for mix number 0260-A?

A. It seems like it was, yes.

Q. And is it your opinion that No. 57 stone is too big for mix number 0260-A?

A. No. Just that it should have been identified that the maximum size of that mix would be 1.5 inches so that the concrete delivery company would know they could never use a four or a three-inch diameter hose to pump it, because it would be too large.

Q. Again, I'm kind of getting into your other opinions, but I was focusing on where you say the aggregate is too big. Are you saying that the aggregate is too big for the concrete mix, or are you saying it was too big to go through the hoses that were being used that day?

MR. CASEY: Object to form.

A. It's too big according to the minimum standard of care of the Washington State Concrete Safety and Health Code contained in WAC 296-155-682, so it was too big, that it violated the standard of care of Labor & Industries, DOSH, WISHA. Some of it might have squeezed through, but it's too big in that it provides a potential for a plug if it's more than

one-third of the size of the concrete pumping hose.

Q. I appreciate your answer, but I don't think you answered my question. Is it your opinion that the aggregate that was in mix 0260-A that was being used on the morning of the incident was too large for the mixture?

A. Oh, no. It was the mixture. It was spec'd in the mixture. It was too large for a three-inch or even a four-inch diameter concrete pumping hose. So it was what was ordered. There's no question about that. It was just that if the rest of the -- if the general contractor and the concrete pumping crew don't know the maximum number, the maximum size, they can't make decisions on whether the hose size could be reduced or not.

Q. So naturally from that statement that you just made, the general contractor -- is it your opinion that the general contractor and the concrete installation subcontractor didn't know the size of the aggregate that was ordered?

A. They didn't know the maximum size that the aggregate could be that was ordered, and they made assumptions that 7/8ths met the maximum, and they didn't ask, and Miles didn't tell them, about maximum size. So I'm kind of looking at all three as

1 responsible: Miles with the duty to --
2 Q. I get it. I get what you're saying.
3 A. Yes.
4 MR. CASEY: Can you --
5 MR. MOORE: Can you let him finish his
6 opinion.
7 MR. CASEY: You keep saying "they." Can
8 you clarify.
9 Q. That's what I was going to ask. Who are
10 you talking about made these assumptions?
11 A. Or didn't understand the maximum size. So
12 let me define "they." That Derek Mansur, when asked
13 about -- so for Miles, when asked about what 7/8ths
14 inch meant on the batch ticket, said, "That's not
15 something we're trained in. I don't know the answer."
16 When Ralph's Concrete Pumping driver, Anthony Howell,
17 was asked, he didn't really know what that meant.
18 And Steve Miller of Inland didn't really know. So no
19 one knew that the maximum size could be up to
20 one-and-a-half inches in this batch that was ordered.
21 I don't think hardly anyone, until after the fact,
22 and the size of the rocks were visible after the
23 accident and questions started to be asked.
24 So when I say "they," I'm kind of including
25 all three entities, Inland, Ralph and Miles, that

should have or could have known or should have asked or should be knowledgeable of maximum size. Not average aggregate size, but maximum size that would be delivered in that batch.

Q. I don't remember your experience. Have you ever been a contractor?

A. No. My experience is worker safety and health for the last 39 years for OSHA and Washington State OSHA, and teaching at the University of Washington. So the 39 years as safety and health on sites like this, but I'm not a contractor, I'm not a carpenter, not a plumber, not an electrician.

Q. Not a concrete pumper?

A. No.

Q. Not a concrete manufacturer?

A. No.

Q. What is your understanding of who on this job specified the various concrete mixes?

MR. CASEY: Object to form.

A. It looked like that was provided by Inland to Hilltop to Miles.

Q. The concrete specifications were provided to Hilltop, is that your understanding?

A. By Inland.

Q. And do you know how many different

A. Yes, they were, yes. And they were aware, yes.

Q. And it's your belief that they didn't understand what size aggregate was going to be necessary to pour walls versus what size aggregate may be in the concrete for a PT slab?

A. They didn't understand what the maximum size aggregate might be in that mix. And they're more professional at putting the concrete in. Someone like Ralph's job is more delivering it, the concrete, to them, so everyone has their own task. But I kind of feel that the safety culture fell apart with all four of those contractors, from Inland, to Miles, to Ralph's, and to Hilltop, for not knowing that you can't reduce this concrete pumping hose size with this type of aggregate without the possibility of it plugging the hose.

Q. Do you believe that Miles delivered the concrete that was requested by Hilltop?

A. Yes.

Q. Do you believe that the concrete supplier, talking generally, has any ability to dictate how the concrete pumper performs his job?

MR. CASEY: Object to the form.

MR. MOORE: Join.

A. Well, they have some communication with them. They're at the back loading the hopper at all times. They have an emergency cutoff switch if necessary. They have to keep in some semblance of communication if something occurs. But generally they're not going to direct the means and methods of Ralph's for pumping. That's their expertise. But providing at least some information to them about the maximum aggregate size I feel is imperative, so that Ralph's would know that you can't reduce this less than five inches with an aggregate size that was being delivered.

Now, I also would say Ralph's has a duty to ask or to know that, so I'm putting both in that Inland has a duty to make sure that both those contractors know and understand and work together in their pre-task planning of the job site. So I'm kind of saying all three fell below the standard of care in that Miles didn't provide the maximum size, and that Ralph's didn't ask or find out and reduced the hose two different times, and that Inland didn't oversee the whole site safely.

Q. I'm just going to ask you a hypothetical question. If a concrete delivery service provides -- shows up at a job and brings the concrete that was

A. Yes. The left column was that Inland had control of the job. Then my middle column is that Ralph's created a hazard by allowing workers in a hazard zone while the concrete was beginning to be set up to start the pumping operation. There's a good possibility the antenna was broken. It could be also that the size of the pump was too small to begin with. Instead of a 46-meter pump, it perhaps should have been a 55-meter pump. It's quite possible that the hose got kinked or blocked it's very possible by the three-foot long four-inch reducers, and then the three-foot long three-inch diameter reducers.

So when Mr. Howell tried to restart the pump, there were still workers in that hazard zone, the whip zone, and that -- there were other issues, too, that weren't anything about the cause of the accident, but indicate the overall safety culture. I just made a note that Ralph's allowed -- there were no safety pins on the clamps on the delivery pipe. That wasn't the root cause or anything.

Interesting, when Derek Mansur was deposed, he said that he heard the Ralph's delivery truck driver mention that he had to replace the batteries in his remote control, so I thought that was interesting. Whether the signal lost contact, either

from a broken antenna or the batteries low, both are unacceptable in my mind and fall below the care of a concrete delivery pump company.

Also, there was no concrete vibrator on the back of the hopper. According to Anthony Howell, one of the purposes for the vibrator on the back is to prevent any air from getting in the system as the concrete fills the hopper, but there wasn't one on this particular 46-meter pump truck. Also, when start-up is occurring, there is a safety rule where you don't want workers in the hazard zone of the whip line, and that was allowed to happen when Mr. Vargas was injured.

Oh, there's also another indication of safety is that there's a five-meter rule for safety in the concrete pumping industry for overhead electrical power lines, so that's something else that needs to be addressed in that pre-hazard planning.

Matt Skoog said in his safety report, that was copied in the Labor & Industries report, his indication of what happened was a hose was clogged, pressure caused the hose to whip. When the pump clogs, the operator needs to back off the pressure and fix the clog. That clog could have been at the three or four-inch reducer. It also could have been

where the whip line was resting against the side of the foundation and then went horizontal. That would provide a possible kink in the hose. I'm not sure where the plug occurred, if that was the situation that caused pressure to build up. But in the end, remote control was lost. And that shouldn't have happened, either because of low batteries or a broken antenna. That would be something Ralph's should have identified in their pre-shift checklist.

And then any time the pump is restarted and the concrete freefalls, there's a chance a void could be created, and if the line is blocked, then the air, the entrapped air can cause whipping. And the pump operator allowed workers to be in that danger zone at the start-up. In my opinion that fell below the standard of care, because it exposed them to the hazards of the whipping, of the hose whip, which did occur. So that would be my opinions on Ralph's in the middle column.

Q. And again, I'm going to pass that on to Alex to ask you more specifics about. That being said, though, are these opinions about Ralph's in addition to your May 1, 2015, report, or included in there?

A. Many of them are included in, but overall

issue you're talking about, the zone is a 12-foot radius with the reducer at the center of the circle, correct?

A. Yes.

Q. So if you were outside the 12 feet, you're outside the danger zone?

A. Yes. If it can't strike you at its perimeter farthest whip hazard zone, then you're out of danger.

Q. You have mentioned several times in both your deposition and in your report here today about what I think is called an initial assignment meeting. Am I misstating that?

A. Yes. Under WAC 296-155-110, there's a requirement that everyone has an accident prevention program in writing tailored to the specific role of operations that they're doing on the construction site. One of the requirements is that there has to be an initial assessment of the scope of work for that section, that group, that time, that construction project. So that would be looking at the specific hazards during, say, concrete pumping. So that's why I mentioned that I felt that that wasn't specifically addressed prior to the start of concrete pumping. Maybe it's a little meeting, but

there has got to be some way that each individual contractor would look at that scope of work, and that's -- yes.

