

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.

**BRIEF OF APPELLANT STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS AND COYOTE RIDGE
CORRECTIONS CENTER**

ROBERT W. FERGUSON
Attorney General

CARL P. WARRING
WSBA #27164
CATHERINE HENDRICKS
WSBA No. 16311
Assistant Attorneys General
Attorneys for Defendant State of
Washington, Department of
Corrections
1116 West Riverside Ave
Spokane, WA 99201
509-456-2773
509-458-3548 – FAX

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
IV.	STATEMENT OF THE CASE.....	6
	A. Statement of Facts.....	6
	1. The Incident on September 11, 2012.....	6
	2. Inmate Schawn Cruze.....	8
	3. Inmate David Kopp.....	13
	4. Officer Jonathan Johns.....	14
	5. Sergeant David Lynch.....	14
	B. Procedural Posture.....	14
V.	SUMMARY OF ARGUMENT.....	18
VI.	ARGUMENT.....	18
	A. STANDARD OF REVIEW.....	18
	B. CR 56(e) Limits the Admissibility of Evidence at Summary Judgment.....	20
	C. Employers Are Immune from Litigation Under the Industrial Insurance Act (IIA).....	24
	1. The IIA Is Expansive Legislation Meant to Be Used to the Exclusion of “Every Other Remedy”.....	25
	2. The “Deliberate Intent to Injure” Exception Is Narrowly Tailored to Discourage Litigation.....	28

3.	Actual Knowledge that Injury Is Certain to Occur Requires Knowledge that the Specific Employee Will Be Injured and Cannot Involve Chance	30
4.	The Department Did Not Have Actual Knowledge that Officer Johns or Lynch Were Certain To Be Injured By Cruze or Kopp Because an Offender's Actions and Choices Are Not Certain	38
5.	Willful Disregard of Certain Injury Cannot Be Measured Under A Negligence Standard and Employer Action Defeats the Willful Disregard <i>Birklid</i> Prong	39
6.	The Department Did Not Willfully Disregard Actual Knowledge of Certain Injury: the Staff Was Warned About Cruze and Johns and Lynch Were Trained to Handle Assaultive Inmates in a Dangerous Work Environment	42
D.	Trial Court's Decision to Deny DOC IIA Immunity Imperils the Agency's Ability to Classify and House Inmates in State Correctional Facilities	43
VII.	CONCLUSION	46

TABLE OF AUTHORITIES

Cases

<i>Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	19
<i>Baker v. Schatz</i> , 80 Wn. App. 775, 912 P.2d 501 (1996).....	39
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	passim
<i>Brame v. W. State Hosp.</i> , 136 Wn. App. 740, 150 P.3d 637 (2007).....	passim
<i>Cameron v. Murray</i> , 151 Wn. App. 646, 214 P.3d 150 (2009).....	16, 23
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	20
<i>Ensley v. Mollmann</i> , 155 Wn. App. 744, 230 P.3d 599 (2010).....	21, 23
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	20
<i>Garibay v. Advanced Silicon Materials, Inc.</i> , 139 Wn. App. 231, 159 P.3d 494 (2007).....	19, 29, 31
<i>Gorman v. Garlock, Inc.</i> , 121 Wn. App. 530, 89 P.3d 302 (2004).....	28
<i>Hope v. Larry's Markets</i> , 108 Wn. App. 185, 29 P.2d (2001).....	40
<i>In re Dyer</i> , 143 Wn.2d 384, 20 P.3d 907 (2001).....	45

<i>Keck v. Collins</i> , 181 Wn. App. 67, 325 P.3d 306 (2014).....	19, 23
<i>Kenco Enters. Nw., LLC v. Wiese</i> , 172 Wn. App. 607, 291 P.3d 261.....	21
<i>Lewis v. Casey</i> , 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).....	44, 45
<i>Michelbrink v. State</i> , 191 Wn. App. 414, 363 P.3d 6 (2015).....	39, 40
<i>Procunier v. Martinez</i> , 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).....	45
<i>Renfro v. Kaur</i> , 156 Wn. App. 655, 235 P.3d 800 (2010).....	21
<i>Rice v. Offshore Sys., Inc.</i> , 167 Wn. App. 77, 272 P.3d 865.....	21
<i>Ross v. Bennett</i> , 148 Wn. App. 40, 203 P.3d 383 (2008).....	21
<i>Rothwell v. Nine Mile Falls Sch. Dist.</i> , 173 Wn. App. 812, 295 P.3d 328 (2013).....	27
<i>Sandin v. Conner</i> , 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).....	45
<i>Schuchman v. Hoehn</i> , 119 Wn. App. 61, 79 P.3d 6 (2003).....	26, 31
<i>Shellenbarger v. Longview Fibre Co.</i> , 125 Wn. App. 41, 109 P.3d (2004).....	31
<i>Stenger v. Starwood School Dist.</i> , 95 Wn. App. 802, 977 P.2d 660 (1999).....	40
<i>Stertz v. Indus. Ins. Comm'n of Washington</i> , 91 Wn. 588, 158 P. 256 (1916).....	26

<i>Tilly v. Dep't of Labor & Indus.</i> , 52 Wn.2d 148, 324 P.2d 432 (1958).....	26
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 119 Wn. App. 95, 79 P.3d 18 (2003).....	36, 41
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	passim
<i>Walston v. Boeing Co.</i> , 181 Wn.2d 391, 334 P.3d 519 (2014).....	27, 39
<i>Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.</i> , 123 Wn.2d 891, 874 P.2d 142 (1994).....	19
<i>White v. State</i> , 131 Wn.2d 1, 929 P.2d 396 (1997).....	20
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	20
Statutes	
RCW 51.04.010	passim
RCW 51.04.020	16
RCW 51.04.090	28
RCW 51.24.020	1, 5, 29
RCW 51.32.010	26, 27
Rules	
CR 56	19
CR 56(e).....	20, 21
RAP 2.3(b)(1)	5, 18
Regulations	

WAC 137-25-020..... 9

I. INTRODUCTION

In 1911, in what the Supreme Court has called “the grand compromise,” Washington granted workers a “swift and certain” no fault remedy for injuries suffered in the workplace through the Industrial Insurance Act (IIA) and granted employers immunity from workplace injury suits by workers. RCW 51.04.010. Statutory App. at 1. The Washington Legislature created one narrow exception to employer immunity, an exception for injuries caused by “the deliberate intention” of the employer. RCW 51.24.020. Statutory App. at 2. This case does not fall within that exception.

Officer Jonathan Johns and Sergeant David Lynch, two corrections officers employed by the Washington Department of Corrections (DOC) at Coyote Ridge Corrections Center (CRCC), were injured at work while trying to control two inmates who suddenly and randomly assaulted one of the officers. Although the altercation was arguably foreseeable, there was no evidence DOC had “actual knowledge” that injury to the officers was “certain to occur” and willfully disregarded such knowledge, as is required by the Supreme Court’s decisions in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995), and *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 18, 109 P.3d 805 (2005) (en banc). Despite the absence of evidence satisfying the *Birklid* test, the trial court, opining that one of the

inmates should have been classified for maximum security custody instead of medium security custody, denied DOC summary judgment. The trial court's order denies DOC the immunity guaranteed by the Legislature in RCW 51.04.010 and encroaches on DOC's authority and ability to decide how to classify and where to house inmates.

DOC seeks judgment as a matter of law in order to preserve both its statutory immunity, as an employer, and its discretion, as an agency of the executive branch, to classify and house inmates in accordance with agency policies and procedures without court interference.

