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SUPREME COURT
OF THE STATE OF WASHINGTON

No. 96340-1

Court of Appeals No. 351408-III

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

Petitioners,

v.

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

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioners are Johnathan Johns, David Lynch and Jennifer Lynch. They are the plaintiffs in an action initiated against defendants State of Washington Department of Corrections (DOC) and Coyote Ridge Corrections Center (CRCC).

II. COURT OF APPEALS DECISION FOR REVIEW

Plaintiff-Petitioners seek review of the July 10, 2018 unpublished opinion[1], of the Court of Appeals, Division Three, reversing the trial court's denial of DOC's summary judgment motion. Appendix, pp. 1-8.

III. ISSUES PRESENTED FOR REVIEW

(1) Does the Court of Appeals ruling impair an employee's statutory right to file a lawsuit under the Industrial Insurance Act and allow employers to avoid liability for injuries to employees if a human actor's exercise of volitional control is involved?

(2) Did the Court of Appeals commit error by expanding the rulings in *Vallandigham* to find that the certainty prong of the *Birklid* test cannot be met where a human actor exercises volitional control over his

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[1]Defendants filed a Motion to Publish on July 27, 2018. The motion was denied on August 21, 2018.

actions and human behavior simply does not follow immutable laws of chemistry such as the formaldehyde resin at issue in *Birlkid?*

(3) Is it appropriate to reverse a denial of summary judgment and conclude that under the Industrial Insurance Act (IIA) an employer cannot be held responsible for the injuries suffered by employees because a human actor has the ability to exercise volitional control when the DOC knew about direct and specific threats to harm employees made by a life without parole inmate with a propensity for violence, who previously assaulted employees, who was disqualified from all DOC facilities except CRCC, whose transfer was objected to by employees, and who did not meet the employers' own threat assessment standards for placement at CRCC? And did the Court of Appeals commit error by failing to consider these facts in the light most favorable to the non-moving party?

IV. STATEMENT OF THE CASE

Plaintiffs Johnathan Johns and David Lynch worked as corrections officers at the Coyote Ridge Correction Center (CRCC) when they were violently attacked by inmates Schawn Cruze and David Kopp. Kopp was serving a 240 month sentence for second degree murder. Cruze was serving a term of life in prison after a 1997 persistent offender sentence following conviction for Assault in the Second Degree. CP 34-43. Cruze

had a history of staff manipulation, and assaults[2] on both staff and offenders and had received mor than 50 serious infractions prior to assaulting Plaintiffs. CP at 60-64.

On September 11, 2012, Cruze and Kopp were notified they would no longer be cell mates and were being assigned to new quarters with new cell mates. Angered by the change, Cruze grabbed a wooden-handled mop and a plastic-handled brush from an unlocked broom closet. He gave the mop to Kopp. They walked up behind a workstation where Officer Johns was working and started hitting him. Johns received blows to the back and sides of his head.

Johns retreated into a hallway and other officers began engaging the combative inmates. Sergeant Lynch arrived and was hit by Cruze several times. Additional officers arrived to subdue the inmates and put an end to the altercation.

Johns and Lynch filed suit against DOC, claiming that the IIA immunity did not extend to this incident because DOC had deliberately

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[2]Respondent 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.

injured them by placing Cruze at CRCC when he was not qualified to be in a medium custody facility.

DOC utilizes a custody review to evaluate and identify risks to staff and offenders. CP 273. Offenders with scores between 0 and 39 are housed in maximum custody or close custody; 40 and 55 in medium custody facilities; 56 and above are housed in minimum custody facilities. *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 compromise in a close custody setting. *Id.* On July 25, 2012, his custody score unexplainedly increased to 40 points. CP at 307-308. The DOC claims Cruze's score was miscalculated, but that they would have provided an override regardless of his score to send him to CRCC. CP at 311.

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 CRCC, a medium custody facility. CP at 314-319.

This information was passed onto Correctional Unit Supervisor Pete Caples who was in charge of E-Unit where Cruze was to be transferred. CP at 314.

After seeing Cruze's extensive violent history, 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 due to his perpetual failure to successfully complete programming, 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.* Caples shared his concerns with his supervisors Sean Murphy, Rick Carter, and Kevin Bowen. CP at 299-301.

