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NO. 34817-9-II

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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DARWIN BRAME, et al,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES, WESTERN STATE HOSPITAL

Respondent.

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**BRIEF OF RESPONDENT WASHINGTON STATE  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
WESTERN STATE HOSPITAL**

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ROB MCKENNA  
Attorney General

STEVE PUZ  
Assistant Attorney General  
629 Woodland Sq. Loop SE  
PO Box 40126  
Olympia, WA 98504-0126  
360-459-6600  
Attorney for Respondent

## TABLE OF CONTENTS

I.	COUNTERSTATEMENT OF ISSUES.....	1
II.	COUNTERSTATEMENT OF THE CASE .....	1
	A. The Treatment Of Mentally Ill Patients At Western State Hospital And Appellants’ Industrial Injuries.....	1
	B. Appellants’ Misstatement of Facts.....	8
	C. Procedural History .....	13
III.	STANDARD OF REVIEW.....	15
IV.	SUMMARY OF ARGUMENT.....	16
V.	LEGAL ARGUMENT .....	18
	A. Employer Immunity Under The IIA .....	18
	1. Employers Are Immune From Suit By Employees Injured In The Course Of Their Employment .....	19
	2. The Limited “Deliberate Intent To Injure” Exception .....	22
	a. <i>Stenger v. Stanwood School District</i> .....	28
	b. <i>Vallandigham v. Clover Park School District</i> .....	29
	B. WSH Is Immune From Suit For Appellants’ Work Related Injuries .....	36
	1. WSH Did Not Have Actual Knowledge That Appellants Were Certain To Be Injured By Specific CFS Patients .....	36
	2. WSH Did Not “Willfully Disregard” Actual Knowledge Of Certain Injury.....	41
	C. Appellants’ Negligence Claims Are Barred By The IIA. ....	47

VI. CONCLUSION .....49

## TABLE OF AUTHORITIES

### Cases

<i>Atherton Condo Ass'n v. Blume</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	15
<i>Birklid v. Boeing</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	passim
<i>Brand v. Dep't of Labor &amp; Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	19, 20
<i>Byrd v. Systems Transport, Inc.</i> , 124 Wn. App. 196, 99 P.3d 394 (2004); <i>review denied</i> , 153 Wn.2d 1004, 103 P.3d 1247 (2005).....	48
<i>Crow v. Boeing Co.</i> , 129 Wn. App. 318, 118 P.3d 894 (2005).....	46, 48
<i>Department of Labor &amp; Industries v. Baker</i> , 57 Wn. App. 57, 786 P.2d 821 (1990).....	20
<i>Detention of Marshall v. State</i> , 156 Wn.2d 150, 163, 125 P.3d 111 (2005).....	39
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	passim
<i>Goad v. Hambridge</i> , 85 Wn. App. 98, 931 P.2d 200 (1997), <i>review denied</i> , 132 Wn.2d 1010, 940 P.2d 654 (1997).....	48
<i>Gorman v. Garlock, Inc.</i> , 121 Wn. App. 530, 89 P.3d 302 (2004), <i>aff'd</i> 155 Wn.2d. 198, 118 P.3d 311 (2005).....	21
<i>Group Health Co-Op of Puget Sound</i> , <i>Inc. v. State</i> , 106 Wn.2d 391, 722 P.2d 787 (1986).....	39

<i>Henson v. Crisp</i> , 88 Wn. App. 957, 946 P.2d 1252 (1997), <i>review denied</i> , 135 Wn.2d 1010, 960 P.2d 937 (1998).....	48
<i>Hope v. Larry's Markets</i> , 108 Wn. App. 185, 29 P.3d 1268 (2001).....	29, 46
<i>Howland v. Grout</i> , 123 Wn. App. 6, 9, 94 P.3d 332 (2004).....	15, 22
<i>Judy v. Hanford Environmental Health Foundation</i> , 106 Wn. App.26, 22 P.3d 810 (2001), <i>review denied</i> , 144 Wn.2d 1020 (2001).....	22
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	16
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	15
<i>Minton v. Ralston Purina Co.</i> , 146 Wn.2d 385, 47 P.3d 556 (2002).....	21
<i>Schuchman v. Hoehn</i> , 119 Wn. App. 61, 79 P.3d 6 (2003).....	40, 48
<i>Schwab v. Department of Labor and Industries.</i> , 69 Wn.2d 111, 417 P.2d 613 (1966).....	20
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	16
<i>Shellenbarger v. Longview Fibre Co.</i> , 125 Wn. App. 41, 103 P.3d 8070 (2004).....	38, 48
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	39
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.3d 410 (2004).....	15

<i>Stenger v. Stanwood School Dist.</i> , 95 Wn. App. 802, 977 P.2d 660 (Div. I, 1999).....	27, 29
<i>Tilly v. Department of Labor &amp; Industries</i> , 52 Wn.2d 148, 324 P.2d 432 (1958).....	20
<i>Vallandigham v. Clover Park School Dist.</i> 400, 154 Wn.2d 16, 109 P.3d 805 (2005).....	passim
<i>Vallandigham v. Clover Park School Dist.</i> , 119 Wn. App. 95, 79 P.3d 18 (Div. II, 2003) .....	28, 31, 32, 33
<i>West v. Zeibell</i> , 87 Wn.2d 198, 550 P.2d 522 (1976).....	21
<i>Weyerhaeuser Co. v. Aetna Cas. &amp; Sur. Co.</i> , 123 Wn.2d 891, 897, 874 P.2d 142 (1994).....	15
<i>White v. State</i> , 131 Wn.2d 1, 9, 929 P.2d 396 (1997).....	15, 39
<i>Wolf v. Scott Wetzel Services, Inc.</i> , 113 Wn.2d 665, 782 P.2d 203 (1989).....	21
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 225, 770 P.2d 182 (1989).....	16, 40

**Statutes**

RCW 10.77.010(2).....	2
RCW 10.77.090 .....	2
RCW 10.77.110 .....	2
RCW 10.77.210 .....	45
RCW 10.77.210(1).....	5, 45
RCW 10.77.2101 .....	5

RCW 51.04.010 .....	passim
RCW 51.04.090 .....	22
RCW 51.16.035 .....	20
RCW 51.24.020 .....	passim
RCW 51.32.010 .....	passim
RCW 71.05.012 .....	4, 45
RCW 71.05.020(4).....	2
RCW 71.05.150 .....	2
RCW 71.05.360(2).....	45
RCW 72.01.045(2).....	8, 36

**Other Authorities**

<i>In re Ken Bezley,</i> BIIA Dec. 95 5865 & 95 6356 (1997) .....	20
<i>In re Rickey Morgan,</i> BIIA Dec. 94 1042 (1995) .....	20
6 A Larson, <i>WORKERS' COMPENSATION LAW</i> , Vol. 6, page 103-10 (Nov. 2002) .....	20, 27

**Rules**

CR 56 .....	15
CR 56(e).....	39
ER 402, 403, 802, 803 .....	39
ER 703 .....	39

RAP 10.3(g)..... 15

**Regulations**

WAC 296-17-31003-004 ..... 20

## I. COUNTERSTATEMENT OF ISSUES

Did the trial court correctly rule that Western State Hospital did not deliberately intend to produce appellants' work related injuries, and, thus, is immune from suit under Washington's Industrial Insurance Act, Title 51 RCW?

a. Did the trial court correctly rule that appellants failed to establish that Western State Hospital knew, with certainty, that severely mentally ill patients would cause their specific industrial injuries?

b. Did the trial court correctly rule that appellants failed to establish that Western State Hospital "willful disregarded" actual knowledge of certain injury to appellants?