II. ASSIGNMENT OF ERROR

1. The trial court erred in failing to award summary judgment to a Washington employer (DOC) where the IIA and all of the relevant case law deny the trial court subject matter jurisdiction and grant the employer immunity from suit. CP at 380-87, 485-7. The trial court also erred on reconsideration of this same issue. CP at 488-91.
2. The trial court erred in considering and relying upon the hearsay and opinion testimony of Jonathan Johns and David Lynch, contrary to CR 56(e), and over the timely, fully articulated objection of DOC. CP at 354-6; 485-87 (¶s 4, 5, 7,8,9).¹

¹ The trial court issued a letter opinion (CP at 485-7) on October 7, 2016, and later directed that it be attached as Ex. A to the Order Denying Defendant's Motion for Summary Judgment (CP at 380-82). The letter opinion was never attached to the Order, although the

3. The trial court erred in finding that DOC's motion to disregard or strike the inadmissible evidence (in the Declarations of Jonathan Johns and David Lynch) was untimely because that motion was submitted by DOC in its reply brief, rather than separately noted under CR 6(d). CP at 354; 489 (FF Nos. 1-7).
4. The trial court erred in determining that the DOC policies submitted on reconsideration could, with reasonable diligence, have been produced as part of the summary judgment proceedings and were not admissible under CR 59(a)(4), and, notwithstanding that ruling, using the policies as an alternative basis for its findings and conclusions denying DOC summary judgment. CP at 489 (FF, Nos. 8-18. CL Nos. 3, 6, and 8).
5. The trial court erred in paragraphs 4, 5, 7, 8, and 9 of its letter opinion filed October 7, 2016. CP at 485-87.
6. On reconsideration, the trial court erred in entering findings of fact 6, 16, 17, and 18. CP at 489-90. It also erred in entering conclusions of law 1, 2, 3, 6, 7, and 8. CR at 490-91.
7. The trial court's erred when it supplemented Jonathan John's hearsay statement ("If an offender acts out against officers at a higher custody

intent of the trial court was clear. CP at 381. When Franklin County produced the Clerk's Papers to this Court, it initially failed to include the trial court's letter opinion, although the opinion had been designated as a Clerk's Paper by DOC. Both of trial court's letter opinions (CP at 485-91) were filed, subsequently, with this Court by Franklin County as Clerk's Papers and should be included in the record for this case.

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.”) with the bracketed phrase “[if not certain].” Compare CP 261, ¶ 11 with CP 486-87, ¶ 7. This trial court error, and the bias against DOC it reflects, was not cured on reconsideration, when the trial court struck its own emendation of Johns hearsay statement “[i]n the interests of justice,” but allowed Johns’ hearsay statement to continue to serve as a material fact precluding summary judgment. CP at 490 (CL No. 2).

8. The trial court erred in its application of the *Birkliid*² test to this case, both in its initial letter opinion (where the decision is not mentioned) and on reconsideration. CP at 485-87; 491 (CL No. 7).
9. The trial court erred in its analysis of *Vallandigham*,³ and in erroneously distinguishing that decision both in its initial letter opinion and on reconsideration. CP at 486-87, ¶7; 491 (CL No. 7).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether this Court should disregard the inadmissible evidence presented by Johns and Lynch in opposition to DOC’s motion for summary judgment and determine whether DOC should be granted judgment as a matter of law based on evidence that comports with the requirements of CR 56(e)? Error Nos. 2, 3, 5, 6, and 7.
2. Whether this Court should consider the DOC policies submitted on reconsideration where the trial court relied upon them as the basis

² *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995).

³ *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 18, 109 P.3d 805 (2005).

of the findings of fact and conclusions of law it entered on reconsideration and where the trial court's original decision relied upon incorrect paraphrases of the same policies by Johns and Lynch? Error No. 4.

3. Whether the trial court had subject matter jurisdiction? Error Nos. 1,8, and 9.
4. Whether the plain language of the IIA, the policy considerations underpinning the Act, and the Washington cases interpreting the Act require that this Court enter judgment as a matter of law for the employer (DOC)? Error Nos. 1, 8, and 9.
5. Whether DOC is entitled to immunity in an action by two corrections officers injured by inmates at work where the IIA provides workers "sure and certain" no fault relief and withdraws workplace injury from "private controversy"? RCW 51.04.010; RAP 2.3(b)(1). Error Nos. 1, 8, and 9.
6. Whether DOC is entitled to immunity where the evidence, viewed in the light most favorable to the employees, established only that injury to the workers may have been foreseeable *but not certain* to occur, and where the only exception to employer immunity from employee suits under the IIA would be where the workers' injuries result "from the deliberate intention" of the employer," defined by well-settled law as when the employer had "actual knowledge that injury was certain to occur and willfully disregard[ed] that knowledge"⁴? RCW 51.04.010; RCW 51.24.020. Error Nos. 1, 8, and 9.
7. Is award of judgment as a matter of law to DOC essential where the trial court's decision to deny DOC the protections of the IIA imperils the agency's ability to both classify and house inmates and make officer assignments in state correctional facilities? Error Nos. 5, 6, and 7.

⁴ *Birkliid*, 127 Wn. 2d at 865.

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. The Incident on September 11, 2012

David Kopp, serving a twenty-year sentence for murder, and Schawn Cruze, serving life without parole under Washington's "Three Strikes" law, were cellmates at CRCC near Connell, Washington. CP at 34-55. Mr. Kopp had a history of two serious infractions, but no history of infractions for perpetrating violence while in custody. CP at 57-8. Mr. Cruze had 57 serious infractions, including two allegations of non-injury assault on staff members (in 2005 and 2008). CP at 60-64.

Late in the morning of September 11, 2012, the CRCC Facility Risk Management Team (FRMT) met to discuss cell reassignments to accommodate new inmates coming to the facility and to increase the safety of the unit. CP at 66-70. At the meeting it was determined that inmates Cruze and Kopp should be transferred to different cells. CP at 66-70. Inmates Cruze and Kopp were notified of the change shortly after the FRMT meeting concluded. CP at 66.

Approximately 40 minutes after learning about the cell reassignment, Mr. Cruze obtained a plastic handled counter brush and a wooden handled dust mop from a supply closet. CP at 76. What took place next is shown in the CRCC security camera video, and is undisputed. CP at

484.⁵ Mr. Cruze kept the counter brush and gave the mop handle to Mr. Kopp. CP at 76, 484. The two then approached Corrections Officer Jonathan Johns from behind while he was looking down and doing paperwork at a workstation in the day room. CP at 66, 76, 484. The two inmates appeared to be walking normally through the area when Mr. Cruze suddenly hit Officer Johns hard across the back of the head with the brush and Mr. Kopp struck the officer on the side of the head with the mop handle. CP at 76, 345, 484. Officer Johns quickly retreated to a nearby hallway pursued by the inmates. CP at 76, 345, 484. In the hall, Officer Johns squared off with inmate Kopp and wrestled him down while Officer Nicholas Rutz, having seen Officer Johns under attack confronted inmate Cruze and began fighting him. CP at 76, 345, 484. Other officers, including Sergeant David Lynch, responded and quickly subdued the inmates. CP at 76, 345, 484. Officer Johns and Sergeant Lynch sustained injuries in the altercation. CP at 78, 80.

In the disciplinary proceedings that took place after the assault, Mr. Cruze admitted he initiated the assault because he and Mr. Kopp were angry about being moved to different cells. CP at 82,84, 348-50. Inmate Cruze admitted to being the instigator and stated he was particularly upset because

⁵ The CRCC security camera video was viewed and relied upon by the trial court in its decision. CP at 485, ¶ 2. The parties have provided the video to this Court by stipulation and Order of the Commissioner (dated 7/20/17). CP at 484.

he was being moved to a cell occupied by a child sex offender. CP at 82, 84, 350. When Sergeant Flores, who was part of the team taking statements in the aftermath of the incident, asked Cruze what started the fight/attack, Mr. Cruze admitted that Officer Johns was not the object of his anger, telling the investigator:

CUS [referring to DOC Custody Unit Supervisor Peter Caples] thinks he can mess with people. The officer [Johns] just happened to be the one that got it. They have been saying stuff and messing with staff. You put me in with a CHIMO.⁶ I wish I could have gotten the CUS. The guy that I hit did not deserve it. I do not know, wrong guy at the wrong time.

