NO. 44035-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL S. MICHELBRINK, JR., a single man,

Respondent,

v.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Washington State Patrol (WSP) includes as part of its Taser training program a one- to five-second Taser exposure so its officers fully understand the capabilities of this law enforcement tool, giving them both the confidence in using the Taser when necessary, as well as the restraint not to use the Taser when lesser means of force are called for. Ninety-nine percent of WSP trainees exposed to the Taser completed the training without incident and reported no injury. Only four of 791 troopers missed work as a result of an injury caused by a Taser exposure.

Respondent Michael Michelbrink, an active duty WSP Trooper, filed this tort lawsuit after sustaining an injury from the Taser exposure. Michelbrink was fully compensated for this injury, having received workers' compensation benefits as well as additional benefits through WSP. Thus, his tort lawsuit fails because the Industrial Insurance Act provides the exclusive remedy for his workplace injury. Michelbrink's claim that he may recover damages in excess of workers' compensation under the "deliberate intention to produce injury" exception should be rejected because there is no evidence that WSP developed the training program with intent to injure. Moreover, given the one-percent injury rate for WSP Taser training, Michelbrink did not establish that WSP was

certain that he would be injured nor did he establish WSP willfully disregarded knowledge of certain injury.

Accordingly, this Court should reverse the trial court's denial of WSP's motion for summary judgment and dismiss Michelbrink's lawsuit in its entirety.

II. ASSIGNMENTS OF ERROR

The trial court erred by denying WSP's motion for summary judgment, and in so doing, denied the employer immunity from suit to which it is entitled under Washington's Industrial Insurance Act, RCW Title 51.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Is WSP immune from tort liability under the Industrial Insurance Act where it is undisputed that (1) WSP did not know with certainty that Trooper Michelbrink would sustain any injury during Taser training and (2) there is no evidence that WSP willfully disregarded certain injury?

IV. STATEMENT OF THE CASE

A. Washington State Patrol Hiring And Training Program

Each year, the Washington State Patrol recruits "the best of the best" men and women to train to become state troopers tasked with

enforcing Washington's traffic and criminal laws. CP at 13, ll. 19-25.[1] The hiring process is extremely competitive. CP at 13, ll. 19-25; 40-41, ¶ 5. Applicants must pass an oral examination, a psychological test, and a physical evaluation. CP at 14, ll. 1-13. They must also meet the WSP's physical requirements and pass a physical fitness test. CP at 40, ¶ 5. Finally, they must "survive a six-month academy . . . a six- to eight-week coaching trip [with a commissioned trooper], and then once [WSP] assigns [the trooper to their assigned location they] have to survive . . . a year's probation." CP at 14, ll. 9-13.

The six-month Academy is a para-military training program which trains cadets to become troopers. CP at 41, ¶ 6. In addition to classroom instruction, Academy cadets must pass a variety of hands-on training exercises. CP at 41, ¶ 6. For example, cadets must demonstrate they are proficient in operating their vehicles on a high-speed driving course and must demonstrate their ability to use physical force during defensive tactics training. CP at 41, ¶ 6.

A critical component of the WSP training program is to train cadets to become proficient with the tools of their trade, including their patrol vehicles, firearms, "pepper spray," and Taser. CP at 41, ¶ 6. Not

[1] Citations use the "CP" number that is stamped on the bottom-center of the clerk's papers submitted to this Court.

only must troopers know how to properly operate this equipment, they must also understand the capabilities of the tools they employ. CP at 41, ¶ 6.

Training does not end after the Academy; commissioned troopers are required to train and recertify their skill sets on a routine basis. CP at 41, ¶ 7. For example, troopers are periodically required to recertify on the driving training course. CP at 41, ¶ 7. Additionally, as was the case here, troopers may enroll in training when new weapons or equipment become available to line troopers. CP at 41, ¶ 7.

B. Risk Of Injury Associated With WSP Employment

The job of a WSP Trooper carries an inherent risk of injury. CP at 40, ¶ 4. Most obviously, troopers risk their safety and sometimes their lives when they are required to use force to apprehend hostile individuals. CP at 40, ¶ 4. The WSP Training Division is responsible for ensuring that its personnel are effectively trained to perform their job duties in the safest manner possible. CP at 40, ¶ 4; 42, ¶ 8.

WSP training instructors work to minimize the risk of injury during training exercises, but law enforcement training is by necessity very physical and carries the risk of injury. CP at 40, ¶ 4; 42, ¶ 8. For example, trainees participate in "ground-fighting" exercises in which they physically engage one another using different holds, kicks, and throws.

CP at 42-43, ¶ 8(a); 17, ll. 3-22. Trainees wear headgear, mouthpieces, and groin protection to mitigate the risk of injury. CP at 42-43, ¶ 8(a). However, because of the physical nature of this training, bruises, cuts, and muscle strains do occur. CP at 42-43, ¶ 8(a). While less common, trainees have also sustained more serious injuries such as torn ligaments and fractures during ground-fighting exercises. CP at 42-43, ¶ 8(a). Another example is pepper spray training where trainees learn not only how to deploy pepper spray, but also the affect of the spray by being exposed during training. CP at 43, ¶ 8(c). While the exposure is painful, unpleasant, and poses some health risks, it is necessary so the cadet learns how the recipient's physical capabilities will be affected. CP at 43, ¶ 8(c); 43-44, ¶ 9. As Michelbrink readily acknowledges, much of WSP training causes temporary pain or discomfort, and training also runs the risk of causing actual injuries or physical conditions. CP at 17, ll. 14-22.

In addition to training troopers to sharpen law enforcement techniques, WSP strives to teach its troopers how and when to use force while avoiding excessive force. CP at 43-44, ¶ 9. Where possible, WSP exposes trainees to the effects of different methods of force so trainees learn first-hand not only how to use force, but also how force acts on individuals. CP at 43-44, ¶ 9. WSP troopers are more likely to refrain from using excessive force because they themselves have experienced

such force; they have been exposed to pepper spray and the Taser, and have experienced different holds and throws in ground-fighting exercises. CP at 43-44, ¶ 9. By experiencing this training, troopers also understand the limits of different types of force, and in what situations they may need to elevate their use of force against a threatening individual. CP at 43-44, ¶ 9.

