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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 34817-9-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DARWIN BRAME, et al,
Appellants,

v.

WESTERN STATE HOSPITAL, an Agency of the State of Washington,
Respondent.

REPLY BRIEF OF APPELLANTS

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ORIGINAL

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I. REPLY TO COUNTER STATEMENT OF ISSUES

Whether the trial court correctly ruled that no genuine issues of material fact existed and thus properly granted a motion for summary judgment. The material facts presented in this case were whether there were genuine issues of material fact in regards to whether or not Western State Hospital (“WSH”), the employer, knew with certainty that the staff, the employees, would be injured and whether WSH failed to act upon that knowledge.

Summary judgment is appropriate where the evidence when viewed in the light most favorable to the nonmoving party demonstrates that there are no genuine issues of material fact and thus the moving party is entitled to judgment as a matter of law. CR 56. A material fact is one upon which the outcome of litigation depends in whole or in part. *Anica v. Wal-Mart Stores, Inc.*, 120 Wash. App. 481, 84 P.3d 1231 (2004).

II. REPLY TO COUNTER STATEMENT OF THE CASE

A. The Treatment of Mentally Ill Patients at Western State Hospital and Appellants’ Industrial Injuries.

Again, the Respondent focuses on the CFS patients and their assaultive conduct, whether they are assaultive or whether there are

effective techniques to distract and effectively diffuse agitated, aggressive patients and thus preventing assaults upon staff. Respondent's Brief at pages 3 through 6. However, the issue has not been about the care of the patients but rather the care of the staff (the employees). The issue has been whether WSH knew for certain that an injury would certain to occur to the staff and they failed to act upon that knowledge by not taking adequate steps in preventing the injuries.

B. Appellants' Misstatement of Facts.

Respondent questions the validity of the Reports (Short Staffing, Understaffed Dangerous Ward Reports, Staff Injured Today Dangerous Ward Report) submitted by Appellants, however later on in their brief they stated on page 12 that the Assault Review Team recommendations were implemented. One of the recommendations Respondent claims that they implemented was that there was more accurate reporting of assaultive conduct. Reporting of assaultive conduct was done on the Reports that were submitted by Appellants. Appellants did not feel it necessary to submit the remaining 238 reports. Submitting all of them would likely bombard the court system.

“Non-Violence Initiative” implemented by Doctor Andrew Phillips,

the current CEO of WSH since January 2004, was an initiative that required zero use of restraint and seclusion even when staff was being attacked. This initiative, as stated by Respondent on page 12 of their Brief, was designed to increase patients' involvement in their own treatment, create a more comforting and supportive environment on each ward, and provide patients with greater choices as they work towards their own recovery goals. Nothing is mentioned regarding the protection of staff against assaults. Doctor Phillips stated in his deposition that he believed that staff had a right to defend themselves, however, he implemented the Non-Violence initiative where zero use of restraint and seclusion to be used. CP 118. In addition, he did not review the 1999 survey prepared by the Assault Review Team which was conducted for the sole purpose of reducing staff assaults by patients. CP 118.

Inadequate training. Respondent states that Appellants were unable to support their contention of inadequate training in dealing with assaultive patients to prevent injuries. During Appellants employment, they received the most a two hour assault prevention training session during orientation and a Patient Assault Residents Training. CP 116. The duration of the Appellants employment was a minimum of two years. CP 117.

III. SUMMARY OF ARGUMENT

An exception to the exclusive remedy under IIA requires deliberate intention by the employer to injure or cause injury to the employee. RCW 51.24.020. To prove “deliberate intent,” Appellants must prove that WSH: (1) had actual knowledge that the appellant was certain to be injured; and (2) willfully disregarded the knowledge. *Birklid v. Boeing*, 127 Wash. 2d 853, 856, 904 P.2d 278 (1995). Appellants, have not failed to satisfy either element. Respondent claims that there is undisputed evidence that establishes it is not possible to predict with certainty the future behaviors and actions of mentally ill patients and thus, WSH could not have had actual knowledge that Appellants’ specific industrial injuries were certain to occur. According to WSH’s own statistical records, from the year 2003 through 2005, a minimum of thirteen injuries to staff by patients had been reported every month. Each year the number of injuries per month increased. CP 111. The statistical records indicate that an injury to staff members were certain to occur.

In the *Birklid* case, Boeing factory workers prevailed in a suit against their employer because the employer knowingly and deliberately allowed the employees to be exposed to toxic fumes. *Birklid v. Boeing*,

127 Wash. 2d at 873. However, not every employee who was exposed to the fumes was injured. Similarly in our case, WSH's own statistics indicate that they had knowledge staff was going to be injured by patients.

IV. CONCLUSION

As a matter of law, when there are genuine issues of material facts summary judgment should be denied. CR 56. Because there exists evidence that WSH knew that injuries were certain to occur against Appellants and that there exists deliberate intent to willfully disregard that knowledge by WSH, the trial courts ruling granting Respondent's summary judgment motion should be overruled.

Respectfully submitted this 21 day of September, 2006.

~~THOMAS D. DINWIDDIE, WSBA# 6790
Attorney for Appellants~~

DECLARATION OF MAILING

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the below date, I mailed or caused delivery of a true copy of the foregoing to:

Steve Puz
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at the regular office or residence thereof.

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DATED this 21st day of September,
2006 at Tacoma, Washington.

[Signature]
LISA D. HOLLIS, Paralegal