CP at 84. At the time of the September 11, 2012, assault, Cruze and Kopp made no threat against Officer Johns or Sergeant Lynch or any other person at CRCC. CP at 84, 348-50. The inmates did not warn these officers or anyone else at CRCC that they were angry, or that the officers were targets. CP at 84, 348-50.

2. Inmate Schawn Cruze

Schawn Cruze was committed to DOC in July 1997 as a persistent offender. CP at 34-43. He was sentenced to life in prison without possibility of parole or early release (LWOP) after a conviction for Assault in the Second Degree (DV) for an attack on his brother. CP at 34-43; 335. In the

⁶ Slang for child molester.

20 years he has been incarcerated by DOC,⁷ inmate Cruze's infraction history shows he amassed 57 serious infractions, including two alleged non-injury assaults on staff members in 2005 and 2008. CP at 60-64.

Prior to September 11, 2012, Mr. 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. DOC records established that the 2005 and 2008 assault infractions were categorized by DOC as Category B, Level 1 infractions for "Assaulting a Staff Member" rather than the more serious Category A Serious Infraction for "Aggravated Assault," defined as "an assault resulting in documented physical injury requiring treatment in a medical facility. . ." CP at 60-64; WAC 137-25-020. Statutory App. at 3-4.

Mr. Cruze's infraction history also includes a variety of other offenses including assault or intimidation of inmates and inappropriate relations with (and sexual harassment of) female staff members. CP at 60-64. His infraction history shows periods when he had multiple serious infractions within a year, and other times where he would go a year or more with no serious infractions. CP at 60-64. During the spring of 2012, he may

⁷ Cruze's infraction history includes one offense in 1992, five years before he was sentenced to life without parole. CP at 60-64.

have made oral threats to staff, although the circumstances regarding those hearsay threats is unclear from the record. CP at 327-29.

The primary behavior that made Cruze difficult to place within DOC was his “compromise” of female staff members at many DOC facilities (including CBCC, SCCC, and WSP). CP at 314, 318. This series of sexual relationships made placement of Cruze more difficult, because, under the Prison Rape Elimination Act (PREA), DOC was required to consider Cruze to be the victim (because he was the incarcerated party). CP at 314, 317. DOC had no evidence that “contraband was being introduced to [Cruze] by the staff he compromised,” and because some of the staff (and their spouses) remained DOC employees at various facilities, Mr. Cruze’s transport within DOC was difficult. CP at 307, 314-15, 317-19.

Mr. Cruze was temporarily placed in Administrative Segregation at Monroe Correctional Complex (MCC) on July 5, 2012, during the investigation of a sexual relationship with staff at WSP. CP at 304, 307. In the Administrative Segregation Review conducted on July 9, 2012—two months before the assault at issue in this case—inmate Cruze had a “current custody review score of 37.” CP at 304. A score of 37 “requires placement at a Close security facility.” CP at 401, 409.⁸ Inmates who have been

⁸ DOC submitted the policies referred to here on reconsideration to address inaccuracies in the hearsay statements made by Johns and Lynch in opposition to summary judgment. Although DOC moved to strike the officers’ hearsay and opinion statements,

sentenced to life without parole (LWOP) are held in Close custody for the first four years of their time in custody. CP at 409. Because inmate Cruze had been an LWOP inmate for fifteen years, his custody status was determined by his individual behavior.⁹ CP at 419. Inmates may receive an override of a Close custody designation and be placed in Medium custody for a variety of reasons. CP at 404.

On July 25, 2012, DOC conducted a second Administrative Segregation Review of inmate Cruze. He is described as having a “current custody review score of 40 points, equating to medium custody.” CP at 307. This review also describes a written statement presented by Mr. Cruze, in which he identifies that three things “he sees as being most likely to influence his behavior positively in the future as visits with his family first,

they were the primary evidence supporting the trial court’s first letter decision. CP 485-86, ¶ 4, 5.

On reconsideration, the trial court found that DOC’s “newly-produced evidence” could have been discovered and produced in the summary judgment proceeding and, consequently, was not new evidence (as defined by CR 59(a)(4) for admissibility on reconsideration); the trial court also found that the DOC policies had not been authenticated under ER 901-904 because they were appended directly to the reconsideration motion. CP at 490-91 (CL Nos. 3 and 4). But, “notwithstanding” these conclusions of law, the trial court used the DOC policies as the basis for new findings of fact (8 through 18) on reconsideration, and determined as a conclusion of law that the “newly-produced evidence does not justify reconsideration.” CP at 490-91 (FF Nos. 8-18; CL No. 6).

The trial court also used the policies as the basis for striking one of the erroneous key statements in its original decision—that Cruze’s LWOP status required that he be housed in closed custody facility. CP at 491 (CL No. 5). Given the trial court’s extensive use of and reliance upon the DOC policies submitted at reconsideration, DOC requests that this Court consider them as part of the record on review. They provide a factual counterpoint to the hearsay offered by Johns and Lynch--hearsay the trial court relied upon in both its initial decision and on reconsideration.

⁹ Cruze received one point in April 2012 for programming that was not included in the 37 score. CP at 311, 366.

a job second and finally a single-man cell.”¹⁰ CP at 307. At its conclusion, this review states: “This investigation has been completed by HQ IIU staff who recommend promotion to medium custody and transfer to CRCC.” CP at 307, 315, 319. Mr. Cruze was an inmate at CRCC by August 13, 2012. CP at 302. The Custody Unit Supervisor (CUS Peter Caples), whom Mr. Cruze would have targeted on September 11, 2012 (CP 84), had he been able to do so, said that the difference in Cruze’s custody review score could be attributed directly to the facility chosen by headquarters when it made the placement decision (Inmates receive 2 points for closed custody placement, 5 points for medium). CP at 293-4. Sergeant Lynch’s declaration—without factual support-- states that such an override would have been made by DOC to save money (CP at 271); CUS Peter Caples testified that he thought Washington had “mutual agreements with other states where we’ll take one of theirs and they’ll take one of ours.” CP at 296.

¹⁰ Mr. Cruze may have been strongly affected by separation from his family in Vancouver, Washington, particularly the separation from his mother. CP at 333. On September 7, 2012—five days before the incident at issue—he attended his mental health “call out” at CRCC. CP at 333. He thought he was being treated differently by custody officers because of his history of compromising female staff. CP at 333. The response DOC and Cruze received from Psych. Assoc. Trisha Whitman-Winchester recommended that he: “address his desire to have a 1) positive reputation and 2) be able to make a case for returning to the other side of the state to be closer to his mom.” CP at 333. This is the last DOC evaluation of inmate Cruze before the September 11, 2012, assault.

DOC policies define 38 as the cutoff for Medium custody (CP at 409), but the statements attributable to DOC in this case describe Mr. Cruze as having received a discretionary administrative “override” of his custody score. CP at 287-8, 293, 311, 346, 404, 406. Mr. Cruze’s override comported with DOC policy on discretionary overrides. CP at 409.

The record provides admissible evidence of various discretionary reasons why DOC headquarters staff may have decided to promote inmate Cruze to medium custody status, including his written statement on July 25, 2012, DOC’s obligation to treat Mr. Cruze as a victim under PREA, his mental health call-out and expressed desire to find a way (through good behavior) to be placed closer to his mother, and the simple need for Close custody beds. CP at 315, 319, 333. All entitle DOC to immunity.

There is no admissible evidence to support the assertion that Mr. Cruze was not transported out-of-state because of the cost of housing him in an out-of-state facility. CP at 271, 296, 363.