C. Washington State Patrol's Taser Training Program

In 2006, WSP purchased the Taser Model X26[2] for issue to line troopers and designated Sergeant Mark Tegard to develop a Taser training program. CP at 52, ¶ 10. After obtaining certification as a trainer by the manufacturer, Sgt. Tegard led Taser training for all troopers from January 2006 until April 2010. CP at 49, ¶ 4; 54, ¶ 13. Each training session consisted of four 50-minute classroom instruction periods and two 50-minute practical exercises. CP at 54, ¶ 13. The session began with a PowerPoint presentation which consisted of over 200 slides provided by

[2] The Taser Model X26, manufactured by Taser International, Inc., operates by discharging two metal probes connected by thin insulated wires which are propelled against a threatening individual. CP at 49, ¶ 5. When the probes connect with the individual, the electronic pulses cause muscles to contract which results in the temporary loss of body control. CP at 48, ¶ 3. Tasers provide law enforcement officers with a nonlethal means of handling a threatening situation. In contrast to firearms and batons, Tasers are not used to injure suspects but are instead used to safely gain control of threatening individuals. CP at 48, ¶ 3. Use of a Taser reduces the risk of injury to both the officer and threatening suspect. CP at 52, ¶ 9. As Michelbrink testified, "I think [a Taser] gives me more options in a situation. If I could use my Taser with a [sic] nonlethal force and subdue somebody or save their life versus going to my gun and shooting them, I think that's a big benefit." CP at 22, ll. 9-12.

Taser International, Inc., with some modifications by Sgt. Tegard. CP at 54, ¶ 13; *see also* CP at 87-94. During each session, Sgt. Tegard explained how the Taser operated, the safety requirements, and the potential health risks from being exposed to the Taser. CP at 54, ¶ 13.

The training module included a practical exercise in which trainees were exposed to the Taser. CP at 54, ¶ 13. The practical exercise was conducted in a controlled environment where each trainee was exposed to the Taser for one to five-seconds while two spotters held them to prevent them from falling or other inadvertent injury. CP at 52-53, ¶ 11; 55, ¶ 15.

Prior to the exposure exercise, Sgt. Tegard explained to each class that the Taser had been tested on over 100,000 human volunteers. CP at 54, ¶ 13; 88. He explained that some volunteers experienced pain, minor skin irritation, temporary blisters, and redness and minor bleeding if the probes punctured the skin. CP at 54, ¶ 13. In addition, Sgt. Tegard explained that some volunteers had experienced physical exertion type injuries, muscle strains, and strain-related injuries caused by strong muscle contractions such as muscle tears or stress fractures.[3] CP at 54, ¶ 13; 88; 92.

[3] Trooper Michelbrink claims that he was not told about a possible fracture, but seems to acknowledge that Sgt. Tegard presented a PowerPoint presentation or at least some type of visual presentation. CP at 23, ll. 13-18. The presentation, attached to Sgt. Tegard's declaration, notes the possibility of fracture in the lesson plan. CP at 88.

The possibility of a stress fracture was low. The manufacturer warnings stated in part:

> **Strain Injury Risks.** It is possible that the injury types may include, but are not limited to, strain-type injuries such as hernias, ruptures, dislocations, tears, or other injuries to soft tissue, organs, muscles, tendons, ligaments, nerves, and joints. Fractures to bones, including vertebrae, may occur. These injuries may be more likely to occur in people with pre-existing injuries or conditions such as pregnancy, osteoporosis, osteopenia, spinal injuries, diverticulitis, or in persons having previous muscle, disc, ligament, joint, or tendon damage. **It is believed that the risk of these injuries is comparable to or less than the risk(s) from vigorous physical exertion, such as weight training, wrestling, or other intense athletic endeavors.**

CP at 61.

Before being exposed to the Taser, the trainees were informed that they needed to notify Sgt. Tegard of any present or prior medical conditions. CP at 54, ¶ 13. Based on information provided by the manufacturer, Sgt. Tegard understood that injuries such as fractures could occur in individuals with pre-existing back conditions such as osteoporosis. CP at 55, ¶ 15. Unless a trainee came forward, Sgt. Tegard assumed that, having been accepted into the WSP, the trainee was medically able to participate in the exposure. CP at 54, ¶ 13.

The purpose of exposing trainees to the Taser includes the following:

- Increase the credibility of the trooper as a subject matter expert on the effects of the Taser;
- Enhance the troopers' understanding of the capabilities of the weapon in its deployment, thereby instilling in the trooper confidence that his or her Taser is an effective law enforcement tool;
- Enhance the troopers' understanding of how they would be incapacitated if a Taser was pointed at them by an assailant so the troopers may employ the appropriate self-defense measures;
- Increase the troopers' confidence that they can safely touch an individual they have tased in order to effectuate an arrest without receiving a similar shock.

CP at 54-55, ¶ 14; 91; *see also* CP at 53, ¶ 12.

WSP's decision to require exposure for troopers who attended Taser training was consistent with the manufacturer's own recommendation as well as policies of other law enforcement agencies.[4] CP at 50-52, ¶¶ 7-8. Indeed, Taser International, Inc. trainers exposed Sgt. Tegard to the Taser during his certification training. CP at 52, ¶ 8.

D. WSP's Taser Training Injury Rate Is Only One Percent

From 2005 through 2011, 791 troopers and cadets were exposed to the Taser during training. CP at 39, ¶ 3; 46. Only eight—or one

[4] In developing the Taser training program, Sgt. Tegard consulted with other law enforcement agencies and researched law enforcement publications. CP at 50-51, ¶¶ 6-7. One such publication by the International Association of Chiefs of Police, the largest nonprofit membership organization of police executives, recognized that "[m]any departments require that officers who carry a [Taser] experience themselves the electric shock first-hand. This training option seeks to encourage an officer to have a greater appreciation of the effects of the [Taser] which will assist the officer in determining the circumstances when to use [a Taser]." CP at 82.

percent—reported any type of injury, and only four of these individuals reported an injury that caused them to miss work. CP at 39, ¶ 3; 46.

E. Benefits Available To Injured WSP Troopers

WSP employees are covered by the Industrial Insurance Act and are thus entitled to receive workers' compensation benefits for injuries sustained on the job. *See* CP at 35, ¶ 4. Industrial insurance benefits for injured workers include the following: (1) wage replacement for missed work; (2) coverage for medical treatment related to the workplace injury; (3) vocational training benefits for injured workers who cannot return to their jobs of injury; and (4) monetary compensation for permanent impairments. RCW 51.04.030; 51.32.080, .090 and .095. These benefits are funded by the premiums paid by WSP and other employers. RCW 51.16.035; WAC 296-17-31003 through 31004.