## II. COUNTERSTATEMENT OF THE CASE

### A. The Treatment Of Mentally Ill Patients At Western State Hospital And Appellants' Industrial Injuries

This case arises from industrial injuries sustained by appellants. Specifically, while working at Western State Hospital (WSH), the appellants were assaulted by different severely mentally ill patients committed to this psychiatric hospital. CP at 635-40.<sup>1</sup>

WSH is one of two state-owned psychiatric hospitals. The hospital

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<sup>1</sup> "CP" refers to the clerks papers.

provides evaluation and inpatient treatment for individuals suffering from serious, long-term mental illness. The Center for Forensic Services (CFS), where each of the appellants worked at the time of their injuries, is a locked, secure ward that houses approximately 240 involuntarily committed patients.<sup>2</sup> CP at 89-90; CP at 103. CFS houses patients who have been found gravely disabled, a danger to themselves or others, or not guilty of committing a crime by reason of insanity. CP at 89-90; CP at 96-97; CP at 103; *see also* RCW 10.77.110 (the court “shall order” the hospitalization of a defendant that is acquitted of a crime by reason of insanity and is found to present “a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing the public safety or security...”); RCW 71.05.150 (persons who, as a result of a mental disorder, are “gravely disabled” or who are deemed a “danger to themselves or others” shall be hospitalized).

The population of CFS also includes individuals committed to WSH for an assessment of their competency to stand trial. CP at 89-90; CP at 96-97; CP at 103; *see also* RCW 10.77.090 (if a defendant is charged with a felony and determined to be incompetent the court “shall commit the defendant to the custody of [WSH] . . . until he or she has

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<sup>2</sup> “Commitment” is defined as “a determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or less restrictive setting.” RCW 10.77.010(2); RCW 71.05.020(4).

regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense...”).

Appellants do not dispute, and thereby concede that it was impossible to predict, with certainty, the future actions and behaviors of the severely mentally ill patients who caused their industrial injuries. CP at 92-93; CP at 99-100; CP at 104, 106. Drs. Mehlman, Gage, and Klein of WSH provided many reasons to support this undisputed medical opinion.

First, while the CFS patients suffer from pronounced mental illnesses, most are not assaultive. CP at 93; CP at 99; CP at 104. Moreover, past assaultive conduct by a patient does not mean that patient will be assaultive in the future. *Id.*

Second, it is sometimes possible to identify certain “triggers” (i.e., actions, behaviors, and words) that tend to cause agitation or aggression in a specific patient. However, the presence of those triggers does not necessarily mean the patient will become assaultive, nor does the absence of known triggers mean the patient will never become assaultive in the future. CP at 99. Third, staff are frequently successful in using a variety of different techniques to distract and effectively diffuse agitated, aggressive patients and thereby prevent them from becoming assaultive. CP at 93.

Fourth, notwithstanding the proper and necessary treatment provided, the thought processes of CFS patients are disorganized and their actions irrational. CP at 92; CP at 97-98; CP at 99. Their mental illness makes it difficult for them to comprehend the events occurring around them. CP at 99. Further, some CFS patients respond to commands “received” from the auditory hallucinations they experience. *Id.* Staff are rarely able to tell when a patient is experiencing such a hallucination, much less the nature of the “command” given to the patient. *Id.* Fifth, patients develop tolerances to the psychotropic medications prescribed. This can only be discovered when a patient’s condition and behavior deteriorates. CP at 92. Further, patients sometimes decide to stop taking their psychotropic medications prescribed to them because they don’t like the side effects of the medication or, more typically, the patient simply denies having a mental illness. CP at 92; CP at 98. Again, staff are unable to tell that a patient has stopped taking their medication until that patient’s condition deteriorates. *Id.* Finally, despite the proper and necessary treatment they receive, the CFS patients experience good days and bad days in terms of their behavior and ability to interact with others. CP at 97.

By law, all patients committed to WSH are entitled to individualized treatment that provides the “best opportunity to restore the person to or maintain satisfactory functioning.” RCW 71.05.012; *see also*

RCW 10.77.210(1) (WSH must provide “adequate care and individualized treatment”) and 71.05.360(2) (same). To provide the effective therapeutic treatment required by law, staff must interact with patients, engage them in treatment, and be available to meet the patients’ day-to-day health and safety needs. CP at 91-92; CP at 99. As Dr. Mehlman, the Director of CFS, testified:

The treatment of mentally ill patients is not an exact science. Generally mental illness cannot be ‘fixed’ or ‘cured’ like a broken arm. Every individual treated is different. These differences may include different responses to medications, different levels of insight into their mental illness, varying degrees of participation in their treatment, and different personality traits and characteristics. All of these factors influence the efficacy of the treatment rendered.

CP at 91.

All CFS patients participate in treatment plans administered by a team of experts that includes psychiatrists, psychologists, psychopharmacologists, licensed nurses and social workers. CP at 91; CP at 96-97; CP at 103-104. Each individual treatment plan is guided by the patient’s known medical and mental health history, their current diagnosis, and the patient’s current conduct and behaviors.<sup>3</sup> *Id.* The effectiveness of the treatment plan is reviewed by the team of experts during daily morning

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<sup>3</sup> By law, WSH must make treatment decisions based on the patient’s current conduct, not the classification of the criminal charges that led to the commitment at CFS. RCW 10.77.2101.

rounds, at regular treatment planning conferences, and during the weekly reviews conducted for each patient at CFS. *Id.* The treatment plans for all CFS patients are continuously modified as necessary to meet the changing needs of each patient, and to address concerns raised involving the patient's behaviors and/or actions. CP at 96-98.

As part of their treatment regimen, psychotropic and other types of medications are administered to the CFS patients. CP at 97-98; CP at 104. These medications help *control* the patient's symptomatology by blunting the extreme behaviors exhibited by the patients. Importantly, however, these medications do not "cure" the patient's mental illness, nor do they completely eliminate the aggressive behaviors caused by the patient's mental illness. CP at 91; CP at 97.

Appellants were all employees of WSH assigned to work with severely mentally ill patients on CFS. Appellants' injuries occurred between 2001 and 2004 when different patients suddenly became aggressive and assaultive. *See, for example*, CP at 687 (appellant, whose specific job it was to protect "patients and staff from acts of violence from recalcitrant patients" (CP at 778), was injured while restraining a psychotic, delusional patient); CP at 696-99 (appellant injured while restraining a patient who suddenly became assaultive after concluding that WSH staff had killed and eaten his children); CP at 704 (after being told

she could not attend Halloween party, patient initially went to her room without incident, then suddenly charged out and attacked appellant from behind); CP at 712 (while being escorted to an area with less stimulation, patient suddenly became assaultive); CP at 731 (in response to being told to eat her lunch in the dining hall, patient threw her lunch tray to the floor and assaulted appellant; appellant candidly described the patient's assaultive conduct as "totally unpredictable"); CP at 741-42 (appellant, whose job it was to provide security on ward (CP at 782), injured while restraining patient who suddenly became assaultive); CP at 755 (appellant assaulted trying to restrain patient who, without warning or provocation, ran out of his room and hit his head on a plexiglass wall); CP at 775 (medication ordered for agitated patient; appellant held down patient's legs while medication administered; patient's leg got free and appellant was kicked).<sup>4</sup>

Appellants Saatchi, Ford and Salazar chose not to file industrial insurance claims with the Department of Labor and Industries (L&I). Every one of the remaining appellants filed industrial insurance claims, which were allowed by L&I. Those appellants received medical treatment and wage replacement benefits from L&I for their industrial injuries. CP at

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<sup>4</sup> Details of appellants' specific industrial injuries, the allowance of their L&I claims and the payment of assault benefits is set forth at CP at 688-783 (Exhibits 1-16). For ease of reference, an index detailing the documents that relate to each appellant's industrial injuries can be found at CP at 684-87.

688-73. Similarly, those same appellants received assault pay benefits from WSH for their industrial injuries. *Id.*; see RCW 72.01.045(2).

**B. Appellants' Misstatement of Facts**

Although the trial court dismissed appellants' lawsuit on legal grounds, there are numerous factual inaccuracies contained in the Brief of Appellant that should be corrected to better understand the underlying case and the basis for the trial court's ruling.

Importantly, all of the record citations in the Brief of Appellant are to their trial court brief. Thus, as demonstrated below, what appellants represents as "facts" are actually nothing more than unsupported arguments from their trial court brief.

