NO. 44035-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

MICHAEL S. MICHELBRINK, JR.,

Respondent

vs.

STATE OF WASHINGTON,
WASHINGTON STATE PATROL,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

Respondent agrees with the statement of Appellant's Assignments of Error.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Respondent agrees with the statement of the issues set forth in Appellant's Motion for Discretionary Review.

III. COUNTER STATEMENT OF THE CASE

On August 10, 2007, Michael Michelbrink, Jr., then a veteran Washington State Patrol Line Trooper for approximately 8 years, was required to attend "Taser training" which included being exposed, that is to say "shot", with an electronic gun called a "Taser". Two probes, akin to darts were shot into Trooper Michelbrink's back. These probes pierce the flesh and leave scars, so-called "signature marks". CP 128, lines 17-24.

Trooper Michelbrink felt instant pain, had trouble breathing, and was incapacitated. CP 25, lines 10-12.

As a result of this "training", Trooper Michelbrink was diagnosed with a fracture at T5 and a cervical disk protrusion at CP 32, lines 4-9. It is undisputed that these injuries were proximately caused by powerful muscle contractions caused by the Taser.

Following Trooper Michelbrink's injury, the Washington State Patrol changed its policy. The exposure to the Taser was no longer mandatory. CP 129, lines 1-16.

At the time of Trooper Michelbrink's injuries, Appellant Washington State Patrol knew that exposure to the Taser could result in the following:

> "These potential injuries include but are not limited to: Cuts, bruises and abrasions caused by falling, strain-related injuries from strong muscle contractions such as muscle or tendon tears, or stress fractures."

CP 31, lines 16-19.

Sgt. Tegard, in designing the Taser training program, was himself required to sign a release before he was tased. CP 128, lines 1-2. Sergeant Tegard was obviously aware that stress fractures could occur even before he put the program together.

Later, after fractures did occur, Sgt. Tegard contacted the Taser manufacturer to:

> "See if they had more information on other people that had a serious fracture."

CP 133, lines 22, 23.

The Taser program then went from mandatory to optional.

Trooper Michelbrink, as a result of these Taser injuries, is now in the category of "long-term impairment". He now sits at a computer

terminal and does background checks of potential employees of the Washington State Patrol. CP 35, lines 19-26; CP 36, lines 1-2.

His impairment is permanent; he can never return to duty as a Line Trooper with the accompanying career opportunities. Nor will Trooper Michelbrink ever be able to perform the duties of a law enforcement officer, his lifelong ambition, for any other law enforcement agency.

Trooper Michelbrink filed suit against his employer more than two years ago, on September 24, 2010. A Motion for Summary Judgment (not the subject of this Motion for Discretionary Review) was heard and denied more than a year ago on August 15, 2011.

The State chose to delay a second Motion for Summary Judgment a mere 20 days prior to the trial date of October 30, 2012. That trial date had been pending for more than seven months. The State chose to delay the hearing, thereby creating its own emergency.

The Motion filed by the Appellant asks that the Court dismiss

> "This case on the basis that Plaintiff's claim that the Washington State Patrol deliberately injured him during a training exercise fails as a matter of law."

Nowhere in its Motion for Summary Judgment, nor in its materials, did the Appellant mention "subject matter jurisdiction", as it now does in this Court. The only issue before Judge McCauley was as set forth in the Appellant's Motion for Summary Judgment.

IV. ARGUMENT

The denial of the Motion for Summary Judgment is generally not an appealable order under RAP 2.2(a) and discretionary review such an order is not ordinarily granted. CGHI Enterprises v. Pacific Cities Inc., 137 Wn.2d 933, 949, 977 P.2d 1231 (1999).

The case of Barber vs. Bankers Life & Casualty, 81 Wn.2d 140, 500 P.2d 88 (1972), accurately summarizes a trial court's function in evaluating motions for summary judgment. Those long recognized guiding principles are:

> (1) Pursuant to CR 56(c), a summary judgment is only available where, "there is no genuine issue as to any material fact and . . . "the moving party is entitled to judgment as a matter of law."
>
> (2) The burden is on the movant for summary judgment to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him.
>
> (3) And, where a motion is made for summary judgment, it is the duty of the trial court to consider all evidence and all reasonable inferences therefrom in a light most favorable to the nonmovant.
>
> (4) The motion should be granted only if, from this evidence, reasonable men could reach but one conclusion.
>
> (5) The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.

Barber vs. Bankers Life & Casualty, supra, at 142-144.

Regardless of how many times the Washington State Patrol states Judge McCauley committed obvious error, stating it over and over again does not make it so. The materials submitted in support of and in opposition to the Motion for Summary Judgment are voluminous. Judge McCauley carefully examined both parties' materials and concluded material issues of fact remain in dispute, requiring resolution by a Grays Harbor County jury. In fact, without the benefit of a verbatim report of proceedings, this Court has absolutely no idea how Judge McCauley ruled, what he ruled on, and how he came to the conclusion he did. As a result, although a reviewing Court reviews these decisions ***de novo***, it is impossible to say Judge McCauley committed obvious error.