Kevin Bowen worked at DOC headquarters over classification. CP at 295. His responsibility was to build transfer orders for offenders. *Id.* Kevin Bowen agreed with Caples that Cruze should not be placed in medium custody. CP at 299-301. Kevin Bowen wrote to Timothy Thrasher sharing his objection 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 infracted/found guilty of fighting with another offender as recently as 03/23/12. He was also found guilty of 717[3] for this incident as a use of force was required due to his refusal to stop fighting. On 06/08/2010 he was infracted 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 STG[4] 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.

Cruze had prior history of acting out when being asked to move cells. CP at 321-322. Cruze also has a documented history of violence. Officers at another facility were so concerned about Cruze's violence that in anticipation of him hearing he was being terminated from programing, they decided to place him in restraints prior to the meeting. CP at 324-325.

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

[4]Security Threat Group

When the staff attempted to put him in restraints he resisted and was infracted. *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 made numerous and repeated threats to harm staff. Cruze's infraction record shows that he was infracted 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 Monroe[5]". 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.

Neither the April 5, 2012 threat nor the May, 2012 were documented by Thrasher or Frakes in Cruze's records. See CP at 60-64. However, these threats were specifically made aware to the two

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[5]Jayme 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.

individuals who provided the authorization to transfer Cruze to medium custody. Neither of the threats were discussed with CRCC employees when Cruze was transferred to a medium security facility.

Thrasher knew that employees should be warned about Cruze and knew that all staff would not see the warnings. CP at 314. He stated, "I am also going to do a chrono entry documenting his behavior, however, **I know all staff will not see it.**" Id. (emphasis added). The DOC report following the violent assault determined that classification staff were aware of the issues surrounding Offender Cruze, including behavior history and precautions, however this information was not passed down to unit custody staff. CP at 351.

Despite the warnings and objections, Timothy Thrasher and Scott Frakes pushed through the transfer. CP at 317. Cruze arrived at CRCC in mid August of 2012 and attacked officers within a month of arriving. CP at 302.

V. ARGUMENT

A. Grounds that qualify a case for review.

The Supreme Court will accept a case for review only if the petition involves an issue of substantial public interest, involves a significant question of law under the state or federal constitution, the

decision of the Court of Appeals conflicts with a decision of the Supreme Court, or the decision of the Court of Appeals conflicts with another published decision of the Court of Appeals. RAP 13.4(b). This case satisfies all four grounds for review. The State of Washington Department of Corrections agrees that this case is a matter of general public interest[6].

B. Standard of review for summary judgment decisions.

Appellate courts review a summary judgment order de novo. *Highline School District No. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976). Summary judgment is only appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." CR 56(c). When considering a summary judgment motion, and on appellate review, the court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert v. Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). At summary judgment, Plaintiffs need not *prove* certainty and are required only to raise genuine issues of material fact. CR 56(c).

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[6]DOC moved to publish the Court of Appeal's decision stating "The Court's opinion is a matter of general public interest because of the number of individuals employed by DOC, and the number of locations across the state where DOC provides employment; the opinion also clarifies an established principle of law regarding application fo the "deliberate intention" standard in cases brought by employees against employers..."

C. The Court of Appeals ruling impairs an employee's statutory right to file a lawsuit under the IIA and allows employers to avoid liability for employee injuries if a human actor is involved in the injury.

Washington has established a clear mandate to protect employees from the dangers and injuries that occur in the work place through the IIA. RCW 51.04 *et seq.* The IIA provides various benefits to injured workers depending on the particular circumstances of each case, including a private right of action if injury results from the deliberate intention of the employer to produce such injury. RCW 51.24.020. 'Deliberate intention' means 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, 904 P.2d 278 (1995).

The Court of Appeals decision focused solely on the "certainty prong." *See* Appendix, 4-8. The Court of Appeals has rendered an employee's private right of action ineffective if a human actor is involved by concluding that the certainty prong can never be met when a human actor is involved because they exercise volitional control over their actions. *Id.* at 7-8. They further impinged the private right of action and effectively determined that only cases involving chemicals causing injury to employees can proceed to trial by stating "a human actor's behavior

simply does not follow immutable laws of chemistry such as the formaldehyde resin at issue in *Birklid* did." *Id.* at 7.

