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NO. 35140-8

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

JONATHAN O. JOHNS, individually, and DAVID
W. LYNCH and JENNIFER LYNCH, husband and
wife,

Respondents,

v.

STATE OF WASHINGTON DEPARTMENT OF
CORRECTIONS and COYOTE RIDGE
CORRECTION CENTER,

Petitioners.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Under the Industrial Insurance Act (IIA), employees—like officers Johns and Lynch—have access to “swift and certain” no fault remedies for any actual injuries they may incur in the course of their employment by the Department of Corrections (Department or DOC). RCW 51.04.010. The Department, as the officers’ employer, has immunity from this suit, and from any workplace injury suit by its employees. RCW 51.04.010; *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995); *Stertz v. Industrial Ins. Comm’n*, 91 Wn. 588, 590–91, 158 P. 256 (1916). There is one exception to employer immunity for those rare chilling instances in which a Court finds that an employer deliberately intended to injure its employee. RCW 51.24.020; *Birklid*, 127 Wn.2d 853. This is not one of those cases.

The Washington Supreme Court has interpreted the “deliberate intent to injure” exception of the IIA narrowly—in order to discourage litigation and ensure that cases like this one are resolved as a matter of law. In *Birklid*, the Court discussed and rejected the traditional negligence tests—foreseeability, “substantial certainty,” and “conscious weighing”—used in other jurisdictions in favor of a deliberate intent test that requires both actual knowledge that a particular injury was *certain* to occur and

willful disregard of that knowledge.¹ Neither prong of the *Birklid* test is satisfied here.

In their responding brief, officers Johns and Lynch argue that they have presented admissible evidence sufficient to create “material issues of fact” and insist they are entitled to trial on those issues. They have not. And they are not entitled to trial under the stringent standards applicable to the deliberate intent exception to the IIA. Here, the officers provided some evidence that their injury was foreseeable. And, if the admissible evidence is interpreted in the light most favorable to the officers, it is possible they have provided some evidence that injury to one of the corrections officers in their unit was a “substantial certainty.”² But Respondents have failed to provide any admissible evidence that DOC willfully disregarded *actual knowledge* these officers were *certain* to be injured. Because the officers cannot satisfy the deliberate intent requirement of RCW 51.24.020 (as clarified by *Birklid*), DOC is entitled to judgment as a matter of law.

¹*Birklid*, 127 Wn.2d at 865, and *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 18, 109 P.3d 805 (2005) (en banc).

²One of the three tests for the “deliberate intent” exception to employer immunity rejected by the Supreme Court in *Birklid*. 127 Wn.2d at 865.

II. ARGUMENT IN REPLY

A. On De Novo Review, this Court Relies Upon Admissible Evidence

Relying upon the Supreme Court's decision in *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40, 46 (2014), officers Johns and Lynch maintain that: "A summary judgment is reviewed de novo." DOC concurs fully with this core principle of appellate review and requests that this Court review the full record that was before the trial court, and, acting de novo, apply CR 56(e) standards to the declarations of Jonathan Johns (CP at 259-66) and David Lynch (CP at 267-79).

Under CR 56(e), this Court must consider whether the affidavits of Johns and Lynch were "made on personal knowledge [and] set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The trial court failed to satisfy its obligation to evaluate the opposition affidavits of Johns and Lynch under the evidentiary standards articulated in CR 56(e) and relied upon those declarations—and upon the briefing dependent upon them—to its detriment in its erroneous decisions on summary judgment and on reconsideration. CP at 485-91. The trial court erred because it relied upon the hearsay and rumor those incompetent declarations placed into the record.

For example, the trial court's key determination that this case differs from *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 18, 109 P.3d 805 (2005)(en banc) is based upon an incompetent statement in the Johns declaration (as well as palpably prejudicial speculation on the part of the trial court):

“If an offender acts out against officers at a higher custody facility putting him in a lower custody facility makes it easier [if not certain] for the offender to continue to act out and harm staff. Decl. of Johnathan Johns, Page 3, LL 1-3.”

CP at 487 (footnote omitted).³

“Certainty of harm” is the core legal issue in any case based upon the “deliberate intent” exception to the IIA. Here, the *primary* evidence the trial court relied upon in finding the “deliberate intent” exception was the incompetent opinion and speculation of a low-ranking corrections officer, an officer who had no administrative or supervisory role and had been at Coyote Ridge for slightly more than two years at the time he was assaulted by inmates Cruze and Kopp. CP at 259. The trial court wrongly relied on Johns' incompetent statement in its critical analysis of *Vallandigham*.