Cases in which obvious error has been found illustrate the nature of a claimed error which would allow discretionary review. Examples of cases granting discretionary review are: In Re the Marriage of Wolk, 65 Wn.App. 356, 828 P.2d 634 (1992) (trial court's failure to impose attorney fees and costs when the relevant statute directed "the court shall order."); Pacific Rock Environmental Enhancement Group v. Clark County, 92 Wn.App. 777, 964 P.2d 1211 (1998) (statutory definition of "land use decision" did not include a hearing examiner's prehearing discovery order); Shannon v. State, 110 Wn.App. 366, 40 P.3d 1200 (2002) (tort claim statute requiring verification by the claimant was unambiguous and

compliance mandatory); DGHI Enterprises v. Pacific Cities, Inc., 137 Wn.2d 933, 977 P.2d 1231 (1999) (court rule requires the entry of findings of fact and conclusions of law before a successor judge may perform the duties of the predecessor judge); Washington State Department of Labor and Industries v. Davison, 126 Wn.App. 730, 109 P.3d 479 (2005) (trial court's erroneous application of law).

By this appeal, the State has once again failed to recognize the gravamen of Respondent's claim. The State Patrol intended to injure Respondent and the other Troopers when they were tased. The taser shoots out probes that contain barbs which penetrate the skin. These are aluminum darts tipped with stainless steel barbs. This is followed by pain inflicted by electric shock which incapacitates the recipient. The material submitted by the Appellant, entitled "Product Warnings—Law Enforcement", contains this paragraph, CP 60:

> "Probe Removal. In most areas of the body, injuries or wounds caused by TASER probes will be minor. TASER probes have small barbs. There is a possible risk of probes causing injury to blood vessels. Follow your training and agency's guidance for probe removal."

In fact, the training manual written by Sgt. Tegard states that 99% of all volunteers to tasing were incapacitated. CP 88. The Appellant's denial of any initial intent to injure is in stark conflict with the facts.

The inevitable and certain injury is the barbs penetrating the body [in addition to the incapacitation and pain due to electric shock] which normally result in puncture wounds. But, both the manufacturer, Taser International, and the Appellant recognize that "secondary" injuries do result in fractures to bones, including vertebrae. The document submitted by Appellant, CP 61, makes this plain:

> "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. . . .**" [Emphasis Added.]

That is exactly what happened to Michael Michelbrink. As a result of being tased, he suffered compression fractures at C5-6 and T5. His doctors have concluded and will testify that the tasing was the cause of the fractures; the Appellant does not dispute the injuries or the cause..

Respondent does not contend that the State Patrol intended that he suffer vertebrae fractures as a result of the tasing. The State Patrol did intend to injure him in order to show him the effect of being tased. It believed that the injury would be minor, but it knew there was a risk of far more serious injury. It accepted that risk on behalf of Michael Michelbrink. It believed that the benefit of the training outweighed the risk to the Troopers.

Every law student knows the well-established legal doctrine of the "eggshell skull". If one intends to injure, or negligently injures another, he is responsible for the damage which results. He cannot defend by saying, "I did not intend the injury to be so serious." One cannot assume

that the person has a normal thickness skull; similarly one cannot assume that every person tased will have a minor injury.

The position of the State Patrol was made very clear through the deposition testimony of Mark R. Tegard, the Appellant's employee responsible for designing and implementing the taser training at the Washington State Patrol Academy.

Sgt. Tegard did himself undergo an exposure to the taser. However he was required to sign a release prior to undergoing the exposure. CP 128, lines 1-2.

While in the beginning of his deposition he was vague about his knowledge of potential injuries from being tased, he did refer to "muscle contractions", and stated "that's where they kind of talked to strains, you get muscle strains, muscle contractions." He went on to talk about "signature marks, which is where the electricity entered the body." He preferred to refer to these marks as "signature marks" and not scarring. CP 128, lines 17-25.

In evaluating the training, and after Sgt. Tegard learned of at least one stress fracture caused by the exposure to the taser, he did additional investigation. CP 133, lines 10-12. What he did was to:

> A. "Contact TASER, see if they had anymore information on other people that had a serious fracture.
>
> Q. "Well, is that like – a serious fracture? Is there anything that's a nonserious fracture?

CP 133, lines 22-23.

At some point in the program, the Appellant's staff made the decision to make tasing an option, and not a requirement. CP 129, lines 1-11.

Later in his deposition, Sgt. Tegard did state that the training manual that he put together contained a statement that the "potential injuries", in addition to "cuts, bruises and abrasions caused by falling", could also include "strain-related injuries from strong muscle contractions such as muscle or tendon tears, or stress fractures." CP 131, lines 13-25.