As they did below, appellants claim there were "37 Short Staffing Reports" and "219 Understaffed Dangerous Ward Reports" submitted by unidentified staff to some unknown "ward manager." Br. Appellant at 3-4. However, appellants could only submit 18 of these reports to the trial court. There is no evidence before this court of the remaining 238 reports relied upon by appellants, much less the contents of those reports.

Of the 18 reports that were submitted, none were authored by any of the appellants. *See, e.g.*, CP at 152-163 (Decl. of Dinwiddie, Ex. B). Further, although the reports submitted allege that certain units were understaffed, *none of the appellants were injured on any of the dates*

*listed in those reports.*

Appellants argue these forms were submitted only when employees believed there was inadequate staff assigned to a unit. Br. Appellant at 2-3. However, appellants failed to produce one declaration substantiating that claim. Indeed, the sworn testimony shows these pre-printed union forms were frequently submitted irrespective of whether a staff shortage actually existed. CP at 541.<sup>5</sup>

Also, as they did below and again citing only the argument from their trial brief, appellants make a number of unsupported and misleading claims concerning the “Johnson Behavioral Model Classification System” in their statement of facts. Br. Appellant at 3. Appellants argue that WSH was required to use the Johnson Model to establish mandatory staffing levels for each ward. *Id.* That statement is simply false. The Johnson Model is a tool that allows staff to consistently assess mentally ill patients from a variety of angles, identifying an individual patient’s strengths and needs which are then incorporated into that person’s treatment plan. CP at 795-796. It also provides a common ground for different disciplines to communicate with each other. *Id.* The Johnson Model represents a “snapshot” of the needs of the patient at a given point in

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<sup>5</sup> Indeed, the strategy appears to have been to “flood” WSH with as many of these forms as possible, regardless of whether the information contained in them was inaccurate. CP at 541.

time. *Id.* The score produced by this model is neither static nor does it determine the number of staff required on a particular ward. *Id.*

Appellants next claim that some staff members didn't understand the Johnson Model and were not trained how to use it. Br. Appellant at 3. Appellants claim the head nurses were aware of this training gap, but did nothing to resolve it. *Id.* Appellants' contention is as disingenuous as it is misleading. The Psychiatric Security Attendant (PSA) and Psychiatric Security Nurse (PSN) job classifications, which were the jobs held by most of the appellants, lack the education, training, or licensure to assess the mental health of patients. CP at 778-82; CP at 795-96. As a result, they are not responsible for or permitted to score CFS patients under the Johnson Model. *Id.*<sup>6</sup>

Even if the Court were to accept that the Johnson Model was designed to set mandatory staffing levels, which it was not, appellants failed to produce any evidence that the wards they worked on were understaffed at the time of their industrial injuries. Further contradicting appellants' unsupported claim, most of their industrial injuries occurred when two and frequently more staff were present. *See* CP at 688-773.

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<sup>6</sup> Appellants Saatchi and Slagle, who are registered nurses, *did* perform assessments under the Johnson Model. Tellingly, neither was willing to testify that the Johnson Model was designed to set mandatory staffing levels, did not criticize the training they received on the use of the Johnson Model, and were unable to support the claim that PSNs and PSAs should be trained in its use.

There is simply no evidence in the record supporting appellants' claim that additional staff were required or would have prevented their industrial injuries.<sup>7</sup>

Appellants next claim that Dr. Klein "believed that patients will assault staff unless there was a substantial change." Br. Appellant at 7. Actually, what Dr. Klein testified to in his deposition was: "But I do think that no matter what changes were made, it's most likely there would continue to be assaults." CP at 443. As he later explained:

While WSH has taken many steps to prevent patient on staff assaults, the risk that such an assault may take place is always present at WSH. The treatment provided to the patients hopefully reduces but never eliminates that risk.

CP at 104. Dr. Andrew Phillips, CEO of WSH, similarly testified that because the population WSH treats are mentally ill, there is a higher chance of assaults occurring. CP at 583. This is not only true at WSH, this is also true at psychiatric facilities throughout the United States. CP at 583. Dr. Klein and every other medical expert testified, without any challenge from appellants, that severely mentally ill patients have difficulty understanding events that take place around them. CP at 104; CP at 92-93; CP at 99. Even when properly treated, mentally ill patients can suddenly become violent and assaultive. CP at 99. It is not possible

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<sup>7</sup> Indeed, it is undisputed that needlessly increasing staff on a ward may actually increase the tension and anxiety of patients making it more likely they will become aggressive and assaultive. CP at 105.

to predict when or how individual, severely mentally ill patients will act. Thus, it is not possible to completely prevent assaults from occurring. CP at 93; CP at 99-100; CP at 104-105.

Again, citing only the unsupported argument from their trial brief, appellants next claim that none of the recommendations from the Assault Review Team were ever implemented. Br. Appellant at 4-5. This is simply wrong. The undisputed evidence demonstrates that many of the recommendations were implemented. *See* CP at 549-52 (more accurate reporting of assaultive conduct; new alarm system installed; two-way wireless radios distributed to staff; development and distribution of “panic buttons” for staff to call for immediate help dealing with a patient; installation of public address systems on the wards; placement of gloves, masks and instructions on how to use proper protection when dealing with the bodily fluids of patients; placement of padded shields on wards).

In addition, WSH began a “Non-Violence Initiative” designed to reduce the aggressive, assaultive conduct by patients. CP at 104-106; *see also* CP at 92 and 98. This initiative 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. *Id.* One benefit that WSH hopes to achieve through its initiative is a reduction in the need

to use seclusion and restraint to control patients. *Id.* Essentially, by improving how treatment is delivered, how staff interacts with patients, and by providing patients with greater involvement in their own treatment, some or all of the factors that lead patients to become assaultive will be reduced. In turn, this will reduce the need for staff to use seclusion and restraint to control patients. *Id.*

Finally, appellants claim that they were inadequately trained, which caused patients to assault them. Br. Appellant at 6. Not surprisingly, appellants were unable to support this contention with any evidence. That is because none exists. Appellants could not point to any evidence in the record demonstrating that the training they received fell below accepted standards of practice, nor could they explain how additional training could protect them from the assaults that every psychiatrist and psychologist testified were unprovoked and completely unpredictable. CP at 93; CP at 99-100; CP at 104-105.

### **C. Procedural History**

Four separate lawsuits involving identical claims were filed in Pierce County Superior Court. On the agreed motion of the parties, these lawsuits were consolidated under Pierce County Superior Court Cause No. 04-2-13074-9. CP at 671-72; CP at 678-79.

The first lawsuit, Pierce County Superior Court Cause No. 04-2-

13074-9, identified Luterrio Skyles, Mohammad Saatchi, and Christy Forsythe as plaintiffs. CP at 635-640 (Complaint). However, none of these individuals filed claims with the Office of Risk Management, as required by RCW 4.92.100-110. CP 86-87. In addition, this Complaint names Marvin and Janet Fritts as plaintiffs. Although the Complaint alleges the Fritts are married and reside in Pierce County, the Complaint does not allege any other facts concerning either individual.<sup>8</sup> CP at 635-40.

Claiming immunity from suit for plaintiffs' industrial injuries, WSH filed a Motion for Summary Judgment on February 17, 2006. CP at 1-3. WSH also moved to dismiss plaintiffs Marvin and Janet Fritts for their failure to allege any facts justifying any cause of action or any relief. *Id.* Finally, WSH moved to dismiss the actions of plaintiffs Skyles, Saatchi and Forsythe because they failed to comply with the claim filing statute. *Id.* While plaintiffs opposed WSH's Motion for Summary Judgment, they did not oppose either of WSH's Motions to Dismiss. CP at 110-128.

On April 13, 2006, the Honorable John Hickman granted WSH's Motion for Summary Judgment and its Motions to Dismiss. CP at 622-24.

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<sup>8</sup> In the affirmative defenses contained in its Answer, WSH raised both the claim filing error and the Fritts' failure to allege any facts justifying any relief. CP at 648-49.

Appellants' chose only to appeal the order granting summary judgment.<sup>9</sup>  
CP at 625-26.