3. Inmate David Kopp

David Kopp was committed to DOC in July 2010, for 240 months for Second Degree Murder with a firearm. CP at 45-55. His DOC infraction history showed two serious infractions relating to tattooing and possession of drugs/alcohol, but no infractions involving violence or assault. CP at 57-8. He had been in DOC custody for two years. CP at 57-8.

4. Officer Jonathan Johns

In 2008, Officer Johns began employment as a Correctional Officer 1 at Airway Heights Corrections Center near Spokane. CP at 86-7. In 2010, Officer Johns transferred to Coyote Ridge Corrections Center as a Correctional Officer 2. CP at 89. On January 15, 2016, Officer Johns resigned his position to take a new job as an officer with the Hanford Patrol in Richland, Washington. CP at 91.¹¹ Officer Johns received extensive training at DOC including several courses involving the risk of assault by inmates. CP at 93-98.

5. Sergeant David Lynch

Sergeant Lynch began his employment with DOC in 1994. CP at 100-110. His positions have included Correctional Officer 2, Classification Counselor 2, Correctional Sergeant (promoted in 1999) as well as temporary lieutenant. CP at 101-02. He has also received extensive training from DOC including numerous training courses involving the risk of assault by inmates. CP at 112-23.

B. Procedural Posture

On November 13, 2015, Coyote Ridge Corrections Center (CRCC) employees Johnathan O. Johns and David W. Lynch sued their employer

¹¹ In order to obtain the position, Officer Johns would had to meet and pass the rigorous physical standards found at 10 CFR 1046.

(collectively, “the officers”), the State of Washington Department of Corrections (DOC) and CRCC, for “physical and emotional injuries” they suffered as a result of an attack by two inmates at CRCC. CP at 1-5. In its answer, DOC¹² identified several affirmative defenses, including assertions that the trial court lacked subject matter jurisdiction over the officers’ claims, that the IIA provided their exclusive remedy, and that DOC, as an employer, was immune from suit under the IIA. RCW 51.04.010; CP at 6-11.

In August 2016, DOC moved for summary judgment on the basis of the exclusive remedy provisions of the IIA, which denied subject matter jurisdiction to the trial court and granted immunity from suit to the DOC, as the officers’ employer. CR 51.04.010; CP at 12-236.

Officer Johns and Sergeant Lynch opposed summary judgment, asserting that DOC was not entitled to immunity under the IIA because this was a case in which the employees’ injuries had resulted “from the deliberate intention of [DOC] to produce such injury.” RCW 51.04.020; CP at 237-353. In support of their claim that DOC had acted with the “deliberate intention” to produce the actual injury they sustained, the officers each filed a declaration.

¹² The Complaint names both DOC and CRCC as defendants. CP at 1. For simplicity, this brief identifies the DOC as the officers’ employer. As the officers state in their Complaint, DOC operates CRCC. CP at 1.

In its reply brief, in accordance with CR 56(e), *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150, 150 (2009), and other recent cases concerned with the inefficacy of filing separate motions to strike in this context, DOC requested that the trial court rely upon only the admissible evidence in the record and ignore the hearsay and unsupported opinion which Johns and Lynch put forth in their opposition declarations.¹³

In a letter ruling dated October 6, 2016 (and filed October 7), the Franklin County Superior Court denied DOC's motion. CP at 380-83. On December 7, 2016, the trial court entered an Order Denying Summary Judgment prepared by Plaintiff's counsel. CP at 380-87. The trial court directed that its letter of October 6, 2016, be "attached as Ex. A." CP at 381.

DOC requested reconsideration on December 15, 2016, appending several of the DOC policies that Sergeant Lynch and Officer Johns had referred to—incorrectly--in their declarations in opposition to summary judgment. CP at 388-434. In its motion, DOC argued that the trial court should reconsider its failure to rule upon DOC's motion to strike the hearsay and erroneous statements of DOC policy in the Johns and Lynch

¹³ By agreement of the parties, both the opposition memorandum and the reply brief were filed late because of the birth of a child to Plaintiffs' counsel, CP 354. In their briefing, the parties made the trial court aware of the agreement they had reached regarding the briefing schedule. CP 354. On reconsideration, the trial court identified and chose not to honor the legal significance of the parties' agreement. CP at 489 (FF Nos. 1-5; CL No. 1).

declarations, as well as the trial court's reliance upon (and improper extension of) those statements in its ruling denying summary judgment to DOC. DOC also argued that the trial court had wrongly decided the core issue regarding the exclusive remedy provisions of the IIA because of its reliance upon inadmissible facts as well as its misinterpretation of the Washington Supreme Court's holdings in *Birklid*¹⁴ and *Vallandigham*.¹⁵

In opposition, Johns and Lynch argued (despite the delay in the briefing schedule made as a courtesy to Plaintiff's counsel) that the DOC motion to strike had been untimely, that the trial court "had effectively denied the purported motion and properly cited to the [Johns'] statement in its letter decision," and that the DOC had improperly supplemented the record by appending the actual texts of the DOC policies Johns and Lynch had referenced in their declarations.

On February 24, 2017, the trial court denied reconsideration to DOC in an opinion that included Findings of Fact and Conclusions of Law. CP at 463-68.

DOC sought discretionary review by this Court. CP at 467-77. Commissioner Wasson granted DOC discretionary review on June 5, 2017,

¹⁴ *Birklid v. Boeing Co., supra.*

¹⁵ *Vallandigham v. Clover Park Sch. Dist. No. 400, supra.*

finding that “the superior court committed obvious error that renders further proceedings useless.” CP at 478-84; RAP 2.3(b)(1).

V. SUMMARY OF ARGUMENT

- It was error for the trial court to ignore public policy and decades of legal precedent interpreting the IIA and deny DOC the statutory immunity mandated for employers by RCW 51.04.010.
- The deliberate intent to injure exception to the IIA is very narrow and it was error for the trial court to expand it to a case where the evidence established that injury was foreseeable but not certain to occur.
- The evidence submitted, viewed in the light most favorable to Johns and Lynch, was insufficient to establish that DOC had actual knowledge that the inmates were certain to injure the plaintiffs.
- Denial of immunity to DOC would imperil its ability to classify and house inmates at state correctional facilities.

VI. ARGUMENT

A. STANDARD OF REVIEW

When reviewing summary judgment, the appellate court conducts the same inquiry as the trial court and reviews the motion *de novo*. *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 236, 159 P.3d 494 (2007). Summary judgment is appropriate when, viewed in the light most favorable to the nonmoving party, “there is no genuine issue as to any material fact” and “the moving party is entitled to a 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. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). A defendant can meet this burden by showing that the plaintiff lacks evidence “sufficient to establish ... an element essential to that party’s case.” *Keck v. Collins*, 181 Wn. App. 67, 90, 325 P.3d 306 (2014). This Court must grant DOC judgment as a matter of law if, given the admissible evidence, considered in the light most favorable to the officers, reasonable minds could reach only one conclusion. *Vallandigham*, 154 Wn. 2d at 26 (en banc).

To overcome a motion for summary judgment, the non-moving party must present specific, admissible evidence that creates an issue of material fact. *Vallandigham*, 154 Wn.2d at 26. If the nonmoving party fails to establish the existence of each essential element of their claim, a court must grant summary judgment. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) held that “[i]n such a situation, there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial”). The nonmoving party may not rely on speculation, argumentative assertions, or

on mere allegations that unresolved factual issues remain. *See White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Young*, 112 Wn.2d at 226. The nonmoving party may not rely upon evidence that would not be admissible at trial. CR 56(e).

In this case, Officers Johns and Lynch, did not provide admissible evidence sufficient to establish the essential elements of “deliberate intent to injure,” the narrow exception to RCW Title 51 immunity they allege. Under *Young* and *Celotex*, this failure is fatal. The Department of Corrections is entitled to judgment as a matter of law.

