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

No. 35140-8

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 RESPONDENTS JONATHAN O. JOHNS,
DAVID W. LYNCH AND JENNIFER LYNCH**

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I. INTRODUCTION

This appeal and this case question whether injuries to two employees were caused by the deliberate intention of their employer. There is ample evidence in the record to show genuine issues of material fact and that summary judgment was appropriately denied. The genuine issues of material fact include whether Defendant had actual knowledge that injury to its employees was certain to occur and willfully disregarded such knowledge. Washington Department of Corrections (“DOC”) has failed to recognize that at summary judgment a plaintiff need not prove their case they need only present evidence of material questions of fact. DOC has not presented declaration evidence sufficient to rebut the genuine issues of material fact Plaintiffs raised in their response to summary judgment.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The superior court is expressly given subject matter jurisdiction under the Industrial Insurance Act in RCW 51.24.020 and appropriately denied summary judgment and determined there are genuine issues of material fact sufficient to defeat summary judgment. CP 487.
2. The superior court acted within its discretion and appropriately denied DOC’s motion to disregard or strike because it was not timely filed, the

parties had not agreed a motion to strike could be filed late, and because the DOC did not argue the motion to strike at the summary judgment hearing. CP 489-490.

3. The superior court acted within its discretion and appropriately denied DOC's motion to disregard or strike because the motion was submitted in the reply brief, was untimely, was not separately noted under CR6(d), and not argued at the summary judgment hearing.

4. The superior court acted within its discretion and appropriately concluded that the DOC policies submitted on reconsideration could, with reasonable diligence, have been discovered and produced as part of the summary judgment proceedings and was not properly authenticated. CP 490-491.

5. The superior court acted within its discretion and did not err in paragraphs 4, 5, 7, 8, and 9 of its letter opinion filed October 7, 2016. CP 485-487.

6. The superior court acted within its discretion and did not err on reconsideration when it entered findings of fact 6, 16, 17, and 18. CP 489-490. It also acted within its discretion and did not err in entering conclusions of law 1, 2, 3, 6, 7, and 8. CP at 490-491.

7. The superior court acted within its discretion and there is no error as the trial court struck “[if not certain]” from its *Letter Decision* filed October 7, 2016. CP at 490.

8. The superior court did not err in its application of *Birklid v. Boeing Co.*, 127 Wn.2d 853, (1995). As the trial court noted, it “appreciates the narrow interpretation by the Washington Supreme Court of the deliberate intention exception detailed in RCW 51.24.020.” CP 486.

9. The superior court did not err in its analysis of *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn2d.16 (2005) as it noted that in *Vallandigham*, the employer attempted to address and alleviate the risk to employees; whereas here, the employer’s actions increased the risk to employees and that the evidence taken as a whole “demonstrates a unique set of circumstances and risks that are not otherwise present for correction officers who work daily among prison inmates”. CP 486-487, CP 490.

III. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The superior court did not abuse its discretion when it denied Defendant’s untimely motion to strike, and the information contained within the declarations was based on Plaintiffs’ knowledge and Plaintiffs are competent to testify on the matters stated within their declarations.

2. The superior court acted within its discretion when it determined that the DOC policies, submitted for the first time as part of the motion for

reconsideration without an accompanying declaration or affidavit, were not properly authenticated but still considered the policies when it determined genuine issues of material fact sufficient to defeat summary judgment are in the record.

3. The superior court is granted subject matter jurisdiction in RCW 51.24.020.

4. Plaintiffs' claims under RCW 51.24.020 and the evidence provided at summary judgment create genuine issues of material fact sufficient to defeat summary judgment and Defendant is not entitled to judgment as a matter of law.

5. DOC is not entitled to immunity from going to trial because Plaintiffs have presented evidence sufficient to create genuine issues of material fact and a trial is necessary for fact finders to make evidentiary findings.

6. DOC is not entitled to immunity from going to trial because Plaintiffs have presented evidence sufficient to create genuine issues of material fact as to whether the employer had actual knowledge that injury was certain to occur and willfully disregarded that knowledge, and a trial is necessary for fact finders to make evidentiary findings to make that determination.

7. The superior court's decision does not deny the DOC's ability to classify and house inmates, and Defendant is not entitled to judgment as a matter of law.

IV. STATEMENT OF THE CASE

DOC utilizes a custody review score to make decisions on where and how to house offenders. CP at 259. The custody review score allows DOC employees to evaluate and identify risks to both staff and offenders and to keep high risk offenders at appropriate custody levels. CP 273. An offender's history and behavior affects their individual score. CP at 260.

Offenders with scores between 0 and 39 are housed in maximum custody or close custody facilities. *Id.* Offenders with scores between 40 and 55 are housed in medium custody facilities, and those with scores of 56 and above are housed in minimum custody facilities. *Id.* A custody score is based on the offender's current custody classification, infraction behavior, program behavior, detainers, and escape history. CP at 290.