### III. 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, 799 P.2d 250 (1990).

To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). If

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<sup>9</sup> Similarly, appellants did not assign error or provide written argument addressing the order dismissing the lawsuits of Saatchi, Forsythe, Skyles or the Fritts'. Accordingly, the trial court's order dismissing these claims is not subject to review. RAP 10.3(g); *State v. Goodman*, 150 Wn.2d 774, 781-782, 83 P.3d 410 (2004) (a party must assign error for the issue to be reviewed on appeal); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002) ("A party waives an assignment of error not adequately argued in its brief.").

the non-moving party fails to make a showing sufficient 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 and n. 5, 770 P.2d 1027 (1989).

#### **IV. SUMMARY OF ARGUMENT**

The Legislature expressly abolished all civil actions and civil causes of action for work related injuries and, in its place, created a workers' compensation program that provides sure and certain relief to injured workers without regard to fault. RCW 51.04.010; RCW

51.32.010; *Vallandigham v. Clover Park School Dist.* 400, 154 Wn.2d 16, 26, 27, 109 P.3d 805 (2005); *Birklid v. Boeing*, 127 Wn.2d 853, 859-860, 904 {/2d 278 (1995). By intent and design, the Industrial Insurance Act (IIA) provides the exclusive remedy for employees injured at work. *Id.* A narrow, limited exception exists for injuries that were deliberately caused by the worker's employer. RCW 51.24.020. To prove "deliberate intent," each individual appellant must prove that WSH: (1) had actual knowledge the appellant was certain to be injured; and, (2) willfully disregarded that knowledge. *Vallandigham*, 154 Wn.2d at 27-28; *Birklid*, 127 Wn. 2d at 865. As a matter of law, appellants failed to satisfy either element.

The undisputed evidence establishes it is not possible to predict with certainty the future behaviors and actions of mentally ill patients. CP at 92-93; CP at 99-100; CP at 104, 106. Thus, as a matter of law, WSH could not have had actual knowledge that appellants' specific industrial injuries were certain to occur. *See Vallandigham*, 154 Wn.2d at 33.

Further, as a matter of law, appellants' reliance on historical data of patient-to-staff assaults at WSH is insufficient to prove actual knowledge that appellants' specific industrial injuries were certain to occur. *Id.* A probability of injury, even a substantial certainty that an

unidentified staff member would be assaulted by a WSH patient at some future date, is not sufficient to prove actual knowledge of certain injury. *Id.*; *Birklid*, 127 Wn.2d at 864-65.

It is also undisputed that WSH continuously provided necessary and appropriate treatment to the patients at CFS. That treatment was designed to reduce the patients' symptoms and reduce the risk that they would become aggressive or assaultive. Thus, appellants cannot demonstrate that WSH "willfully disregarded" actual knowledge of certain injury. *See Vallandigham*, 154 Wn.2d at 35.

Finally, appellants' negligence claims were expressly abolished by the Legislature. RCW 51.04.010; RCW 51.32.010. Furthermore, employer negligence, even gross negligence, does not defeat the immunity from tort lawsuits that employers enjoy under the IIA. *Vallandigham*, 154 Wn.2d at 27; *Folsom v. Burger King*, 135 Wn.2d 658, 664-665, 958 P.2d 301 (1998). *Birklid*, 127 Wn.2d at 860-61.

For each of these reasons, this Court should affirm the trial court's dismissal of appellants' lawsuit.

## **V. LEGAL ARGUMENT**

### **A. Employer Immunity Under The IIA**

This case is governed by the IIA and controlled by well established case law.

**1. Employers Are Immune From Suit By Employees Injured In The Course Of Their Employment**

Finding the common law tort system “uncertain, slow and inadequate” for injured workers, the Legislature enacted the IIA 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 IIA is a “grand compromise” that provides workers with sure and certain relief *without regard to fault*. RCW 51.04.010; RCW 51.32.010; *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). The “no fault” remedy enjoyed by injured workers under the IIA is significant.

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, page 103-10

(Nov. 2002).

By design, then, 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); *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). The “sure and certain” medical treatment, wage replacement benefits and vocational services provided to injured workers under the IIA are funded by the premiums paid by WSH and other employers. RCW 51.16.035; WAC 296-17-31003 through 004.

In exchange for these fault-free, certain benefits, employers receive immunity from civil lawsuits for work related injuries. RCW 51.04.010; RCW 51.32.010; *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). This immunity shields employers not only from liability for work related injuries, but from the expense and resources required to defend civil lawsuits.

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).

To underscore the importance of employers' immunity from suit, the Legislature enacted a second provision that expressly prohibits workers from suing their employer for on the job 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 compensation shall be in lieu of any and all rights of action whatsoever against any person whomsoever.*

RCW 51.32.010 (emphasis added).

The Legislature intentionally made the IIA's employer immunity provisions very broad. *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). Employer immunity is, without question, a key foundational block upon which the ongoing

existence and viability of the IIA literally rests. By express provision of law, if employer immunity provisions are ever held invalid, the entire Industrial Insurance Act “shall be thereby invalidated.”

RCW 51.04.090.

## 2. The Limited “Deliberate Intent To Injure” Exception

The IIA’s immunity provisions are overcome only in the rare instance where the employer “deliberately intended” to produce the worker’s injury. RCW 51.24.020.<sup>10</sup> This exception is narrowly interpreted 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).

For more than eighty years, “deliberate intent” was found only in cases involving assault and battery by the employer or its agents against an employee. *See Birklid*, 127 Wn.2d at 862. Then, in 1995 the Supreme Court was asked to determine whether fourteen employees had alleged sufficient facts to justify a finding of “deliberate intent” despite the absence of any physical assault by their employer. *Id.* at 856. In *Birklid*,

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<sup>10</sup> RCW 51.24.020 provides:

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.

Boeing began preproduction testing of a new material used to make highly contoured interior parts of planes. The material was impregnated with phenol-formaldehyde resin. *Id.* The use of this chemical caused the air in the production facility to be “white with dust.” *Id.* The phenol-formaldehyde resin caused employees to experience dizziness, dryness of their nose and throat, burning eyes, and upset stomachs. *Id.*

Anticipating that symptoms would worsen with the imminent increase in production, a Boeing supervisor requested improved ventilation. Boeing management denied the request, stating the problem did not warrant the expenditure of funds. *Id.* Then, without taking any steps to address the health issues caused by the phenol-formaldehyde, Boeing commenced full production.

As Boeing’s supervisor predicted, when full production began, workers experienced dermatitis, rashes, nausea, headaches, and dizziness. Workers passed out on the job.

*Id.* at 856.

The evidence, viewed in a light most favorable to the injured workers, demonstrated that Boeing knew the symptoms experienced by its workers resulted from the exposure to the phenol-formaldehyde. Boeing also: removed labels from the containers holding the phenol-formaldehyde resin; altered workplace conditions during government safety tests to manipulate test results; deliberately disguised the potential harm of this

chemical; harassed employees who requested protective equipment; and, retaliated against employees who availed themselves of medical treatment. *Id.* at 857. Finally, the un rebutted evidence established that employees were used as “human guinea pigs” to test the toxic effect of the chemical without the employees’ knowledge or consent. *Id.*

After reviewing the decisions interpreting RCW 51.24.020, the *Birklid* Court concluded the statutory phrase “deliberate intention” encompassed more than just physical assault. *Id.* at 862-63, 855-56. Instead, 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.

However, a mere possibility, or even a “substantial certainty” of injury, falls short of the deliberate, intentional conduct necessary to satisfy the *Birklid* test. *Id.* In establishing this new standard, the *Birklid* Court specifically rejected the “substantial certainty” and “conscious weighing” tests adopted by a small number of other states.

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 injuries as well. *Id.* at 864. The “conscious weighing” test focuses on whether “the employer had an opportunity to consciously 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 51.24.020.” *Id.*

Rather, to avoid summary judgment the worker must demonstrate the employer knew the specific plaintiff was certain to be injured, and the employer willfully disregarded that knowledge. *Id.* The *Birklid* court concluded that the employees before it satisfied this new two-part test. Critical to its holding, the court found that Boeing put the phenol-formaldehyde into full production knowing it was certain to make the plaintiffs ill. *Birklid*, 127 Wn.2d at 863.

