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DIVISION II

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STATE OF WASHINGTON

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No. 44035-1-II

COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON

MICHAEL MICHELBRINK, JR.,

Respondent,

v.

STATE OF WASHINGTON, WASHINGTON STATE PATROL,

Appellant.

BRIEF OF AMICUS CURIAE
WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

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I. IDENTITY AND INTEREST OF AMICUS WASPC

The Washington Association of Sheriffs and Police Chiefs (WASPC), with over 850 members, represents the interests of most State law enforcement agencies and local law enforcement departments in Washington. WASPC provides model policies, makes recommendations, and provides training and other guidance regarding law enforcement operations. This training and guidance includes defensive tactics training, as well as guidance on the kinds of tools law enforcement might purchase or use for safe and effective police work.

This Court's April 23, 2014 ruling and opinion (the Opinion) in *Michelbrink v. Washington State Patrol*, 180 Wn. App. 656, 323 P.3d 620 (2014), if it were to become law, would undercut the exclusive remedy provision of the Industrial Insurance Act (IIA) that is the product of the century-old Grand Compromise, or quid pro quo, between labor and business. Under the IIA created in 1911, workers gave up their right to sue their employers in exchange for a no-fault, liberally construed, generous workers' compensation benefits system.

The Opinion exposes WASPC's member agencies and departments to numerous worker lawsuits for would-be "injuries" arising in defensive

tactics training. Such training carries a risk of injury.¹ WASPC's main concerns are the destructive impact the Opinion will have on defensive tactics training and options for less-than-lethal-force tools. Officers must be effectively trained in the use of non-deadly force, including Tasers, so that they have the flexibility to safely and effectively resolve uncertain, rapidly developing situations with dangerous, agitated persons. WASPC urges this Court to revise the Opinion and grant employer immunity to the Washington State Patrol (WSP).

II. ISSUE OF INTEREST TO AMICUS WASPC

The Supreme Court has directed this Court to reconsider its April 23, 2014 Opinion in light of the Court's decision in *Walston v. The Boeing Company*, 181 Wn.2d 391, 334 P.3d 519 (2014). *Walston* is the latest in a line of decisions under *Birklid v. The Boeing Company*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995) that have consistently narrowly construed the IIA's "deliberate intention" exception to employer immunity. *Walston*, 181 Wn.2d at 397-99. *Walston* narrowly construed the IIA concept of "injury" in terms of the threshold medical condition needed to establish that an employer knew with certainty that particular practices or exposures will cause the claimed injury (mesothelioma), thus making that injury under the practice or exposure deliberately intentional. *Id.*

¹ See e.g., Dec. M. Lamoreaux (pp. 3-7), CP 40-44.

It was in this context that *Walston* held that, under the employer-certainty-of-injury element of the “deliberate intention” exception, no injury occurs with initial exposure to asbestos because employer practices involving such initial exposure do not always result in *compensable* industrial injury or occupational disease (mesothelioma). *Id.* In light of *Walston* and *Birklid* and other decisions of the Washington Supreme Court interpreting the IIA:

1. Does the fact that incidentally there is mere piercing of the skin and some temporary pain to all trainees during Taser training exercises per se make every application of a Taser in police training an “industrial injury” for purpose of the *Birklid* test for employer certainty, such that law enforcement officers may sue their employers for each and every application of a Taser in training?

2. Does public policy support applying the “deliberate intention” exception to these training circumstances?

III. STATEMENT OF THE CASE

This Court’s Opinion relies on a declaration of a WSP trainer for its conclusion that WSP is not entitled to judgment as a matter of law on the issue of certainty of industrial injury for all trainees involved in WSP’s Taser training. *Michelbrink*, 180 Wn. App. at 666. The Opinion quotes from what the Court considers to be the key part of the declaration:

[T]he *most typical* effects of [Taser] exposure included temporary pain, minor skin irritation, temporary blisters, and redness or minor bleeding if the Taser probes punctured the skin.

Id.

