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No. 68912-6-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BRANDON TAPPERT,

Appellant,

vs.

NUPRECON GP, INC., and NUPRECON, LP,

Respondents.

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REPLY BRIEF OF APPELLANT BRANDON TAPPERT

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## I. INTRODUCTION

Brandon Tappert submits this brief in response to the Brief of Respondent Nuprecon GP, Inc. and Nuprecon LP (“Resp. Br.”) The Respondent’s brief failed to present arguments on the facts or law that should dissuade this Court from reversing the trial court decision dismissing the Petitioner’s lawsuit on Respondent’s Motion for Summary Judgment.

## II. REPLY ARGUMENT

### A. A History Of Prior Injuries Is Not Required To Establish Nuprecon’s Deliberate Intent To Injure Tappert, Under RCW 51.24.020.

Nuprecon’s position is based on the premise that a history of prior injuries is essential to establish the deliberate intent to injure. It cites numerous cases in support. The position however, is incorrect and misleading. The test set forth in *Birkliid v. Boeing*, 127 Wn.2d 853, 904 P.2d 278 (1995) requires that the employer have had actual knowledge that injury was certain to occur, and disregarded that knowledge.

In the cases cited by Nuprecon, a history of prior injury was required because the danger to the worker was uncertain or unknown. In both *Birkliid*, and *Hope v. Larry’s Market*, 108 Wn. App. 185, 29 P3d 1268 (2001), a history of repeated injuries was needed to establish that exposure to particular substances would, in fact, cause harm. In *Birkliid*, the

substances were phenol-formaldehyde resins – the effects of which were uncertain. To what extent, if any, workers would be injured through continuous exposure, was unknown. In *Hope*, the substances were industrial cleaning solutions – the effects of which were uncertain. In both cases, it was not until workers suffered repeated injury did the employer have actual knowledge.

The present case can be distinguished. The hazards of carbon monoxide exposure are universally known. There is no uncertainty that even a single exposure can cause injury or death. Furthermore, the blastrac floor stripper had a large and prominently displayed warning label describing the hazards of carbon monoxide inhalation. Finally, the site supervisor, Rob Lindsey, wore a carbon monoxide detector with an alarm set to activate when the carbon monoxide reached hazardous levels. CP 237.

- A. Nuprecon had actual knowledge that injury to Tappert was certain to occur once the CO alarm activated, and disregarded that knowledge by not informing him about the alarm, and instructing him to remain in the room.

Nuprecon’s site supervisor, Rob Lindsey clearly states that the CO detector alarm was set to activate when carbon monoxide reached hazardous levels. CP 237. The moment that eventually happened, Lindsey had *actual knowledge* that Tappert was *certain* be harmed if he

stayed in the room. Lindsey disregarded that knowledge by instructing him to remain and finish debris clean up.

The comment by Lindsey to “ventilate” the room does not mitigate this willful disregard, because it lacks context in two key respects. First, Lindsey did not tell Brandon Tappert *when* he should ventilate (before or after cleaning up the debris). In a sealed asbestos abatement environment, a worker told only “to ventilate” the area, would most likely wait until *after* he had finished cleaning up the debris, so as to reduce the chance of asbestos particles spreading to the outside.

Second, Lindsey did not tell Tappert *why* the room should be ventilated. In fact, Lindsey *knew* ventilation alone was not enough. By Nuprecon’s own safety protocol (Exhaust Emission Control Procedures) in the event of alarm activation, workers were to **“move to a fresh-air environment until the monitor resets . . .”** CP 199. Ventilation was *secondary* to moving workers to fresh air. Hence, Lindsey knew that if he told Tappert about the CO alarm, Tappert would not have stayed in the room, but left with him. Lindsey concedes this issue in paragraph 10 of his declaration: “we were running behind schedule for this job, and had to work quickly to catch up. We were under a lot of pressure to make up time.” CP 237. Needless to say, it would have put the project farther behind schedule if Tappert left the room before the clean up was finished.

Nuprecon goes through considerable analysis of *Byrd v. System Transport Inc*, 124 Wn. App. 196, 99 P.3d 394 (2004), and *Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003), but its reliance on these cases is misplaced. The specific holdings do not apply here. In *Byrd*, the court properly held that the employer was not responsible where it did not cause the injury or the condition that caused the injury. In that case the plaintiff had a medical condition and died of severe dehydration. The plaintiff knew she was ill. She had unfettered opportunity to seek medical attention, and drink liquids, but failed to do so. Here, Nuprecon willfully and consciously exposed Tappert to carbon monoxide gas. When the gas reached hazardous levels, Nuprecon willfully failed to remove Tappert from the environment, *or even warn him*. Tappert suffered injury because of it.

In *Schuchman*, the employee was injured when her hand and arm got caught in an ice machine. The employer had been aware of the dangerous ice machine, even admitting, “We knew this was going to happen, we just didn’t know when.” *Schuchman* at page 65. Even with such an admission, the Court did not find deliberate intent to injure. It found that the employer lacked the willful disregard of the “actual knowledge that injury [was] certain to occur.” *Schuchman* at page 70, quoting *Folsom v. Burger King*, 135 Wn. 2d 658, 667, 958 P.2d 301

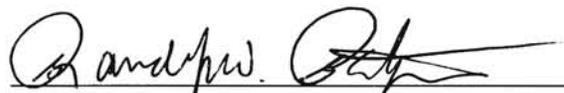
(1998). Though the employer knew of the dangerous condition, the plaintiff could not establish that the employer knew *when* injury to *that her* was *certain* to occur.

In the present case, the hazards of carbon monoxide are universally known. The danger and certainty of harm were established the moment the CO alarm activated. Leaving Tappert in the hazardous environment and failing to warn him of the danger demonstrates Nuprecon's deliberate disregard of the injury certain to occur.

### III. CONCLUSION

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

DATED this 28<sup>th</sup> day of January, 2013.



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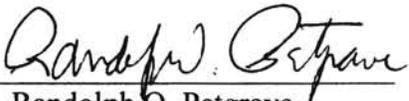
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BRANDON TAPPERT, )  
 ) Case No.: 68912-6-1  
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 Appellant, )  
 ) CERTIFICATE OF SERVICE  
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 vs. )  
 )  
 NUPRECON GP, INC., and NUPRECON, )  
 LP, )  
 )  
 Respondents. )  
 )  
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I, Randolph O. Petgrave, hereby certify under the penalty of perjury of the laws of the State of Washington that on January 28, 2013, I filed the Reply Brief of Appellant Brandon Tappert, with the Court of Appeals Division I, and that I further served the same on Aaron Owada by email at [aowada@amslaw.net](mailto:aowada@amslaw.net), and [lockerman@amslaw.net](mailto:lockerman@amslaw.net), the parties having agreed to accept service of documents by email.

Dated this 28th day of January, 2013.

By   
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