³ In Conclusion of Law #2, entered on reconsideration, the trial court stuck its own parenthetical comment “[if not certain]” from its October 6, 2016, Letter Decision “in the interests of justice”—presumably acknowledging the bias it reflected. CP at 491. But the trial court did not strike the incompetent statement from officer Johns' declaration that served as the basis for the trial court's denial of summary judgment. CP at 491. Nor did it reconsider its decision on the applicability of *Vallandigham*. CP at 491.

Respondents' attempt to distinguish *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), has no bearing on this case. A trial court's decision to find a particular declaration *untimely* is a discretionary decision. But that is not the same as finding *argument* about the admissibility of hearsay and incompetent testimony to be untimely, as the trial court did in this case. The duty of the trial court was to follow CR 56(e). It did not do so. This Court does not review a decision to base a ruling on hearsay and rumor for abuse of discretion. This Court reviews that decision *de novo* and relies solely upon those statements in the Johns and Lynch declarations that are competent and not hearsay. A complete list of the hearsay and incompetent statements made by officers Johns and Lynch was originally identified in the timely Reply Brief DOC filed in the trial court:

Declaration of David Lynch

- *Paragraph 17 – hearsay, lack of foundation and/or personal knowledge.*
- *Paragraph 18 – lack of foundation, personal knowledge.*
- *Paragraph 20 – hearsay, lack of personal knowledge.*
- *Paragraph 21 – hearsay, lack of personal knowledge*
- *Paragraph 22 – hearsay, lack of personal knowledge*
- *Paragraph 23 – hearsay, lack of personal knowledge, best evidence (Offender Cruze's complete history was provided to Plaintiffs and the documents reflecting this history are the best evidence of his history.*
- *Paragraph 24 – hearsay, lack of personal knowledge, best evidence. This averment is also in conflict with Custody Unit Supervisor (CUS) Caples' deposition testimony at page 79 where he stated Cruze had done some step down programs.*
- *Paragraphs 25, 26, 27 – speculation, lack of personal knowledge – Sergeant Lynch was not involved in the over-ride process as this is*

done by the Associate Superintendent at DOC Headquarters. Sgt. Lynch offers no foundation for his “knowledge” of why the Associate Superintendent provided a custody override for Cruze. CUS Caples testified in deposition that he was not sure if there was a cost for DOC to transfer an inmate out of state. Caples’ deposition at p. 68. Sgt. Lynch is speculating.

- Paragraph 42 – speculation, lack of foundation or personal knowledge. Again, Sgt. Lynch was not involved in the decision to provide a custody override and transfer Cruze to Coyote Ridge. He is merely speculating.

Declaration of Jonathan Johns

- Paragraphs 10, 11, 12, 13, 14, 15, 18 – impermissible opinion, speculation, lack of foundation/personal knowledge. Officer Johns was not involved in the classification of Cruze or the decision to transfer him to CRCC.
- Paragraph 16 – hearsay

CP at 355-56.

The parties concur that DOC gave the trial court notice that portions of the declarations filed by officers Johns and Lynch were inadmissible in its timely Reply Brief—the form specified by *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150, 150 (2009).⁴ But even if the trial court had

⁴ In *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150, 150 (2009) (emphasis added), the court noted:

To begin with, materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal. Thus, it is misleading to denominate as a “motion to strike” what is actually an objection to the admissibility of evidence that could have been preserved in a reply brief rather than by a separate motion.

Washington courts have affirmed the reasoning of *Cameron* in a variety of contexts, recognizing that a summary judgment motion differs from trial in that the evidence necessarily remains in the record to be considered by the appellate court on *de novo* review. *Keck v. Collins*, 181 Wn. App. 67, 90, 325 P.3d 306 (2014); *Ensley v.*

no notice, it had a duty to make its decision in this case based upon evidence that comported with CR 56(e).

In its *de novo* review of the evidence and argument in this case, this Court has a similar duty. DOC requests that this Court follow the requirements of CR 56(e) and rely solely upon the evidence (and argument) that comports with the rule's requirements.