Q. I didn't mean to cut you off. Did I cut you off?

A. No.

Q. Just so I'm clear, you're aware -- and I'm kind of cutting to the chase to speed things up -- you're aware of the safety meetings going on on this project, correct?

A. At least once a week I believe, yes.

Q. Right. And you're saying this would be something different from the safety meetings?

A. Yes. It would be part of each of the employers' safety prevention program, and it basically says each individual company, so we're talking about four different subcontractors, or three different subcontractors and the general, would each have their own hazards of the nature of work that were going on site. It might be called their company accident prevention program; it might be called safety and health program. But then prior to that task, prior to the hazards, prior to the start of that scope of work, there would be a review with the general and with the subs of what is going to go on,

what could happen, what is the worst case scenario, where are we going to set up, who is going to be here today. So that's why I bring that up.

Q. Am I correct in understanding that this would be a meeting that happens every day that these various trades are on site, the initial meeting happening every day, is that what you're telling me?

A. It might. But if they do the same task the whole rest of the week, then that first Monday morning meeting would be fine. But then if new contractors come on, that has to be picked up on Tuesday or Wednesday or Thursday, and then once a week, they do a site safety audit of the entire site and have a site safety meeting with everyone. But when a new task occurs, then there's an initial review of the job assignment prior to the start of that scope of work. So it might not have to be daily if everything is going to be similar.

Q. Did you do an investigation into whether or not this initial assignment meeting had been done at the start of pumping operations for the project?

A. I couldn't find a specific site safety meeting where Inland documented this pre-task planning scope of work.

Q. Let me ask you, when you're talking about

1 documentation of this pre-task scope of work, is that
2 a required report as mandated by OSHA for purposes of
3 OSHA 300 reporting?
4 A. That's after the fact. OSHA 300 is when
5 an injury occurs and it goes on an OSHA log.
6 Q. I misspoke. Is it the required reporting
7 for OSHA standards?
8 A. For L & I standards the minimum is
9 initial, and then weekly.
10 Q. Well, when you say "weekly," I want to
11 make sure I understand what you mean by "weekly"
12 versus what I understand by "weekly."
13 A. Sure.
14 Q. There are weekly safety meetings. I think
15 you've agreed to that.
16 A. Yes.
17 Q. You're saying in addition to the weekly
18 safety meeting, you're saying there's a weekly
19 initial assignment meeting?
20 A. They might be combined. They may be all
21 combined with the contractors, but there's also, in
22 addition to the weekly meetings and audits which are
23 required -- and I think we've seen evidence they were
24 doing those -- initial new scope of work. So let's
25 say a crane comes out to the site and you set up.

You have to look at everything that is going to happen for this crane setup. Say the concrete pumping is coming out. So that's a new assignment.

Now, maybe you had an overall safety meeting last Wednesday, but now on Monday there's a new concrete pumping operation coming out. So that's where I see the minimum standard of care is of the general making sure that everyone is on the same page to review the hazards, review where equipment will be, review the scope of work of the subcontractors to make sure that it all goes safely.

Q. And you mentioned some things previously. Just make sure I understand. For purposes of this pumping operation, your testimony is that that should have happened that morning, correct?

A. Prior to the start of work, yes.

Q. Prior to the start of work, it could be that morning or it could be much earlier, correct?

A. Yes.

Q. You mentioned the things that should be addressed in that meeting, talking about all hazards, and I think you mentioned the aggregate size, the size of the truck, the flagging, the electrical proximity and all those things, am I correct?

A. Exactly. That there's adequate distance

to put the outriggers out for the pumper truck, you know, what workers will be involved, personal protective equipment review, those kinds of things, yes.

Q. Who calls the meeting?

A. General contractor.

Q. With regard to this instance, then, and specific to this meeting that you think several items should be covered, what would give the general contractor the advance knowledge to bring up aggregate size as a subject matter of hazard?

A. If there is any chance that the pumper truck they ordered might not get far enough, then the question may come up, how are you going to reach from here to there, or should we find a different site to set the pumper truck up? It's just the beginning of the discussion. It may or may not come up depending on whether reducers would be necessary for the operation.

Q. Is it your testimony that the general contractor should have been aware of the fact that the pump truck supplied was not large enough?

MR. CASEY: Object to form.

A. That would be one of the things in this initial meeting, yes.

Q. Who would be responsible for bringing it up?

A. The general would be asking how far do we have to pump today? What size truck you got coming out? What time are they going to be here? Where are they going to set up? You know, we're going to have to block this sidewalk. You know, those are the kinds of questions that would typically come up.

Q. Did you exhaust your knowledge of what issues would come up?

A. That's a good start, yes.

Q. Well, what's the finish?

MR. CASEY: Object to form.

A. Boom length, boom diameter, where will people be stationed, fall protection. You know, those kinds of things.

Q. I'm with you. I'm with you. Here is my dilemma, Mr. Gleason. I'm looking at a 496-page document that has just a load of stuff about operations of the pump truck itself, and I just want to make sure I understand. Is it your testimony that all potentially relevant subjects up to and including the entire operations manual of the Putzmeister should be brought up at that meeting?

A. I don't think that's possible.

Q. Okay. So where do you draw -- the question I have, then, is this: Where do you draw the line as to what subject matters should be covered up? Again, let me preface this by asking you this: Inland Washington cannot see the future, can they?

MR. MOORE: Object to form, argumentative.

Q. I'm asking a literal question of reality in this sphere we live in. No one can predict the future, am I right?

A. You're correct.

Q. So after-the-fact review of what did happen is sort of 20/20 hindsight as they call it, correct?

MR. MOORE: Object to form, argumentative.

Q. I'm asking a simple proposition.

A. There are certain things easily that could be brought up, and that's the things we've already mentioned: The overhead power lines and the laydown area and the flagging and traffic control and pedestrians. All those things.

Q. You said aggregate size and you said pump size and you said boom diameter. You didn't say hose diameter, but is that something that you think should

MR. BUTLER: I want to ask a quick question before he forgets.

MR. MOORE: Sure.

MR. BUTLER: Did the Murphy notes bear in your opinions in any respect?

THE WITNESS: No, I don't think so.

MR. BUTLER: Okay.

Q. Now, you were asked about some training and safety meetings that Hilltop employees, including Gildardo Crisostomo Vargas, had or may have had. Do you remember that discussion, or those discussions?

A. Yes.

Q. Do you have any indication that Gildardo Crisostomo Vargas was instructed or trained to stay out of the danger zone at start-up?

A. You know, it's unclear to me. I think Matt Skoog talked generally about their safety training, but I don't know exactly what was told to him.

Q. We talked about duck and cover, which was duck and cover after you hear the plug or something to that effect?

A. Yes. I recall that.

Q. Do you remember any training or safety meetings provided by Hilltop or anybody else in this

case to Gildardo saying stay out of the danger zone when the pump is starting up?

MR. CASEY: Object to form.

A. I don't recall seeing that specifically.

Q. Now, if Miles Sand and Gravel had provided information to Inland's engineer regarding the composition of the mix, including the aggregate size, would that be sufficient to deem it communicated to the workers on the ground?

MR. MUSE: Object to form.

A. I would say yes.

Q. Would that information be required to have been provided from Inland's engineer to -- to anybody at Hilltop?

A. So then it can go downstream, so normally it comes from the manufacturer, if you will, or whoever is creating the concrete, and then to -- or it might even go directly to Hilltop if they're the ones that ordered it. That would make sense. But then that information would be available for them. They might share that with Ralph's when they call for the pump truck, something like that.

MR. BUTLER: You're referring to Hilltop?

THE WITNESS: Yes.

Q. And was there any indication in this case that the true size of the aggregate, assuming it's one to 1.5 inches max, is there any indication that that information was communicated to anybody who was on the site at the time of the incident?

A. I don't believe so.

Q. And is that information that should have been communicated to those people?

A. I believe it should have been.

MR. MUSE: Object to form.

A. So they could make choices of hose size requirements.

Q. And again, do you remember the discussion with Mr. Casey's hypothetical regarding what happens if continuous flow was made during the slurrying process?

A. Yes.

Q. So just to be clear, if they slurry up on the other side of the wall and they get continuous flow at that point, and then they kink the hose and then they move the boom to the location where the end product is going to go, at the point when they unkink the hose and start pumping again, would that be considered start-up for the purpose of the zone of danger?

MR. CASEY: Object to form.

A. Yes. In my opinion the fact of swinging the boom, now it's a new start-up, and after the halo is removed and the hose put in the foundation formwork, then that's when the pump operator turns the concrete pumper truck on with people away.

Q. So at that point, in this case, in this specific incident, or instance, at the time of the incident, neither Gildardo Crisostomo Vargas or anybody else should have been within twice the radius of the hose, is that correct?

MR. CASEY: Object to form.

MR. BUTLER: I'll just say it's misstating the testimony.

A. That at the very least 12 feet away from, but according to Ralph's, and the usual standard of care is double that, so 25 feet roughly, that no one should be in the danger zone.

Q. And was Gildardo in the danger zone at the time he was injured?

MR. CASEY: Object to form.

A. Yes.

MR. MOORE: I believe that's all I have. Thank you.