B. CR 56(e) Limits the Admissibility of Evidence at Summary Judgment

In *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), the Washington Supreme Court applied the *de novo* review standard to “all trial court rulings made in conjunction with a summary judgment motion.” Washington has consistently applied the *de novo* review standard to trial court rulings concerning the contents of evidence presented on summary judgment.¹⁶

¹⁶ *See, e.g., Kenco Enters. Nw., LLC v. Wiese*, 172 Wn. App. 607, 614–15, 291 P.3d 261 (hearsay), *review denied*, 177 Wn.2d 1011, 302 P.3d 180 (2013); (2013); *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 85–87, 272 P.3d 865 (authentication, hearsay, personal knowledge, speculation), *review denied*, 174 Wn.2d 1016, 281 P.3d 687 (2012); *Renfro v. Kaur*, 156 Wn. App. 655, 666, 235 P.3d 800 (2010) (extrinsic, subjective intent); *Ensley v. Mollmann*, 155 Wn. App. 744, 751–55, 230 P.3d 599 (2010) (hearsay); *Ross v. Bennett*, 148 Wn. App. 40, 45, 48–49, 203 P.3d 383 (2008) (extrinsic, subjective intent, context of formation, authentication, legal conclusion, relevance, undue prejudice, hearsay).

In its *de novo* review of DOC's motion for summary judgment, this Court, like the trial court, is bound to examine supporting and opposing affidavits in order to determine whether they are "made on personal knowledge...set forth such facts as would be admissible in evidence...and show affirmatively that the affiant is competent to testify to the matters stated therein. CR 56(e).

In its reply brief, DOC objected to a number of statements within the Johns and Lynch declarations on evidentiary grounds. DOC identified these statements to be "hearsay, impermissible opinion/argumentative and/or conclusory statements not based on personal knowledge." CP at 355. DOC requested that the trial court disregard and/or strike all inadmissible statements in the declarations, including the following:

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 trial court ignored DOC’s request. CP at 487, ¶7; CP at 489 (FF Nos. 1-6 and CL No. 1). As a result, the trial court’s opinion is supported almost exclusively by evidence that was inadmissible under CR 56(e). DOC requests that this Court correct that error on *de novo* review.

The trial court’s reasons for accepting this inadmissible evidence were disingenuous, at best. In *Cameron*, 151 Wn. App. at 658 (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 this Court on *de novo* review. *Keck*, 181 Wn. App. 67; *Ensley*, 155 Wn. App. at 751–55.

If a motion to strike is no longer necessary to preserve an objection to the admissibility of the evidence, and if such an objection can properly be preserved *in the moving party’s reply brief*, then the trial court erred in ignoring DOC’s well-articulated objection that Johns’ and Lynch’s declarations in opposition to summary judgment contained inadmissible hearsay and statements unsupported by personal knowledge.¹⁷

¹⁷ As noted above, the trial court was informed that the reply brief was not filed five days before the hearing (in accordance with the local rule) because plaintiff’s counsel required a four-day extension for the response briefing, “because the birth of his child caused complications with his schedule.” Plaintiff proposed that the reply would be due on September 23, 2016, the date it was filed. The reply brief was timely.

The trial court’s determination that the DOC’s objections to the Johns and Lynch declarations were not timely because they were not contained in a six-day CR 6(d) motion to strike, and to which Plaintiffs might have responded, is analytically unsound. The response declarations of Johns and Lynch were filed on Tuesday, September 20, 2016. CP at 259, 267. The summary judgment hearing was held six days later on Monday, September 26, 2016. CP at 380.

The parties agreed to delay filing both the response brief and the reply in order to accommodate Plaintiffs' counsel's schedule. Under fundamental tenets of fairness, the reply brief was timely and contained objections to admissibility that are properly considered by this Court in its *de novo* review of the evidence presented at summary judgment.

Much of the testimony contained within Officer Johns' and Sergeant Lynch's declarations in opposition to summary judgment is inadmissible under CR 56(e). *De novo* review under *Folsom* mandates that this Court consider only the admissible evidence in their declarations in support of their argument that DOC deliberately intended to injure them when it determined Schawn Cruze should be housed at CRCC.

C. Employers Are Immune from Litigation Under the Industrial Insurance Act (IIA)

In 1911, the Legislature abolished all civil suits against employers for work related injuries and, in exchange, workers received a "swift, no-fault compensation system for injuries on the job." *Birklid*, 127 Wn. 2d at 859; RCW 51.04.010. This 'grand compromise' and the subsequent case law interpreting that compromise controls this case and the remedies available to Officers Johns and Lynch.

1. The IIA Is Expansive Legislation Meant to Be Used to the Exclusion of “Every Other Remedy”

Before 1911, Washington workers relied upon the common law tort system to recover costs for injuries they obtained at work. Under the common law tort system, “little of the cost of the employer has reached the worker and that little only at large expense to the public.” RCW 51.04.010. Finding this system “inconsistent with modern industrial conditions” and “uncertain, slow and inadequate” for workers, the Washington State Legislature passed the Industrial Insurance Act (IIA or Title 51) to provide swift reparation for workplace injuries.

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). This no fault remedy was a significant gain for workers, the public at large, and was part of a nationwide move to workers’ compensation laws. *Schuchman v. Hoehn*, 119 Wn. App. 61, 71, 79 P.3d 6 (2003).

As a “grand compromise”¹⁸ the IIA provides all workers with swift and certain relief *without regard to fault*. RCW 51.04.010; RCW 51.32.010; *Vallandigham*, 154 Wn.2d at 26. This ‘no fault’ remedy is significant. Workers receive benefits for injuries that they would not have recovered for under the common law tort system, and regularly recover even when their injuries result solely from their own misconduct or intentional actions. *See e.g. Tilly v. Dep’t of Labor & Indus.*, 52 Wn.2d 148, 324 P.2d 432 (1958) (concluding that a widow was entitled to benefits after her husband died at work while engaged in “horseplay” with coworkers). Additionally, the IIA is remedial in nature, and therefore is liberally construed to achieve its purpose of providing compensation to all covered employees, with doubts resolved in the workers’ favor. *Rothwell v. Nine Mile Falls Sch. Dist.*, 173 Wn. App. 812, 820, 295 P.3d 328 (2013) (concluding that emotional injury from cleaning up a suicide scene is a compensable injury under the IIA).

In exchange for this strong guarantee of compensation without regard to fault and the monetary burden this puts on the employer pool,

¹⁸ “Our act came of a great compromise between employers and employed. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers’ booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in future, where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it.” *Stertz v. Indus. Ins. Comm’n of Washington*, 91 Wn. 588, 590, 158 P. 256, 258 (1916) abrogated on other grounds by *Birklid*, 127 Wn. 2d 853.

employers are immune from suit for work related injuries. RCW 51.04.010; *Birklid*, 127 Wn.2d at 859; *Vallandigham*, 154 Wn.2d at 26; *Walston v. Boeing Co.*, 181 Wn.2d 391, 396, 334 P.3d 519 (2014) (en banc). Notably, the IIA is the *exclusive remedy* for workers who are injured during the course of their employment. RCW 51.04.010 (“to the exclusion of every other remedy, proceeding or compensation”); *Rothwell*, 173 Wn. App. at 819. To underscore the importance of the immunity to the sustainability of the IIA, the Legislature enacted a second provision that expressly prohibits workers from suing their employer for work related 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).

These immunity provisions are intentionally broad, and the legislature meant to shield both the employers and the public from the considerable time and expense involved in defending against employment injury lawsuits. RCW 51.04.010; *Gorman v. Garlock, Inc.*, 121 Wn. App. 530, 534, 89 P.3d 302 (2004) (“The legislature enacted this limitation to improve injured employees’ remedies while decreasing expense to employers and the public”), *aff’d*, 155 Wn.2d 198, 118 P.3d 311 (2005).