It is obvious, from the deposition of Sgt. Tegard, that the State Patrol decided that the risk of harm to its Troopers was outweighed by the potential benefit to the State Patrol. That is to say, the benefit outweighs the risk. CP 132, lines 9-21.

This specious "risk versus benefit" argument was long ago rejected by our State Supreme Court in Birklid vs. Boeing Company, 127 Wn.2d 853, 904 P.2d 278 (1995). In that case, Boeing proposed the following formulation for RCW 51.24.020:

> "Evidence that an employer has deliberately engaged in conduct that results in occupational injuries or disease within its workforce is not evidence of a specific intent to injure members of that workforce for purposes of RCW 51.24.020 so long as that conduct was reasonably calculated to advance an essential business purpose.
>
> "Conversely, when an employer deliberately engages in conduct that is not reasonably calculated to advance an essential business purpose, such conduct may constitute evidence of specific intent to injure for purposes of RCW 51.24.020 if the surrounding facts and

> circumstances indicate that the employer's specific purpose was to bring about an employee's injury."

Birklid, at page 862.

The Supreme Court made short work of Boeing's proposal:

> "We decline to adopt Boeing's formulation for RCW 51.24.020 . . ."

Birklid, at page 862.

The Washington State Patrol argues in this Court that the probes that were stuck into Trooper Michelbrink's back during the exposure to the Taser did not result in an "injury". This ignores the evidence that other Troopers who were injured by being shot with the Taser were all granted Labor and Industry benefits. Obviously, an injury did occur. In fact, the definition of "injury" found at RCW 51.08.100, is wholly inconsistent with the position the Washington State Patrol now takes:

> "'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."

Under this definition of "injury" found in Title 51 of the Industrial Insurance Definitions, the injury to Trooper Michelbrink fits exactly. The exposure to the darts was a sudden and tangible happening, of a traumatic nature, and produced a prompt result, and it produced a physical condition that resulted therefrom, to wit: a fractured vertebra and bulging disk.

The Washington State Patrol continues to argue that the benefit to the employees and the State Patrol was so great that an injury to one percent was an acceptable loss. However, the "loss" to the Washington

State Patrol is vastly different from the loss suffered by Trooper Michelbrink, who has been permanently injured.

The Washington State Patrol appears to be implying that the injury to Trooper Michelbrink was an anomaly and he should not be compensated. This argument ignores tort law. The following is a summary of what the law is:

> "It is a well-established precept of tort law that a tort feasor takes his victim as he finds him, and must bear liability for the manner and degree in which his fault manifests itself on the individual physiology of the victim."

Buchalski vs. Universal Marine Corp., 393 F.Supp. 246 (W.D. Wash. 1975), at 248; 6 Wash.Prac., Wash. Pattern Jury Instr. Civ. WPI 30.18.01 (6th Ed.)

The *Restatement of Law(Second) of Torts*, 4th Edition, Section 461, repeats this general statement:

> "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."

The *Restatement* does confirm at Comment (b) that:

> "The rule stated in this Section is an application of a broader rule which applies not only to negligence **but also to intentional conduct**. [Emphasis added.] The broad rule applies not only where a physical injury is unexpectedly increased by the unknown physical peculiarities of the other, but also where an injury to another's pecuniary interests is increased by the unexpected and unknown or unknowable value of the article damaged."

While the Washington State Patrol did not intend to fracture Trooper Michelbrink's back in two places, it did intend to inflict an "injury" upon him as part of a training exercise. This injury, or "happening" in the words of the definition of RCW 51.08.100, produced an immediate result occurring from without. The physical condition that resulted from the Taser shot was a fractured back.

The Washington State Patrol wants to accept no responsibility for having purposely injured Trooper Michelbrink. The Washington State Patrol argues that the benefit to it and its employees outweighed the risk. It argues in its material that the Department of Labor and Industries continued to pay Trooper Michelbrink's salary and all of his medical bills. It offers this as some justification.

However, the Supreme Court in Birklid didn't buy that specious argument either. It stated at Footnote 4 to the Opinion that:

> ". . . the workers all received benefits under Title 51 RCW. . . . [Citation omitted.] This fact does not alter our analysis here. Also RCW 51.24.020 specifically contemplates 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 or payable under this title'."

Further support of Trooper Michelbrink's position is found in the description of the "injuries" suffered by the employees in the Birklid case. The injuries described by the employees included panic disorder, depressive disorder, headaches, nausea, sensory irritation, chemical sensitization, Multiple Chemical Sensitivity Syndrome, sleeplessness, blood in the urine, dermatitis and skin rashes, diarrhea, vomiting,

gastrointestinal distress, shortness of breath, memory loss, and Organic Brain Syndrome. The court determined that the alleged injuries were, in total, sufficient to reach the trier of fact. Trooper Michelbrink's injuries, in comparison, are of a more serious nature. A trier of fact should determine whether the Washington State Patrol intentionally caused them and, if so, to what extent Trooper Michelbrink was injured. The trial court was correct in reaching this conclusion and requiring the case to proceed to trial.