MR. CASEY: I have just a few

Exhibit 37

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs/Petitioners, v. INLAND WASHINGTON, LLC, a Washington limited liability company, and RALPH'S CONCRETE PUMPING, INC., a Washington corporation, Defendants/Respondents, INLAND GROUP P.S., LLC, a Washington limited liability company, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	No. 76717-8-I RULING GRANTING DISCRETIONARY REVIEW IN PART
GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Plaintiffs/Respondents, v.	No. 76893-0-I RULING GRANTING DISCRETIONARY REVIEW

RALPH'S CONCRETE PUMPING, INC., a Washington corporation,

Defendant/Petitioner,

INLAND WASHINGTON, LLC, a Washington limited liability company,

Defendant/Respondent,

INLAND GROUP P.S., LLC, a Washington limited liability company, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,

Defendants.

This case involves a serious injury sustained in a construction worksite during a concrete pumping operation. Injured worker Gildardo Vargas (through his litigation guardian ad litem) and his wife and children seek interlocutory review of the summary judgment dismissal of their claims against Inland Washington, LLC, the general contractor. The plaintiffs also seek review of certain discovery rulings related to their immigration status. Defendant Ralph's Concrete Pumping (Ralph's) seeks review of the denial of its summary judgment motion in which Ralph's argued that its concrete pump operator was a borrowed servant of Vargas's employer and is thus immune from liability under Title 51 RCW. The trial court certified all of these rulings for immediate review.

I accept the trial court's certification on the summary judgment dismissal of Inland. The dismissal appears to involve a controlling question of law as to which there is a substantial ground for a difference of opinion on the scope of Inland's WISHA (Washington Industrial Safety and Health Act, chapter 49.17 RCW) and common law

duties and liability as a general contractor under the Stute line of cases.[1] The denial of Ralph's' summary judgment motion on the borrowed servant issue appears to involve largely a question of fact under established precedent as to whether Vargas's employer had exclusive control of Ralph's' operator for the transaction causing injury. The trial court concluded that there is an issue of fact on this issue. But the evidence relevant to the Stute issue overlaps with that relevant to the borrowed servant issue. To facilitate the resolution of this case, review is also granted on the borrowed servant issue. On the other hand, the discovery rulings appear largely moot, and immediate review may not materially advance the ultimate termination of the litigation. Review is granted in No. 76717-8 solely on the dismissal of Inland. Review is also granted in No. 76893-0.

FACTS

The injury at issue occurred on an apartment complex construction site in Shoreline, Washington. Below is a brief summary of the facts relevant to this ruling.

Inland was the general contractor of the construction project. To install concrete, it hired Hilltop Concrete Construction, Inc. (Hilltop), Vargas's employer. The trial court

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[1] See Stute v. P.B.M.C., Inc., 114 Wn.2d 454, 464, 788 P.2d 545 (1990) (WISHA imposes a specific statutory duty on a general contractor to comply with WISHA regulations for the benefit of employees of independent contractors because "the general contractor's innate supervisory authority constitutes sufficient control over the workplace"); Kelley v. Howard S. Wright Constr. Co., 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (general contractor who retains control over the work of the employee of an independent contractor has a common law duty "within the scope of that control, to provide a safe place of work"); Afoa v. Port of Seattle, 176 Wn.2d 460, 472, 296 P.3d 800 (2013) (Afoa I) ("jobsite owners have a specific duty to comply with WISHA regulations if they retain control over the manner and instrumentalities of work being done on the jobsite," and "this duty extends to all workers on the jobsite that may be harmed by WISHA violations"); Kamla v. Space Needle Corp., 147 Wn.2d 114, 125-27, 52 P.3d 472 (2002) (jobsite owner, who does not retain control over the manner in which an independent contractor performs work, is not liable under common law or WISHA for the manner in which the contractor performed work); Afoa v. Port of Seattle, 198 Wn. App. 206, 217-34, 393 P.3d 802 (2017) (Afoa II) (Port of Seattle, which retained control over the manner of work done on a worksite, had a nondelegable duty to maintain a safe workplace, is vicariously liable for any breach of that duty, and is not entitled to allocate fault to four nonparty airlines to proportionately reduce its liability). In Afoa II, a petition for review is currently pending in the Supreme Court.

has previously ruled, and there is no dispute, that Hilltop, as Vargas's employer, is responsible for workers' compensation but is otherwise immune from liability for his injury under Title 51 RCW and that his co-workers at Hilltop are also immune.

Vargas's employer Hilltop hired Miles Sand and Gravel Co. (Miles) to supply the concrete mix for the project. Hilltop contracted with Ralph's to provide a concrete pump truck and a certified pump operator to pump the concrete into forms built by Hilltop carpenters. Ralph's asserts that Hilltop exercised control over the work of its pump operator Anthony Howell such that Howell was Hilltop's borrowed servant immune from liability for Vargas's injury under Title 51 RCW. The plaintiffs dispute this claim.

On the day of the injury, Hilltop supervisor Matt Skoog was at the worksite. He testified that he oversaw the concrete portion of the work. No Inland employee was in the vicinity. To build the concrete walls, Miles' truck operator would pour concrete mix into the hopper of Ralph's' pump truck, which would pump the concrete through a boom to a hose at the end, which Hilltop workers would use to pour the concrete into the forms. Ralph's' concrete pump operator Howell arrived at the site. Hilltop supervisor Skoog told him where to set up the pump and showed him the walls they were pumping that day. Howell set up the pump and hooked up the end hose. Vargas and several other Hilltop workers were on the scaffolding next to the concrete forms. Vargas held the end of the hose. Howell controlled the boom and the pump by a remote control. After Howell turned on the pump, it momentarily stopped due to a loss of the wireless signal. Howell reestablished the connection and re-started the pump. The hose whipped and hit Vargas in the head, causing him serious injuries.

Vargas and his wife and children filed a lawsuit in King County Superior Court

against Inland, Ralph's, and Miles. In June 2015, the trial court (Judge Carol Schapira) denied Inland's summary judgment motion. The summary judgment order stated that Inland owed "non-delegable duties under Stute" but was "not vicariously liable."[2] No party sought reconsideration or interlocutory review of this order.

In March 2017, Inland filed another summary judgment motion to dismiss the plaintiffs' claims against it. It argued that it was not liable for the acts or omissions of others, did not owe Vargas a duty to provide a safe *non-common* work area under the sole control of his employer Hilltop, and violated no applicable WISHA rules causing his injury. Inland pointed out Hilltop supervisor Skoog's testimony that Hilltop was in charge of pouring concrete, that he oversaw the concrete work, and that Vargas was the lead of the pouring team. Inland argued that a general contractor is not liable for injuries sustained by an employee of its subcontractor *outside common work areas* over which the general contractor lacks control. In response, the plaintiffs argued that Inland, as a general contractor, had per se control over the worksite as a matter of law under Stute. The plaintiffs asked the trial court to vacate its prior vicarious liability ruling as contrary to Division Three's 2013 opinion in Millican[3] and this Court's recent opinion in Afoa II.

Judge Jeffrey Ramsdell declined to "revisit Judge Schapira's earlier ruling" on vicarious liability, stating that Afoa II (decided after the prior ruling) did not present a major change in the law.[4] The court granted summary judgment for Inland because the plaintiffs failed to show any WISHA violation for which Inland had a non-delegable duty:

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[2] Appendix to Answer to Motion for Discretionary Review (Inland App. 76717-8) 9.

[3] Millican v. N.A. Degerstrom, Inc., 177 Wn. App. 881, 896, 313 P.3d 1215 (2013) ("The label 'nondelegable duty' does not mean that an actor is not permitted to delegate the activity to an independent contractor. Rather, the term signals that the actor will be vicariously liable for the contractor's tortious conduct in the course of carrying out the activity.").

[4] Inland App. (No. 76717-8) 1339; RP (Mar. 31, 2017) 76.

> As far as the Stute issue and the non-delegable duty issue that we've just been arguing about, I'm inclined to grant Inland's motion. And the reason for that is, I'm really not seeing much in the way of substance from the Plaintiff as to what the actual violation is of what non-delegable duty we're talking about. It sounds like a generalized guarantor of safety across the board which I don't think is what *Stute* contemplates. And so I'm going to grant Inland's motion and dismiss the claim against them.[5]

On the plaintiffs' motion, the trial court certified for immediate review its summary judgment order, including its "affirmation" of its prior vicarious liability ruling.

Meanwhile, the plaintiffs filed a motion for a protective order to prevent discovery of their immigration status. Inland filed a motion to compel continued depositions of the plaintiffs in part to question them about their immigration status as relevant to their economic damages claim. The trial court granted a protective order as to non-party witnesses, but not as to the plaintiffs, and granted Inland's motion to compel. The court denied the plaintiffs' motion to depose Inland and Hilltop about their use of undocumented labor. Pursuant to the trial court's ruling, Inland deposed the plaintiffs. The court later denied reconsideration of the discovery rulings but, on the plaintiffs' motion, certified the rulings for immediate review.