Offender Shawn Cruze (Cruze) received life without parole (LWOP) as a persistent offender following a conviction for Assault In the Second Degree. CP 34-43. Cruze had a history of staff manipulation, and assaults¹ on both staff and offenders prior to assaulting Plaintiffs on September 11, 2012. CP at 60-64. Cruze has received more than 50 serious infractions since his re-admission to prison. *Id.*

On July 7, 2012, Offender Cruze had a custody score of 37 points, equating to close custody. CP at 304-305. Cruze had been placed in Administrative Segregation pending an investigation at Washington State Penitentiary into suspected/possible concerns of staff manipulation and staff

¹Appellate continually uses the term "non-injury assaults" which is disingenuous as their definition of "non-injury" hinges on whether or not the victim of the assault was required to be treated in a medical facility. See WAC 137-25-020. Individuals can be injured in an assault and still not be required to be treated in a medical facility.

compromise in close custody population at the Washington State Penitentiary. *Id.* On July 25, 2012, his custody score was somehow increased to 40 points. CP at 307-308. There is no indication on the paperwork why or how 3 additional custody points were added to his custody score. *Id.* The DOC claims Cruze's score was miscalculated and should have been calculated to be 39 at the time. CP at 311. With a score of 39, Cruze was not qualified for medium custody and should have remained in close custody. CP at 260.

On July 25, 2012, Timothy Thrasher, Chief of Investigative Operations with DOC, e-mailed numerous staff stating that he had talked with Scott Frakes, Deputy Director of DOC, and recommended Offender Cruze be transferred to Coyote Ridge Corrections Center (CRCC) into a medium custody unit. CP at 314-319. This information was passed onto supervisors at CRCC including Correctional Unit Supervisor (CUS) Pete Caples. CP at 314. CUS Caples was in charge of E-Unit where Cruze was going to be transferred. *Id.*

After seeing Cruze's extensive violent history, CUS Caples had serious concerns about Cruze being placed in a medium custody unit. CP at 299. Other staff at CRCC, including custody and classification staff, objected

to his transfer because it was clear that Cruze should not be transferred to medium custody because of his perpetual failure to successfully program, his extensive infraction history, and his extensive violent behavior. CP at 269-270. Cruze was non-compliant at higher custody levels, with higher security and less access to staff. CP at 270. Placement in medium custody would give him far more freedom of movement and much more access to staff. *Id.* CUS Caples shared his concerns with his supervisors Sean Murphy, Rick Carter, and Kevin Bowen. CP at 299-301.

Kevin Bowen worked at DOC headquarters and was over classification. CP at 295. His responsibility was to build the transfer orders for offenders. *Id.* Kevin Bowen agreed with CUS Caples that Cruze should not be placed in medium custody and that he should be sent out of state. CP at 299-301. Kevin Bowen wrote an e-mail to Timothy Thrasher sharing his objection to Cruze being placed in medium custody and suggested Cruze be assigned maximum custody until he could be sent out of state. CP at 317-319. Kevin Bowen succinctly summarized his concerns with Cruze: "He was infraacted/found guilty of fighting with another offender as recently as 03/23/12. He was also found guilty of 717² for this incident as a use of force

²Causing a threat of injury to another person by resisting orders, resisting assisted movement or physical efforts to restrain - See CP at 63.

was required due to his refusal to stop fighting. On 06/08/2010 he was infraacted and found guilty of WAC 550 (Escape attempt) and 554 (destruction of state property) when he became actively combative with staff on a special transport from SCCC to CBCC. I understand he did quite a bit of damage to the state vehicle. These infractions combined with his LWOP status and STG³ complications – make me extremely reluctant to recommend medium custody. I am giving more consideration for an IMS referral to assign Maximum custody pending [out-of-state] transfer because he has no custody appropriate viable options here.” CP at 317.

Despite Kevin Bowen’s warning and objection, Timothy Thrasher and Scott Frakes pushed through the transfer. CP at 317. Timothy Thrasher stated that he spoke with Scott Frakes and that Cruze would be sent to CRCC. *Id.* Kevin Bowen then informed CUS Caples that he was overruled by Scott Frakes. CP at 300-301. Cruze arrived at CRCC in mid August of 2012. CP at 302.

Cruze, and his cell mate David Kopp, violently attacked and assaulted Corrections Officer Jonathan Johns and Corrections Sergeant David Lynch on September 11, 2012, less than a month after being placed in medium

³Security Threat Group

custody. CP at 63-64. The violent assault occurred after Cruze and Kopp learned they were being transferred to different cells. CP at 76.

Cruze has prior history of acting out when being asked to move cells. Cruze was infraacted and placed in administrative segregation when he destroyed property after being given an order to move from B-Unit to A-Unit. CP at 321-322.

Cruze also has a documented history of violence. 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 programing they decided to place him in restraints prior to escorting him to the meeting. CP at 324-325. When the staff attempted to put him in restraints he resisted and was infraacted. *Id.* Cruze's violent history is also documented in the excessive number of serious infractions he has accrued during incarceration. CP at 60-64.