In addition to workers' compensation benefits, injured WSP troopers are entitled to benefits that are more generous than benefits to which most injured workers are entitled. Recognizing the dangerous nature of a trooper's job, the Legislature has provided injured troopers like Michelbrink with an additional benefit package that is above and beyond what other injured workers receive under the Industrial Insurance Act. For example, while the Industrial Insurance Act provides that workers receive between 65 and 70 percent of their wages when they miss work due to a

workplace injury, injured troopers may receive full pay and benefits for the first six months following an injury. RCW 43.43.040(1)(a). Additionally, WSP is proactive in returning injured troopers to work. CP at 35-36, ¶ 7. If an injured trooper is physically unable to return to a line duty position, WSP makes every effort to place the trooper in a position which accommodates his or her physical restrictions. CP at 35-36, ¶ 7; *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 672, 929 P.2d 510 (1997); WAC 446-40-070(6).[5]

F. Trooper Michelbrink's Workplace Injury

On March 1, 1999, Mr. Michelbrink was commissioned as a WSP trooper and thereafter was assigned to enforce the criminal and traffic laws on the state highways. CP at 34, ¶ 3. Michelbrink joined WSP knowing that as a trooper, he would be called upon to respond to situations that would pose a risk to his safety and even his life. CP at 15, ll. 20-24. During his career, Trooper Michelbrink has made hundreds of arrests, handled five to ten situations where a suspect resisted arrest, and has drawn his firearm. CP at 19, ll. 8-25; 31, ll. 6-15.

[5] While municipal and county law enforcement officers are covered by the Law Enforcement Officers' and Firefighters' Retirement System (LEOFF), WSP troopers are instead covered under the WSP Retirement System. RCW 43.43.130; *see also* RCW 43.43.040 (disability benefits). "The Washington State Patrol's disability requirements are governed by an exclusive statute and regulations that are not tied by analogy or otherwise to the LEOFF system." *Callecod*, 84 Wn. at 672. Under WSP's program, every effort is made to find assignments for injured troopers in order to keep them employed and paid their full salary. *Id.*

Michelbrink knew that his job required grueling, hands-on physical training which posed the possibility of injury. CP at 29-30, ll. 22-2. But despite the risk of injury, Michelbrink understood that WSP cannot train cadets and troopers by simply lecturing them in a classroom; they must actively train in order to prepare for the challenges they face as law enforcement officers. CP at 30, ll. 9-16.

On August 10, 2007, Michelbrink attended WSP's Taser training course. CP at 55, ¶ 16. Michelbrink did not report that he had any pre-existing condition prior to being exposed to the Taser. CP at 24, ll. 11-19. Like all WSP troopers, Michelbrink had been medically certified prior to being commissioned as a trooper, and WSP knew Michelbrink to be healthy at the time of the training. CP at 24, ll. 11-19.

During training, Michelbrink, like every trainee, was exposed to the Taser for a few seconds. Michelbrink experienced some pain and discomfort from the exposure but reported no injury and completed the training. CP at 25, ll. 16-20. However, several days after the training exercise, Michelbrink sought medical treatment and was ultimately diagnosed with a stress fracture in his vertebra that was later thought to be related to the Taser exposure. CP at 32, ll. 4-7.

On August 27, 2007, Michelbrink filed a workers' compensation claim with the Department of Labor and Industries. CP at 35, ¶ 4.

Michelbrink's claim was allowed and he received benefits, including wage replacement payments for missed work, medical coverage, and a permanent partial disability[6] monetary award which compensated him for his injury.[7] CP at 35, ¶ 4; 36, ¶ 7; 28, ll 9-13. Michelbrink also requested and was granted temporary disability leave benefits through WSP which provided him full pay and benefits for the first six months of missed work following the injury. CP at 35, ¶ 4. Finally, Michelbrink requested and was provided a long-term limited duty position with WSP which accommodates his physical restrictions. CP at 35-36, ¶ 7. He continues his employment in this position to this day at his same Trooper rate of pay and benefits. CP at 35-36, ¶ 7.

G. Procedural History

On September 27, 2010, Michelbrink filed this lawsuit alleging only one cause of action: that his injury was due to the "deliberate intention" of WSP to produce injury. CP at 1-4.

On July 6, 2012, WSP moved for summary judgment on the ground that Michelbrink's lawsuit was barred by the Industrial Insurance

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[6] "A permanent partial disability award is a monetary award designed to compensate the worker for ... [the] loss of function of a body part." WAC 296-20-19000; *see also* RCW 51.08.150 and RCW 51.32.080.

[7] Michelbrink is entitled to receive additional medical coverage if his injury ever worsens during the remainder of his life. He may also be able to have his claim reopened and receive additional monetary benefits. *See* RCW 51.32.160.

Act. CP at 95-120. In response, Michelbrink asserted a claim for outrage.[8] *See* CP at 125. On September 4, 2012, the trial court denied WSP's motion for summary judgment. CP at 149-150. WSP filed a timely Motion for Discretionary Review, and on October 19, 2012, Court Commissioner Eric B. Schmidt issued a ruling granting review, concluding that the trial court appeared to have made obvious error.

V. SUMMARY OF ARGUMENT

As a matter of law, WSP is immune from suit and the superior court lacks subject matter jurisdiction over Michelbrink's claim. RCW 51.04.010; 51.32.010; *Vallandigham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 32-33, 109 P.3d 805 (2005). Under Washington law, an injured worker's sole remedy is provided by the Industrial Insurance Act. RCW 51.04.010; 51.32.010. Employees cannot sue their employer for injuries sustained in the course of their employment. *Id.* This immunity is overcome only where the employer deliberately intended to injure its employee. RCW 51.24.020. This limited exception is narrowly interpreted and applies only when an employer has (1) knowledge of certain injury and (2) willfully disregards that knowledge. *Birklid v.*

[8] Michelbrink asserted an outrage claim in a response to an earlier motion for summary judgment, where WSP unsuccessfully sought dismissal based on the statute of limitations for intentional torts. However, the outrage claim is not included in the complaint, *see* CP at 1-4, nor has Michelbrink ever amended his complaint to include an outrage claim.

Boeing Co., 127 Wn.2d 853, 865, 904 P.2d 278 (1995); *Vallandigham,* 154 Wn.2d at 27-28.