Previously, in September 2015, Commissioner Mary Neel of this Court denied Ralph's' motion for discretionary review of Judge Schapira's denial of its summary judgment motion.[6] In its prior summary judgment motion (as in its later motion at issue here), Ralph's argued that its concrete pump operator Howell was Hilltop's borrowed employee and is immune from liability under Title 51 RCW. In denying review, Commissioner Neel pointed out that whether a person is a borrowed servant is ordinarily a question of fact and that Ralph's failed to demonstrate an obvious error in

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[5] Inland App. (No. 76717-8) 1340 (emphasis added); RP 77.
[6] Ruling Denying Discretionary Review (No. 73503-9-I).

the trial court's denial of summary judgment:

> Here, there is evidence that Hilltop told Howell where to set up and where the concrete was to be poured and that Hilltop employees handled the hose; there is also evidence that Howell moved the boom to the appropriate location, turned on the pump, and restarted it when it stopped shortly before it whipped and hit Vargas in the head. Although the language in the lease makes Howell the loaned servant of Hilltop, Ralph's acknowledges that the lease is not controlling. Ralph's has not shown that the trial court's decision denying summary judgment dismissal as a matter of law was obvious error.[7]

A three-judge panel of this Court denied Ralph's' motion to modify the ruling denying review. In March 2017, Ralph's again filed a summary judgment motion on the borrowed servant issue. The trial court again denied the motion. Judge Ramsdell explained that beyond Hilltop's instructions as to where to park the truck and where to pour the concrete, Howell apparently did the work "from the determination as to where to put the boom and how long it should be, et cetera et cetera."[8] The court stated:

> I keep coming back to the fundamental question of, if this is all it takes, then virtually every subcontractor who comes on site that brings equipment with him is a borrowed servant. And I just can't - - I can't believe that that should be the state of the law.[9]

On Ralph's' motion, the trial court certified the issue for immediate review.

DECISION

The plaintiffs seek review of the summary judgment dismissal of their claims against Inland as well as the discovery orders related to their immigration status. Ralph's seeks review of the denial of summary judgment on the borrowed servant issue.

"Interlocutory review is disfavored."[10] "It is not the function of an appellate court

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[7] Ruling Denying Discretionary Review at 7-8 (No. 73503-9-I).
[8] Inland App. (No. 76717-8) 1304-05; RP 41-42.
[9] Inland App. (No. 76717-8) 1305; RP 42.
[10] Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 462, 232 P.3d 591 (2010) (citing Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959)).

to inject itself into the middle of a lawsuit and undertake to direct the trial judge in the conduct of the case."[11] RAP 2.3(b) defines four situations in which this Court may grant pretrial review. The plaintiffs and Ralph's primarily rely on RAP 2.3(b)(4). Under that rule, this Court may accept review when the trial court certifies that its decision "involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." The trial court's certification is not binding on this Court.

A. Summary Judgment Dismissal of Inland: *Stute* and Vicarious Liability

The plaintiffs argue that the trial court erred in applying a retained control analysis when Inland, the general contractor, had per se control over the workplace and is vicariously liable for breaches of WISHA and common law duties. Inland argues that a general contractor owes no duty to an injured employee of its subcontractor when the injury occurs *outside a common work area* over which the general did not retain control.

Under common law, a general contractor who engages an independent contractor is generally not liable for the injuries of the employees of the independent contractor resulting from their work.[12] An exception exists when the general contractor "retains control over some part of the work. The general then has a duty, within the scope of that control, to provide a safe place of work."[13] In Kelley, our Supreme Court explained the policy reasons for requiring the general contractor to bear ultimate responsibility for job safety "in common work areas."[14] In Stute, our Supreme Court followed the "policy reasons" articulated in Kelley and other cases as well as the

[11] Maybury, 53 Wn.2d at 720.
[12] Kelley, 90 Wn.2d at 330.
[13] Id.
[14] Id.

language of WISHA to hold that a general contractor has a non-delegable statutory duty to comply with applicable WISHA regulations to protect the employees of independent contractors "because the general contractor's innate supervisory authority constitutes sufficient control over the workplace."[15] "A general contractor's supervisory authority is per se control over the workplace, and the duty is placed upon the general contractor as a matter of law."[16] In Afoa II, this Court discussed Kelley and Stute and noted that "[b]oth the common law theory of retained control based on the *Restatement* and the WISHA specific duty standard depend on control over the manner of work."[17] This Court also held that nondelegable duties "involve a form of vicarious liability."[18]

It appears that the trial court granted summary judgment for Inland on the ground that the plaintiffs failed to articulate "what the actual violation is of what non-delegable duty we're talking about."[19] The court's decision involves a fact question as to whether the plaintiffs presented sufficient evidence of any WISHA violation. But the court also reaffirmed its prior ruling that Inland is not vicariously liable for the breaches of WISHA or common law duties by the other defendants. This conclusion appears to involve a question of law as to the scope of Inland's WISHA and common law duties and liability as the general contractor. The issue is dispositive of the plaintiffs' claims against Inland when the plaintiffs assert that Inland is primarily responsible for Vargas's injury. In light of the cases discussed above, there is a substantial ground for a difference of opinion

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[15] Stute, 114 Wn.2d at 464.

[16] Id.

[17] Afoa II, 198 Wn. App. at 218. Afoa I and Afoa II involved a jobsite owner Port of Seattle, which was found to have retained the right to control the manner of the work performed by an injured employee of a contractor licensed by the Port to provide ground service work.

[18] Id. at 231 (quoting 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 12.09 cmt. At 161 (6th ed. 2012) and 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT AND LAW PRACTICE § 4:15, at 204-06 (4th ed. 2013)).

[19] Inland App. (No. 76717-8) 1340; RP 77.

on the issue, and immediate review may materially advance the ultimate termination of the litigation. Review is granted on this issue under RAP 2.3(b)(4).

B. Discovery Rulings Related to the Plaintiffs' Immigration Status

The plaintiffs argue that the trial court erred in allowing Inland to question them about their immigration status in discovery when they presented a declaration stating that no deportation proceedings were pending against them. But the issue appears largely moot when Inland has already conducted their depositions. The plaintiffs did not seek emergency relief before then. Further, they fail to demonstrate that the discovery rulings may materially advance the ultimate termination of the litigation. Nor do they demonstrate a probable error that would otherwise warrant review. Although they rely on Salas, that case turned on the balancing under ER 403 of the probative value and unfairly prejudicial effect of plaintiff's immigration status, not discoverability.[20] I respectfully decline to accept the trial court's certification on the discovery rulings.

C. Denial of Summary Judgment on Ralph's' Borrowed Servant Defense

Ralph's' motion for discretionary review appears to present a question of fact based on established precedent. "Normally the question of whether or not a particular individual was a 'loaned servant' is a factual one, to be determined by the jury."[21] "The borrowed servant defense is a legal fiction that expands the concept of respondeat superior."[22] An employer is vicariously liable to third parties for torts committed by its

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[20] See Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 670-72, 230 P.3d 583 (2010) (although plaintiff's immigration status was relevant to his lost future earnings, "the probative value of [his] undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice"); see also Diaz v. Wash. State Migrant Council, 165 Wn. App. 59, 75, 265 P.3d 956 (2011) ("There is nothing in Salas that supports cutting off inquiry at the outset of discovery.").

[21] Nyman v. MacRae Bros. Constr. Co., 69 Wn.2d 285, 288, 418 P.2d 253 (1966).

[22] Wilcox v. Basehore, 187 Wn.2d 772, 783, 389 P.3d 531 (2017).

employee within the scope of employment.[23] An exception exists when the employee's "general employer loans the [employee] to another, or 'special,' employer."[24] "For those activities over which the special employer exercises *complete control*, the special employer also assumes vicarious liability under the 'borrowed servant' doctrine."[25] The borrowed servant doctrine "does not require complete and exclusive control over all aspects of the loaned worker's conduct. Liability arises out of *those particular transactions over which the special employer has exclusive control.*"[26]

Ralph's argues that immediate review is appropriate based on the trial court's certification. It argues that the trial court was inconsistent in granting summary judgment for Inland (where Inland argued that Hilltop had exclusive control over the worksite) while finding an issue of fact preventing Ralph's' summary judgment motion on Hilltop's control over Howell's work. But a general contractor's duty based on its supervisory control over a worksite under Stute involves different considerations than those involved in the exclusive control analysis under the borrowed servant doctrine. Also, the operative facts presented in the prior motion for discretionary review denied by this Court in No. 73503-9-I appear essentially the same as those presented here.

Ralph's argues that what constitutes the "transaction" over which the borrowing employer must have control and what facts are "material" in this case under the borrowed servant doctrine present questions of law. Ralph's argues that the resolution of these issues will facilitate the termination of this litigation. The evidence relevant to the Stute issue overlaps with that relevant to the borrowed servant issue. The plaintiffs

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[23] Wilcox, 187 Wn.2d at 783.
[24] Id.
[25] Id. (emphasis added).
[26] Id. (emphasis added).

support review on the borrowed servant issue, although Inland opposes review. Because review is granted on the Stute issue, I grant review on the borrowed servant issue to facilitate the ultimate resolution of the litigation.

Therefore, it is

ORDERED that discretionary review is granted of the orders granting Inland's summary judgment motion and denying reconsideration in No. 76717-8-I. Review of the discovery rulings is denied. It is further

ORDERED that discretionary review is granted of the order denying summary judgment in No. 76893-0-I. It is further

ORDERED that these cases are linked.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 JUL 21 AM 11:07

Done this 21st day of July, 2017.

Masako Hanazawa
Court Commissioner

Exhibit 38

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
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July 24, 2018

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CASE #: 76717-8-I
Gildardo Crisostomo Vargas, et al., Pets. v. Inland Washington, LLC, Res.