These holdings do not comport with and are in conflict with court rulings in *Perry v. Beverage*, 121 Wash. 652, 214 P.146 (1922) and *Mason v. Kenyon Zero Storage,* 71 Wash. App. 5, 856 P.2d 410 (1993) where human actor's injured employees. They also do not comport with and are in conflict with the analysis in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995) and *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005) as discussed below.

D. The Court of Appeals committed error by expanding the ruling in *Vallandigham* to preclude claims involving a human actor and limiting actions to cases involving chemicals like *Birklid.*

The Court of Appeals used a rigid approach based on an improper application and expansion of *Vallandigham* to determine that there was no certainty. The court in *Vallandigham* concluded that a special needs child's behavior was "far from predictable," because of variables that impacted the student. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 33–34, 109 P.3d 805, 814 (2005). These variables included whether or not the student had taken a prescribed medication, the school districts increasingly restrictive strategies for bringing the negative behavior under control, and that the school district was in the process of

taking steps to alleviate the risk of injury to its employees *Id.* The *Vallandigham* court concluded the school district did not know at that time that the measures would be ineffective and therefore certainty could not have been certain that staff injuries would continue to occur. *Id.* at 34.

Vallandigham does not preclude employer liability for injuries as a result of human actors. The distinguishing factor in *Vallandigham* was the fact that the school district was making efforts to address and alleviate the risk to employees by implementing strategies to prevent, if not eliminate, injuries. The court's ruling places the focus on the actions of the employer and considers what the employer knew at the time the injury occurred.

In this case, the DOC's actions were not to alleviate risk but rather to exacerbate the risk. The DOC removed the protections employees had in close custody institutions from violent life-without-parole inmates with a history of assaults and threats to harm staff. Also, 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 was not involved in programming because of his history of infractions. CP at 269-270. DOC also manipulated his custody score in order to make it appear like he qualified for medium custody. CP at 304-311. 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. CP at 317-319. These were not steps to alleviate or mitigate risks to employees.

As correctly noted by the Superior Court in this case, the DOC's knowledge and actions create "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. The unique set of circumstances create a genuine issue of material fact regarding the certainty prong.

The unique set of circumstances are also different than the facts found in *Brame v. W. State Hosp.,* 136 Wn. App. 740, where employees of the state psychiatric hospital sued their employer because of patient assaults.. In *Brame,* the employees did not contend that any specific assault would occur and relied instead on the history of patient-to-staff assaults and the employer implementing a non-violence initiative aimed at eliminating the use of physical restraint of patients. *Id.* at 749-750. The court applied *Valandigham* and found that the foreseeability of assaults did not establish deliberate intention to injure the employees. *Id.*

An important factor that is not present in either *Brame* or *Vallandigham* is specific threats made by the human actor who assaulted the employees and the employer's knowledge of those threats. CP at 327-

331. Not only did the employer know and ignore the threats, they were not documented in the offender's record for DOC employees to see. *See* CP at 60-64. Also pertinent is the fact that a court of law determined, based on his prior violent behavior and the level of certainty to re-offend, the offender could never be returned to public life. Knowing this, the DOC did not take steps to alleviate employee injuries as the employers in *Vallandigham* and *Brame* did.

This case can and does fall under the analysis found in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). In *Birklid*, 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, Pete Caples called headquarters to object to the transfer of Cruze to medium custody because of his documented 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 *Birklid*, the supervisor also said that he anticipated the problems 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 Pete 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. 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 as concluded by the superior court.

Vallandigham and *Brame* have distinguishable facts while the facts of *Birklid* can be applied similarly in this case. The Superior Court correctly distinguished *Vallandigham* while the Court of Appeals ignored evidence and inferences in favor of Plaintiffs as the non-moving party. CP at CP 486-487, CP 491. The presence or absence of a human actor should not be determinative of the certainty prong. The Court of Appeals emphasis on a human actor's ability to exercise volitional control and not on the employers actions is misplaced and not consistent with precedent.

E. The Court of Appeals erred by failing to consider facts in the light most favorable to the non-moving party and ignoring relevant facts.