The Supreme Court again addressed the two-part *Birklid* test three years later in *Folsom v. Burger King*. In *Folsom*, Blake Pirtle, a former Burger King employee, entered a back door of the fast food restaurant and murdered two employees during a robbery. The estates of the two murdered employees sued the employer alleging that Burger King willfully disregarded actual knowledge of certain injury. *Folsom*, 135

Wn.2d at 661.

Citing immunity under the IIA, the employer moved for summary judgment. In opposition, the plaintiffs submitted evidence demonstrating that: when hired, the employer knew Pirtle had previously been convicted of violent criminal felonies; the employees all knew this Burger King restaurant left large amounts of cash in the restaurant creating an “incentive for robbery”; it was highly predictable that this fast-food restaurant would be robbed; Pirtle sexually harassed female co-workers; the back door entrance did not have a peep hole, nor did it lock properly; and, the employer discontinued a security monitoring service without informing the employees. *Id.* at 665-67.

The trial court denied summary judgment, and the employer sought and was granted discretionary review. *Id.* at 662. The plaintiffs argued that *Birklid* only requires knowledge that *some injury* was certain to occur, and that “exact knowledge of the particular injury that occurred in this case is not necessary.” *Id.* at 665. The Supreme Court disagreed, reversed the trial court and held “deliberate intent” exists only when the employer had actual knowledge the specific injuries suffered by plaintiffs were certain to occur. *Id.* at 667.

Further, in dismissing plaintiffs’ lawsuit, the *Folsom* Court affirmed that negligence, even gross negligence by the employer, is not

enough to prove “deliberate intent to injure” or overcome the immunity the IIA provides to employers. *Id.* at 664-65. The Court also held, as a matter of law, that the employer’s failure to follow safety procedures does not establish “deliberate intent to injure” under RCW 51.24.020. *Id.*

The Washington Supreme Court’s narrow interpretation of “deliberate intent” in *Birklid* and *Folsom* follows the approach adopted by the vast majority of states. As Professor Larson explained:

Since the legal justification for the common-law action is the non-accidental character of the injury from the defendant employer’s standpoint, the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury.

6 A. Larson, § 103, at 103-07.

This past year the Supreme Court again emphasized the extremely narrow scope of the “deliberate intent” exception to employer immunity. In *Vallandigham*, the Court accepted review to resolve a conflict that had developed between two appellate divisions concerning application of the “willful disregard” element of the *Birklid* test. *Cf. Stenger v. Stanwood School Dist.*, 95 Wn. App. 802, 977 P.2d 660 (1999) (Div. I) and *Vallandigham v. Clover Park School Dist.*, 119 Wn. App. 95, 79 P.3d 18

(2003) (Div. II).

*a. Stenger v. Stanwood School District*

In *Stenger* two employees sued the school district seeking damages for injuries caused by a special education student named Jason. Jason was diagnosed as “multi-handicapped” with severe behavioral disabilities. *Stenger*, 95 Wn. App. at 804-805. Plaintiffs produced evidence that Jason caused between 1,316 and 1,347 injuries to school staff over a four year period, at times inflicting injuries on almost a daily basis. *Id.* at 806, 811-12. These injuries included “scratches, gouges, bites, upper body strain; scalp, breast, neck, back, shoulder, leg, arm, wrist, hand, and finger injuries; and bruising.” *Id.* at 812. In addition, numerous claims were filed with L&I in the years preceding plaintiffs’ specific injuries. *Id.*

Both the director of special services for the school district and the school principal testified they were aware of the staff injuries and believed that staff would continue to suffer some level of injury from working with Jason. *Id.* at 813. The evidence also demonstrated that Jason experienced periods of improvement in his behavior which corresponded with a decrease in his assaultive outbursts. *Id.* at 807, 811. Division I held that “[g]iven the frequency of Jason’s outbursts, the number of injuries he inflicted, and the claims filed with the District, a jury could reasonably conclude that the District had actual knowledge that the staff would continue to be injured by Jason in the future.” *Id.* at 813.

As to the second element of the *Birkliid* test, “willful disregard,” Division I focused on “whether a jury could conclude that [the school district’s] efforts to accommodate Jason in the classroom were inadequate and thus constitute willful disregard under the *Birkliid* rule.” *Stenger*, 95 Wn. App. at 813.<sup>11</sup> Concluding that plaintiffs satisfied the *Birkliid* test, the Court reversed the summary judgment ruling in favor of the school district. *Id.* at 817. The school district did not seek review. *Vallandigham*, 154 Wn.2d at 32.

***b. Vallandigham v. Clover Park School District***

In 2003, Division II was presented with facts virtually identical to those in *Stenger*. *Vallandigham*, 119 Wn. App. at 97-98. In *Vallandigham*, two special education instructors sued the school district seeking damages for injuries caused by “RM,” a severely disabled special education student. *Vallandigham*, 154 Wn.2d at 18. RM was diagnosed with epilepsy, mental retardation and autism, which caused severe impairment of his verbal communication skills. *Id.* at 19. RM was 13 when he began the 1999-2000 school year. During that year, RM’s aggression increased.

Between September 14, 1999 and October 25, 1999, he

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<sup>11</sup> Expanding on this ruling two years later, Division I held the “willful disregard” element is satisfied if the remedial measures taken by the employer to prevent worker injuries were “ineffective” in practice. *Hope v. Larry’s Markets*, 108 Wn. App. 185, 195, 29 P.3d 1268 (2001).

assaulted or injured students or staff approximately 18 times by scratching, hitting, pulling hair, biting, pinching, head butting, and grabbing glasses.

*Id.*

RM underwent two behavioral evaluations by the school district. One reported that RM physically hurt students and teachers more than once per week. The second report stated RM hurt students and teachers “daily at various times.” *Id.* at 20-21. In his deposition, the head of the special education department testified that if nothing more was done to stop RM’s behavior, he believed the assaults would continue. *Id.* The school’s special education officer testified that by the end of October, 1999, the district knew it was “probable” RM would have future outbursts that resulted in injuries to staff and other students. *Id.*

Between November 15 and December 31, 1999, RM caused 38 injuries to students and staff.

Again, most were scratches, but the injuries included bites, slaps, and muscle strains that occurred when staff attempted to restrain RM.

*Id.* at 22.

Although only a teenager at the time, Vallandigham produced evidence that RM had “the strength of a full grown man” with an extensive history of assaultive conduct.

1. Clarke received 140 to 150 injuries.
2. Wanda Dalton, a one on one aide, received at least five

injuries.

3. Curtis Fletcher, a para-educator, received five or six injuries.

4. Machele Lindley, a teacher, received one injury.

5. Bruce Milliman, a principal, received at least two injuries.

6. Charlotte Stelzer, a teacher, received two or three injuries.

7. Craig Thompson, a para-educator, received seven to ten injuries.

8. Gabriele Williamson, a para-educator, received at least 15 injuries.

9. Mary Skinner, a para-educator, received four to six injuries.

10. Vallandigham received 40 to 50 injuries.

These injuries spawned eight L & I claims. Of these, Clarke filed three and Vallandigham filed one.

*Vallandigham*, 119 Wn. App. at 104-105.

Over the course of the 1999-2000 school year, RM injured staff and students approximately 96 times, including one occasion when RM “beat up badly” his one-on-one aide. *Vallandigham*, 154 Wn.2d at 23. On October 26, 1999, Vallandigham attempted to intervene in one of RM’s numerous attacks. RM shoved Vallandigham backwards causing her to fall, hit her head and lose consciousness. *Vallandigham*, 119 Wn. App. at 98. The following day RM bit Clarke’s right breast, breaking the skin and leaving a bruise. *Id.* Plaintiffs were injured by RM several more times throughout that school year. *Id.*

As RM’s assaultive behavior worsened, Vallandigham sent a

series of increasingly urgent e-mails to her supervisor notifying him that RM's behavior had become "more assaultive and unpredictable," and that RM was "out of control of his behaviors . . . His mood swings are uncontrollable." *Vallandigham*, 119 Wn. App. at 103. On the day of her industrial injury Vallandigham sent another e-mail pleading for "urgent action." *Id.* Plaintiffs produced evidence that RM's assaultive behavior was not reduced nor was it responsive to the various behavior modification and treatment modalities attempted by the school district. *Id.* at 104-106.