B. Nothing in Respondent's Brief Defeats the Necessity of Awarding Judgment as a Matter of Law to DOC Under Washington Case Law

In the 107 years since the Washington Legislature enacted the IIA, Washington courts—particularly the Washington Supreme Court—have vigilantly policed the “deliberate intent to injure” exception as it applies to Washington employers. In *Birklid*, the Court set out the two-prong standard a plaintiff must meet to pierce the immunity afforded to employers by the IIA. *Birklid* requires that: (1) “the employer had actual knowledge that an injury was certain to occur;” and (2) the employer “willfully disregarded that knowledge.” *Birklid* at 865.

In an effort to satisfy the *Birklid* test, officers Johns and Lynch have compressed and sometimes distorted the underlying facts and law in their response brief. In reply, DOC seeks to provide this Court with facts based

Mollmann, 155 Wn. App. 744, 751–55, 230 P.3d 599 (2010) (specifically focusing on hearsay).

on admissible evidence and accurate statements of the law that has governed the “deliberate intent” exception since *Birkliid*. The officers have not provided admissible evidence sufficient to raise “material issues of fact” regarding DOC’s deliberate intent to injure them. Nothing in their brief should deter this Court from granting IIA immunity to DOC.

1. Clarification of Facts

Prior to September 11, 2012, Schawn Cruze’s infractions included two for assaulting staff without causing injury: one four years prior to this incident (March 6, 2008) and one seven years earlier (May 10, 2005). CP at 60-64. Neither was an “Aggravated Assault.”⁵ CP at 60-64; WAC 137-25-020. Statutory Appendix (App.) at 3-4. The first Aggravated Assault committed by Mr. Cruze was the attack on officers Johns and Lynch at issue in this case.

DOC’s actual knowledge of Mr. Cruze was that in 20 years of incarceration, he had committed 57 serious infractions, including two alleged non-injury assaults on staff members in 2005 and 2008. CP at 60-

⁵ WAC 137-25-020 defines an “aggravated assault” as “[a]n assault resulting in a documented physical injury requiring treatment in a medical facility /treatment center by medical staff including, but not limited to, bandaging, suturing, surgery, etc. An examination conducted by medical staff to determine whether an injury has been sustained shall not be considered treatment.” Thus, something as simple as bandaging would constitute an “aggravated assault” against a staff member. Cruze had never committed an aggravated assault against a staff member prior to this incident.

64. It had been four years since he had made a non-injury assault on a staff member. The record shows that Mr. Cruze had been in a medium custody facility prior to the 2005 assault. CP at 321.

Respondents Brief compresses the chronology of Mr. Cruze's behavior in an effort to establish that DOC *knew* Cruze would behave as he did when he was "asked to move cells":

Cruze was infraacted and placed in administrative segregation when he destroyed property after being given the order to move from B-Unit to A-Unit.

Respondents Brief at 9.

Respondent neglects to mention that this event happened in *December 2004*, almost eight years before the incident at Coyote Ridge, at a different *medium custody* facility, where different corrections officers supervised him. In that incident, Cruze damaged property. He did not assault a corrections officer. DOC had this information, but such dated information was not "actual knowledge that an injury was certain to occur," as required by *Birklid*. Nor was DOC's decision to ask Cruze to move cells—something that had probably occurred dozens of times since December 2004—a demonstration that DOC "willfully disregarded that knowledge."

Respondents Brief takes a similar approach to what it calls Mr. Cruze's "documented history of violence," noting that:

Officers at the Washington State Penitentiary were so concerned about Cruze's violence that in anticipation of him becoming violent when he learned that he was being terminated from programming they decided to place him in restraints prior to escorting him to the meeting. CP at 324-25.

Respondent's Brief at 9.

Respondents do state that this event happened at a different facility, with different officers, but again neglect to mention that it had happened four years before the events at CRCC. It is not evidence that DOC had *actual knowledge* that Cruze would respond to *all change* in a violent manner.