To defend a summary judgment motion on the issue of 'certainty' the plaintiff need only raise genuine issues of material fact whether certainty can be supported by the facts of the case. CR 56. There is sufficient evidence in the record to raise a genuine issue of material fact whether DOC had actual knowledge that an injury was certain to occur[7]. The Court of Appeals committed error by failing to consider facts in the

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[7]The decision does not address the second prong (willfully disregarding that knowledge) however the evidence in the record also raises genuine issues of material fact for the second prong as well.

light most favorable to the non-moving party and by ignoring relevant facts regarding DOC's knowledge of specific intent to injure employees.

Consideration of the facts of this case must start with the acknowledgment that DOC employees face a certain level of risk every day. 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. That level of risk is greater at higher custody, is increased with knowledge of specific threats, and by an inmate's prior violent history. The DOC deals with this risk through placing offenders in housing consistent with their custody scores. CP at 259-260, 273, 290. A genuine issue of material fact therefore arises if facts known to the DOC and the actions of the DOC raise the known risk of injury to employees to the point of certainty of injury.

The fact 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 Pete Caples was ever specifically notified was going to come to his unit because DOC knew he should not be placed in a medium custody facility. CP at 297-298. Caples was told Cruze "had a long history and a lot of staff assaults." CP

at 297. Timothy Thrasher also knew the increased risk Cruze posed, that employees should be warned, but 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 employer going out of its way to warn employees suggests it knew that an employee without knowledge of the increased risk was going to be injured. There was the expectation by DOC headquarters staff that Cruze was going to harm staff. These inferences do not depend on the inmate's actions, rather it depended on the employers actions of providing adequate protections and information to the employee.

The Court of Appeals improperly acts as the trier of fact when it states "There was no certainty that Cruze would act out, let alone that he would do so by assailing corrections officers." Appendix at 7. A full review of the facts of the case must occur prior to this finding of fact but the Court of Appeals failed to consider all of the facts.

The decision by the Court of Appeals does not mention and does not consider the specific threats made by Offender Cruze which Timothy Thrasher referred to as a "homicidal statement." CP at 328, Appendix, pp. 1-8. The decision also does not mention or consider the objections raised by employees prior to the transfer. *Id.* The decision also incorrectly states

that DOC management overrode the custody score, when the DOC's discovery response states "in the strictest sense, this was not considered an override" and that based on the situation "it is expected that an override would have been granted." CP at 311. The facts actually show a manipulation of Offender Cruze's custody score to increase 3 points over a two week period and an admission that the score was miscalculated to be higher than it should have. CP at 291-294, 304-311. The Superior Court found the manipulation was done without sufficient bases and in contravention of DOC policy. CP at 490.

The Court of Appeals also committed error by not making inferences in the light most favorable to Plaintiffs. The logical inference of a direct threat from an offender to harm staff when given the opportunity is that the offender will actually carry out that threat. The threat is also certain to be carried out in a medium custody facility because he has greater access to officers. The threats and opportunity, combined with the fact Offender Cruze will never be allowed back into society because of his lack of volitional control, show that certainty of injury is at least a question of fact. CP 34-43.

Applying the Court of Appeals decision, if DOC placed an officer inside Cruze's cell for the night and Cruze assaulted the employee there

could be no certainty of injury because Cruze exercises volitional control over his actions. This is neither reasonable nor logical. The IIA was designed to provide protections to employees from the deliberate acts of the employer. The Court of Appeals decision removes employee protections by shifting the focus away from the employer's knowledge and actions to focuses on independent human actors. Without review of this case, protections for employees in Washington will be diminished and employers can deliberately intent to injure employees so long as an independent human actor is involved.

VI. CONCLUSION

The Court of Appeals decision is in conflict with published decisions, and changes Washington's interpretation of the Industrial Insurance Act. Protection for Washington's employees is a significant issue of substantial public interest. Review is necessary to remove the conflicts and protect Washington's employees.

Respectfully submitted this 19 th day of September, 2018.

PHILLABAUM LEDLIN MATTHEWS
& SHELDON, PLLC

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I caused to be electronically filed the attached *Petition for Review* with the Clerk of the Court using the 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:

Catherine Hendricks
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Dated this 19 th day of September, 2018, at Spokane, Washington.

s/Douglas Dick
DOUGLAS DICK

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JOHNATHAN 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, Petitioner.	)	No. 35140-8-III UNPUBLISHED OPINION

KORSMO, J. — The Washington Department of Corrections (DOC) obtained discretionary review of the trial court's refusal to grant its motion for summary judgment under the immunity provisions of the Washington Industrial Insurance Act (IIA). Concluding that DOC was immune from this suit by two of its corrections officers, we reverse and remand the case with instructions to dismiss.