Cruze has a documented history of compromising staff. CP at 313-319. Because of his history of compromising and assaulting staff, Cruze had made himself ineligible for confinement at any of the maximum, IMU, and close custody facilities in Washington. *Id.*

Cruze made numerous and repeated threats to harm staff. Cruze's

infraction record shows that he was infractioned for making threats at least 10 times. CP at 60-64. In April of 2012, Timothy Thrasher was aware that Cruze had threatened to strangle corrections officers “just like Biendel at Monroe⁴”. CP at 327-329. Deputy Director Scott Frakes documented that in May of 2012, Cruze was making threats to harm staff when he got the opportunity. CP at 331. On September 7, 2012, Psych Associate Trisha Whitman-Winchester noted Cruze’s intense emotions were dangerous coupled with possible perception that DOC staff, at even entry levels, are conspiring to keep him from his mother. CP at 333. Cruze had been making threats to CRCC staff just prior to violently assaulting Officer Johns and Sergeant Lynch. CP at 261.

Defendant sought summary judgment arguing the September 2012 attack on Plaintiffs was random and spontaneous. CP 16-28. Summary judgment was denied because the superior court determined “plaintiffs have provided facts, with reasonable inferences to which they are entitled, that create genuine issues of material fact sufficient to defeat the Defendant’s Motion for Summary Judgment.” CP at 487.

⁴Jayne Biendel was a Corrections Officer who was strangled to death on January 29, 2011 by an inmate in the prison chapel at Monroe Correctional Complex.

Defendant filed a motion for reconsideration. CP at 388. The superior court also denied the motion for reconsideration and concluded “the facts contained [in the Order] (and the facts referenced in the *Letter Decision* dated October 6, 2016, except as modified herein), with reasonable inferences to which they are entitled, create genuine issues of material fact sufficient to defeat *Defendants’ Motion for Summary Judgment*. The Court’s denial of the *Defendants’ Motion for Summary Judgment* was proper.” CP at 491. The superior court also stated, “The Defendants have not persuaded the Court that the inferences it made in denying the Defendants’ Motion for Summary Judgment were unreasonable. CP at 491, footnote 2.

Defendant filed a motion for discretionary review which was granted. CP at 484. This appeal followed.

V. ARGUMENT

A. Standard of Review For Summary Judgment

A summary judgment ruling is reviewed de novo. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40, 46 (2014). When appellate courts review a summary judgment order, it must consider all evidence in favor of the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080, 1085 (2015). Affidavits and other evidentiary material filed in support of and

in opposition to a summary judgment must be considered most favorably to the nonmoving party and the summary judgment must be denied if a question of fact that is material to the issues remains unresolved. *Ryan v. Zornes*, 34 Wn. App. 63, 64, 658 P.2d 1281, 1281–82 (1983). Affidavits and other testimonial documents of the moving party should be scrutinized with care and all reasonable inferences from the evidence be resolved against the moving party. *Id.*

Summary judgment will be denied if the reviewing court is required to consider an issue of credibility. *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 688, 287 P.3d 694, 696 (2012), as amended on denial of reconsideration (Jan. 8, 2013). Where evidence and reasonable inferences therefrom supporting motion for summary judgment, considered in favor of the nonmoving party, present a genuine issue of material fact, the trial and appellate court's function is not to then resolve such issues, but to permit it to go to trial. *Reed v. Davis*, 65 Wn.2d 700, 705, 399 P.2d 338, 342 (1965).

Courts are reluctant to grant summary judgment when material facts are particularly within the knowledge of the moving party; in such cases, the matter should proceed to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving

party while testifying. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661–62, 240 P.3d 162, 169 (2010).

Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper. *Chelan Cty. Deputy Sheriffs' Ass'n v. Chelan Cty.*, 109 Wn.2d 282, 295, 745 P.2d 1, 8 (1987). The reasonableness of a party's acts is a question of fact, and if it is a material issue in resolving litigation, the granting of a summary judgment is improper. *Morris v. McNicol*, 83 Wn.2d 491, 495, 519 P.2d 7, 10 (1974).

There are genuine issues of material fact which preclude summary judgment. Reasonable minds could differ on the facts and inferences described in the pleadings, deposition, affidavits, and other materials pertinent to deciding the motion for summary judgment. The relevant issue before the court is whether there is a genuine issue as to any material fact and not whether Plaintiffs have proved their case.

B. Defendant's Motion to Strike was Untimely

The superior court's decision not to exclude portions of Plaintiffs' declarations is reviewed for abuse of discretion. A request to strike evidence at summary judgment is reviewed for abuse of discretion. *Keck v. Collins*,

184 Wn.2d 358, 368, 357 P.3d 1080, 1085 (2015). The supreme court specifically considered *Folsom v. Burger King*, 135 Wn.2d 658, (1998), which Defendant cites to support de novo review, when it stated:

“Relying on a statement in *Folsom* that says the de novo standard applies to “ ‘all trial court rulings made in conjunction with a summary judgment motion,’ ” the Court of Appeals reviewed de novo the trial court’s ruling striking the third affidavit as untimely. *Keck*, 181 Wash.App. at 79, 325 P.3d 306 (quoting *Folsom*, 135 Wash.2d at 663, 958 P.2d 301). The quoted phrase from *Folsom*, however, referred to the trial court’s evidentiary rulings on admissibility. See 135 Wash.2d at 662–63, 958 P.2d 301. It did not address rulings on timeliness under our civil rules.” *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080, 1085 (2015).