By express provision, if the employer immunity provisions are ever held invalid, the entire Industrial Insurance Act will be invalidated.

If the provisions... of this title making the compensation to the worker provided in it exclusive of any other remedy on the part of the worker shall be held invalid the entire title shall be thereby invalidated.

RCW 51.04.090. Statutory App. at 5. Employer immunity is a foundational element of the 'grand compromise', and the viability of the IIA rests on its continued existence.

2. The "Deliberate Intent to Injure" Exception Is Narrowly Tailored to Discourage Litigation

An employee may overcome employer immunity under the IIA only on the rare occasion that the employer deliberately intended to produce the injury to the employee.

If injury results to a worker *from the deliberate intention of his or her employer to produce such injury*, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

RCW 51.24.020 (emphasis added). Until the employee vaults that high bar, *no Washington court* should have jurisdiction over his or her personal injury claim. RCW 51.04.010.

Recognizing the clear intention of the IIA to abolish civil suits over workplace injury, Washington courts have consistently applied the

deliberate intention exception narrowly. The law disadvantages employers at least as much as it disadvantages employees, and acknowledges that employers who intentionally harm their employees should not gain the benefit of the IIA. *Birklid*, 127 Wn.2d at 859 (“Employers who engage in such egregious conduct should not burden and compromise the industrial insurance risk pool”); *Vallandigham*, 154 Wn.2d at 27; *Garibay*, 139 Wn. App. 231.

In 1995, Theresa Birklid and the other plaintiffs who filed suit against Boeing, argued before the Washington Supreme Court that they alleged sufficient facts to establish “deliberate intent to injure” and, after reviewing the decisions interpreting RCW 51.24.020, the Court concluded that “deliberate intention encompassed more than a physical assault.” *Birklid*, 127 Wn. 2d at 862–63. The *Birklid* Court established a two-part test and 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.

When constructing the “deliberate intent” definition for Washington, the Supreme Court expressly rejected broader ‘substantial certainty’ or ‘conscious weighing’ tests that other states used. *Id.* (stating

that substantial certainty means the actor knows that the consequences are at least substantially certain to occur and that conscious weighing focuses on the “question of whether the employer had an opportunity consciously to weigh that someone, not necessarily the plaintiff specifically, would be injured”). The Court recognized the importance of the narrow interpretation Washington courts have historically given the deliberate intent exception and RCW 51.24.020 and wanted to give “appropriate deference” to the “four generations of Washington judges ... [and] to the legislative intent embodied in RCW 51.04.010” by adopting the higher standard of certain injury as the Washington rule. *Id.*

3. Actual Knowledge that Injury Is Certain to Occur Requires Knowledge that the Specific Employee Will Be Injured and Cannot Involve Chance

Actual knowledge that injury is certain to occur requires the use of the literal meaning of “certain;” there can be no doubt injury will occur. *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 47-48, 109 P.3d 807 (2004), *review denied*, 154 Wn.2d 1021, 120 P.3d 807 (2004). Gross negligence, substantial certainty, or the failure to follow safety procedures is not enough to show deliberate intent or certain injury. *Vallandigham*, 154 Wn.2d at 33; *Birklid*, 127 Wn.2d at 865; *Garibay*, 139 Wn. App. at 236 (“[s]imply exposing employees to unsafe conditions is not enough”); *Schuchman*, 119 Wn. App. at 72. Further, the injury must be certain to

happen to *the injured party* in order to be certain to occur. *Garibay*, 139 Wn. App. at 238; *see Birklid*, 127 Wn.2d at 861 (the employer must have intended the injury, not the act causing the injury). “Certainty leaves no room for chance.” *Shellenbarger*, 125 Wn. App. at 47.

A comparison between the *Birklid* and *Vallandigham* cases best illustrates the high standard that certainty of injury a plaintiff must meet in order to satisfy the deliberate intent exception to the IIA.

In *Birklid*, Boeing had actual knowledge that injury was certain to occur *when* it continued to expose workers to a chemical that was certain to cause injury *after* receiving information that the chemical made employees sick. *Birklid*, 127 Wn. 2d at 863. In 1987, Boeing began production of a new woven fiberglass cloth to meet FAA regulations on flammability. *Id.* at 856. Boeing impregnated the cloth with phenol-formaldehyde resin. *Id.* During pre-production testing, the air was “white with dust” from the chemical and Boeing employees complained of “dizziness, dryness in nose and throat, burning eyes, and upset stomach.” *Id.*

A Boeing supervisor requested improved ventilation after seeing the effect this chemical had on employees. *Id.* The supervisor explicitly stated that he anticipated the “problem to increase as temperatures rise and production increases.” *Id.* In response, Boeing management denied the request, stating the problem did not warrant the expenditure of funds. *Id.*

Without taking *any* steps to reduce the injuries caused by the phenol-formaldehyde resin, Boeing moved forward with full production. *Id.*

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.

Boeing employees sued in response, arguing that Boeing deliberately intended their injury under RCW 51.24.020. The *Birklid* court examined the evidence of Boeing's knowledge, and also examined evidence that Boeing: removed labels from the containers holding the phenol-formaldehyde resin; denied access to Material Safety Data Sheets; altered workplace conditions during government safety tests to manipulate test results; deliberately disguised the potential harm of the chemical; and harassed employees who requested protective equipment or who availed themselves of medical treatment. *Id.* at 857. The evidence established that Boeing experimentally exposed workers to the toxic chemicals without their informed consent. *Id.*

While establishing the new two-part deliberate intent test, the *Birklid* court found that the evidence demonstrated that Boeing knew that the phenol-formaldehyde was certain to injure its employees. *Id.* at 863. The court reasoned that *after* Boeing had notice that its workers were ill from exposure to the resin, Boeing knew that injury was certain to occur from

continued exposure. *Id.* The central distinguishing fact between *Birkliid* and other Washington cases was that Boeing knew in advance the phenol-formaldehyde fumes injured its workers, yet put the new resin into production anyway. *Id.* (“After beginning to use the resin, Boeing then observed its workers becoming ill from the exposure. In all other Washington cases, while the employer may have been aware that it was exposing workers to unsafe conditions, its workers were not being injured until the accident leading to the litigation occurred. There was no accident here”). The court held that Boeing’s “actual knowledge that an injury was certain to occur” combined with the company’s willful disregard of that knowledge, constituted deliberate intention under RCW 51.24.020.

In contrast to *Birkliid* where a chemical caused the injury, in *Vallandigham*, there could be no actual knowledge that injury was certain to occur when the injury arose from the unpredictable actions of a special needs student. *Vallandigham*, 154 Wn.2d at 18. In *Vallandigham*, two special education instructors sued the school district seeking damages for injuries caused by a severely disabled special education student, “RM.” *Id.* at 17. The injuries center on the 1999-2000 school year, a period when RM’s aggression increased. RM was 13 at the time.

Between September 14, 1999 and October 25, 1999, he assaulted or injured students or staff approximately 18 times

by scratching, hitting, pulling hair, biting, pinching, head butting, and grabbing glasses.

Id. at 19-20.

RM underwent two behavior evaluations by the school district. One reported that RM physical hurt other students or teachers more than once a week. The second reported that RM hurt other students or teachers “daily at various times.” *Id.* at 20-21. In a deposition, one of the behavior analysts opined that if nothing were done to stop RM’s behavior, the assaults would continue. *Id.* at 21. The special education officer at the school stated that by the end of October, the school district knew it was probable, but not certain, that RM “would have future outbursts that injured staff and students.” *Id.*

Between November 15 and December 31, 1999, RM caused approximately 38 injures to students and staff. *Id.* at 22. Most were scratches, “but the injuries included bites, slaps, and muscle strains that occurred when staff attempted to restrain RM.” *Id.* Despite the school’s repeated attempts to change RM’s behavior through amending his Individualized Education Plan (IEP), RM continued to have assaultive conduct. *Id.* at 21-22, 24 (discussing medications with RM’s doctor, incorporating a one-on-one aid for RM, using an isolation room, and adding more structure to RM’s daily routine). Over the course of the 1999-2000 school year, RM injured other staff and students approximately 96 times.