FACTS

Plaintiffs Johnathan Johns and David Lynch worked as corrections officers at the Coyote Ridge Correction Center (CRCC) at the time of the incident giving rise to this litigation. Inmates Schawn Cruze and David Kopp were cell mates at CRCC. Kopp, 22

at the time, was serving a 240 month sentence for second degree murder. Cruze was serving a term of life in prison following a 1997 persistent offender sentence. Cruze was transferred to CRCC in August, 2012, after an infraction-filled institutional career that had worn out his welcome in the state's close custody and maximum custody facilities.[1] CRCC corrections officers were warned the day after Cruze's arrival that they should be careful around him and that CRCC was "the 'last stop' for this offender."

On the morning of September 11, 2012, Cruze and Kopp were notified by authorities at CRCC that they would no longer be cell mates and were being assigned that day to new quarters with new cell mates. The information was not well received by either man, although Mr. Cruze claimed credit for instigating the ensuing troubles.

To express their displeasure with the imminent reassignment, Cruze grabbed a wooden-handled mop and a plastic-handled brush from an unlocked broom closet. He gave the mop to Kopp. As the two men walked past a workstation in one of the prison's common rooms, they turned and started hitting Corrections Officer Johnathan Johns with

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[1] Mr. Cruze could not be housed at the Clallam Bay Corrections Center, Stafford Creek Corrections Center, or the Washington State Penitentiary because he had "compromised" staff members by entering into relationships with married staffers whose spouses also worked at the facility. In light of the Prison Rape Elimination Act of 2003, 34 U.S.C. §§ 30301-30309, Mr. Cruze was considered a victim of those relationships. The relationships were not counted among his infraction history. Other institutions barred him due to previous threats of violence he had made against staff members.

their instruments. Johns, who had been working on paperwork at the station before the sneak attack, received blows to his back and the sides of his head.[2]

Johns was forced to retreat backwards into a hallway, pursued by the two inmates. Other officers rallied to his assistance. Officer Nicholas Rutz arrived first and began struggling with Cruze while Johns fought with Kopp. Sergeant David Lynch arrived and attempted to aid Rutz. Cruze hit Lynch several times in the face. Sufficient reinforcements arrived to subdue the inmates and put an end to the altercation.

Cruze later stated that the incident occurred because he was upset about the short notice change to his cell assignment and his fear that he might be placed with a child molester. He claimed that his anger was directed at the supervisor in charge of cell assignments, Peter Caples, and that Mr. Johns was simply the "wrong guy at the wrong time."

Johns and Lynch filed this suit against DOC, claiming that the IIA immunity did not extend to this incident because DOC had deliberately injured them by placing Cruze at CRCC. Accordingly, discovery and much of the subsequent argument focused on the process by which Cruze ended up at the institution.

DOC uses a point system to determine the type of custody that applies to an inmate. When evaluated at the end of his stay at the Monroe Correctional Complex,

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[2] The initial assault, and much of the ensuing altercation, was captured on a video recording. The video was provided to the trial court and is part of the record of this appeal.

Cruze received a score of 37, a figure that normally required that he be placed at a close custody institution. Needing to move Cruze from the Monroe facility, DOC decided to try CRCC. In order to do so, DOC management overrode his score and raised it to 40, a figure that allowed him to be placed at CRCC.

After discovery, DOC moved for summary judgment of dismissal based on its IIA immunity. The trial court denied the motion and also denied reconsideration, determining that there were factual questions related to the override decision that needed to be resolved at trial. DOC sought discretionary review from this court. Our commissioner granted review after concluding that the trial court probably erred in its ruling.

A panel heard oral argument.

ANALYSIS

Although DOC raises multiple issues, we need only consider one aspect of the immunity argument.[3] The evidence in this record does not establish that DOC acted with the deliberate intent to injure when it placed Cruze at CRCC.