The supreme court determined that rather than de novo review, a decision to exclude evidence is reviewed for an abuse of discretion. *Id.* at 358. Not all matters involved at summary judgment are reviewed de novo. See *Barkley v. GreenPoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 358 P.3d 1204 (2015), review denied sub nom. *Barkley v. JPMorgan Chase Bank*, 184 Wn.2d 1036, 379 P.3d 953 (2016) (court of appeals reviews a trial court’s denial of a motion for continuance to conduct additional discovery, in context of summary judgment, for abuse of discretion.) Here, the superior court made its decision not to exclude evidence based on

timeliness under the civil rules and therefore the appropriate standard for review is abuse of discretion.

In this case, the superior court did not abuse its discretion. Defendant's motion to strike was never properly before the court because Defendant made the motion in its reply brief four days before the hearing date which does not comply with CR 6. CP 489. Defendant also did not note the motion to be heard or raise the issue during oral argument. VRP 1-41. The superior court was therefore not required to address it and did not address it when issuing its ruling. CP at 485-487.

DOC was not denied the opportunity of its motion as it raised the issue in its motion for reconsideration. CP at 389. As part of the motion for reconsideration, the superior court specifically denied the motion to strike as being untimely. CP at 489. While the parties had agreed to modify the filing time frame to accommodate Plaintiffs' counsel's circumstances, there was no agreement, as noted by the court, that a motion to strike was contemplated by the parties at the time the agreement was made to modify the filing time frame. CP at 489. The superior court then properly determined that "based on the record, the Plaintiffs did not have proper notice and opportunity to reply to the Motion to Strike." CP 489. There is no abuse of discretion

because the facts in the record do not show a waiver by Plaintiffs or their counsel to the timeliness of bringing a motion to strike.

The superior court also did not abuse its discretion by allowing the declarations to remain in the record. Plaintiffs made their declarations based on their own personal knowledge and they are competent to testify on the matters stated in their declarations. Plaintiffs made their declarations and statements based on having worked for the DOC for numerous years and that experience provides them with personal knowledge. Plaintiffs' statements are not conclusory. They are logical because when the DOC knows an offender has acted out at a higher custody level and then provides additional access to employees at lower custody, the risk increases and certainty is the logical result.

Plaintiffs' declarations are also admissible under Evidence Rule 704. Plaintiffs' statements are not objectionable just because it embraces an ultimate issue to be decided by the trier of fact. ER 704. It is important to note that Defendant did not produce a single DOC employee's declaration to dispute these statements. Defendant only attacks Plaintiffs' statements, but has produced no evidence or declaration that contradicts it. This may be in

part because the deposition testimony of Mr. Caples supports the Plaintiffs' statements. CP at 285-302.

“The decision to exclude evidence that would affect a party's ability to present its case amounts to a severe sanction.” *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080, 1085 (2015). The superior court acted within its discretion, denied the severe sanction of striking evidence, and ruled that Defendant's motion to strike was untimely. It was appropriate for the court to consider the declarations. There is also substantial evidence in the record from uncontested DOC documents that support Plaintiffs' position which the court relied on to find that material issues of fact exist.

C. RCW 51.24.020 Provides a Private Right of Action

Defendants argue on appeal that employers are entirely immune from suit for work related injuries and that no Washington courts should have jurisdiction over personal injury claims. *Brief of Appellant*, p. 24-28. While the Industrial Insurance Act (“IIA”) did provide a grand compromise, it also expressly provided a private right of action that grants Washington courts jurisdiction over personal injury claims to determine whether the injury to a worker was from the deliberate intention of his or her employer. RCW 51.24.020. Employers who deliberately injure their employees do not enjoy

immunity from suits. *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278, 282 (1995).

Through RCW 51.24.020, Plaintiffs and the trial court have jurisdiction to consider whether or not Plaintiffs' claims meet the statute's requirements as well as the relevant case law. The superior court had jurisdiction when it determined that the evidence in the record, with reasonable inferences to which Plaintiffs are entitled, creates genuine issues of material fact sufficient to defeat Defendant's Summary Judgment Motion. CP 491.

D. The Facts of This Case Are Comparable to *Birkliid* and Create Genuine Issues of Material Fact

In *Birkliid*⁵, a general supervisor wrote to management and informed them that employees got sick from the chemical odors emitted during the pre-production testing of a new product. 127 Wn.2d at 856. Here, CUS Caples called headquarters to object to the transfer of Cruze to medium custody because of his violent history. CP at 299-301. Kevin Bowen also objected to Cruze's transfer to medium custody because of his violent history, and there was no custody appropriate viable option within Washington. CP at 317-319. In *Birkliid*, the supervisor also said that he anticipated the problems

⁵*Birkliid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995).

would increase as production increased. 127 Wn.2d at 856. Cruze's behavior was certain because if an offender acts out at a higher custody facility, putting him in a lower custody facility makes it easier for the offender to continue to act out and harm staff. CP at 260-261. When CUS Caples called headquarters and spoke with Kevin Bowen, Mr. Bowen agreed with CUS Caples and indicated that Cruze should be transferred out of state. CP at 300.