Vallandigham and Clarke sued the school district to recover damages for the injuries inflicted by RM. Relying on *Stenger*, they claimed the school district deliberately intended to produce their injuries. *Vallandigham*, 154 Wn.2d at 25. The trial court granted the defendant's motion for summary judgment, ruling that plaintiffs failed to establish either element of the *Birkliid* test. The plaintiffs appealed the dismissal of their lawsuit to Division II. *Id.*

In analyzing the first element of the *Birkliid* test, Division II focused on "whether RM had a known propensity to injure, and was this propensity so extreme that, from it, Clover Park certainly knew that another injury was forthcoming." *Vallandigham*, 119 Wn. App. at 101. Relying on that standard, and citing RM's history of assaultive conduct,

the Court of Appeals held a jury could reasonably conclude the school district had actual knowledge that plaintiffs' injuries were certain to occur. *Id.* at 106. However, turning its attention to the second element of the *Birkliid* test, Division II ruled the school district did not willfully disregard that knowledge. Because the plaintiffs failed to satisfy both elements of *Birkliid*, Division II affirmed dismissal of the lawsuit. *Vallandigham*, 119 Wn. App. at 98, 109.

Importantly, in its analysis of the willful disregard element, Division II specifically rejected the analysis of Division I in the *Stenger* and *Hope* cases.

We disagree with the nature of our inquiry as Division One described it. By focusing on the efficacy or adequacy of the remedial measures, *Stenger* impermissibly erodes the requirement of "deliberate intent." Clover Park correctly implies that the efficacy of its remedial measures is a negligence issue. The effectiveness of an act in preventing a known risk, even where the risk is certain to occur, is merely another way of questioning the reasonableness of the preventative measure. It would be just as well to ask whether Clover Park observed the proper standard of care in acting to prevent the plaintiff's injuries. But this does not properly characterize our task under the willful disregard prong as it is contrary to the deliberate intention exception's history and the *Birkliid* reformulation.

*Vallandigham*, 119 Wn. App. at 107-108.

Plaintiffs petitioned the Supreme Court for review. In its response, the school district urged the Supreme Court to affirm the ultimate

decision of the Court of Appeals, but asked that it also conclude the school district did not have actual knowledge that plaintiffs' injuries were certain to occur. *Vallandigham*, 154 Wn.2d at 25-26. The Supreme Court granted review, and held that plaintiffs failed to satisfy *both* elements of the *Birklid* test. *Id.* at 32-33.

Specifically rejecting the holdings of Division I and Division II, the Supreme Court held that "certainty of injury" cannot be based solely on a history of injuries inflicted by the person who assaulted the plaintiffs. *Id.* at 33.

We cannot overemphasize that the *Birklid* court considered and rejected both a "substantial certainty" and a "conscious weighing" test.

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Instead, the *Birklid* court, mindful of Washington's historically narrow interpretation of RCW 51.24.020, made it abundantly clear that foreseeability, *or even substantial certainty*, is not enough to establish deliberate intent to injure an employee. Even an admission that the district recognized that injury would probably occur is not enough to establish knowledge of *certain* injury. Only actual knowledge that injury is *certain* to occur will meet this first prong of the *Birklid* test.

*Id.* (citations omitted).

The *Vallandigham* Court held that the school district could not have predicted the actions of a special needs child with certainty, and, thus, could not have been certain that RM would cause plaintiffs' specific injuries. *Id.*

Countless variables can impact a special education student's behavior from day-to-day, including whether or not the student has taken a prescribed medication. Therefore, the employer in the *Birklid* case was in a vastly different position than the employer in this case. While Boeing *knew* that the phenol-formaldehyde fumes would continue to make employees sick absent increased ventilation, the Clover Park School District could not *know* what RM's behavior would be from day-to-day. No one could be sure that RM's violent behavior would not cease as quickly as it began.

*Id.* at 33.

Turning to the "willful disregard" element of the *Birklid* test, the Supreme Court agreed with Division II that, by focusing on the effectiveness of the remedial measures taken by the employer, Division I erroneously grafted a negligence standard onto the *Birklid* test.

We note that this court has been abundantly clear that negligence, even gross negligence, cannot satisfy the deliberate intention exception to the IIA. Therefore, we reject any notion that a reasonableness or negligence standard should be applied to determine whether an employer acted with willful disregard. We disapprove of the holdings in the *Stenger* and *Hope* cases to the extent that they suggest that a finding of willful disregard can be based upon the simple fact that an employer's remedial efforts were ineffective.

*Vallandigham*, 154 Wn.2d at 35 (citation omitted).

Here, there is little doubt that caring for severely mentally ill patients is a challenging and, at times, dangerous occupation. Indeed, recognizing the hazardous nature of working with mentally ill patients,

the Legislature specifically created a supplemental reimbursement program that compensates workers who are injured by patients. *See* RCW 72.01.045(2) (program created in “recognition of the hazardous nature of employment in state institutions”). However, employment in a dangerous occupation is not grounds for evading the employer immunity provisions of the IIA, nor does it relieve appellants of their burden to affirmatively prove both elements of the *Birklid* test. RCW 51.04.010; RCW 51.32.010; *Vallandigham*, 154 Wn.2d at 33-35.

**B. WSH Is Immune From Suit For Appellants’ Work Related Injuries**

As a matter of law, appellants cannot establish that WSH had actual knowledge that each appellant was certain to be injured by a mentally ill patient at CFS, much less that WSH willfully disregarded such knowledge. Accordingly, this Court should affirm the trial court’s dismissal of appellants’ lawsuit. RCW 51.04.010; RCW 51.32.010; *Vallandigham*, 154 Wn.2d at 18-19; *Birklid*, 127 Wn.2d at 865.

**1. WSH Did Not Have Actual Knowledge That Appellants Were Certain To Be Injured By Specific CFS Patients**

To impose liability on WSH for their work related injuries, appellants were required to prove that WSH knew, with certainty, that severely mentally ill patients would cause appellants’ specific industrial injuries. As a matter of law, appellants cannot satisfy this test. *See*

*Vallandigham*, 154 Wn.2d at 33.

Appellants concede the obvious: it is not possible to predict, with any certainty, the future actions or behaviors of severely mentally ill patients. CP at 92-93; CP at 99-100; CP at 104, 106. Further, the unchallenged expert medical testimony establishes that no one knew or could predict with certainty that appellants would be injured by the mentally ill patients on CFS. CP at 93; CP at 99; CP at 104. These concessions are determinative of the issues raised by appellants on appeal. Because WSH could not predict the future actions of mentally ill patients, they could not have known, with certainty, that the patients would assault appellants or cause their industrial injuries. Thus, as a matter of law, appellants cannot satisfy the first element of the *Birkliid* test and this Court should affirm the dismissal of appellants' lawsuit.

*Vallandigham* 154 Wn.2d at 33.

Ignoring the clear holding in *Vallandigham*, appellants argue that, given the history of assaults, it was foreseeable that appellants would be injured. Br. Appellant at 13. But foreseeability of injury, substantial certainty of injury, or even a high probability of injury does not satisfy the "actual knowledge of certain injury" element of the *Birkliid* test. *Vallandigham* 154 Wn.2d at 33; *Birkliid*, 127 Wn.2d at 865. In creating its two-part test, the *Birkliid* Court established a literal meaning of "certain

injury.”

Even an admission that the [employer] recognized that injury would probably occur is not enough to establish knowledge of *certain* injury. Only actual knowledge that injury is *certain* to occur will meet the first prong of the *Birkliid* test.