In any appeal from a summary judgment ruling, this court engages in de novo review; our inquiry is the same as the trial court's inquiry. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). We view the facts, and all reasonable inferences to be

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[3] In light of our disposition, the facts and trial court rulings related to the other issues presented by this review need not be discussed.

drawn from them, in the light most favorable to the nonmoving party. *Id.* If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*; *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

The IIA provides various benefits to injured workers depending on the particular circumstances of each case and is the exclusive remedy for workers who are injured during the course of their employment. *Wash. Ins. Guar. Ass'n v. Dep't of Labor & Indus.*, 122 Wn.2d 527, 530, 859 P.2d 592 (1993); RCW 51.04.010. Thus, the IIA precludes tort claims arising out of an injury that is compensable under the IIA. *Id.* However:

> 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.

The "deliberate intention" standard was authoritatively construed in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). In that case, Boeing had rejected proposed remedial measures and continued to assign employees to work in a fabrication room with formaldehyde resin despite knowledge that the workers repeatedly were getting ill. *Id.* at 856. Determining that the deliberate intention exception applied to those facts, the court held: "the phrase 'deliberate intention' in RCW 51.24.020 means

the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* at 865. This two-prong test for deliberate intention reflected the narrow interpretation historically given to the statute. *Id.*

Subsequent cases have emphasized the narrowness of the *Birklid* test. The first ("certainty") prong can be met only when continued injury is *certain* to occur. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 32, 109 P.3d 805 (2005). The second ("willful disregard") prong of the test requires a showing that the employer deliberately intended to injure the employee. The intention, however, must relate to the injury, not to the act causing the injury. *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 236, 159 P.3d 494 (2007).

Vallandigham is an instructive case. There, a severely disabled special education student repeatedly injured two teachers designated to work with him. The teachers sued the school district under the deliberate intention exception to the IIA. 154 Wn.2d at 19-26. The plaintiffs alleged that during the course of one school year, the disabled student had injured students or staff on 96 different occasions. *Id.* at 24. The trial court dismissed the case at summary judgment. *Id.* at 25.

Ultimately, the Washington Supreme Court affirmed that ruling. In doing so, the court emphasized that "the first prong of the *Birklid* test can be met in only very limited circumstances where continued injury is not only substantially certain but *certain* to occur." *Id.* at 32. The court concluded that a special needs child's behavior is "far from

predictable," making it impossible to know with certainty whether violent behavior—even if frequent—"would not cease as quickly as it began." *Id.* at 33. Substantial certainty of injury is insufficient to satisfy the test. *Id.* at 36.[4]

With these cases in mind, it is clear that DOC's conduct in sending Cruze to an institution that was not designed to provide the close custody that he needed does not satisfy the deliberate intention exception as understood in *Birklid.* There was no certainty that Cruze would act out, let alone that he would do so by assailing corrections officers. Even more so than the special needs student in *Vallandigham* or the psychiatric patients in *Brame v. W. State Hosp.*, 136 Wn. App. 740, 150 P.3d 637 (2007), an inmate in a correctional center exercises volitional control over his actions. A human actor's behavior simply does not follow immutable laws of chemistry such as the formaldehyde resin at issue in *Birklid* did. Even if DOC had believed Cruze would act out against corrections officers at CRCC when he was transferred there, there still was no certainty

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[4] This court reached a similar conclusion in *Brame v. W. State Hosp.*, 136 Wn. App. 740, 150 P.3d 637 (2007). There, employees of a state psychiatric hospital had suffered injuries after repeated assaults by hospital patients. *Id.* at 744-745. The employees sued, arguing that the hospital knew with certainty that patients would assault staff and it willfully disregarded this knowledge. *Id.* at 748-749. Relying on *Vallandigham*, this court found that the foreseeability of assaults did not establish deliberate intention to injure the employees; patient behavior was too unpredictable to find certainty. *Id.* at 749.

that he would do so. The respondents were unable to satisfy the first prong of the *Birklid* deliberate exception test.[5]

Accordingly, the trial court erred in rejecting DOC's motion for summary judgment. DOC was immune from this suit.

Reversed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

[5] In light of this conclusion, we need not address the arguments concerning the second ("willful disregard") prong of the *Birklid* test.

PHILLABAUM LEDLIN MATTHEWS & SHELDON

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