Initially, Michelbrink's argument that WSP created a training program with the deliberate intent to injure its troopers fails to find any support in the record before this Court. More to the point, Michelbrink failed to establish either prong of the *Birklid* test. First, it is undisputed that only one percent of all WSP trainees have reported any type of injury resulting from Taser training. Thus, WSP could not possibly have known that Michelbrink's injury was "certain to occur." For this reason alone, Michelbrink failed to establish his claim. Second, Michelbrink cannot demonstrate that WSP willfully disregarded knowledge of certain injury. Instead, the undisputed evidence demonstrates that WSP undertook numerous safety precautions to mitigate the risk of injury associated with Taser training. Accordingly, the Court should reverse the trial court and dismiss Michelbrink's lawsuit.

Finally, to the extent Michelbrink asserts an outrage claim, the trial court erred by allowing such a claim to proceed. There can be no outrage claim in this case because Michelbrink did not allege an outrage claim in his complaint and never moved to amend his complaint. *Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351-52, 144 P.3d 276 (2006). Even if he had properly pled outrage, the claim fails

under *Birklid* because it is barred under the Industrial Insurance Act. *Birklid*, 127 Wn.2d at 872. Moreover, no jury could conclude that WSP's law enforcement training constituted utterly atrocious conduct. *See Corey v. Pierce County,* 154 Wn. App. 752, 763, 225 P.3d 367 (2010).

For each of these reasons, this Court should reverse the trial court, grant WSP's motion for summary judgment, and dismiss Michelbrink's lawsuit.

VI. ARGUMENT

A. Standard Of Review

When reviewing a motion for summary judgment, the appellate court conducts the same inquiry as the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

To defeat summary judgment, the non-moving party must come forward with specific, admissible evidence to rebut the moving party's

contentions and support all necessary elements of the non-moving party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). If the non-moving party fails to establish the existence of a necessary element to that party's case, summary judgment must be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

> In such situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Id. (citation omitted).

Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions, as well as inadmissible evidence that unresolved factual issues remain are insufficient to create a genuine issue of fact. *White*, 131 Wn.2d at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds can reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler,* 112 Wn.2d 193, 199, n.5, 770 P.2d 1027 (1989).

B. Employer Immunity From Tort Liability Is A Cornerstone Of The Industrial Insurance Act

Finding the common law tort system "uncertain, slow and inadequate" for injured workers, the Legislature enacted the Industrial Insurance Act in 1911.

> The state of Washington, therefore, exercising herein its police and sovereign powers, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault *and to the exclusion of every other remedy, proceeding or compensation*, except as otherwise provided in this title; *and to that end all civil jurisdiction of the courts of this state over such causes are hereby abolished,* except as in this title provided.

RCW 51.04.010 (emphasis added).

The Industrial Insurance Act is a "grand compromise" that provides workers with sure and certain relief *without regard to fault.* RCW 51.04.010; 51.32.010; *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). The "no fault" remedy under the Act enjoyed by injured workers is significant. For example, industrial insurance benefits are routinely paid to workers whose injuries result *solely* from their own misconduct and intentional actions. *See, e.g., Schwab v. Dep't of Labor & Industries.*, 69 Wn.2d 111, 417 P.2d 613 (1966) (widow of worker who committed suicide entitled to death benefits); *Tilly v. Dep't of Labor & Industries*, 52 Wn.2d 148, 324 P.2d 432 (1958) (widow entitled to benefits after husband died at work while engaged in "horseplay" with coworkers); *Dep't of Labor & Industries. v. Baker*, 57 Wn. App. 57, 786 P.2d 821 (1990) (widow of worker who committed suicide entitled to benefits); *In re Ken Bezley*, BIIA Dec. 95

5865 & 95 6356 (1997) (worker entitled to benefits after he broke his foot by jumping into a dumpster full of water to cool himself off); *In re Rickey Morgan*, BIIA Dec. 94 1042 (1995) (worker awarded benefits for injury sustained in a pick-up football game during temporary work stoppage).

> As to how intentional tort fits in with the balance of sacrifices, it must be remembered once again that this is a no-fault system as to both employer and employee. 'Unjust' results, by conventional standards are commonplace. Awards are routinely made to employees as the result of their own intentional misconduct, including intentional torts, as in the case of the aggressors in assault cases, who are now compensated in most states.

6 A. Larson, *WORKERS' COMPENSATION LAW*, § 103, pp. 103-10 (Nov. 2002).

In exchange for providing workers with compensation and treatment without regard to fault, employers are immune from suit for work related injuries. RCW 51.04.010; *Vallandigham*, 154 Wn.2d at 26; *Brand*, 139 Wn.2d at 668; *Wolf v. Scott Wetzel Services, Inc.*, 113 Wn.2d 665, 668-69, 782 P.2d 203 (1989). To underscore the importance of this immunity, the Legislature enacted a second provision that expressly prohibits workers from suing their employer for work related injuries.

> Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, *such payment shall be in lieu of any*

> *and all rights of action whatsoever against any person whomsoever.*

RCW 51.32.010 (emphasis added).

These intentionally broad immunity provisions shield employers from liability and are designed to protect employers from the considerable time and expense involved in defending against such lawsuits. RCW 51.04.010; *see, e.g., Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 389-90, 47 P.3d 556 (2002); *Wolf*, 113 Wn.2d at 668-70; *West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976).

> Employees may not sue their employers for injuries sustained on the job, and their only remedy is workers' compensation under the IIA. The legislature enacted this limitation to improve injured employees' remedies while decreasing expense to employers and the public.

Gorman v. Garlock, Inc., 121 Wn. App. 530, 534, 89 P.3d 302 (2004), *aff'd*, 155 Wn.2d. 198, 118 P.3d 311 (2005).

Employer immunity is, without question, the key foundation upon which the ongoing existence and viability of the Act literally rests. By express provision of law, if the employer immunity provisions are ever held invalid, the entire Industrial Insurance Act "shall be thereby invalidated." RCW 51.04.090.

C. The "Deliberate Intention To Injure" Exception Is Narrowly Construed And Applied

The Industrial Insurance Act's immunity provisions are overcome

only in the rare instance when the employer deliberately intended to produce the worker's injury. RCW 51.24.020 provides as follows:

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

This exception to the employer immunity provisions is narrowly construed and applied. *Vallandigham*, 154 Wn.2d at 27; *Birklid*, 127 Wn.2d at 860-61; *Howland*, 123 Wn. App. at 10-11; *Judy v. Hanford Environmental Health Foundation*, 106 Wn. App. 26, 32, 22 P.3d 810 (2001), *review denied*, 144 Wn.2d 1020 (2001).