*Vallandigham*, 154 Wn.2d at 33; *see also Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 47, 103 P.3d 8070 (2004) (employer admission that asbestos caused long-term health effects insufficient to establish, with certainty, that employer knew plaintiff would be injured by exposure to asbestos).

Certainty leaves no room for chance. 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*, 125 Wn. App. at 47 (citing *Folsom*, 135 Wn.2d at 667).

Appellants rely heavily on the declaration of James Eberwine to argue that, based on the historical data of patient assaults, WSH knew with certainty that staff would be injured by patients at some unknown future date. Br. Appellant at 1-2. For the reasons set forth below, Eberwine’s declaration should be disregarded in its entirety.<sup>12</sup> In any event, Eberwine’s declaration fails to show that WSH knew that *appellants* were certain to be injured. *Vallandigham*, 154 Wn.2d at 33. Thus, it is not

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<sup>12</sup> WSH raised these same objections below. CP at 515-18. The trial court considered Eberwine’s declaration and exhibits “to the extent deemed relevant and admissible by the Court” and dismissed appellants’ lawsuit. CP at 622-24.

relevant to the issues before this Court. *Id.*

Initially, the documents attached to Eberwine's declaration are not authenticated, and contain hearsay and hearsay within hearsay. As such, they are not admissible and must be disregarded. CR 56(e); ER 402, 403, 802, 803; *Group Health Co-Op of Puget Sound, Inc. v. State*, 106 Wn.2d 391, 398-99, 722 P.2d 787 (1986); *see also White v. State*, 131 Wn.2d at 9.

Further, Eberwine could not attest that any of the documents attached to his declaration were "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences." ER 703. Without this necessary foundation Eberwine cannot testify as to the contents of the attachments nor can he use those attachments to support his opinion. ER 703; *Detention of Marshall v. State*, 156 Wn.2d 150, 163, 125 P.3d 111 (2005); *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003); *Group Health*, 106 Wn. 2d at 398-99 (absent the necessary foundation an expert witness cannot testify to inadmissible facts and data relied upon to reach his opinions).

Even if the fatal flaws in his declaration are ignored, Eberwine's opinions fail to establish that WSH had "actual knowledge of certain injury." Eberwine opined only that WSH knew that some staff person "would be assaulted by a patient at some date." CP at 168 (Decl. of

Eberwine). However, it is not enough for appellants to show that WSH knew that *someone* was certain to be injured on some date. Appellants must affirmatively prove that WSH knew that each individual appellant was certain to be assaulted by the specific patient who caused their industrial injuries. *Folsom*, 135 Wn.2d at 667; *Birkliid*, 127 Wn.2d at 864.

In *Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003), a child was severely injured when her hand was caught in an ice machine at work. The employer admitted she “knew this was going to happen” but just did not know when or who would be injured. In dismissing the plaintiff’s lawsuit, the Court of Appeals held “this admission does not show actual knowledge that [the child] was certain to be the injured party.” *Id.* at 72. Like *Schuchman*, there is no evidence that WSH knew that *appellants* were certain to be the injured parties. Indeed, the undisputed evidence conclusively establishes that no one knew or could have known that appellants would sustain their specific industrial injuries. CP at 92-93; CP at 99-100; CP at 104, 106.

Appellants failed to prove that WSH had actual knowledge they were certain to be injured by mentally ill patients at CFS. Accordingly, this Court should affirm the trial court’s dismissal of appellants’ lawsuit. *Vallandigham*, 154 Wn.2d at 33; *Folsom*, 135 Wn.2d at 667; *Birkliid*, 127 Wn.2d at 865; *see also Young*, 112 Wn.2d at 225 (“a complete failure of

proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.”).

**2. WSH Did Not “Willfully Disregard” Actual Knowledge Of Certain Injury**

As a matter of law, appellants failed to establish that WSH had actual knowledge that their injuries were certain to occur. As such, it was impossible for WSH to “willfully disregard” such knowledge. *Vallandigham*, 154 Wn.2d at 34. However, even if appellants could satisfy the first element of the *Birkliid* test, which they cannot, appellants failed to prove that WSH willfully disregarded such knowledge. For this reason as well, this Court should affirm the trial court's dismissal of appellants' lawsuit. *Id.* at 35.

First, it is undisputed that WSH provided the CFS patients with proper and necessary mental health treatment designed to reduce the risk that the CFS patients would become aggressive and/or exhibit assaultive behavior. CP at 99-100. That treatment included ongoing psychiatric assessments of every CFS patient; individualized treatment from a team of mental health experts; and the development and modification, as needed, of treatment plans to take into account each individual patient's history and staff concerns regarding acting out or aggressive conduct. In addition, CFS patients were prescribed psychotropic and other forms of medications

to address their underlying mental illness, all in a further effort to reduce the risk of the patients becoming assaultive. CP at 97; CP at 104.

Finally, WSH began a Non-Violence Initiative. Following a national trend that has been successful in reducing patient violence and staff injuries in institutional settings, the Non-Violence Initiative empowers patients by: increasing patients' involvement in their own treatment; creating a more comforting and supportive environment within the ward; and providing patients with greater choices as they work towards their own recovery goals. CP at 92; CP at 98-99; CP at 105-106. Through this initiative staff have been and will continue to be provided training to help them more effectively interact with patients. *Id.* As Dr. Klein, the Medical Director of WSH, explained:

The initiative also empowers staff by allowing them greater flexibility in how they implement the safety plans. Rather than hierarchical, power-based, iron-cast rules that force confrontation between staff and patients and which may promote conflict, staff will be allowed and encouraged to work in partnership with patients. The safety plan will include an agreement on the safe ways that staff will interact with the patient when that person starts to become out of control or symptomatic. Staff will be expected to work towards building trusting, therapeutic relationships with patients. In my experience, patients can sense such a cultural change in attitude and tend to respond positively by placing greater value on their relationship with staff. Essentially, then, by allowing patients to exercise greater control over their own treatment, greater control of the patient and their behavior is achieved. As a result, there are fewer instances when invasive measures such as restraint and seclusion are necessary or used. This translates into increased safety and security for all persons on the ward.

CP at 105-106.

Citing only their own trial court brief, appellants attack WSH's "Non-Violence Initiative," erroneously claiming it precludes staff from using seclusion or restraint to control aggressive, assaultive patients. Br. Appellant at 6. Appellants' are mistaken. The goal of the Non-Violence Initiative is to create an environment where patients are less likely to become assaultive, thus reducing the *need* for staff to use seclusion and restraint. CP at 105-106. As Dr. Gage, a physician certified by the American Board of Psychiatry and Neurology, explained:

Essentially, by improving treatment, how staff interact with patients, and providing patients with greater involvement in their own treatment, some or all of the factors that lead patients to become aggressive will be reduced, which, in turn, will reduce the need to use seclusion and restraint to control the patient.

CP at 98.

The benefits to staff of reducing the need for seclusion and restraint are obvious.

Seclusion and restraint are invasive procedures that put staff at risk of sustaining injury. First, restraint in and of itself is a violent act. It requires one or, frequently, multiple staff members to physically force the patient to the floor and physically subdue the patient. Second, the action can further traumatize a patient and cause that person to become more aggressive over time. By definition, one or more staff persons approach the patient, physically contain them and often take them to the floor, isolate them in a room and/or tie them down. This not only traumatizes the

person restrained, it also models a negative example for other patients on the ward, instills fear, and can create an environment that promotes aggression.

CP at 106 (Decl. of Dr. Klein); *see also* CP at 93 (Decl. of Dr. Mehlman) (“Seclusion and restraint are not forms of treatment . . . They are used as a last resort because they can traumatize a patient *and put the patient and staff at risk of injury.*”) (Emphasis added). Appellants, most of whom were injured while attempting to restrain out of control patients, failed to produce any of evidence challenging the medical premise or goals of WSH’s Non-Violence Initiative.