The Opinion errs in relying on this evidence as being sufficient to raise a material factual dispute over certainty of industrial injury for WSP Taser trainees. None of these results, singly or in combination, necessarily would even require any first aid, and virtually all of the Taser training applications incidentally result in nothing more than *de minimis* results that do not qualify as industrial injuries. Under *Walston*, the absence of certainty of a back injury or even a compensable injury to each and every one of the Taser exposed workers means that WSP cannot be deemed to have intentionally injured Mr. Michelbrink. Taser training exposure is not certain to cause a back injury or a compensable injury.

IV. ARGUMENT

A. THE FACT THAT TASER TRAINING INVOLVES INCIDENTAL TEMPORARY PAIN AND MINIMAL PIERCING OF THE SKIN DOES NOT PER SE MAKE EVERY TRAINING APPLICATION OF A TASER AN INDUSTRIAL INJURY FOR PURPOSES OF THE HYPOTHETICAL “CERTAIN INJURY” STANDARD OF *BIRKLID*.

The IIA provides a conjunctive definition for “injury:” “a sudden and tangible happening, of a traumatic nature, producing an immediate or

prompt result, and occurring from without, and *such physical conditions as result therefrom.*” RCW 51.08.100 (emphasis. added).² This definition needs common sense fleshing out in order to avoid the absurd or strained result of including the myriad of potential physical conditions that can incidentally result to police trainees during defensive tactics training exercises, and potentially to nearly all employees constantly throughout every workday. Neither common law nor common sense supports the analysis or result in the Opinion.³

With the exception of the *Walston* decision, WASPC has discovered no Washington appellate court decision that has explored what

² The Opinion has parsed out the definition into two parts (*Michelbrink*, at 669 (“two types of ‘injury’”)); such is in conflict with over fifty years of case law and Board decisions. The “physical conditions” provide the objective component of an IIA injury. See the Board of Industrial Insurance Appeal’s *Heimbecker* decision below. *Rothwell v. Nine Mile Falls School District*, 173 Wn. App. 812, 819, 295 P.3d 328 (2013)(injury discussed); *Spino v. Department of Labor and Industries*, 1 Wn. App. 730, 733, 463 P.2d 256 1969)(definition provides an objective test).

³ The Opinion asserts that, because RCW 51.12.010 provides that Title 51 RCW is to be liberally construed, and because RCW 51.24.020’s exception to employer immunity is part of Title 51, the “deliberate intention” exception must be broadly construed in favor of the right of workers to sue their employers. *Michelbrink*, at 670. The Opinion conflicts with both *Walston* and *Birklid* on this point. Both *Walston* and *Birklid* narrowly construed the deliberate intention concept of “injury” under RCW 51.24.020. See *Birklid*, 127 Wn.2d at 865; *Walston*, 181 Wn.2d at 396-397. Also, logic dictates that the “deliberate intention” exception not receive a broad construction. In *Brand v. Department of Labor & Industries*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999), the Supreme Court expressly recognized that the reason for liberal construction of Washington’s workers’ compensation statutes is the “Grand Compromise” that resulted in the exclusive remedy provision of RCW 51.04.010. The quid pro quo under the Grand Compromise was the granting of employer immunity in exchange for no fault workers’ compensation benefits provisions that are liberally construed in favor of workers. *Id.* Logically, one should not liberally construe in favor of workers the very thing that they gave up in exchange for benefits: the right to sue their employers. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 27-28, 109 P.3d 805 (2005) (“Washington courts have consistently interpreted RCW 51.24.020 narrowly...”)

minimal threshold of “physical condition” qualifies as an injury under RCW 51.08.100. Outside of this context of cases exploring *Birklid’s* hypothetical-based “deliberate intention” test for employer practices, where this particular threshold is situated generally does not matter.⁴

However, as WSP pointed out in its Reply Brief at 13, the Board of Industrial Insurance Appeals has issued a significant decision⁵ that rejects the theory that mere temporary sensations such as pain or dizziness caused by a work accident constitute an industrial injury under RCW 51.08.100. *In re: Kenneth Heimbecker*, BIIA Dec., 41, 998 (1975). There, an injured worker contended that in order to prove that he had sustained an industrial injury, he only needed to prove his allegation that he struck the back of his

⁴ Even in the WDLI’s overseeing of self-insured employers who are required in some circumstances to ensure that injured workers’ rights to file claims are protected, WASPC has discovered no appellate case law that assists in determining the threshold for what “physical conditions” qualify as injuries (see RCW 51.08.100). Self-insured employers (who employ about a third of Washington’s workforce, include most large employers, extending to law enforcement employers) must provide an accident report to a worker “upon the self-insurer’s first knowledge of the existence of an industrial injury or occupational disease.” WAC 296-15-320.