1. *Birklid v. Boeing*

Prior to *Birklid*, "deliberate intent to injure" was found only in cases involving assault and battery by the employer against an employee. *Birklid*, 127 Wn.2d at 861-62. In *Birklid*, the state Supreme Court was asked to determine whether fourteen employees of Boeing had alleged sufficient facts to justify a finding of "deliberate intent" despite the absence of any physical assault. *Id.* at 856-859. Boeing began preproduction testing of a new material used to make airplane parts. *Id.* at 856. The material was impregnated with toxic phenol-formaldehyde resin. *Id.* During preproduction, a Boeing supervisor informed management that

employees exposed to the toxin had complained of dizziness, dryness in nose and throat, burning eyes and upset stomach. *Id.* The supervisor told management that he expected the problem to increase as production increased and requested increased ventilation in the workplace. *Id.* Boeing management denied the request. *Id.*

When full production began, workers experienced dermatitis, rashes, nausea, headaches, dizziness, and passed out on the job as a result of the repeated toxic exposure. *Id.* The workers alleged that Boeing not only exposed them to toxic chemicals, it also removed safety labels on chemicals, harassed employees who requested protective equipment or sought medical treatment, altered working conditions to deceive government inspections, and conducted experimentation on workers without their consent. *Id.* at 857. The workers' suit alleged that Boeing intentionally, knowingly, and repeatedly exposed them to toxic chemicals in the workplace. *Id.* at 858.

The *Birklid* court concluded that the deliberate injury exception under RCW 51.24.020 was not limited to assault and battery in the workplace. *Id.* at 862-63. The court observed that in all prior Washington cases that rejected deliberate injury claims, "while the employer may have been aware that it was exposing workers to unsafe conditions, its workers

were not being injured until the accident leading to the litigation occurred." *Id.* at 863. The court went on to state as follows:

> There was no accident here. The present case is the first to reach [the Supreme Court] in which the acts alleged go beyond gross negligence of the employer, and involve willful disregard of actual knowledge by the employer of continuing injuries to employees.

Id. (emphasis added).

The *Birklid* court held that "deliberate intent to injure" exists when:

> (1) "the employer had actual knowledge that an injury was certain to occur;" and
>
> (2) the employer "willfully disregarded that knowledge."

Id. at 865.

Under the first *Birklid* prong, a mere possibility of injury, or even a "substantial certainty" of injury, falls short of the deliberate, intentional conduct necessary to satisfy this test. *Id.* Indeed, the *Birklid* court specifically rejected the "substantial certainty" and "conscious weighing" tests adopted in a small number of other states. *Id.*

Under the "substantial certainty" test, if the injury is substantially certain to occur as a consequence of actions the employer intended, the employer is deemed to have intended the specific injuries to the workers as well. *Id.* at 864. The "conscious weighing" test focuses on whether

"the employer had an opportunity consciously to weigh the consequences of its act and knew that someone, not necessarily the plaintiff specifically, would be injured." *Id.* at 865.

The *Birklid* court expressly rejected both tests, finding them contrary to the "appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010." *Id.* Rather, to avoid summary judgment the worker must demonstrate the employer knew in advance that plaintiff's specific industrial injury was certain to occur, and the employer willfully disregarded that knowledge. *Id.*

2. *Folsom v. Burger King*

Several years after *Birklid* was decided, the state Supreme Court was asked whether an employer deliberately injured an employee who was murdered by a former co-worker. *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998). The estate of the employee argued that Burger King acted with deliberate intention to injure because it knew of the worker's violent criminal history, that the worker had sexually harassed co-workers, that the restaurant held large amounts of cash in the restaurant which invited robbery, and had discontinued a security monitoring service without notifying employees. *Id.* at 665-66. The plaintiffs further argued that because Burger King had knowledge that "some injury was certain to

occur," knowledge that the employee would be murdered was not required. *Id.* at 665. The court rejected this argument and dismissed the claim, finding that the evidence presented did not show that the employer knew "its employees would be killed." *Folsom*, 135 Wn.2d at 667.

3. *Vallandigham v. Clover Park School District*

In 2005, the state Supreme Court was again asked whether an employer was immune from a suit involving workplace injuries. *Vallandigham*, 154 Wn.2d 16. Surveying Washington state case law, the court observed that since *Birklid*, only three Washington state cases had allowed deliberate injury claims to survive summary judgment. *Id.* at 29-32. Two of those lawsuits, like *Birklid*, involved claims of repeated injury due to repeated toxic exposure in the workplace. *Id.* (citing *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996) and *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001)). The third case, *Stenger v. Stanwood School Dist.*, 95 Wn. App. 802, 977 P.2d 660 (1999), which the *Vallandigham* court rejected, had allowed a workplace injury claim based on school employee injuries sustained at the hands of a special needs student. *Vallandigham,* 154 Wn.2d at 31-32.

Vallandigham also involved injuries sustained by school employees from a special needs student. Prior to reaching the Supreme Court, the appellate court concluded that the plaintiffs had satisfied the

first (but not the second) *Birklid* prong. *Vallandigham*, 119 Wn. App. 95, 106, 79 P.3d 18 (2003). The plaintiff school teachers alleged that the school district deliberately injured them because it had knowledge of certain injury based on numerous injuries caused by the same student over a one-year period. *Id.* at 97. The plaintiffs provided evidence that according to one assessment, the student "physically hurt other students or teachers *on a daily basis*." *Id.* at 104 (emphasis in original). The student had attacked both plaintiffs, knocking one unconscious and biting the other plaintiff's right breast during an altercation. *Id.* at 98. One plaintiff estimated that she sustained 140 to 150 injuries by the student over a two-year period. *Id.* at 104

The state Supreme Court reversed the appellate court's finding that the first *Birklid* prong was met and found that the plaintiffs had not shown that the school district was certain they would sustain an injury. *Vallandigham*, 154 Wn.2d at 32. The court held that even if the school district could be substantially certain that the student would again cause injury, a reasonable jury could not conclude that the district had knowledge injury was *certain* to occur. *Id.* The court concluded that the workers had not met the *Birklid* test, which "can be met in only very limited circumstances where continued injury is not only substantially certain, but *certain* to occur." *Id.* (italics in original, underlining added).