Appellants also attack WSH for providing humane, medically necessary treatment to the severely mentally ill patients involuntarily committed at WSH. Br. Appellant at 15. Appellants argue that WSH should operate like a jail and completely segregate patients from staff. *Id.* Appellants claim that WSH’s refusal to turn the psychiatric hospital into a jail proves that it deliberately intended to injure its staff. *Id.* Not surprisingly, appellants could not find one physician willing to endorse such a plan for the treatment of mentally ill human beings.

The undisputed medical testimony establishes that effective mental health treatment can only occur if there is direct interaction between patients and staff. As Dr. Mehlman testified:

It is not possible to effectively treat mentally ill patients

who are physically segregated from mental health providers and staff. To provide effective therapeutic treatment it is necessary to interact with the patient and engage the patient in their own treatment. Interaction is necessary to provide effective group therapy, conduct meaningful interviews and perform meaningful, reliable assessments. Such interaction also facilitates greater observation of the patient and their behavior, making it more likely that staff will be able to diffuse a patient's agitation and prevent the patient from becoming violent or assaultive.

CP at 92; *see also* CP at 91; CP at 99; CP at 103-104.

Moreover, the Legislature has expressly rejected appellants' "One Flew Over the Cuckoo's Nest" approach to the treatment of the mentally ill. Every person committed to WSH "shall have the right to adequate care and individualized treatment." RCW 10.77.210(1); RCW 71.05.360(2). WSH is required by law to provide quality treatment to all patients at the hospital, whether their commitment stems from a criminal or civil proceeding. RCW 10.77.210; RCW 71.05.012; RCW 71.05.360(2). Further, the individualized treatment must provide the patient with the "best opportunity to restore the person to or maintain satisfactory functioning." RCW 71.05.012. Appellants do not dispute, and therefore concede, that effective treatment can only be achieved when staff have constant interaction with patients. CP at 91; CP at 99; CP at 103-104. Thus, appellants' unsupported argument that WSH should follow an inappropriate treatment protocol fails.

Finally, appellants argue that their injuries conclusively demonstrate that the steps taken by WSH to prevent CFS patients from becoming assaultive were “ineffective.” Br. Appellant at 14-15. Citing *Hope v. Larry’s Market*, 108 Wn. App. 185, 29 P.3d 1268 (2001), appellants argue this is sufficient to show “willful disregard” and defeat summary dismissal of their lawsuit. *Id.* Appellants are wrong. The precise holding in *Hope* cited and relied upon by appellants here was expressly disapproved in *Vallandigham*.

We disapprove of the holdings in *Stenger* and *Hope* to the extent that they suggest that a finding of willful disregard can be based upon the simple fact that an employer’s remedial efforts were ineffective.

*Vallandigham*, 154 Wn.2d at 35; *see also Crow v. Boeing Co.*, 129 Wn. App. 318, 326, 118 P.3d 894 (2005) (“We note that the court in *Vallandigham* rejected the court’s holding in *Stenger* that willful disregard can be shown when remedial measures are ineffective.”).

Appellants failed to establish the willful disregard element of the *Birklid* test for an intentional injury. Accordingly, as a matter of law, WSH is immune from suit and this Court should affirm the dismissal of appellants’ lawsuit. RCW 51.04.010; RCW 51.32.010; *Vallandigham*, 154 Wn.2d at 34-35.

**C. Appellants' Negligence Claims Are Barred By The IIA.**

Appellants, in effect, ask this Court to throw out Washington's Industrial Insurance Act, ignore almost a century of case law, and allow workers to sue their employers in negligence for work related injuries. Br. Appellant at 11-13. Appellants' argument is frivolous and should be rejected.

By definition and design, the IIA bars appellants from pursuing a negligence action against WSH. In 1911, Washington, like the rest of the nation, determined that common law negligence actions produced "uncertain, slow and inadequate" compensation for injured workers. RCW 51.04.010.<sup>13</sup> Calling the result now advanced by appellants "economically unfair and unwise," and exercising its police and sovereign power, the State of Washington expressly abolished all common law civil actions and civil causes of action for work related injuries and, in its place, created a fully integrated workers' compensation program. RCW 51.04.010; RCW 51.32.010. As a matter of law, a worker can only sue his employer for an injury that the employer deliberately intended to produce. RCW 51.24.020.

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<sup>13</sup> Tellingly, appellants fail to cite this statute in their brief, much less explain why they are exempt from this law that has applied to every Washington worker for the past 95 years.

Appellants suggest their negligence claims are encompassed in this “deliberate intent” exception to the employer immunity provisions in the IIA. Br. Appellant at 12. Again, appellants are simply wrong. RCW 51.04.010; RCW 51.32.010 (the compensation provided by the IIA “shall be in lieu of any and all rights of action whatsoever against any person whomsoever.”).

We note that this court has made it abundantly clear that negligence, even gross negligence, cannot satisfy the deliberate intent exception to the IIA.

*Vallandigham*, 154 Wn.2d at 35; *Folsom*, 135 Wn.2d at 664-65; *Birklid*, 127 Wn.2d at 860-861; *Crow v. Boeing Co.*, 129 Wn. App. at 323-24; *Shellenbarger*, 125 Wn. App. at 48; *Byrd v. Systems Transport, Inc.*, 124 Wn. App. 196, 202, 99 P.3d 394 (2004); *review denied*, 153 Wn.2d 1004, 103 P.3d 1247 (2005); *Schuchman v. Hoehn*, 119 Wn. App. at 72; *Henson v. Crisp*, 88 Wn. App. 957, 961, 946 P.2d 1252 (1997), *review denied*, 135 Wn.2d 1010, 960 P.2d 937 (1998); *Goad v. Hambridge*, 85 Wn. App. 98, 103, 931 P.2d 200 (1997), *review denied*, 132 Wn.2d 1010, 940 P.2d 654 (1997).

As a matter of law, this Court should affirm the trial court’s dismissal of appellants’ negligence claims. *Vallandigham*, 154 Wn.2d at 35; RCW 51.04.010; RCW 51.32.010.

## VI. CONCLUSION

Recognizing the “countless variables” that can impact a special education student’s behavior, the *Vallandigham* Court ruled the defendant school district “could not *know* what RM’s behaviors would be from day to day.” *Vallandigham*, 154 Wn.2d at 33. For this reason the Court ruled, as a matter of law, the plaintiffs could not prove the school district had actual knowledge of certain injury sufficient to establish a deliberate intent to injure, and affirmed the dismissal of plaintiffs’ lawsuit. *Id.*

Here, appellants do not dispute, and thereby concede that it was impossible to predict, with certainty, the future actions and behaviors of the severely mentally ill patients who caused their industrial injuries. CP at 93; CP at 99-100; CP at 104-105. Further, appellants do not contest that WSH administered proper and necessary mental health treatment to the CFS patients to reduce, to the extent possible, the risk that these patients would become aggressive or assaultive. CP at 91-93; CP at 98; CP at 104-105. Thus, as a matter of law, appellants cannot prove that WSH “deliberately intended” to produce their injuries and this Court should affirm the dismissal of appellants’ lawsuit. *Vallandigham*, 154 Wn.2d at 33; RCW 51.04.010; RCW 51.32.010.

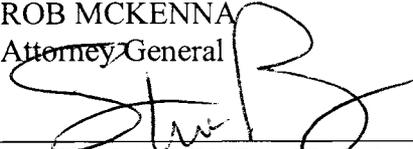
Similarly, the trial court properly dismissed appellants’ negligence claims. As a matter of law, the State of Washington expressly

“abolished” all common law negligence actions between workers and employers arising from on the job injuries. *Id.* Further, as a matter of law, employer negligence, even gross negligence, is not enough to establish deliberate intent to injure or defeat the IIA’s employer immunity provisions. *Vallandigham*, 154 Wn.2d at 35; RCW 51.04.010; RCW 51.32.010.

For each of the reasons set forth above, the State of Washington asks this Court to affirm the trial court’s dismissal of appellants’ lawsuit.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of August, 2006.

ROB MCKENNA  
Attorney General



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STEVE PUZ, WSBA No. 17407  
Assistant Attorney General  
Attorneys for Respondent