In *Birklid*, management denied the request for improved ventilation and proceeded with full production without any corrective action. 127 Wn.2d at 856. Here, Timothy Thrasher denied the request and Scott Frakes supported the transfer to medium custody. CP 317-319; CP at 276. The employees were told "you guy's have to deal with that." CP at 301. While in *Birklid*, employees became ill as predicted, here Plaintiffs Johns and Lynch were violently assaulted, as predicted. 127 Wn.2d at 857.

In *Birklid*, the court viewed the evidence in the light most favorable to the non-moving party and determined Boeing knew in advance its workers would become ill from the fumes, yet put the resin into production. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 863, footnote 7, 904 P.2d 278, 284 (1995). Plaintiffs have alleged facts supporting an inference that DOC supervisors

knew that the employees were going to be injured by putting Cruze into medium custody, yet put Cruze into medium custody. Those employees were then injured. These factual similarities, with reasonable inferences to which Plaintiffs are entitled, create genuine issues of material fact sufficient to defeat summary judgment. The superior court acted appropriately and should be upheld.

E. There are Genuine Issues of Material Fact That Precluded Summary Judgment

The phrase “deliberate intention” in RCW 51.24.020 is interpreted by the courts to mean the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865–66, 904 P.2d 278, 285–86 (1995). At summary judgment, Plaintiffs need not *prove* deliberate intention and are required only to raise genuine issues of material fact. CR 56(c). The Plaintiffs raised genuine issues of material fact here as the facts in the record with reasonable inferences in Plaintiffs favor create genuine issues of material fact sufficient to defeat Defendant’s Motion for Summary Judgment. CP at 491. Defendant also did not persuade the superior court that the inferences made in denying summary judgment were unreasonable. CP at 491, footnote 2. A review of

the facts leading up to the assault will also show the superior court's ruling should be upheld.

i. Whether the Department of Corrections Had Actual Knowledge that Injury is Certain to Occur is a Genuine Issue of Material Fact that Precludes Summary Judgment.

A "central distinguishing fact" of the *Birkliid* case was that Boeing knew in advance its workers would become ill from the phenol-formaldehyde fumes, yet put the new resin into production and observed its workers becoming ill from the exposure. *Baker v. Schatz*, 80 Wn. App. 775, 781, 912 P.2d 501, 505 (1996). Here, the DOC knew in advance its workers would become injured by Cruze, yet put Cruze into a less restrictive medium custody unit and observed its workers being assaulted because of the lesser restrictions in a medium custody unit. Under such circumstances, the injury is not accidental and the DOC knew its employees would be injured.

Cruze's record shows that his violent actions have been a regular occurrence during his confinement at every facility he was housed. CP at 60-64, CP at 346. The DOC developed and uses an infraction system to punish and monitor an inmate's actions. *See* Washington Administrative Code Title 137 Chapter 25. While being confined, Cruze has accumulated more than 50 serious infractions. CP 60-64. The DOC was aware of Cruze's violent

history because it maintains all of his records. CP at 60-64. There were at least two staff assaults that occurred prior to the one that injured Plaintiffs Johns and Lynch. *Id.* These instances are part of the larger pattern of Cruze's behavior.

Cruze's record shows that he repeatedly overreacted to negative news. In one instance, he destroyed property when he was told to move from one cell to another. CP at 321-322. DOC employees felt it was necessary to restrain Cruze prior to giving him bad news. CP at 324-325. In another instance from June 2010, he attempted to escape and destroyed property while being transported from one facility to another. CP at 60-64; CP at 335-338.

It is also documented that he acted out violently toward others when given the opportunity and continually threatened staff. CP at 60-64. Cruze has at least 10 documented threats toward others. CP at 60-64. In addition to the documented threats, DOC headquarters staff ignored serious threats made by Cruze that they were specifically aware of. On April 5, 2012, Cruze was reported to have said that he was going to strangle corrections officers "just like Biendel at Monroe". CP at 327-329. Deputy Director Scott Frakes documented that in May of 2012, Cruze was making threats to harm staff at

CRCC when he got the opportunity. CP at 331. Scott Frakes stated the DOC takes these types of comments seriously. *Id.*

Neither the April 5, 2012 threat nor the May, 2012 threat resulted in an infraction. See CP at 60-64. Nor were they clearly documented anywhere in Cruze's record with DOC. However, these threats were specifically made aware to the two individuals who provided the authorization to transfer Cruze to a medium custody unit, Thrasher and Frakes. Neither of the threats were discussed with CRCC employees when Cruze was transferred to a medium security facility.

Thrasher and Frakes knew from DOC records that Cruze had injured DOC employees in the past. Thrasher and Frakes knew that Cruze had made threats in the past and knew he was continuing to make threats to harm staff, when given the opportunity, immediately prior to his transfer to medium custody. Thrasher and Frakes willfully disregarded that knowledge as well as those specific threats and pushed Cruze into medium custody.