Since *Vallandigham* was decided, Washington courts have consistently rejected deliberate injury claims and have emphasized that such claims require a pattern of continuing injuries and repeated employee complaints that the employer willfully ignores. *French v. Uribe, Inc.,* 132 Wn. App. 1, 10, 130 P.3d 370 (2006) (*Birklid* requires a pattern of recurring employee complaints of injuries caused by continuing practices by the employer); *Brame v. Western State Hospital*, 136 Wn. App. 740, 749-50, 150 P.3d 637 (2007) (even a history of prior injuries is not sufficient unless such injuries demonstrate that the employer knew with certainty that such injuries would continue); *Crow v. The Boeing Co.*, 129 Wn. App. 318, 325, 118 P.3d 894 (2005) (rejecting a deliberate injury claim finding that "the type of repeated, continuous, certain injury sufficient to meet the first prong of the *Birklid* test did not occur"). [9]

D. Michelbrink's "Deliberate Intention To Produce Injury" Claim Fails As A Matter Of Law Because WSP Did Not Have Knowledge Of Certain Injury Nor Did It Willfully Disregard Such Knowledge

The trial court erred by holding that the "deliberate injury" exception of the Industrial Insurance Act applies in this case when WSP

[9] These decisions are consistent with cases decided before *Vallandigham. See Byrd v. System Transport, Inc.*, 124 Wn. App. 196, 204, 99 P.3d 394 (2004) (injured worker must establish previous record of harm sufficient to charge the employer with knowledge of certain injury and willful disregard of that knowledge); *Howland*, 123 Wn. App. 6 at 11-12 (even evidence of prior injuries is not sufficient unless such evidence demonstrates the employer had knowledge of *certain* injury to employees).

did not have knowledge of certain injury and did not willfully disregard such knowledge.

1. WSP Did Not Have Actual Knowledge Of Certain Injury And Did Not Intend Michelbrink's Injury

To impose liability on WSP for his workplace injury, Michelbrink must prove that WSP knew, with certainty, that he would be injured from the Taser exposure. *Folsom*, 135 Wn.2d at 667. In this case, Michelbrink did not establish the first prong of the *Birklid* test because (1) there is no evidence that WSP knew that he was certain to sustain a fracture or any injury during training, and (2) the purpose of the training exercise was not to injure him.

a. There Is No Evidence That WSP Was Certain Michelbrink Would Sustain An Injury

Given the extremely low injury rate for WSP's Taser training, as well as WSP's reliance on information from the manufacturer which also reflected a very low possibility of injury, no jury could conclude that WSP was certain Michelbrink would be injured. The undisputed fact is that 99 percent of the troopers and cadets who attended WSP training did not report any injury following the Taser exposure. CP at 39-40, ¶ 3; 46. In addition, WSP relied upon information obtained from the manufacturer of Taser and other law enforcement agencies and publications, which demonstrated that the possibility of injury from a Taser exposure in a

controlled training environment was extremely low. CP at 50-51, ¶ 7. Relying on information provided by the manufacturer, WSP knew that a stress fracture was a rare injury that could affect individuals with pre-existing conditions such as osteoporosis. CP at 50-51, ¶ 7; 61. There is no evidence that Michelbrink had such a pre-existing condition. CP at 24, ll. 11-19. Michelbrink has not established the first prong of the *Birklid* test and his claim must be dismissed.

As noted above, the state Supreme Court has stressed that the first element of a deliberate injury claim is met only in very limited circumstances, holding that it could not "overemphasize" that the plaintiff must demonstrate that the employer had "actual knowledge that injury is *certain* to occur." *Vallandigham*, 154 Wn.2d at 33 (emphasis in original). "Washington courts have repeatedly held that known risk of harm or carelessness is not enough to establish certain injury, even when the risk is substantial." *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 47, 103 P.3d 807 (2004). [10]

[10] Indeed, Washington courts have consistently rejected deliberate injury claims for a variety of workplace injuries even when the risk of injury seemed fairly certain. *See, e.g., Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003) (plaintiff seriously injured by ice bagging machine failed to prove actual knowledge of certain harm, even when the employer stated that "we knew this was going to happen, we just didn't know when"); *Shellenbarger*, 125 Wn. App. at 49 (no actual knowledge of certain injury due to asbestos exposure because "we know now that asbestos exposure does not result in injury to every person"); *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200 (1997) (no actual

In *Vallandigham*, for example, the state Supreme Court rejected a deliberate injury claim where the plaintiffs' evidence demonstrated a pattern of injury that far exceeds WSP's Taser training injury rate. In that case, despite evidence of 140 to 150 workplace injuries[11] to one plaintiff during a two-year period, the court concluded that the employer did not have knowledge of certain injury. *Vallandigham*, 154 Wn.2d at 32. Applying the reasoning of *Vallandigham*, the one-percent injury rate in the present case does not demonstrate knowledge that an injury was certain to occur.

Moreover, the facts in this case can be easily distinguished from the four recent Washington cases which have allowed deliberate injury claims to survive summary judgment. In contrast to Michelbrink's claim, three of the four decisions involved workplace environments where an employer repeatedly exposed employees to toxic fumes or chemicals despite repeated complaints by employees and a pattern of continuous injuries. *Vallandigham*, 154 Wn.2d at 29-32 (collecting cases); *see also Crow*, 129 Wn. App. at 325-28. The fourth case, *Stenger*, 95 Wn. App. 802, involved a different fact pattern that was ultimately rejected by the Supreme Court in *Vallandigham*. 154 Wn.2d at 31-32.

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knowledge even when an employer is alleged to have ignored clear safety warnings from manufacturers).

[11] *See Vallandigham*, 119 Wn. App. at 104.

These three cases also involved allegations of employer misconduct which are wholly inapposite from the law enforcement training exercise at issue in this case. In particular, Washington courts have allowed deliberate injury claims when employers have misrepresented the hazards posed by toxins in the workplace. In *Birklid*, for example, the employer was alleged to have actual knowledge that fumes in the workplace would make workers ill, observed employees become ill, lied about the effects of the fumes, and continued to subject workers to the fumes. *Birklid,* 127 Wn.2d at 857. Similarly, in *Baker*, employees were repeatedly told that they should use a toxic chemical to wash their arms and hands, despite evidence that the employer knew that the manufacturer of the chemicals warned against skin contact, and further, that employees had repeatedly complained about health problems caused by the chemical exposure. *Baker,* 80 Wn. App. at 783-84. Finally, in *Hope*, an employee alleged that her employer tried to convince her of the safety of a chemical frequently used in the workplace despite the employer's knowledge of its hazards. *Hope,* 108 Wn. App. at 188.[12]

[12] The *Vallandigham* court rejected the *Hope* holding with regard to the appellate court's evaluation of the second *Birklid* prong. *Vallandigham,* 154 Wn.2d at 35. Specifically, *Vallandigham* held that a finding of willful disregard of certain injury cannot be based upon "the simple fact that an employer's remedial efforts were ineffective." *Id.*

In the instant case, there is no evidence comparable to *Birklid*, *Baker*, or *Hope*. WSP trainees were exposed for one- to five-seconds during a controlled-environment training exercise, in contrast to *Birklid* and other cases where the employer willfully ignored hazards of a daily working environment. *Compare Crow*, 129 Wn. App. at 328. Additionally, as discussed above, there was no evidence of repeated injury. Nor is there any evidence of trainee complaints about the effects of the Taser exposure.