As DOC acknowledges in its opening brief, Mr. Cruze was an LWOP offender with a long list of serious infractions. That may have made it foreseeable, or even "substantially certain" that he might attack a corrections officer at some time in some DOC facility, although there was little admissible evidence in support of either of those theories from Johns and Lynch at summary judgment. There may be evidence, although most offered by Johns and Lynch was inadmissible at summary judgment, that the administrative decisions related to the increase in Mr. Cruz's offender score may have constituted a "conscious weighing" of the risk he might pose a harm to DOC employees. But the "foreseeability," "substantial certainty," and "conscious weighing" tests have all been considered and

rejected by the Washington Supreme Court. None of the admissible evidence offered by officers Johns and Lynch rises to the level of “deliberate intent” as defined by *Birklid*. It was not *certain* that these officers would be harmed in this way. Without admissible evidence of *certainty*, the “deliberate intent” exception cannot strip DOC of the employer immunity provided under the IIA and *Birklid*. DOC did not have actual knowledge that the Plaintiffs’ injuries would occur.

2. Clarification of Law

In Respondents Brief, officer Johns and Lynch rely on pre-*Birklid* precedents (*Perry v. Beverage*, 121 Wash. 652, 209 P. 1102, 214 P. 146 (1922); and *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 856 P.2d 410 (1993)), to suggest that “one assault on a co-worker” is sufficient to remove an employer’s protections and, consequently:

One assault by the ward of an employer with a history of injuring employees is sufficient to remove the employer’s protections when the ward has such an extensive history of violence, made specific threats of violence to employees, received an override to a custody level he was not qualified for, and then followed through on that threat leading directly to the injury that resulted.

Respondents Brief at 30. This is a misstatement of the applicable law.⁶

⁶ It is also an overstatement of the admissible facts.

After *Birklid*, the case law that governs the Court's decision in this case must be *Vallandigham*, (where even with over 96 injuries recorded in one year and outbursts happening on a daily basis, the Supreme Court held that plaintiffs' injuries were not certain to occur under the deliberate intent exception to the IIA because there was a chance that the student would act differently on any given day or that the injuries could be prevented); and *Brame v. W. State Hosp.*, 136 Wn. App. 740, 749, 150 P.3d 637 (2007) (in a case where employees were continually assaulted by patients at a hospital, the Court of Appeals found that even when 'triggers' are known for assaultive behavior, no one can say that an individual's assaultive behavior will continue or cease).

In *Vallandigham*, the Supreme Court held that "certainty of injury" could not be based on a history of assaults because even a history of violence only rises to substantial certainty that the action is likely to continue. *Id.* at 33.

We cannot overemphasize that the *Birklid* court considered and rejected both a "substantial certainty" and a "conscious weighing" test. . . . 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 Supreme Court held in *Vallandigham* that “even a history of violence only rises to substantial certainty that the [violence] is likely to continue;” it is “not enough to establish deliberate intent to injure an employee.” It may have been foreseeable that Mr. Cruze would injure these, or other officers, but since he had not injured an officer for four years and had only done so twice in the twenty years he was incarcerated, DOC, as an employer, did not place its employees at risk in a manner that compares with the behavior by the Boeing Corporation that led the *Birklid* Court to find the corporation deliberately intended to harm its workers.

In *Brame*, at Western State Hospital, patients assaulted staff either unexpectedly or after a trigger event. *Brame*, 136 Wn. App. at 744. In that case, the Court of Appeals found that training on how to respond to assaultive behavior in a workplace with the inherent risk of assault defeated the willful disregard of certain injury prong of the *Birklid* deliberate intent test. *Brame*, 136 Wn. App. at 750.

After *Birklid*, *Brame* and *Vallandigham* now define the parameters for decisions in cases involving assault by individual human beings. The chance that an inmate will react violently in any given situation is just that, a chance. As *Birklid* made clear, exposure to a toxic chemical is certain to

produce injury, while working with an inmate can, at most, produce a substantial certainty of injury. An inmate may always choose not to lash out.

III. OPENING ARGUMENTS

DOC affirms all of the other arguments in its opening brief and refers this Court to its opening brief for accurate statements of fact and law. No argument has been abandoned.

IV. CONCLUSION

DOC respectfully requests that this Court find that, as an employer, the Department is entitled to the immunity afforded under RCW 51.04.010 and the Washington Supreme Court's subsequent interpretations of that statute. After making such a finding, DOC requests that this Court dismiss this case as a matter of law.

RESPECTFULLY SUBMITTED this 16 day of February, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the Appellant's Reply Brief with the Clerk of the Court using the Washington State Appellate Court's E-Filing Portal system which will send a copy of such filing to counsel of record for the other parties to this case, including the following:

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