**** Read this Notice Carefully ****
**** This is the only notice counsel will receive. ****

No. 76717-8-I-I/2
Counsel:

The Court of Appeals is committed to the timely and expeditious processing of cases on appeal. In order to facilitate that objective, and to ensure adequate advance notice to all parties, Division I has instituted changes in the oral argument calendaring process. Oral argument in this case has been scheduled for September 10, 2018 at 9:30 am before Judges Leach, Verellen and Dwyer at the Court of Appeals. Pursuant to RAP 11.4(a), the court has scheduled 10 minutes per side for oral argument.

Because of the significant advance notice regarding the calendaring of this matter, continuances will ordinarily not be granted. Continuances will be granted only on a showing of good cause.

If counsel desires either additional time for oral argument, or a continuance, **a written motion must be filed by August 3, 2018**. **Failure to file a written motion for continuances by the date identified will result in the case being heard on the scheduled date.**

Counsel has sole responsibility for determining whether the proper record to review the appeal has been filed with this court. Counsel's failure to ensure the filing of a proper record necessary for review may result in the imposition of sanctions pursuant to RAP 18.9.

Counsel should acknowledge receipt of this letter. Please date and sign the attached copy of this letter and return it to the undersigned within five days of receipt.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Name: ----------

Bar #: ----------

Sign: ----------

Exhibit 39

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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July 24, 2018

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CASE #: 76893-0-I
Gildardo Crisostomo Vargas, et al., Res. v. Ralph's Concrete Pumping, Inc., Pet.

**** Read this Notice Carefully ****
**** This is the only notice counsel will receive. ****

Counsel:

The Court of Appeals is committed to the timely and expeditious processing of cases on appeal. In order to facilitate that objective, and to ensure adequate advance notice to all parties, Division I has instituted changes in the oral argument calendaring process. Oral argument in this case has been scheduled for September 10, 2018 at 9:30 am before Judges Leach, Verellen and Dwyer at the Court of Appeals. Pursuant to RAP 11.4(a), the court has scheduled 10 minutes per side for oral argument.

No. 76893-0-I-I/2

Because of the significant advance notice regarding the calendaring of this matter, continuances will ordinarily not be granted. Continuances will be granted only on a showing of good cause.

If counsel desires either additional time for oral argument, or a continuance, **a written motion must be filed by August 3, 2018**. **Failure to file a written motion for continuances by the date identified will result in the case being heard on the scheduled date.**

Counsel has sole responsibility for determining whether the proper record to review the appeal has been filed with this court. Counsel's failure to ensure the filing of a proper record necessary for review may result in the imposition of sanctions pursuant to RAP 18.9.

Counsel should acknowledge receipt of this letter. Please date and sign the attached copy of this letter and return it to the undersigned within five days of receipt.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Name: ----------

Bar #: ----------

Sign: ----------

Exhibit 40

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
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July 26, 2018

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CASE #: 76717-8-I
Gildardo Crisostomo Vargas, et al., Pets. v. Inland Washington, LLC, Res.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on July 26, 2018, regarding oral argument scheduled for September 10, 2018:

Notation Ruling
Vargas v Inland Washington
No. 76717-8-I
July 26, 2018

This case is set for consideration on the September 10, 2018 calendar at 9:30 am. At the direction of the panel, each side shall have 15 minutes oral argument. The parties should be prepared to address the applicability of the decision in Afoa v. Port of Seattle (94525-0), filed in the Supreme Court of July 19, 2018.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Exhibit 41

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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State of Washington

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August 30, 2018

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Page 1 of 2
CASE #: 76717-8-I
Gildardo Crisostomo Vargas, et al., Pets. v. Inland Washington, LLC, Res.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on August 30, 2018, regarding oral argument scheduled for September 10, 2018:

Notation Ruling
76717-8-I, Vargas v Inland Washington
August 30, 2018

The panel has conferenced and determined that this matter will be resolved without the need for oral argument. Accordingly, at the direction of the panel, the argument set for September 10, 2018 is stricken. An opinion will issue in due course.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Exhibit 42

RICHARD D. JOHNSON,
Court Administrator/Clerk

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August 30, 2018

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CASE #: 76893-0-I
Gildardo Crisostomo Vargas, et al., Res. v. Ralph's Concrete Pumping, Inc., Pet.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on August 30, 2018:

> The panel has conferenced and determined that this matter will be resolved without the need for oral argument. Accordingly, at the direction of the panel, the argument set for September 10, 2018 is stricken. An opinion will issue in due course.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAM

Exhibit 43

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, And ROSARIO CRISOSTOMO FLORES, minor children, Petitioners, v. INLAND WASHINGTON, LLC, a Washington limited liability company, Respondent, INLAND GROUP P.S., LLC, a Washington limited liability company; RALPH'S CONCRETE PUMPING, INC., a Washington corporation; and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	DIVISION ONE No. 76717-8-I UNPUBLISHED OPINION FILED: September 17, 2018

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2018 SEP 17 AM 10: 51

DWYER, J. – In light of the Supreme Court's decision in Afoa v. Port of Seattle, 191 Wn.2d 110, 421 P.3d 903 (2018), which reversed this court's decision in Afoa v. Port of Seattle, 198 Wn. App. 206, 393 P.3d 802 (2017), the standards for discretionary

review set forth in RAP 2.3(b)(4) are not met. Accordingly, we deem review improvidently granted.

This matter is remanded to the superior court for further proceedings, as if review had never been granted by this court in the first instance.

Dismissed.

Dwyer, J.

We concur:

Verellen, J.

Leach, J.

Exhibit 44

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2018 SEP 17 AM 8:59

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Respondents, v. RALPH'S CONCRETE PUMPING, INC., a Washington corporation, Petitioner, INLAND WASHINGTON, LLC, a Washington limited liability company; INLAND GROUP P.S., LLC, a Washington limited liability company; and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	DIVISION ONE No. 76893-0-I UNPUBLISHED OPINION FILED: September 17, 2018

DWYER, J. – A petition for discretionary review was filed by Ralph's Concrete Pumping, Inc. Although no issue presented for review warranted discretionary review, our commissioner granted discretionary review because such review was granted in a companion case, No. 76717-8-I.

We have deemed review in No. 76717-8-I to be improvidently granted and have dismissed that case. Accordingly, we deem review in this matter to be improvidently granted and also dismiss.

This matter is remanded to the superior court for further proceedings, as if review had never been granted by this court in the first instance.

Dismissed.

We concur:

Exhibit 45

FILED
10/17/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, And ROSARIO CRISOSTOMO FLORES, minor children, Petitioners, v. INLAND WASHINGTON, LLC, a Washington limited liability company, Respondent, INLAND GROUP P.S., LLC, a Washington limited liability company; RALPH'S CONCRETE PUMPING, INC., a Washington corporation; and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	DIVISION ONE No. 76717-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The petitioners having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

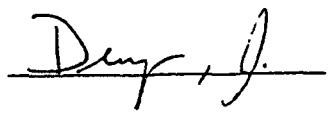

Exhibit 46

FILED
10/17/2018
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children, Respondents, v. RALPH'S CONCRETE PUMPING, INC., a Washington corporation, Petitioner, INLAND WASHINGTON, LLC, a Washington limited liability company; INLAND GROUP P.S., LLC, a Washington limited liability company; and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation, Defendants.	DIVISION ONE No. 76893-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondents having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

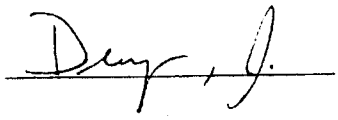

Exhibit 47

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; and LUCINA FLORES as Guardian ad Litem for PATRICIA CRISOSTOMO FLORES, and ROSARIO CRISOSTOMO FLORES, minor children,	)
Plaintiffs,	)
vs.	) No. 13-2-32219-6 SEA
INLAND GROUP P.S., LLC, a Washington limited liability company, INLAND WASHINGTON, LLC, a Washington limited liability company, RALPH'S CONCRETE PUMPING, INC., a Washington corporation, and MILES SAND & GRAVEL COMPANY d/b/a CONCRETE NOR'WEST, a Washington corporation,	)
Defendants.	)

DEPOSITION UPON ORAL EXAMINATION OF MATTHEW SKOOG

1:30 p.m.
Thursday, November 3, 2016
3232 Rockefeller Avenue
Everett, Washington

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MR. CASEY: So not this incident?

MR. MOORE: Not this incident.

A Sometimes.

Q Under what circumstances would Hilltop tell the pump truck operators what hoses to use?

A Pouring large sums of concrete in one location or smaller sums of concrete in a location.

Q And specifically on the Shoreline -- I believe you called it the North City Apartments job; is that right?

A Yes.

Q On the North City Apartments job was Hilltop involved in the selection of what hose was to be used by Ralph's Concrete?

A I don't recall.

Q Did Hilltop on any job ever tell Ralph's Concrete pump operators what reducers to use, if any?

MR. CASEY: Object to form.

A We would never tell them what to use, no.

Q Do you know what a reducer is?

A Yes.

Q What is a reducer?

A It reduces the size of the hose.

Q Are you familiar with standard lumber sizes?

A Yes.

Q What does a two-by-four mean to you?

A An inch-and-a-half by a three-and-a-half-inch piece of wood.

Q So a two-by-four is not actually two inches by four inches, it's one-and-a-half inches by three-and-a-half inches?

MR. BUTLER: Object to form.