Further, exposure to the Taser is practiced by many law enforcement agencies and is supported by the manufacturer. CP at 50-52, ¶¶ 7-8; 82. There is simply no evidence that WSP engaged in any misconduct when it conducted a one-time exposure during this law enforcement training exercise.

In sum, the trial court erred by concluding that Michelbrink had established the first prong of the *Birklid* test when there is no evidence that WSP was certain that Michelbrink would be injured.

b. The Purpose Of The Training Exercise Was Not To Injure Troopers

The undisputed evidence demonstrates that the purpose of WSP's training was not to injure troopers but was to train them to use a new law enforcement tool. CP at 53, ¶ 12; 55, ¶ 16. WSP included an exposure

requirement so its officers would fully understand the capabilities of this tool, giving them both the confidence in using the Taser when necessary and the restraint not to use the Taser when lesser means of force are called for. CP at 43-44, ¶ 9; 53, ¶ 12.

In his arguments to the trial court, Michelbrink asserted that by knowingly exposing him to the pain and discomfort of the Taser, WSP was certain that his particular injury would occur. CP at 123. Under Michelbrink's argument, all defensive training would constitute a deliberate intent to injure because, as Michelbrink acknowledges, the participants experience pain and discomfort as a result of the exercises.[13] *See* CP at 17, ll. 14-22. Further, even medical professionals working in hospitals which require employee inoculations or tuberculosis pin prick testing could bring a deliberate injury claim based on the prick of the needle if the employee sustained a rare reaction.[14] The new definition of "deliberate intent" that Michelbrink invites the Court to adopt is inconsistent with the narrow exception to the Industrial Insurance Act

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[13] Law enforcement agencies and similar agencies recognize both the need for hands-on defensive tactics training and the risks involved in such training. *See, e.g.*, WAC 139-10-212 (Department of Corrections applicants "must possess good health and physical capability to actively and fully participate in defensive tactics...[i]n order to minimize risk of injury and maximize the benefit [of such training]"); WAC 308-19-305 (requiring defensive tactics and Taser training for bail bond recovery agents); WAC 139-05-200 (requiring WSP cadets to complete basic law enforcement training); *see also* RCW 43.101.080(8).

[14] *See, e.g.,* WAC 296-126-222(5) (referring to medical employer required inoculations and physical exams).

created by the Legislature and violates the Supreme Court's cautionary instruction to narrowly apply deliberate injury claims. *Vallandigham*, 154 Wn.2d at 30-31.

In *Folsom*, discussed *supra*, the state Supreme Court rejected a similar argument to the one made by Michelbrink. 135 Wn.2d at 305-06 (estate of a worker murdered by a former Burger King employee claimed that it only needed to demonstrate that "some injury was certain to occur" and that the "exact knowledge of the particular injury that occurred is not necessary"); *see also Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 159 P.3d 494 (2007) (rejecting plaintiff's claim that because the employer knew of harm caused by toxic exposure from pipes, it deliberately injured an employee who was killed by ruptured pipes).[15]

Further, the same argument advanced by Michelbrink was persuasively rejected in a New Jersey appellate court decision. *Bustamante v. Tuliano*, 248 N.J. Super. 492, 591 A.2d 694 (1991). In *Bustamante,* a police officer injured during training claimed that his employer deliberately injured him and sought damages beyond workers'

[15] This Court yesterday, January 29, 2013, rejected a similar argument in *Walston v. Boeing*, No. 42543-2, 2013 WL 326309 (Wash. Ct. App. Jan. 29, 2013). In that case, an employee injured by asbestos exposure argued that certainty of injury was established because asbestos exposure is certain to cause "cellular injury" even if exposure is not certain to result in an asbestos-related disease. This Court reversed the trial court's denial of the employer's motion for summary judgment, concluding that it was the employee's burden to establish the employer's knowledge of certain injury, and the employee failed to meet this burden.

compensation benefits. *Id.* at 493-94. The officer lost his eye when he was shot with a wax training round during a training exercise. *Id.* The officer argued that because his employer knew that the wax training round would "sting," there was intent to "injure." *Id.* at 500. The court rejected this argument, finding that the purpose of shooting the trainee with a wax round was not to injure the trainee but instead served as evidence that the trainee was the "victim" for the purpose of the training exercise. *Id.* The court further concluded that the law enforcement training "with a focus on weaponry to address the problem of armed and mentally ill offenders is a fact of life of police employment and plainly within the legislative contemplation of [New Jersey's] Workers' Compensation Act." *Id.*

Similarly, the training injury sustained by Michelbrink was the type of injury the Legislature intended to cover through workers' compensation and WSP benefits. As discussed in Sections III(E) and (F), *supra*, Michelbrink received not only workers' compensation benefits, but also WSP benefits which the Legislature has provided because of the inherent dangers faced by law enforcement officers.

Michelbrink's argument also fails because an employer's knowledge of temporary pain or discomfort from a workplace activity, absent injury, is not sufficient to establish the first *Birklid* prong. The plain language of the statute requires the intention of the employer to

produce "such injury," meaning the specific injury the worker sustains; the statute cannot mean that an employer intends to injure its employee when only temporary discomfort is expected but the employee sustains a rare injury.[16] RCW 51.24.020. WSP did not deliberately intend to cause a stress fracture – an injury that occurred in 0.25 percent[17] of its trainees – merely because it had knowledge that trainees would have momentary pain or discomfort during the training exercise. *See* CP at 39, ¶ 3; 46.

Indeed, Michelbrink's argument that WSP knew of certain injury based on the momentary pain caused by the Taser as well as the penetration of the Taser prongs is undermined by his own claim. Michelbrink did not claim an injury on the day of the training exercise due to the penetration of the Taser prongs or the two seconds of pain from the exposure. *See* CP at 25, ll. 14-20. Michelbrink testified that when he was exposed, "the pain is there and the pain is done and [the trainers holding you] bring you down to the floor" and that the pain was only temporary initially. CP at 25, ll. 14-20. He didn't report an injury until he

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[16] In *Henson v. Crisp*, 88 Wn. App. 957, 946 P.2d 1252 (1997), for example, the Court rejected a claim by an employee who claimed severe emotional distress as a result of an employer prank where a toy gun was pointed at the employee. The Court held that there was no evidence that the employer "was aware of [the worker's] **particular sensitivity**, that [the employer] had any reason to wish her harm or had previously manifested ill will or harmful conduct toward her." *Henson,* 88 Wn. App. at 962 (emphasis added).