The fact that DOC headquarters was going out of its way to tell CRCC that Cruze was coming is evidence of its knowledge that staff were going to be injured. CP at 314-315. Cruze was the only inmate CUS Caples was ever specifically notified was going to come to his unit. CP at 297-298.

Timothy Thrasher knew that employees should have been warned about Cruze and knew that all staff would not see the warnings. CP at 314. (“I am also going to do a chrono entry documenting his behavior, however, **I know all staff will not see it.**” (Emphasis added).

The incident report produced following the assault on Plaintiffs shows that such knowledge was disregarded. CP at 345-353. The report states, “there was a lack of communication between unit staff. The classification staff were aware of the issues surrounding Offender Cruze to include behavior history, reasons for moving, and precautions. This information was not passed down to unit custody staff.” CP at 350. The report also contained the recommendations to “enhance efforts at information sharing for all unit staff when “high profile”/”high notoriety” offenders are assigned to the housing unit.” CP at 352. This report was signed by the DOC Assistant Secretary. CP at 353.

The DOC knew that its employees were going to be harmed by a dangerous, violent, and high notoriety criminal and instead of using precautions and safety mechanisms of higher custody to protect its employees, or moving him out of state, it intentionally moved Cruze to medium custody. Just as chemical exposure to employees was ongoing and

certain to continue in *Birklid*, there is sufficient evidence for a trier of fact to determine that Cruze's threats of violence and acts of violence toward DOC employees was ongoing and certain to continue. The warning that was issued regarding Cruze is evidence that the DOC had actual knowledge that Cruze was going to continue to injure employees.

Whether the warnings were conveyed or not, an employer would not magically escape liability and remedy their knowledge by attempting to warn their employees that they are going to be harmed. There is no reference in *Birklid* that all Boeing had to do was notify its employees that the dangerous chemicals were going to harm them. Boeing needed to have taken the added precautions of additional ventilation to protect its employees. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 856, 904 P.2d 278, 281 (1995). Boeing did not and the court found that there was sufficient evidence to proceed to a trial. Here, the DOC removed the protections by overriding the custody score and not following the policies designed to protect its employees. This is sufficient evidence to create genuine issues of material fact and proceed to a trial.

Cruze's behavior and threats have not changed over time. Evidence provided by the DOC after the assault on Plaintiffs show Cruze continued to

make threats. Cruze threatened, “Any time you DOC [*] give me an opportunity in the future, which you will, I’m gonna hurt you the right way. I don’t care what facility I’m in or what staff it is, I’m gonna do it right next time.” CP at 341. There was then a recommendation to update OMNI to reflect Cruze’s future intent to harm any and all staff. CP at 343. A similar update was not completed based on prior threats to harm staff that members of DOC headquarters were aware of. CP at 60-64.

Defendant DOC had actual knowledge of serious threats against its employees and willfully disregarded that knowledge by placing Cruze in a medium security unit. DOC knowingly ignored serious threats of violence towards its employees and allowed violence toward staff to continue with certainty. Considering these facts in the light most favorable to Plaintiffs as the non-moving party, DOC management, through its agents Scott Frakes and Timothy Thrasher and others who prepared the reports documenting Cruze’s behavior, knew that injury was certain to occur and willfully disregarded that knowledge when it placed Cruze into medium custody.

ii. This Case Is Distinguishable From *Vallandigham* as Determined by the Superior Court

Cruze’s actions were predictable, expected and therefore certain. Based on his documented history, any time he received bad news he was

going to act out violently. When he was told to move from one cell to another he acted out violently and destroyed property. CP at 321-322. He tried to escape and destroyed state property to obstruct his transportation to another facility. CP at 335-338. When he was going to be told that he was being terminated from a program, employees restrained him knowing that he would act out violently. CP at 324-325. It was certain that he would assault Plaintiffs when he was told to move cells because the medium custody unit did not have the protections necessary to deal with a violent LWOP individual with a maximum custody review score.

Unlike *Vallandigham*,⁶ where the school district was attempting a series of increasingly restrictive strategies for bringing negative behavior under control, here the DOC became increasingly *less restrictive*. Instead of making it harder for Cruze to harm employees, it made it easier. Instead of restricting Cruze more, after his inappropriate behavior at the Washington State Penitentiary (WSP) in July, DOC rewarded Cruze by increasing his custody score and putting him in medium custody. CP at 304-308.

There is no evidence that the DOC was trying to get Cruze's behavior under control. There was no remedial action being taken with Cruze as he

⁶*Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005).

was not involved in programming because of his history of infractions. The evidence shown by DOC statements is that Cruze was put in a medium custody unit as there was nowhere else in the state he could go because his violent actions had precluded him from every maximum security unit in the state, despite his custody score and against the objections of multiple employees. CP at 317-319.