A It depends on the lumber.

Q How so?

A Lumber can come out different sizes from different lumber companies.

Q Other than this incident, have you been involved in any kind of lawsuit of any kind?

MR. BUTLER: Object to form and scope.

A What do you mean "involved"?

Q Have you sued anyone, been sued, have you been a witness in any lawsuit?

A Yes.

Q Which?

A I don't know the name of it.

Q Let me break those down. Have you ever been sued before?

A Not personally, no.

Q Has a company that you worked for -- well, that is pretty overbroad.

MR. BUTLER: He can probably answer for about half of his employers.

Q Have you ever sued anybody personally?

A No.

Q Has any company that you've had any ownership interest in

Q And do you know if that boom was extended in any way when you first saw it that morning?
A No, it was folded up when I first saw it.
Q Do you remember if the -- well, do you remember if the Ralph's pump truck had outriggers?
A Yes.
Q Do you know if -- strike that.
When you first saw the Ralph's pump truck on the morning of the incident, had it already had its outriggers extended?
A No.
Q On the morning of the incident did you see the pump truck move prior to the priming process?
A Yes.
Q Where did you see it move from and to?
A From the street to a location to set up for pumping.
Q From what street?
A The street on the west side of the building. I don't recall the exact street number.
Q Do you know how it was determined that the pump truck would set up where it did?
A It was the only location we could use.
Q Do you know who made that decision as to where to park the pump truck that morning?
A I believe we all did in order to find the best spot for the pump to sit to pour.

Q When you say "we all", who was involved in that?
A Steve Miller and I and possibly Don from Ralph's Concrete Pumping.
Q What do you remember of that discussion involving Steve Miller, you, and Don from Ralph's?
MR. CASEY: Object to form; mischaracterizes the testimony.
A I don't recall exactly.
MR. BUTLER: Join.
Q Who is Don from Ralph's?
A I don't know his exact title. He's a contact when we need to figure out what size pump we use or where to put a pump he comes out and checks it out for us and we call him when we need anything, really.
Q Do you remember calling him that day?
A I don't recall.
Q Do you know if he was there before you were there that morning?
MR. CASEY: Object to form.
Q "He" being Don.
A No, he was not.
Q Is Don typically called on every time that Ralph's is pumping on a site?
MR. CASEY: Object to form.
A Not every time.

Q Is it unusual for Don to be called on site?
MR. CASEY: Object to form.
A No.
Q Under what circumstances is Don called to a job site?
MR. CASEY: Object to form.
A When we need advice as to what pump truck to use.
Q Do you know what pump truck was used on the day of the incident?
A I don't recall the size.
Q Do you know what a 55-meter boom pump truck is?
A Yes.
Q Is it pretty self-explanatory? It's a pump truck with a 55-meter boom?
A Yes.
Q Do you know what a 46 is?
A Yes.
Q The same thing?
A Shorter. Yes, same thing but shorter.
Q So a 46 would be a pump truck with a 46-meter boom?
A I believe so, yes.
Q Do you know if a 55 or a 46 was ordered that day?
A I don't recall.
Q Do you know whose decision it was to determine what size boom truck would be needed?
A I don't recall.

Q Was Steve Miller involved in the selection of the size of the boom truck?

MR. BUTLER: Object to form.

A I don't recall.

Q On the day of the incident do you know how many reducers were used on this pump truck?

A I do not.

Q Do you know the size of the hose on the end of the system on the day of the incident?

A I did not know exactly which size, no.

Q So describe in as much detail as you can recall what happened between the time that the pump was primed and the time of the injury.

MR. CASEY: Object to form.

A I guess I would defer to my declaration.

MR. MOORE: Let's please mark this one as Exhibit 1.

(Exhibit 1 marked for identification.)

Q And is Exhibit 1 the declaration that you were referring to?

A Yes.

Q Who wrote this declaration?

A I believe John Butler wrote it.

Q Who is John Butler?

A Him (indicating).

Q Counsel here. And what's your understanding of who he

A I believe Hilltop Concrete's safety manual.
Q Is any of this your writing?
A No.
Q Do you know who wrote it?
A No.
Q Do you know when it was written?
A I do not.
Q I believe previous testimony said that this was written after Gildardo's injury. Would you agree with that?
A I do not know.
Q You don't know if it was written before or after Gildardo's injury?
A I do not.
Q So is it accurate to say you have no recollection of having seen this prior to Gildardo's injury?
A I don't recall exactly when I saw it.
(Exhibit 3 marked for identification.)
Q Now you have what's been marked Exhibit 3. Have you seen that before?
A I don't recall.
Q Do you know what this is?
A It's a concrete ticket.
Q And do you know who Derek Mansur is?
A No, I don't recall.
Q Under customer order number it says Matt. Do you know if

that's you?

A Yes.

Q Does that refresh your recollection as to who had Miles Concrete Nor'West deliver concrete to this job?

A Yes. I don't believe you ever asked that question.

Q Fair enough. How did this document come into being?

A It is a receipt of concrete ordered.

Q And did you place the order for this concrete?

A Yes.

Q What exactly did you order?

A I would have -- I ordered a yardage amount of concrete and a certain mix number.

Q Do you know what mix code 0260A is?

A I don't recall.

Q There are different kinds of concrete; is that correct?

A Yes.

Q What kind of concrete is this one that's shown in the Exhibit 3?

A It is the concrete that we ordered for pouring walls.

Q And is this the concrete that was ordered for this job?

MR. BUTLER: I'll object to form.

A It looks like it, yes.

Q Now, if you'll look in the fine print, this area here says 7/8 #57. Do you know what that means?

A I do not. I believe that is the size of the rock that goes

in the concrete mix, but I'm not positive.

(Exhibit 4 marked for identification.)

MR. MOORE: This was also marked previously as an exhibit to Derek Mansur's deposition.

Q Would you agree that what's been marked as Exhibit 4 is kind of an enlarged view of part of Exhibit 3?

A Yes.

Q And that may help you read the fine print a little better. And again it says 7/8 #57?

A It's almost the same size.

Q It's a little clearer, maybe not much, but it is what it is. So what does that tell you about the rock size?

A I believe it means 7/8 rock size, but I don't know for sure.

Q This is something you ordered?

A I ordered a mix number, yes.

Q And who decided what mix number to order?

A I am given a list of mix numbers for each type of concrete, whether it's a wall or a slab, and I order the mix number that is given to me.

Q Who gave you this mix number?

A Inland.

Q Do you remember who at Inland?

A I believe it was Steve. No, I believe the mixes were given to me by Gordon.

Q So Gordon gives you the mix?

A Yes.
Q And is it your understanding that he gets it from Steve, Steve Miller?
A It's my understanding that he gets it from Inland.
Q Is it your understanding that the 7/8 means that the maximum aggregate rock size is 7/8 of an inch on this mix?
A It's my understanding that 7/8 would mean that would be the size they prefer. I don't know if it's maximum or not.
(Exhibit 5 marked for identification.)
Q And have you seen what's been marked as Exhibit 5 before?
A I don't believe so.
Q Can you identify what's been marked as Exhibit 5?
A It looks like the concrete trucks that were ordered for that day.
Q Is that an invoice for the concrete that was ordered on May 23rd, 2013?
A It looks that way.
Q And on the top three it shows -- well, actually before the top three items it says "PO Number: Matt". Does that refer to you?
A I believe so.
Q And the top three has a PO number after the dash. It's 141903, is that right?
A That's what I see.
Q And if you look on Exhibit 3 there's a "D-i-s-p Ticket Num".

Do you see that?
A Yes.
Q And that also says 141903?
A Yes.
Q So would you agree that the top three items on Exhibit 5 match Exhibit 3?
A The ticket number seems to match, yes.
Q And so this is the bill for the load that was being used at the time; is that right?
A It seems that way, yes.
(Exhibit 6 marked for identification.)
Q And have you seen what's been marked as Exhibit 6?
A I do not believe so.
Q Do you know what this is?
A It looks like the mix design for the mix that was ordered that day.
(Exhibit 7 marked for identification.)
Q You've been handed what's been marked as Exhibit 7. Can you identify the photograph which has been marked as Exhibit 7?
A It looks like concrete on a concrete floor.
Q Do you agree that this is a picture that was taken at the job site on the day of the incident?
A It's hard to say exactly.
Q On this project what kind of lumber did Hilltop use in building the forms?

A Plywood.
Q Anything else?
A Two-by-fours.
Q Anything else?
A Scaffolding lumber. I don't recall what it was.
Q I'm circling a piece of wood in Exhibit 7, and if I represent that this is a picture taken on the job site on the day of the incident, would you have any reason to disagree with that?
MR. BUTLER: Object to form.
A I don't have a reason to disagree, but I cannot say that I specifically can tell you that it was.
Q Now, the piece of lumber that I circled there, is that a 2-by-4?
MR. BUTLER: Object to form.
A I don't know.
Q Well, if that was a piece of lumber that was used in the building of forms on the job site on the day of the incident, would you have any reason to believe that that was not a 2-by-4?
A Based on the picture, it could be two 2-by-4s, it could be a 4-by-4. I don't really know. It even looks like it could be something smaller than a 2-by-4. I can't really tell.
(Exhibit 8 marked for identification.)
Q And do you recognize what's been marked as Exhibit 8 as a

picture taken at the job site on the day of the incident?
A Yes.
Q And do you recognize the wheelbarrow in kind of the upper left area of this picture?
A I see a wheelbarrow, yes.
Q Do you remember that wheelbarrow being there at the time of the incident?
A I don't recall.
Q Do you know whose wheelbarrow that is?
A I do not. It looks like -- I don't know exactly whose it is, no.
Q And I'm going to circle an area in Exhibit 8 with a black pen, a Sharpie. Now, the concrete shown in the circle there, do you know where that came from?
A I believe it came from the pump.
Q And is it concrete that came from the pump at the time of the incident?
A Yes.
Q And that board that it's resting on, do you know what size that is? Do you know what the dimensions of that is?
A It's a 2-by-12.
Q Now, we mentioned earlier that a 2-by-4 is usually 1.5 inches by 3.5 inches, the true dimensions; is that right?
MR. BUTLER: Object to form; again foundation.
Q We said that a long time ago in the deposition?