Id. at 24. These injuries spawned eight L&I claims. Of these, Clarke filed three and Vallandigham filed one. *Id.*

On one occasion, RM “beat up badly” his one-on-one aide. *Id.* at 23. On another, when Vallandigham tried to stop RM from scratching another student, RM head-butted her, causing her to fall backward, hit her head, and lose consciousness. *Id.* at 20. The next day, RM bit Clarke on her breast, leaving a mark. *Id.* Prior to these incidents, Vallandigham and a colleague had sent e-mails to the school district explaining RM’s increasingly assaultive behavior, how RM “is out of control of his behaviors,” how his mood swings are uncontrollable, and pleading for “urgent action.” *Vallandigham v. Clover Park Sch. Dist. No. 400*, 119 Wn. App. 95, 103, 79 P.3d 18 (2003), *aff’d*, 154 Wn.2d 16, 109 P.3d 805 (2005).

Vallandigham and Clarke sued the school district to recover damages for their injuries based on the *Birkliid* deliberate intent exception to the IIA. *Vallandigham*, 154 Wn.2d at 25. The trial court granted the school district’s motion for summary judgement, ruling that the plaintiffs failed to establish either element of the *Birkliid* test. The plaintiffs appealed the dismissal to Division II. *Id.* Division II affirmed the dismissal finding that the school district did not willfully disregard the knowledge of certain injury, but held that the plaintiffs presented enough evidence for a jury to conclude that the district had actual knowledge that injury was certain to

occur. *Id.* The Supreme Court granted review, and agreed with the trial court, holding that plaintiffs failed to satisfy either element of the *Birklid* test. *Id.* at 32-33.

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 *Vallandigham* Court reasoned that the school district could not know with certainty what the actions of a child with special needs would be, and therefore, the school district could not know with certainty that RM would cause plaintiffs’ specific injuries. *Id.* Further, the Court reasoned that the school district could not know that their strategies for stopping the injuries and halting RM’s aggressive behavior would not be effective, so they could not know that RM’s actions would continue with certainty. *Id.* at 33-34.

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.

The difference between the *Birklid* and *Vallandigham* outcomes is the degree of certainty that the specific injury will result. In *Birklid*, it was certain that continued exposure to a toxic chemical would produce injury to the Boeing employees. There was no chance that the chemical exposure would not produce an injury. By contrast, in *Vallandigham*, even with a substantial certainty, with over 96 injuries recorded in one year and outbursts happening on a daily basis, the plaintiffs' injuries were not certain to occur under the deliberate intent exception to the IIA. There was a chance that RM would act differently on any given day or that the injuries could be prevented. The human elements of choice and unpredictability were fatal to the plaintiffs' argument that the school district knew that injury was certain to occur. *See also Brame v. W. State Hosp.*, 136 Wn. App. 740, 749, 150 P.3d 637 (2007) (discussing continued assaults by patients at a hospital and

finding that even when ‘triggers’ are known for assaultive behavior, no one can say that an individual’s assaultive behavior will continue or cease).

The fatal flaw of human unpredictability for the *Brame* and *Vallandigham* plaintiffs is the flaw in this case. The chance that an inmate will react violently in any given situation is just that, a chance. 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.

4. The Department Did Not Have Actual Knowledge that Officer Johns or Lynch Were Certain To Be Injured By Cruze or Kopp Because an Offender’s Actions and Choices Are Not Certain

Since 1995, Washington courts have continued to apply the *Birklid* exception sparingly, usually in cases that involved repeated, continuous, certain injury caused by chemical exposure or intentional assault. *See, e.g., Birklid* at 865-66 (holding that continuous exposure to toxic resin was enough for certain injury); *Michelbrink v. State*, 191 Wn. App. 414, 430, 363 P.3d 6 (2015) (finding that intentionally shooting a police officer with a Taser for training did satisfy the deliberate intention exception); *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996) (concluding that employers who allowed its employees to be repeatedly exposed to chemicals after they reassured the employees that they were not toxic, despite contrary

knowledge, acted with deliberate intent); *see also Walston*, 181 Wn.2d at 397 (holding that asbestos exposure is not certain to cause injury therefore the deliberate intention exception does not apply).

This is not a case of repeated, continuous, known injury like *Birklid*. DOC did not have actual knowledge that inmate Cruze would injure two correctional officers at CRCC. Although Mr. Cruze was a difficult inmate to manage and the possibility of assault was recognized as foreseeable, he had not made any assault on a staff member for four years. CP at 60-64.

5. Willful Disregard of Certain Injury Cannot Be Measured Under A Negligence Standard and Employer Action Defeats the Willful Disregard *Birklid* Prong

Willful disregard of certain injury occurs when an employer compels an individual to act despite certain injury, or when an employer does nothing to prevent a known and certain injury from happening. *See Michelbrink*, 191 Wn. App. at 434 (finding that requiring a police officer to be shot with a Taser in training was willfully disregarding certain injury); *Birklid*, 127 Wn.2d at 863 (finding that because by Boeing did nothing after being told the toxic chemicals were harming employees, and moved forward with production, the company willfully disregarded actual knowledge of injury). Inadequate or ineffective remedial measures do not constitute willful disregard of certain injury. *Vallandigham*, 154 Wn.2d at 35 (disapproving *Stenger v. Stanwood School Dist.*, 95 Wn. App. 802, 813,

977 P.2d 660 (1999) and *Hope v. Larry's Markets*, 108 Wn. App. 185, 195, 29 P.2d 1268 (2001)) and finding that ineffective remedial efforts are enough to satisfy the willful disregard prong of the *Birklid* test). Moreover, training on how to respond to assaults constitutes employer action and defeats the willful disregard of certain injury requirement. *Brame*, 136 Wn. App. at 750 (finding that training in how to respond to patient assaults constituted Hospital action to alleviate problem and defeated the willful disregard requirement).

In *Vallandigham*, the Washington Supreme Court expressly rejected the *Stenger* and *Hope* precedents that ineffective remedial measures could constitute willful disregard. The Court reasoned that by focusing on the “efficacy or adequacy of the remedial measures,” the precedents were measuring the reasonableness of the measures and therefore were impermissibly adopting a negligence standard. *Vallandigham*, 154 Wn.2d at 35 (quoting *Vallandigham*, 119 Wn. App at 108). The Court goes on to explain that it made clear in *Birklid* that it rejects use of a negligence standard for evaluating the deliberate intent exception to the IIA and therefore rejects any “[n]otion that a reasonableness or negligence standard should be applied to determine whether an employer acted with willful disregard.” *Vallandigham*, 154 Wn.2d at 35.

Training on how to respond to assaultive behavior in a workplace with the inherent risk of assault defeats the willful disregard of certain injury prong of the *Birklid* deliberate intent test. *Brame*, 136 Wn. App. at 750. In *Brame*, hospital patients assaulted staff either unexpectedly or after a trigger event. *Id.* at 744. The hospital staff contended that the ineffective training in how to respond to patient assaults constituted willful disregard of certain injury. *Id.* at 748-49. The court rejected this negligence standard of willful disregard, and reasoned that by training its staff on patient assaults, the Hospital was not willfully disregarding knowledge of certain injury. *Id.* at 750. Instead, this argument supported the conclusion that the Hospital “in fact took steps to alleviate the problem.” *Id.*

In this case, Officer Johns and Sergeant Lynch argue that the decision to classify Cruze as medium custody demonstrated DOC’s willful disregard of the knowledge of certain injury. But this analysis is flawed. The classification of inmates is, in part, a remedial measure intended to protect DOC staff from dangerous inmates. The question of whether DOC should have classified Cruze as medium security is a question of whether the remedial measure taken was ineffective, and is, therefore a negligence question. Negligence is barred as a measure of “deliberate intent” by *Birklid*. None of the arguments put forth by Johns and Lynch regarding DOC’s discretionary custody score override comport with the evidentiary

standards imposed by *Birklid*, *Vallandigham* and *Brame*. The reasonableness of DOC's remedial measures cannot be at issue in a case under the IIA in Washington State.