In *Vallandigham*, future injury was unpredictable in part because of the school's efforts to control the student's behavior and prevent injury. 154 Wn.2d at 33-34. This was not the case here as the State removed the protections and barriers that would control Cruze's behavior and prevent injury. This is similar to *Baker v. Schatz*, where the employer failed to take remedial measures to protect its employees. 80 Wn. App. at 784. In *Baker*, General Plastics' refusal to alter the working environment was sufficient to create a genuine issue of material fact as to whether General Plastics had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Id.* The court found that "the employees are entitled to have a jury determine whether General Plastics deliberately intended to injure its employees." 80 Wn. App. at 784.

This case does not deal with a young student, nor does it deal with a child with special needs. This case deals with a LWOP offender with no chance of ever being released, who has nothing to lose by injuring DOC employees. The only improvement Cruze may have become eligible for was lower custody placement *if he met the standards established by the DOC*, which he did not. LWOP offenders are predictable and the DOC has established custody scores and custody placement to deal with that predictability. The DOC knew with certainty what Cruze's behavior would be like and knew that his behavior should be monitored in a maximum security facility.

Every time Cruze was kicked out of one facility, a new set of employees were forced to deal with him and the violence continued. Cruze's behavior was certain because if an offender acts out at a higher custody facility, putting him in a lower custody facility makes it easier for the offender to continue to act out and harm staff. CP at 260-261. This equates to certainty, or at least an inference, to which Plaintiffs are entitled to create genuine issues of material fact. A fact finder must determine whether Cruze's history and DOC's knowledge establish certainty based on the totality of the circumstances.

It is also important to note that Cruze was telling DOC employees that he was going to harm employees when given the chance. CP 327-331. He told the DOC he was going to harm staff and then he did harm staff. That shows certainty. DOC knew about the threats and still moved Cruze to medium custody and Cruze followed through on his threats injuring the Plaintiffs. These facts sufficiently support an inference of certainty to defeat summary judgment.

One assault by a co-worker is sufficient to remove the employer's protections. *See Perry v. Beverage*, 121 Wash. 652, 209 P. 1102, 214 P. 146 (1922); *Mason v. Kenyon Zero Storage*, 71 Wash.App. 5, 856 P.2d 410 (1993). One assault by the ward of the 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. The deliberate intention exception applies regardless of whether the employer had actual knowledge that the employee's specific injuries themselves were certain to occur. *Michelbrink v. State*, 191 Wn. App. 414, 428, 363 P.3d 6, 13 (2015).

The DOC knowingly allowed a violent offender with no chance of ever being released from prison, who had consistently acted out, and who effectively eliminated his ability to be housed in every maximum security facility in the entire state, to be placed into a lower security facility. Continued injury was certain to occur because of the offender's history, his confinement to life without parole, and especially because the offender had not met the standards necessary to be in a medium custody facility.

The superior court appropriately determined that these facts, as well as others in the record on summary judgment, could be construed to show "that the employer took action that increased the risk to staff." CP at 486-487. All parties agree that there is a specific level of risk that is always present when working in a correctional facility. As stated by Defendant, "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." *Appellant's Brief*, p. 43. By ignoring the system put in place to protect employees, the DOC increased the risk to a certainty. Defendant knew that Cruze's violent behavior was certain to continue and knew that employees were certain to continue working in the area where the protections were removed.

Increasing the risk makes the risk become a certainty. When taken in the light most favorable to the non-moving party, the increase in the risk creates genuine issues of material fact as to whether the injury became certain. Therefore, the court appropriately denied summary judgment.

iii. Whether DOC Willfully Disregarded Its Knowledge is a Genuine Issue of Fact

The inappropriateness of a maximum security offender being placed in a medium custody unit by manipulating an offender's custody score was not lost on DOC supervisors. On July 26, 2012, Kevin Bowen wrote to Timothy Thrasher that, because of Cruze's infractions combined with his life without parole status and security threat group complications, he should be sent out of state because there were no custody appropriate viable options. CP at 317. Kevin Bowen's regular responsibility was to look at all of an offender's data and build the transfer order for where the offender should be placed. CP at 295. Bowen recognized that there was no appropriate viable options left for Cruze and made his recommendation that Cruze should not be placed in medium custody and that he should be sent out of state. CP at 317.

DOC supervisors at CRCC also knew that Cruze should not be housed in a medium custody unit. Plaintiffs' direct supervisor CUS Pete

Caples learned via e-mail that Cruze was going to be transferred to his unit. CP at 314-315. Cruze was the only inmate CUS Caples was ever specifically notified was going to come to his unit. CP at 297-298. CUS Caples was concerned about Cruze's violence and shared those concerns with his supervisors. CP at 299. Initially, Kevin Bowen told CUS Caples that Cruze would be sent out of state and that he agreed with CUS Caples' concerns. CP at 300. CUS Caples talked with Kevin Bowen after Cruze was still being pushed into his unit and was told he had been overruled by Deputy Director Scott Frakes. CP at 300-301. CUS Caples was told "I'm sorry you guy's have to deal with that." *Id.*

In *Birklid*, previous employee complaints gave Boeing certain knowledge that employees would suffer injury with continued exposure to the chemicals. *Birklid* at 863, 904 P.2d 278. Here, the employee complaints are the same and were raised to headquarters that Cruze should not be placed in medium custody because of his violent behavior.

