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COURT OF APPEALS  
DIVISION II

2015 JUN 29 AM 9:31

STATE OF WASHINGTON

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Court of Appeals Cause No. 44035-1-II

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

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MICHAEL MICHELBRINK, JR.,

Respondent,

vs.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

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**BRIEF OF RESPONDENT IN OPPOSITION TO AMICUS CURIAE  
WASHINGTON ASSOCIATION OF SHERIFFS AND CHIEFS**

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## **TABLE OF CONTENTS**

COUNTERSTATEMENT OF THE CASE.....	1
ARGUMENT.....	2
CONCLUSION.....	3

## TABLE OF AUTHORITIES

### Cases

<i>Birklid vs. Boeing Company</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	1, 2, 3
<i>Walston vs. Boeing Company</i> , 181 Wn.2d 391, 334 P.3d 519 (2014).....	3

## COUNTER STATEMENT OF THE CASE

The brief of Amicus Curiae adds nothing to the argument before this Court. It speaks to a “mere piercing of the skin” and “some temporary pain”. Amicus brief, page 3.

It refers to “incidental temporary pain” and “minimal piercing of the skin”. Amicus brief, page 4. At no point in the brief is there a denial that Washington State Patrol intended to “pierce the skin” of Trooper Michelbrink.

The contrast between what actually occurs during a tasing and how it is depicted in the Amicus brief is astounding. The injuries in *Birkliid vs. Boeing Company*, 127 Wn.2d 853, 904 P.2d 278 (1995), were less serious than suffered by Trooper Michelbrink. Yet, the Supreme Court held these injuries to be sufficient to take the claims outside of the Grand Bargain.

## ARGUMENT

The main thrust of this “me too” brief of the Amicus concerns the alleged negative impact the ruling will have on law enforcement training. They argue, that the ruling will expose WASPC’s members and departments to numerous employee lawsuits. The answer to this is a resounding “No”.

If the only injury that results from the tasing are the scars left after the probes are pulled out of the skin, and the aftermath of the shock, there is no evidence that these member agencies will be exposed to numerous claims. When the tasing, however, results in career-ending injuries, such as happened to Trooper Michelbrink, there will and should be claims made against the offending agency.

Washington State Patrol required that its Troopers undergo tasing as a condition to carrying the taser. The employee took all of the risks and the employer received the rewards.

If, as the Respondent believes and the Court of Appeals agreed, Washington State Patrol intended to injure him in order to show the effects of the taser. The impact on the training regimens is inconsequential. This risk versus benefit analysis was specifically rejected in *Birkliid*.

In that case, Boeing attempted to argue that evidence that an employer deliberately engaging conduct resulting in injuries was not evidence of the specific intent to injure so long as the conduct was “reasonably calculated to advance an essential business purpose”. *Birkliid* at page 62. The court rejected this argument. Here, Washington State Patrol and the Amicus intend to justify the injuries caused by the tasing by arguing that such training was necessary to give them the “flexibility to

safely and effectively resolve uncertain, rapidly developing situations of dangerous, agitated persons”. Amicus brief, page 2.

The effort by Washington State Patrol and WASPC should be rejected by this Court just as Boeing’s effort was rejected by the Supreme Court in *Birklid*.

**CONCLUSION**

The *Walston* holding is consistent with *Michelbrink vs. Washington State Patrol*. This Court should reject the efforts by Washington State Patrol and Amicus. It should reaffirm its holding in *Michelbrink*.

DATED: June 26, 2015

Respectfully submitted,

BROWN LEWIS JANHUNEN & SPENCER  
Attorneys for Respondent Michelbrink

By

  
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IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

MICHAEL MICHELBRINK, JR., )  
)  
Respondent, )  
)  
vs. )  
)  
STATE OF WASHINGTON, WASHINGTON )  
STATE PATROL, )  
Appellant. )  
\_\_\_\_\_ )

CERTIFICATE OF MAILING

I, Carlene E. Kuhn, hereby certify 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 true and correct copy of "Brief of Respondent in Opposition to Amicus Curiae Washington Association of Sheriffs and Chiefs", in the United States mails, postage prepaid, on this 26<sup>th</sup> day of June, 2015, addressed as follows:

David C. Ponzoha, Court Clerk  
Court of Appeals, Division II  
950 Broadway, Ste 300, MS TB-06  
Tacoma WA 98402-4454

I further deposited in the United States mails, postage prepaid, on this 26<sup>th</sup> day of June, 2015, a true and correct copy of the "Brief of Respondent in Opposition to Amicus Curiae

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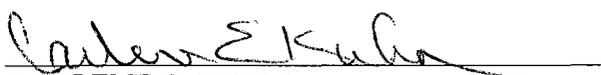
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26<sup>th</sup> day of June, 2015, at Montesano, Washington.

  
CARLENE E. KUHN  
Assistant to Curtis M. Janhunen  
Attorney for Respondent Michelbrink