A Yes.
Q What are the true dimensions of a 2-by-12, specifically the 2-by-12s that you used in this job?
MR. BUTLER: Same objection.
A An inch and a half by anywhere from a 11 to 11-and-a-half.
Q Do you happen to know whether this one shown in the circle in Exhibit 8 is an 11 or an 11-and-a-half?
A No.
Q But the maximum size it would be would be 11-and-a-half; is that right?
MR. BUTLER: Object to form; foundation.
A I can't say for sure, but based on my experience, yes.
Q And let me circle another one. I made another circle closer to where the exhibit mark is in blue Sharpie. Were those rocks also from the concrete that was being used at the time?
A It looks like it, yes.
Q What is the size of the board that that's resting on?
A That is a 2-by-4.
Q With true dimensions of 1.5 by 3.5 inches?
MR. BUTLER: Same objection.
A It should be close to that, yes.
(Exhibit 9 marked for identification.)
Q And what's been marked as Exhibit 9, is that also a picture of the scene at the time?

A It looks like it.
Q And I'm going to make another circle with a black Sharpie. Are those also rocks from the concrete that was being used at the time?
A It looks like it, yes.
Q And what size board are those rocks in the circle resting on?
A A 2-by-12.
Q And I'm going to make another circle in blue. Is that also a 2-by-4 that's been circled in blue that the rocks are resting on?
A Yes.
(Exhibit 10 marked for identification.)
Q And you've been handed what's been marked as Exhibit 10. Is that another photograph of the scene on the day of the incident?
A It looks like it is.
Q And is the concrete in the middle, is that also concrete that came from the pump at the time?
MR. CASEY: Object to form.
MR. BUTLER: Join.
A It looks like it.
Q And can you identify the piece of lumber that's in the middle of that concrete?
A It looks like a 2-by-4.

Q And I'm going to circle two things here. I've just circled with a black Sharpie what appears to be two nails in the picture shown in Exhibit 10. Do you know what kind of nails those are?

A The one on the left looks like a duplex nail. On the right it also looks like a duplex nail.

Q What is a duplex nail?

A It's a nail with two heads on it.

Q Do you know how long those nails are?

A I do not know how long the ones in the picture are.

Q Are these kind of nails the types that are used by Hilltop in building forms?

A That type of nail is, yes.

Q And what type of nails were used on this project?

A Duplex nails.

Q Do you know the dimensions or the length of the duplex nails that were used by Hilltop on this project?

A There was two different sizes.

Q And what sizes did you use?

A I don't know the exact size. There's a larger size and a smaller size that are very standard.

Q Did you use three-inch nails on this job?

A I don't know. There's a larger size and a smaller size. I don't know the exact sizes.

(Recessed 4:51 p.m. to 5:03 p.m.)

(Exhibits 11 through 15 marked for identification.)

Q We're back on the record and you still understand that you are still under oath; is that right?

A Yes.

Q You've been handed now Exhibits 11, 12, 13, 14, and 15.

A Yes.

Q And are all of those depictions of the job site on the date of the incident?

MR. BUTLER: Object to form.

A It looks like it.

Q And is all the concrete shown here concrete that was poured out at the time of the incident?

A It looks like that way.

Q And looking at Exhibit 11, do you see the wood and the concrete towards the top of the exhibit?

A Yes.

Q Is that a 2-by-4?

A I believe so.

Q With actual dimensions of 1.5 by 3.5?

MR. BUTLER: Object to form.

A Roughly.

Q And on Exhibit 12 the piece of wood sticking in the concrete there, is that also a 2-by-4?

A It looks that way.

Q With dimensions of 1.5 by 3.5?
A Yes, I believe so.
MR. BUTLER: Same objection.
Q And in Exhibit 13, the piece of wood in the concrete, is that also a 2-by-4 with actual dimensions of 1.5 by 3.5?
MR. BUTLER: Same objection.
A It does also look the same.
Q And let's look at Exhibit 14. I'll circle that one. I've circled part of the piece of wood there. Can you tell me the dimensions of that piece of wood?
MR. BUTLER: Same objection.
A A 2-by-4.
Q With dimensions of 1.5 by 3.5?
MR. BUTLER: Same objection.
A Roughly.
Q And let's look the Exhibit 15. I'll circle with a blue Sharpie that piece of wood. Do you know what the dimensions of that piece of wood are circled in blue?
A It looks like a 2-by-4.
MR. BUTLER: Same objection.
Q Also with the dimensions of 1.5 by 3.5?
MR. BUTLER: Same objection.
A If it is a 2-by-4.
Q Do you believe more probably than not that that's a 2-by-4?
MR. BUTLER: Objection. This is not an expert.

A In the picture it looks bigger than the 2-by-4 in the wall.
Q And the wall to the left of it, that's a 2-by-4?
A Yes.
Q And I'm going to circle the nail here. Do you know what size that is?
A I do not know the size, no.
Q And the size of the lumber right above that nail that's been circled in blue, do you know what size that is?
MR. BUTLER: Same objection.
A It appears to be a 2-by-12.
Q And what are the actual dimensions of that 2-by-12?
MR. BUTLER: Same objection.
A Roughly an inch-and-a-half by roughly 11 to 11-and-a-half.
Q And one other question. In these exhibits the concrete shown -- let's look at Exhibit 8. Is Exhibit 8 also the location where Gildardo was at the time of the injury?
A It appears that way.
Q And do you know how much concrete actually came out prior to the hose whip injury?
A I don't recall any coming out.
Q So all the concrete shown in these pictures we've been talking about, did that come out after the hose whip?
A I believe so.
MR. MOORE: And that's all the questions I have for now, but we will continue this deposition, I guess, to a

Exhibit 48

Exhibit 32

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GILDARDO CRISOSTOMO VARGAS, an incapacitated person, by and through WILLIAM DUSSAULT, his Litigation Guardian ad Litem; LUCINA FLORES, an individual; ROSARIO CRISOSTOMO FLORES, an individual; and PATRICIA CRISOSTOMO FLORES, a minor child by and through LUCINA FLORES, her natural mother and default guardian,	)	
Plaintiffs,	)	
vs.	)	No. 13-2-32219-6 SEA
INLAND GROUP P.S., LLC, a Washington limited liability company,	)	
(Caption continued on next page.)	)	

VIDEOTAPED INTERPRETED DEPOSITION UPON ORAL EXAMINATION OF
JUAN CRISOSTOMO VARGAS

10:00 a.m.
Friday, February 24, 2017
19743 First Avenue South
Normandy Park, Washington

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(Caption cont'd)

INLAND WASHINGTON, LLC, a)
Washington limited liability)
company, RALPH'S CONCRETE)
PUMPING, INC., a Washington)
corporation, and MILES SAND)
& GRAVEL COMPANY d/b/a)
CONCRETE NOR'WEST, a)
Washington corporation,)
)
Defendants.)

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6 TIMOTHY DUVAL
Tsunami Production Company

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* * *

MARKED QUESTIONS

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Do you recognize the type of wood in, um, Exhibit 25, 26, and 27 that is used to build scaffolds at Hilltop?	68

Q Okay. Please continue, but do try and give the interpreter a chance to catch up every once in a while.

A Um, well, we start at seven in the morning. We set everything up. We already knew -- we had been told that we were going to pour cement that day. So we set up everything, the wires, the vibrator.

So the pump arrived and everything was normal and we were just setting everything up with -- we were getting our gloves, everything to be ready and, um -- and all that. I mean, in that period of time, we were told that the cement had arrived. The pump operator told us to be ready; we were ready.

THE INTERPRETER: The interpreter needs to clarify one thing.

A Um, so we were up in the scaffolding, everything was normal. And that's when the pump operator told us that we needed to remove --

THE INTERPRETER: The interpreted needed to clarify that.

A -- to remove the -- to unfold the, the hose so that everything would be ready. And there were three people there. My brother was the one that was going to hold the hose because he was going to pour. I had the vibrator to vibrate it, and there was another person holding the motor to the vibrator.

Um, so we were told to -- that it was okay. And my brother removed the wire from the hose, but we were eight feet short from where the cement had to be poured. So, so the operator told us that my brother had to push or pull the hose --

THE INTERPRETER: Pull the hose, interpreter correction.

A -- to sit it on the wall to come closer. So it was like eight feet before, but then the hose was eight feet short.

MR. BISHOP: I'm, I'm going to interject. That's, that's not quite what I heard as a Spanish speaker, so I'm just gonna ask the question again in English.