6. The Department Did Not Willfully Disregard Actual Knowledge of Certain Injury: the Staff Was Warned About Cruze and Johns and Lynch Were Trained to Handle Assaultive Inmates in a Dangerous Work Environment

DOC also did not willfully disregard the knowledge about inmate Cruze that it had. All of the correctional officers in this section of CRCC were warned about inmate Cruze's prior infraction history, including the risk that he might compromise a member of their staff. CP 297, 365, 369, 372, 374. Officer Johns and Sergeant Lynch were both well trained for inmate violence; managing risk and inmate behavior, as well as personal defense, were central to their professional lives. CP at 93-98; 112-23; 125-236. Such training is dispositive under *Birklid*, *Vallandigham* and *Brame*. There is no evidence that DOC underplays the risk of danger to correctional staff, and certainly no evidence that it took actions such as those required to satisfy the second ("willful disregard") prong of the *Birklid* test.¹⁹ The

¹⁹ As noted above, the *Birklid* Court found that Boeing: removed labels from the containers holding the phenol-formaldehyde resin; denied access to Material Safety Data Sheets; altered workplace conditions during government safety tests to manipulate test results; deliberately disguised the potential harm of the chemical; and harassed employees who requested protective equipment or who availed themselves of medical treatment 127 Wn.2d at 857.

admissible evidence in this record establishes that DOC trained and warned its employees.

This case concerns a single incident where inmates assaulted an officer in a correctional facility. The assault was not deliberately intended by the DOC nor by CRCC. This Court should continue to support the legislative intent of the IIA and honor the four generations of judges who have ruled on similar suits by applying the deliberate intent exception narrowly, enforcing the employer immunity provisions, and acknowledging that under RCW 51.04.010 it does not have jurisdiction over personal injury actions alleged by employees against their employers.

D. Trial Court's Decision to Deny DOC IIA Immunity Imperils the Agency's Ability to Classify and House Inmates in State Correctional Facilities

It is an unassailable fact that Corrections Officers who manage inmates in the prison facilities across the state face the risk of serious injury or death at the hands of inmates every day. DOC houses tens of thousands of inmates and operates pursuant to longstanding policies that govern how inmates are classified and housed. Corrections Officers are trained extensively concerning the risks of injury or death at the hands of inmates and in how to protect themselves and others from this constant threat.²⁰ CP

²⁰ As the court noted in *Brame*, evidence of such training defeats Plaintiffs' claims: "Instead of showing willful disregard of the problem of patient-on-staff assaults,

at 125-236. In order to effectively and efficiently do the job of housing inmates securely and safely, DOC needs broad discretion when setting and executing operational policies.

As the United States Supreme Court has directed: “We have consistently reaffirmed. . .that the judiciary is ill equipped to deal with the difficult and delicate problems of prison management and prison administrators are entitled to considerable deference.” *Lewis v. Casey*, 518 U.S. 343, 387, 116 S. Ct. 2174, 2197, 135 L. Ed. 2d 606 (1996), citing and reaffirming *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989) where the Court recognized “that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.”

Washington’s Supreme Court agrees, stating that it “is not in the best interest of the courts to involve themselves in the ‘day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.’ ‘[C]ourts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.’ *In re Dyer*, 143 Wn.2d 384, 393, 20 P.3d 907 (2001) (quoting

the record shows the Hospital in fact took steps to alleviate the problem.” *Brame*, 136 Wn. App. at 750-51.

Sandin v. Conner, 515 U.S. 472, 482, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)). Rather than follow the Supreme Court's decisions and extend deference to DOC in classifying and housing inmates like Mr. Cruze, the trial court's decision *promotes* court intervention in such operational decisions.

The trial court's departure from *Birklid* and *Vallandigham* and refusal to follow the Supreme Court's deference directives in *Lewis* and *Procunier* leaves DOC, an agency of the executive branch, subject to unprecedented liability to corrections officers injured by inmates. Obviously, many inmates have histories of assaultive behavior and the trial court's ruling, if allowed to stand, would abrogate RCW 51.04.010 and allow officers injured by inmates with a history of assaultive behavior to sue DOC without regard to the immunity accorded employers by the IIA and subject to the uncertainty of having inmate classification and housing decisions second guessed by lawyers, judges and juries.

The trial court's order interferes with DOC's freedom to use the knowledge and expertise of its officials in making inmate classification and housing decisions. Under the trial court's ruling, DOC's ability to make day to day classification override decisions under its policies, is effectively taken away and left for court approval. Allowed to stand, the trial court's order would allow the narrow exception recognized in *Birklid* to swallow

the rule. Corrections facilities cannot be operated effectively, economically, safely or efficiently under the trial court's rule. Judgment of dismissal as a matter of law is necessary to restore the discretion afforded DOC by statute and case law.

VII. CONCLUSION

As discussed above, as matter of law, Officers Johns and Lynch cannot establish that the Department had actual knowledge that their September 11, 2012, injury was certain to occur. Therefore, it was impossible as a matter of law for the Department to "willfully disregard" knowledge it did not possess. *See Vallandigham*, 154 Wn.2d at 34. However, even if Officers Johns and Lynch could satisfy the first element of the *Birklid* test, which they cannot, Officers Johns and Lynch failed to prove that DOC willfully disregarded such knowledge. For each of these reasons, DOC request that this Court award judgment as a matter of law on all of Johns and Lynch's claims and dismiss this lawsuit. *Id.* at 35.

RESPECTFULLY SUBMITTED this 20th day of October, 2017.

 #46944
for

CARL P. WARRING, WSBA #27164
CATHERINE HENDRICKS, WSBA #16311
Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the Motion for Extension of Time to File Appellant's Opening 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:

Douglas Reuben Dick
doug#@spokelaw.com

Brian Scott Sheldon
bsheldon@spokelaw.com

Catherine Hendricks
cathh@atg.wa.gov

Carl Warring
carlw@atg.wa.gov

DATED this 20th day of October, 2017, at Spokane, Washington.

s/Nikki Gamon
NIKKI GAMON
Legal Assistant

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

October 20, 2017 - 3:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35140-8
Appellate Court Case Title: Johnathan O. Johns, et al v. State of Washington, Department of Corrections
Superior Court Case Number: 15-2-50995-3

The following documents have been uploaded:

- 351408_Briefs_20171020150713D3405300_1207.pdf
This File Contains:
Briefs - Appellants
The Original File Name was AppellantsBrief.pdf
- 351408_Other_20171020150713D3405300_2346.pdf
This File Contains:
Other - Statutory Appendix
The Original File Name was StatutoryAppendix.pdf

A copy of the uploaded files will be sent to:

- TorSeaEF@atg.wa.gov
- angie@spokelaw.com
- atgmitorspoef@atg.wa.gov
- bsheldon@spokelaw.com
- cathh@atg.wa.gov
- doug@spokelaw.com
- ssheldon@spokelaw.com

Comments:

Sender Name: Nikki Gamon - Email: nikkig@atg.wa.gov

Filing on Behalf of: Carl Perry Warring - Email: carlw@atg.wa.gov (Alternate Email: nikkig@atg.wa.gov)

Address:
1116 W Riverside, Suite 100
Spokane, WA, 99205
Phone: (509) 458-3503

Note: The Filing Id is 20171020150713D3405300