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Washington State Supreme Court

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Supreme Court Cause No. 90406-5
Court of Appeals Cause No. 44035-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL MICHELBRINK, JR.,

Respondent,

vs.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

RESPONDENT'S RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

As it did before the trial judge and the Court of Appeals, WSP refuses to admit that the Taser exposure does result in an injury. The Taser, according to WSP, causes, “temporary pain”, and a “minor wound”. This position must be contrasted with what actually occurs when a person is shot with a Taser.

The Taser shoots out probes that contain barbs which penetrate the skin. These are aluminum darts tipped with stainless steel barbs. The designer of WSP’s Taser program, Sgt. Mark Tegard, spoke of “signature marks”, which is where the electricity enters the body. He prefers “signature marks” to “scarring”. CP 28. At every step, WSP uses euphemisms to describe what a Taser shot actually does to the human body. It is an “exposure”, leaving “signature marks”.

As discussed in the Court of Appeals Opinion, Trooper Michelbrink was required to be shot with the Taser if he wanted to carry it. Later, WSP changed its policy and being shot with the Taser became optional.

In his deposition, Trooper Michelbrink testified that he felt immediate pain, laying on the ground while the darts’ “probes were pulled out of his back”. D 22-23.

Later (and WSP does not dispute this medical finding) Trooper Michelbrink was diagnosed with a fracture at T5 and a cervical disk protrusion at C5. It is undisputed that these injuries were proximately caused by powerful muscle contractions as a result of being shot with a Taser. CP 32.

WSP continues to include in its materials the benefits Trooper Michelbrink is paid, as if that somehow excuses its conduct in causing his permanent disability. Petition for Review, pg. 6, fn. 6. Trooper Michelbrink is now a background investigator and no longer allowed to perform law enforcement functions. He was forced to turn in his service revolver and automobile. CP 35.

PROCEDURE

Trooper Michelbrink sued WSP alleging that it intended to injure him when he was required to be shot with a Taser. WSP moved for summary judgment. The trial court denied the Motion, finding that there were genuine issues of material fact that must be resolved by a jury. WSP appealed. The Court of Appeals, after discussing the burden placed on the party moving for summary judgment, affirmed the trial court. WSP now seeks discretionary review.

ARGUMENT

1. WSP INTENDED TO INJURE TROOPER MICHELBRINK.

The training program designed by Sgt. Tegard had at its core the requirement that each participant be shot with the Taser. As discussed above, this meant that two stainless steel barbs were shot into Trooper Michelbrink's back, causing a wound, pain, shock, trouble breathing, and involuntary muscle contractions. CP 25.

This wound or "injury" fits within the definition of "injury" found in RCW 51.08.100. WSP prefers to liken it to something minor, but it is only minor to those not receiving the shot.

Whether WSP was aware that certain injury would occur when it required Trooper Michelbrink to be shot with the Taser is a jury question. After Trooper Michelbrink was injured, WSP reversed itself and being shot with the Taser as part of the training was no longer mandatory.

2. THERE IS NO CONFLICT BETWEEN MICHELBRINK VS. WSP AND THE CASES CITED BY WSP.

In an effort to obtain discretionary review, WSP attempts to find conflict between the instant case and *Vallandigham vs. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005), *Folsom vs. Burger*

King, 135 Wn.2d 658, 958 P.2d 301 (1998), and *Henson vs. Crisp*, 88 Wn.App. 957, 946 P.2d 1252 (1997), where no conflict exists.

In each of those cases, the court found that there is no evidence that injury was certain to occur. In contrast, here the trial court and the Court of Appeals have found that injury was certain to occur when Trooper Michelbrink was shot with the Taser and that there remain genuine issues of material fact whether WSP intended to injure him.

3. THIS CASE WILL NOT UNDERMINE LAW ENFORCEMENT TRAINING.

WSP argues that if this case is not reversed, law enforcement training would be undermined. Not so. If the injury inflicted by the Taser results in damages which exceed the benefits under Title 51, there may indeed be claims made against the employer. According to WSP's own statistics, few shootings result in injuries which would not be sufficiently compensated under Title 51. Petition for Review, pgs. 6, 10. In those rare instances where the shootings cause secondary injuries, such as here, where the victim is permanently injured, then the employer should be held liable.

From WSP's standpoint, it may have been a cost of doing business. It has decided that the risk of permanent injury to its employees was outweighed by the benefits of the training. That is to say,

shooting its employees with the Taser. The benefit under WSP's analysis is all with the employer. The risk and resulting permanent injury is all with the employee.

4. THE COURT OF APPEALS CORRECTLY APPLIED *BIRKLID VS. BOEING COMPANY*, 127 Wn.2d 853, 904 P.2d 278 (1995).

In its opinion, the Court of Appeals correctly applied the holding of *Birkliid vs. Boeing Co.* It discussed the burden on the party moving for summary judgment, repeating the maxim that the burden of showing that there was no genuine issue of material fact for trial falls upon the moving party. The Court of Appeals then stated that taken in the light most favorable to Michelbrink:

“ . . . [T]he record shows that (1) WSP required Taser training for troopers opting to use Tasers on the job; (2) WSP knew at a minimum that the Taser barbs would wound and deliver an electric shock on contact with the trooper's back; and (3) despite this knowledge of certain injury, WSP shot troopers with Tasers during training, which it required of all troopers using Tasers in the course of performing their duties. We hold, therefore, that Michelbrink has established a material issue of fact about whether WSP deliberately intended to injure him, despite its knowledge that the Taser barbs were certain to cause injury, to defeat summary judgment.”

323 P.3d 620, at p. 629.

The Court of Appeals got it exactly right. There can be no justification for WSP Tasing its own people. Anything to be learned about the Taser and its effect on the human body could be amply demonstrated

by video tapes of other persons being Tased. There was no more a need to Taser its own people than to cause its own people to be hit with a baton or shot with a firearm.

CONCLUSION

This Court should deny the Petition for Review and remand the case to the Grays Harbor County Superior Court for trial.

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Respectfully submitted,

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