[17] By all accounts, the injury Michelbrink sustained was very rare, as evidenced by the manufacturer's own warnings which equated the risk of fracture due to a Taser exposure to that posed by vigorous exercise. CP at 61.

experienced pain several days after the training. The undisputed evidence is that just one trainee of 791 reported an injury caused by the Taser prongs and no trainee reported an injury due to the momentary pain of the Taser exposure. CP at 39-40, ¶ 3; 46.

In sum, the trial court erred when it determined that an employer's knowledge of momentary pain or discomfort during an employment activity can give rise to a deliberate injury claim. This far-reaching interpretation of RCW 51.24.020 violates the Supreme Court's cautionary instruction to narrowly apply deliberate injury claims. *Vallandigham*, 154 Wn.2d at 30-31. Michelbrink failed to establish the first *Birklid* prong, and his lawsuit should be dismissed.

2. WSP Did Not Willfully Disregard Knowledge Of Certain Injury

Even if Michelbrink could demonstrate that WSP knew of certain injury, he cannot establish that WSP willfully disregarded such knowledge.

Willful disregard of certain injury cannot be shown by merely establishing that the employer's actions were negligent or even grossly negligent. *Vallandigham,* 154 Wn.2d at 35. Whether an employer has implemented steps to alleviate the risk of injury to its employees is a relevant question related to willful disregard. *Id.* at 29. Willful disregard

"cannot be based on the simple fact that the employer's remedial measures were ineffective." *Crow*, 129 Wn. App. at 325. Thus, Michelbrink cannot establish a deliberate intent to injure claim by arguing that WSP was negligent in conducting its training program or that it unnecessarily exposed him to the risk of injury. *See id.*

In this case, there is no evidence of willful disregard of certain injury. The undisputed evidence demonstrates that WSP had control measures in place, such as providing two spotters to prevent injuries caused by falling and requiring the use of safety goggles. CP at 52-53, ¶ 11. Michelbrink has provided no evidence of what WSP should have done differently in conducting its Taser training program. The exposure was performed by Sgt. Tegard who was certified as a trainer by the manufacturer, and he conducted the exposure exercise using the technique taught to him by Taser International, Inc. instructors. CP at 55, ¶ 15. Sgt. Tegard understood the risk of injury to be low and that stress fractures were unlikely but could occur in individuals with pre-existing conditions. *Id.* Based on this understanding, Sgt. Tegard informed trainees that they need to notify him of any pre-existing medical condition prior to participating in the exposure exercise. CP at 54, ¶ 13. There is no evidence that Michelbrink had any pre-existing medical condition that would have made him more susceptible to a fracture, and he acknowledges

that WSP knew him to be healthy at the time of the exposure. CP at 24, ll. 11-19. WSP recognized the possible risks involved in the training and took appropriate steps to mitigate such risks.

Again, it is undisputed that the vast majority of trainees completed training without incident and did not sustain any injury. CP at 39-40, ¶ 3. As a result, there can be no willful disregard on the part of WSP. *See Crow*, 129 Wn. App. at 330 (holding that there can be no willful disregard absent a showing of actual knowledge that injury is certain to occur). In sum, Michelbrink failed to satisfy either element of the *Birklid* test. Accordingly, the Court should reverse the trial court, grant WSP's motion for summary judgment, and dismiss Michelbrink's lawsuit.

E. Michelbrink's Outrage Claim Fails Because Even If Properly Pled, It Is Barred By The Industrial Insurance Act

While not pled in his complaint, Michelbrink may claim that he asserts an outrage claim against WSP. As a threshold matter, there can be no outrage claim in this action because the only cause of action Michelbrink identified in his complaint was the deliberate intent to injure claim and he never amended his complaint. CP at 1-4. Thus, to the extent the trial court allowed an outrage claim to go forward, this Court should reverse. *Pacific Northwest Shooting Park Ass'n*, 158 Wn.2d at 351-52 (cause of action that was not pled in the complaint and only raised in

response to summary judgment failed to provide defendant fair notice of the claim).

Even if the outrage claim were properly pled, it nonetheless fails under *Birklid.* In *Birklid*, the Supreme Court held that the Industrial Insurance Act bars an outrage claim against an employer when, as here, the plaintiff fails to meet his burden of proving a deliberate intention to injure claim under RCW 51.24.020 and there is no evidence of an injury separate from the workplace injury. 127 Wn.2d at 872. The exceptions to the Act's bar for outrage claims does not apply, as Michelbrink has not alleged, much less established, that he sustained an injury separate from his back injury nor has he alleged any tort arising apart from the Taser exposure. *See id.* at 866-72. Michelbrink's outrage claim is inextricably tied to his industrial injury and is, therefore, barred by the immunity provisions of the IIA. *Id.*; RCW 51.04.010; 51.32.010; *see also Goad*, 85 Wn. App. at 104-05 (dismissing claims for infliction of emotional stress because the claim "stem[med] directly" from the workplace injury).

Even if the outrage claim were not barred by the Act, Michelbrink's claim fails because no reasonable jury could conclude that WSP's Taser training program constituted outrage. *See Corey,* 154 Wn. App. at 763 (the court must initially determine whether the alleged conduct was "sufficiently extreme" before submitting an outrage claim to

a jury). No reasonable person could conclude that this training program, intended to familiarize troopers with a new law enforcement tool, was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *See Grimsby v. Samson,* 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

Accordingly, this Court should reverse the trial court, grant WSP's motion for summary judgment, and dismiss Michelbrink's outrage claim.

VII. CONCLUSION

For the reasons stated herein, the trial court erred when it denied WSP's motion for summary judgment. The trial court's ruling should be reversed and this lawsuit should be dismissed.

RESPECTFULLY SUBMITTED this 30th day of January, 2013.

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I certify under penalty of perjury in accordance with the laws of the State of Washington that the Appellants'Opening Brief was electronically filed with the Court of Appeals as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of January, 2013, at Tumwater, Washington.

Laurel B. DeForest
LAUREL B. DeFOREST

WASHINGTON STATE ATTORNEY GENERAL

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