THE INTERPRETER: Go ahead.

Q When your brother had the hose and he unkinked it, were you more than eight feet away from the target where you were attempting to pour?

A Yes.

Q And it's my understanding from listening to you that the operator then told your brother to walk the hose closer to the target zone so that you became about eight feet away from the target zone; is that correct?

A Correct.

Q And when this happened, was the hose laid flat on the wall?

A Yes.
Q And the hose is connected to something called "reducers," as I understand it; is that correct?
A Yes.
Q When the hose was being laid out flat, did the reducers also become more horizontal or flatter along with the hose?
A Yes.
Q Okay. I'd like to just have you continue in your own words with respect to what happened from that point forward.
A So that's what was going on. The operator said everything was ready. I had the vibrator, vibrator inside the wall. My brother had, um, laid down the hose like the operator had said. And then -- and then when he unkinked it, water and gravel came out of it only.
Q When you say water and gravel came out of it only, I understand -- does that mean -- pardon me.
When you say water and gravel came out of it only, does that mean that no good concrete came out of it?
A Yes.
Q Then what happened?
A Well, it didn't come out and we were waiting and the cement wasn't coming out, and we saw that the operator, he wasn't there.
Q Okay. And you're on videotape, and I think that the record's gonna reflect when you said the operator wasn't

there, you were looking off to the -- your left shoulder; is that correct?

A Yes, on this side.

Q Okay. Let's, let's -- I'm gonna give you an exhibit.

MR. BISHOP: We'll mark this as Exhibit 1.

(Exhibit No. 1 marked for identification.)

Q Is this exhibit, um, an accurate representation of the positions of the three people you indicated were on the scaffold?

A Yes.

Q Can you go ahead with this felt and I'm just going to have you put, um, the first initial of the person over the person.

So, um, first of all, where were you in this picture? Can you just point?

A In the middle.

Q Okay. So can you put a "J" for Juan right over the -- right over your head?

THE WITNESS: (Complies.)

Q Can you put a "G" over where Gildardo was, over his head?

THE WITNESS: (Complies.)

Q Do you know the name of the other person?

A His name was Enrique.

Q Is that Luis Enrique Cruz Medina?

that are in front of you?
A I don't know.
Q Well, go ahead and take a look at this and tell me if you know the size of the, the reducer after taking a look at it.
A Some three inches, more or less.
Q Is this the type of system that was involved on the day that your brother was injured?
A Yes.
Q And can you tell me what this silver thing is here in between the reducers?
A They call it clamps. I don't know how to say it in Spanish.
Q And who decides whether to use this type of equipment on the job?
A The pump operator.
Q Does Matt Skoog or any of the Skoogs ever tell the operator what type of reducers to use?
A I don't think so.
MR. BISHOP: Okay. At this time, I'd like to mark these reducers as exhibits. Um, you're free to use a felt or if you'd like me to, I'll write on it.
THE REPORTER: It's up to you.
MR. BISHOP: I'll take a sticker and I'll write on it. Because I don't know if the sticker is gonna last.

1 understand the turret of the pump truck to be in Exhibit 19?
2 THE WITNESS: (Drawing.)
3 Q Oh, that's not working too well. Go ahead and just try
4 and mark it up a little bit more so that your mark sticks.
5 It's okay. Just mark it up.
6 THE WITNESS: (Complies.)
7 Q There you go.
8 And can you tell me, if you know, why the turret of the
9 pump truck was not placed closer to where you have drawn the
10 stickman of Martin Gomez in 19 before the job started?
11 A I don't know.
12 Q Who, who makes those types of decisions, where the --
13 where the pump truck should be placed before pumping starts,
14 if you know?
15 A The operator.
16 Q Do you, um -- so when you say "operator," in this case,
17 you mean the Ralph's pump operator or someone else?
18 A The one that has the control.
19 Q And who is that?
20 MR. CASEY: Object to form. I apologize.
21 Q You can an- -- you can answer. He was not supposed to
22 do that.
23 MR. BUTLER: For the record, he did not waive
24 the form objection standing notions for the entire party.
25 MS. ALIMENT: All right, guys.

Q Okay. So go ahead, answer the question.
First of all, I'll have the question read back. She's gonna read the question again for you.
(Page 58, line 19 was read back by the reporter.)
A The operator.
Q And I just need to be clear, do you mean the Ralph's operator?
A Yes. The one that holds the machine's controls.
Q When you say control, do you mean the remote control?
A The one that brings the truck, the machine; that's what I'm saying.
Q Okay. And does -- I understand your answer, but I need to ask, do you -- do you understand if Steve Miller or Inland has any control over where the pump truck gets placed on this job, pump trucks got placed on this job?
A I don't know.
Q Okay. I'm gonna show you Exhibit 22, it's the next exhibit in sequence. Do you recognize, um, the objects in this picture?
(Exhibit No. 22 marked for identification.)
A That's the street where the building was built.
Q Can you tell from this picture where the pump truck was placed on the day your brother was injured?
A Around --

Q Okay.
A -- here.
Q Go ahead and take your felt and, and make a mark where you think the pump truck was, to your memory.
THE WITNESS: (Complies.)
Q Okay. And I'm gonna go ahead and put "pump truck" and point to the arrow, because you think the pump truck was in the circle, is that correct, in that area?
A Yes.
Q Okay. Okay. I've written the words "pump truck" and an arrow. Does that accurately reflect where you believe the pump truck was on May 23, 2013?
A Yes.
Q Okay. And now can you tell me who put -- who, who put that fence with the orange plastic on it in place, if you know?
A The offices from the Inland Company.
Q Um, and when it -- when fences had to be -- when fences had to be moved on this job site, who authorized the movement of fences, of construction fences, if you know?
A The one from the office.
Q Do you mean the Inland office?
A I think so.
Q Do you know if Hilltop ever moved those fences when they needed to be moved?

A Yes.
Q Did anyone from Inland or Ralph's or Miles or anyone else ever tell you that this is a safer way to pump with the boom in this A con- -- A-frame con- -- configuration?
A I don't know.
Q Did you ever receive any training concerning a safe way to have the boom before pumping starts as opposed to an unsafe way to have a boom before pumping starts?
A No.
(Exhibit No. 25 marked for identification.)
Q Okay. I've handed you what's marked as Exhibit 25. Do you recognize the photograph that is Exhibit 25?
A Yes.
Q What is it?
A It's on top of the scaffolding, you know, of, of, of the accident.
Q Looking at the picture more closely, do you know, um, who may have been standing by what appears to be the two-by-four in front of the -- strike it.
Let me ask you, do you know if all the, um, stones in this picture were stones that came out of the hose as the result of the explosion?
A Yes.
Q And after the explosion happened, did you have a chance to look at those stones?

Q Based on, on your experience dealing in building scaffolding and helping to place concrete, do these stones seem larger than usual, than what you usually experience when you're pumping?

A I don't know. I couldn't say anything.

Q Okay. You can't tell; is that -- is that a fair statement?

A Yes.

Q Okay. Has anyone ever given you training from -- and I mean from Hilltop, from Inland, from Ralph's, from Miles, concerning the, the potential danger of putting large stones into reducers?

THE INTERPRETER: For the interpreter, two as a number two, right? Or "two reducers" or "into reducers"?

MR. BISHOP: Into.

THE INTERPRETER: Thank you.

A No.

(Exhibit No. 28 marked for identification.)

Q I've handed you what's is marked as Exhibit 28. Do you recognize the picture?

A Yes.

Q What is it?

A It's the location of the accident there.

Q Do you see a vibrator hose?

A Yes.

Q Okay. I'm gonna go back quickly to "Struck-By and Crushing Hazards," the lost -- last document here. And somebody wrote in the bottom left-hand corner these words, and I'll read them into the record: "Rebar needs caps installed where applicable."

THE INTERPRETER: May the interpreter use this? Where?

Q "Rebar needs caps installed where applicable."

THE INTERPRETER: I had already read the others, the interpreter.

Q And the second thing it says is: "Eye contact needs to be made with equipment operators before entering danger zone."

And what does that mean to you, when it says, eye cant-- "Eye contact needs to be made with equipment operators before entering a danger zone"?

A To me, what it means is that I have to have that contact if there is some kind of machinery to be able to go by.

Q By "machinery," do you mean, um -- does that include concrete pump truck?

A That could be.

Q Okay. Who told you, if anyone, to go up to the scaffold, get on the scaffold and get ready to pump?

A The operator.

Q The pump operator?
A Yes.
Q And when you were on the scaffold, I believe you testified earlier he was behind you on the deck; is that correct?
A Yes.
Q And I believe you testified that he was the one who told you that you were going to lay the hose and the reducers out flat when you were going to be short; is that true?
A Yes.
Q Okay. And I believe you also testified that you were able to see him and he was able to see you, at least in the beginning when he stood beside Matt Skoog; is that correct?
A Yes.
Q And when he left, did he tell you where he was going?
A No.
Q Did he give you any instructions at all when he left?
A No.
Q Did he tell you to stay on the scaffold?
A No.
Q Did he tell you to get off the scaffold?
A He didn't tell us anything.
Q Okay. I'm gonna hand you the next exhibit.
(Exhibit No. 31 marked for identification.)

BISHOP LAW OFFICES, P.S.

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