Timothy Thrasher and Scott Frakes ignored Kevin Bowen's warning and pushed through Cruze's placement to medium custody. CP at 317. Thrasher and Frakes knew there was no other maximum security facility that Cruze could be housed in because he had been kicked out of every maximum

security facility in the State of Washington. Timothy Thrasher and Scott Frakes were also aware of specific threats to DOC officers that were not openly recorded as infraction history. CP at 327-331. Despite this knowledge, the employer willfully disregarded all of the information and denied the requests to keep him in a higher security facility or move him out of state. They intentionally determined to house him in medium custody anyway.

Offenders should have displayed a tendency toward non-violent crimes and behaviors to be able to be housed in a medium custody unit. CP at 260. Cruze was non-compliant at higher custody levels, with higher security and less access to staff. CP at 270. In a medium custody unit he would, and did, have access to far more freedom of movement than he had in the last several years and much more access to staff. *Id.*

Custody review scores, DOC policies and standards are established to protect employees in the same way added ventilation would protect employees from chemicals. Custody in maximum security was needed to protect DOC employees from the continuing violence of a LWOP violent offender. The DOC knew this, heard objections from employees and supervisors, and chose to deliberately disregard custody protocol and transfer

Cruze to a medium custody unit which caused injury to employees.

It is also of considerable note that Scott Frakes, Deputy Director of Prisons, openly admitted to David Lynch by e-mail that he was responsible for the transfer of Cruze to medium custody. CP at 276. Scott Frakes made this admission after Mr. Lynch specifically stated “offenders like Cruze need to be managed at the level they are classified at and NOT overridden.” *Id.* (emphasis in original). Frakes’ statement “I own the decision on Cruze” is sufficient to show knowledge and willful disregard of that knowledge. CP at 276. This evidence, and the inferences drawn therefrom, create a genuine issue of material fact whether Defendant willfully disregarded the knowledge it had.

F. The Superior Court’s Decision Does Not Deny Defendant’s Ability to Classify and House Inmates

DOC’s argument is that it should never be second guessed no matter the consequence of its actions or decisions upon its employees. No employer should be provided such deference when they fail to follow basic policies and procedures that are designed to protect their employees. The DOC, and any other employer, should be held responsible to follow their own rules and procedures.

In its brief, Appellant argues that it is entitled to deference to make day to day classification override decisions; however, in its response to discovery it stated “[i]n the strictest sense, this was not considered as an override.” CP at 311, footnote 1. Defendant also admits that Cruze’s score was miscalculated. *Id.* Additional evidence bears out that more than just one point was “miscalculated” because on July 9, 2012, Offender Cruze was currently assigned Close Custody with a custody review score of 37 points, and then on July 25, 2012 his custody review score was 40 points. CP at 304-307. When Cruze’s inmate custody scores were discussed with CUS Pete Caples, he could not provide a basis for an inmate’s score to increase 3 points within that time frame other than through an override. CP 290-294.

Unlike *Brame*⁷ and *Vallandigham* where the employer took steps to alleviate a problem, the DOC exacerbated the problem by removing the protections and ignoring longstanding policies that govern how inmates are classified and housed. DOC has and will continue to maintain broad discretion to house inmates so long as it follows and executes the operational policies it has in place. When it disregards its own policies and employees are injured, the State Legislature has provided a remedy for those injured

⁷*Brame v. W. State Hosp.*, 136 Wn. App. 740, 150 P.3d 637 (2007).

employees in RCW 51.24.020.

Courts will look at each case individually and if the facts leading up to an employee's injury are sufficient to satisfy the requirements of RCW 51.24.020 then defendants will be required to defend their actions. This keeps employers in Washington responsible for their actions and provides the incentive for employers to not be derelict in the protection of their employees. This is consistent with the supreme court's determination that employers who deliberately injure their employees do not enjoy immunity from suits, and that employers who engage in egregious conduct should not burden and compromise the industrial insurance risk pool. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278, 282 (1995).

Lawsuits hold employers responsible for their actions and act as a deterrent to keep them from making decisions that will cause harm to their employees. The State Legislature enacted RCW 51.24.020 to consider situations such as the one in this case. Employees in the State of Washington are entitled to an opportunity to be heard and to present evidence that their employer caused their injury. Employers are likewise entitled to present their defense. The appropriate place for a determination to be made under RCW 51.24.020 is at a trial because of the genuine issues of material fact.

VI. CONCLUSION

As discussed above, Plaintiffs have established facts with reasonable inferences to which they are entitled to create genuine issues of material fact sufficient to defeat summary judgment. Defendants have not presented declaration evidence sufficient to rebut the genuine issues of material fact Plaintiffs raised in their response to summary judgment. For these reasons the superior court did not commit error and should be upheld.

Respectfully submitted this 20th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed *Brief of Respondents Jonathan O. Johns, David W. Lynch and Jennifer Lynch* 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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