<http://www.ini.wa.gov/ClaimsIns/Insurance/SelfInsure/EmpList/FindEmps/Default.asp>
If self-insurers do not report and provide coverage for all industrial injuries, they can be subjected to corrective action (RCW 51.14.095) or even lose their authority to self-insure (RCW 51.14.080(3)). Under the Opinion’s view of what constitutes an IIA injury, the administrative burden would be greatly increased if every minor event were claimed as an industrial injury.

⁵ The Legislature has directed the Board to publish and make accessible its Significant Decisions. See RCW 51.52.160. The Board’s Significant Decisions may be accessed at [www.biaa.wa.gov/significantdecisions/contents.htm]. The Board’s interpretation of the IIA “is entitled to great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 573, 141 P.3d 1 (2006)

head on a metal object and “felt dizzy for about five minutes.” The Board rejected this theory under the following analysis:

[The worker’s] argument is not correct. The term “injury,” as defined by RCW 51.08.100, has two distinct elements. First, there is the tangible happening or incident which may be termed the accident. Second, there must be a resulting “physical condition,” or what may be termed the bodily harm. *Obviously, every slip, fall, bump, and the like, does not result in bodily harm - - in other words, not every accident results in some physical condition.* Thus, every industrial accident does not constitute an “industrial injury.”

Heimbecker, BIIA Dec., 41, 998 at 2 (Emphasis added).

Washington courts avoid readings of statutes that yield “unlikely, absurd, or strained consequences.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655, 663 (2002). It is a strained reading of the IIA to count as industrial injuries the countless minimal events occurring throughout every work day that cause some temporary pain but do not require a medical visit or even first aid or lost time. Many minimally impactful events do not cause a compensable “industrial injury” even though the employer knows specific events create the risk of resulting in “physical conditions” of some sort: such include temporary pain, minor skin irritation, temporary blisters, redness, minor bleeding, minor skin piercings, bumps, bruises, paper cuts, scratches, minor nosebleeds from bumps, dizziness, sunburns, slivers, runny nose, watery eyes, dust or

smoke in the eyes, allergy symptoms, and the like. This litany of physical conditions could variously result from Taser training, hand-to-hand defensive tactics training, clearing blackberry bushes, filing paperwork, digging, twisting office equipment or other machinery, bumping into a desk corner or door jamb, contact with inoculation needles, or animal scratches for veterinarian staff.⁶

The evidence here is that the Taser training by WSP for the vast majority of the participants did not reach the threshold for a compensable industrial injury under RCW 51.08.100. As WSP points out in its Reply Brief at 3 (CP at 39, 46), only one Trooper out of 791 has reported an injury caused by the Taser prongs, and there have been no reported injuries based solely on the temporary incapacitation caused by the exposure. Disregard of a risk of injury is not sufficient to meet the *Birklid* test; certainty of actual harm must be known and ignored. *Walston* at 398.

In *Walston*, the Supreme Court rejected the plaintiff's argument to the effect that, because all those exposed to asbestos incur injury at the cellular level, Boeing had actual knowledge of certain "injury" from

⁶ Likewise strained is the Opinion's result of allowing a minor skin piercing to legally pierce Title 51 immunity, especially in light of the undisputed altruistic purposes of the Taser training. See discussion in *Harris v. State Dep't of Corrections*, 368 Mont. 276, 294 P.3d 382 (Mont. 2013), *infra*, and CP 40-44. The IIA was intended to provide extensive benefits to injured workers and corollary immunity to employers. In the law enforcement training context, to allow de minimis, incidental piercings to pierce Title 51 immunity is to allow the deliberate intention exception to swallow the rule of immunity.

asbestos exposure. 181 Wn.2d at 398. The *Walston* Court rejected this argument, explaining that injury at the cellular level does not meet the threshold for compensable industrial injury, and therefore is not sufficient injury for the asbestos exposure to qualify under the “deliberate intention” exception. *Id.* Similarly here, the result of the Taser training application creates the *risk* of compensable industrial injury in all training participants. However, it is only in the rare occasion that the result of the Taser application meets the threshold for a compensable industrial injury; therefore, WSP cannot be deemed to have actual knowledge of certain injury under *Birklid*’s hypothetical-based, deliberate intention standard.