In his ruling, the Commissioner misstated the law. The Commissioner determined that because only one percent of recipients of a Taser discharge suffered a "continued injury", an injury is not "certain" to occur. Commissioner's Ruling at page 3. This ruling is apparently based upon the holding in Vallandigham vs. Clover Park School District, 154 Wn.2d 16, 109 P.3d 805 (2005). That ruling is inapposite to this case. In Vallandigham, a special ed student continued to injure staff over a fairly lengthy period of time. The argument made by the plaintiffs in that case was that the injuries to different staff employees were continuous over a lengthy period of time such that at some point it became certain that an injury would occur. The court rejected that argument, holding:

> "In sum, substantial certainty that employee injury would continue is not enough, and here a jury could not conclude that continued injury was certain."

154 Wn.2d at page 34.

In the instant case, the Trooper does not argue that his injury was a "continued injury" as incorrectly characterized by the Commissioner. His injury actually occurred immediately upon being struck by the Taser darts.

There was no need for plaintiff to argue that his was a "continued injury". The fact that he also suffered a contraction injury as a by-product of the absolutely certain injury, solidified, rather than weakened, the certainty of injury to anyone who is shot with the Taser gun.

The Washington State Patrol moved for discretionary review, arguing that its Motion for Summary Judgment should have been granted as there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. The burden is on the Washington State Patrol to show that there are no issues of material fact. Here, obviously, whether the Washington State Patrol intended to injure Trooper Michelbrink is a material fact which can only be decided by a jury. The Washington State Patrol knew all the Troopers would be injured in one way or another. Some were more seriously injured than others. Unfortunately, Trooper Michelbrink suffered a fractured back for which the Washington State Patrol is liable in damages.

In its brief—for the first time—the State Patrol raises the issue of whether the pleadings are adequate to support the claim of outrage. Not in its first Motion for Summary Judgment, nor in its second Motion for Summary Judgment was this issue ever raised. It was not raised in the Motion for Discretionary Review. Any reference to the adequacy of the pleadings should be stricken. Obviously, the Appellant believed this to be a throw-away issue. However, Respondent will address the issue.

The State of Washington is a notice pleading state. In the leading case of Sherwood vs. Moxee School District, 58 Wn.2d 351, 363 P.2d 138, (1961), the court stated:

> "No longer is it necessary for a plaintiff to plead the facts 'constituting a cause of action.' Indeed the phrase 'cause of action' no longer appears in the Rules of Civil Procedure. The word 'claim' alone is used. [Citation omitted].

58 Wn.2d at 352.

The present requirement on rules of pleading is found at CR 8. It reads:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for a judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

The case dealing with the tort of outrage and notice pleading is Waller vs. State, 64 Wn.App. 318, 824 P.2d 1225 (1992). While that case did not deal with the IIA exception for the deliberate intention to injure found at RCW 51.24.020, it did deal with the claim of outrage. The trial court granted a motion for summary judgment. One of the issues was whether the plaintiffs had specifically pleaded outrage. The court held:

> "The Wallers contend that there existed a genuine issue of material fact regarding their claim of outrage and although their claim for negligent infliction of emotional distress was not specifically pleaded, under a system of notice pleading the issue was raised."

64 Wn.App. at page 318.

The Appellant is well aware that Respondent is pursuing the claim of outrage.

V. ATTORNEY FEES ON APPEAL

Respondent requests that the Court award his attorney fees and costs on appeal.

VI. CONCLUSION

Genuine issues of material fact remain. The trial court's rulings should be affirmed and the case sent back to Grays Harbor County Superior Court for a jury trial.

Respectfully submitted,

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OF THE STATE OF WASHINGTON

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

Respondent,

vs.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Petitioner.

AFFIDAVIT OF FILING AND SERVICE

STATE OF WASHINGTON)
) ss.
GRAYS HARBOR COUNTY)

The undersigned being first duly sworn on oath, deposes and says:

That I am a citizen of the State of Washington, over the age of 18 years, and competent to be a witness herein. That I deposited the original and one copy of the "Brief of Respondent" to the Court of Appeals, and further deposited a true and correct copy of the Brief of Respondent to the attorney for Appellant, in the United States mails, postage prepaid, on the 27th day of February, 2013, addressed as follows:

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CARLENE E. KUHN

SUBSCRIBED and SWORN to before me on February 27, 2013.

NOTARY PUBLIC for Washington,
residing at Aberdeen.