B. PUBLIC POLICY MILITATES AGAINST APPLICATION OF THE “DELIBERATE INTENTION” EXCEPTION IN THIS AND OTHER TRAINING CIRCUMSTANCES.

The *Birklid* Court chose among several policy-based choices and picked the narrowest choice. *Birklid*, at 863-865. *Walston* carefully followed *Birklid*’s policy-based “deliberate intention” rule. *Walston*, at 396-397. Policy considerations favor WSP’s position, as supported by the only two other jurisdictions to have addressed the current issue in published appellate court decisions. WSP’s policy arguments (see, e.g., WSP Opening Brief, at 32-33) mirror the policy analysis by the Montana Supreme Court in a Taser-training, employee lawsuit. *Harris v. State Dep’t of Corrections*, 368 Mont. 276, 294 P.3d 382 (Mont. 2013).

Harris failed to provide any evidence from which we can infer that the intent was to harm rather than educate and train. Instead, he points to the training materials that disclosed the risks associated with tasing, and merely speculates that Appellees intended to injure Harris “to some extent” by using the taser on him.

Harris, 294 P.3d at 387-88. Similar policy focus is found in the New Jersey appellate court’s analysis in the rubber-bullet-training employee lawsuit. *Bustamonte v. Tuliano*, 284 N.J. 492, 591A.2d 694 (1991):

. . . . [W]e agree with Tuliano that the intent to “sting” falls far short of the required intent to injure. Indeed, what was involved here was nothing more than an intent to let the victim know he had been hit. . . . The suggestion that Tuliano intended or expected some injury to Bustamante is simply not supported by this record. This injury was surely accidental.

Bustamonte, 591 A.2d at 698-99. In sum, public policy considerations militate against application of the “deliberate intention” exception in this and other bona fide law enforcement training circumstances.

V. CONCLUSION

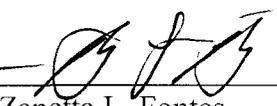
For the reasons stated, WASPC asks the Court to revise its Opinion and hold that the Washington State Patrol is entitled to judgment as a matter of law because under RCW 51.04.010 workers’ compensation benefits are Mr. Michelbrink’s exclusive remedy for his training injury.

RESPECTFULLY SUBMITTED this 18th day of May, 2015.

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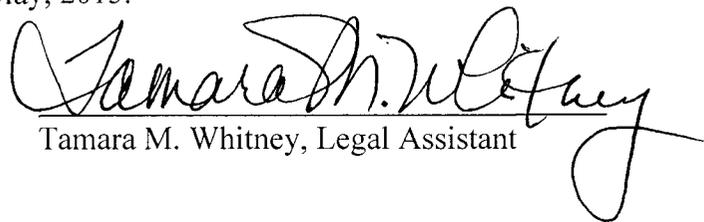
I declare under penalty of perjury under the laws of the State of Washington that on May 18, 2015, a true and correct copy of the foregoing document was sent to the following parties of record via the method indicated:

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I declare that I caused to be served a true and correct copy of the following documents:

- Motion of Washington Association of Sheriffs and Police Chiefs for Leave to File an Amicus Curiae Brief; and
- Brief of Amicus Curiae - Washington Association of Sheriffs and Police Chiefs;

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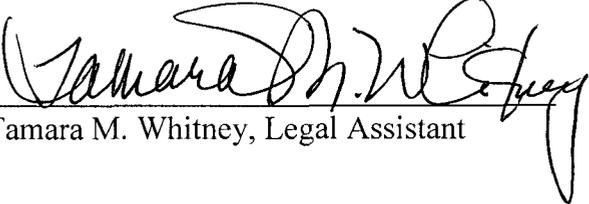
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