

No. 88511-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ESTATE OF GARY G. WALSTON and DONNA WALSTON,
husband and wife,

Appellants,

v.

THE BOEING COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE
UNITED STEELWORKERS LOCAL 12-369

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
(206) 574-6661
Attorneys for Amicus Curiae
United Steelworkers Local 12-369

FILED
JAN 24 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
bjh

 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii-iv
A. IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
B. STATEMENT OF THE CASE.....	1
C. SUMMARY OF ARGUMENT	2
D. ARGUMENT	3
(1) <u>Under RCW 51.24.020/.030, Walston Had an Action Against Boeing for Deliberate Injury after <i>Birklid</i></u>	3
(2) <u>Washington’s Special Concern for Preventing Worker Exposure to Toxic Substances Also Supports Walston’s Interpretation of a Claim Under RCW 51.24.020</u>	11
(3) <u>The Proper Rule for Toxic Substances Exposure in Deliberate Intent to Injury Cases</u>	15
E. CONCLUSION.....	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Allen v. Asbestos Corp., Ltd.</i> , 138 Wn. App. 564, 157 P.3d 406 (2007), <i>review denied</i> , 162 Wn.2d 1022 (2008).....	1
<i>Baker v. Schatz</i> , 80 Wn. App. 775, 912 P.2d 501, <i>review denied</i> , 129 Wn.2d 1021 (1996).....	8, 13, 14, 15
<i>Berry v. Crown Cork & Seal Co.</i> , 103 Wn. App. 312, 14 P.3d 789 (2000), <i>review denied</i> , 143 Wn.2d 1015 (2001).....	1
<i>Birklid v. Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	<i>passim</i>
<i>Dep't of Labor & Indus. v. Fankhauser</i> , 121 Wn.2d 304, 849 P.2d 1209 (1993).....	4
<i>Dep't of Labor & Indus. v. Landon</i> , 117 Wn.2d 122, 814 P.2d 626 (1991).....	4
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wn.2d 291, 996 P.2d 582 (2000).....	12
<i>Hope v. Larry's Markets</i> , 108 Wn. App. 185, 29 P.3d 1268 (2001), <i>overruled on other</i> <i>grounds by Vallandigham</i>	8, 13, 14, 15
<i>Lockwood v. AC&S, Inc.</i> , 109 Wn.2d 235, 744 P.2d 605 (1987).....	1
<i>Lowy v. Peace Health</i> , 174 Wn.2d 769, 280 P.3d 1078 (2012).....	6
<i>Mavroudis v. Pittsburgh Corning Corp.</i> , 86 Wn. App. 22, 935 P.2d 684 (1997).....	4
<i>Montaney v. J-M Manufac. Co., Inc.</i> , ___ Wn. App. ___, ___ P.3d ___, 2013 WL 6761929 (2013).....	1
<i>Morgan v. Aurora Pump Co.</i> , 159 Wn. App. 724, 248 P.3d 1052, <i>review denied</i> , 172 Wn.2d 1015 (2011).....	1
<i>Provost v. Puget Sound Power & Light Co.</i> , 103 Wn.2d 750, 696 P.2d 1238 (1985).....	17
<i>Shellenbarger v. Longview Fibre Co.</i> , 125 Wn. App. 41, 103 P.3d 807 (2004), <i>review denied</i> , 154 Wn.2d 1021 (2005).....	18
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	11-12

<i>Soproni v. Polygon Apartment Partners</i> , 137 Wn.2d 319, 971 P.2d 500 (1999).....	7
<i>State v. Conte</i> , 159 Wn.2d 797, 154 P.3d 194 (2007).....	7
<i>State v. Wright</i> , 54 Wn. App. 638, 774 P.2d 1265 (1989).....	5
<i>Vallandigham v. Clover Park School District No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	9
<i>Walston v. Boeing Co.</i> , 173 Wn. App. 271, 294 P.3d 759 (2013).....	18
<i>WR Enterprises v. Dep't of Labor & Indus.</i> , 147 Wn.2d 213, 53 P.3d 504 (2002).....	10

Federal Cases

<i>Day v. NLO</i> , 851 F. Supp. 869 (S. D. Ohio 1994).....	16
<i>Duncan v. Northwest Airlines, Inc.</i> , 203 F.R.D. 601 (W.D. Wash. 2001).....	15
<i>Gulden v. Crown Zellerbach Corp.</i> , 890 F.2d 95 (9th Cir. 1989).....	15
<i>In re Hanford Nuclear Reservation Litigation</i> , 292 F.3d 1124 (9th Cir. 2002).....	17
<i>Katanga v. Praxair Surface Technologies, Inc.</i> , 2009 WL 506832 (W.D. Wash. 2009).....	14
<i>Koslop v. Cabot Corp.</i> , 631 F. Supp. 1494 (M.D. Pa. 1986).....	12
<i>Smith v. Monsanto Co.</i> , 822 F. Supp. 327 (S. D. W. Va. 1992).....	12

Other Cases

<i>Broussard v. Smith</i> , 999 So. 2d 1171 (La. App. 2008).....	15
<i>Davis v. U.S. Employers Council, Inc.</i> , 934 P.2d 1142 (Or. App. 1997).....	15
<i>Lusk v. Monaco Motor Homes, Inc.</i> , 775 P.2d 891 (Or. App. 1989).....	15
<i>Major v. Firemen's Fund Ins. Co.</i> , 506 So. 2d 583 (La. App. 1987).....	15
<i>Quick v. Myers Welding & Fabricating Co.</i> , 649 So. 2d 999 (La. App. 1995), writ denied, 653 So. 2d 598 (1995).....	15
<i>Robinson v. North American Salt Co.</i> , 865 So. 2d 98 (La. App. 2003), writ denied, 860 So. 2d 1139 (2003).....	15
<i>Speck v. Union Electric Co.</i> , 741 S.W.2d 280 (Mo. App. 1987).....	18
<i>Tulloh v. Goodyear Atomic Corp.</i> , 639 N.E.2d 1203 (Ohio App. 1994).....	16

Statutes

RCW 4.22.070(3)(a)	12
RCW 49.70	11
RCW 49.70.010	11
RCW 51.08.100	5
RCW 51.08.140	5
RCW 51.16.035(1)	10
RCW 51.16.035(2)	10
RCW 51.24.020	<i>passim</i>
RCW 51.24.030	<i>passim</i>
RCW 51.24.030(3)	4
RCW 51.44	10
RCW 70.105D.010	11

Rules and Regulations

RAP 10.6(b)	1
-------------	---

Other Sources

Elizabeth M. Ward, <i>et al.</i> , <i>Priorities for Development of Research Methods in Occupational Cancer</i> , 111 <i>Environ. Health Perspect.</i> 1-12 (2003), http://dx.doi.org/10.1289/ehp.5537	13
Michelle Gorton, <i>Intentional Disregard: Remedies for the Toxic Workplace</i> , 30 <i>Envtl. L.</i> 811 (2000)	11, 17
Recovery for Exposure to Beryllium, 116 <i>A.L.R. 6th</i> 143 (2006)	12

A. IDENTITY AND INTEREST OF AMICUS CURIAE

RAP 10.6(b) requires an amicus curiae to describe its interest in a case before the Court. Amicus curiae United Steelworkers Local 12-369 (“USW”) has done so in its motion for leave to file an amicus curiae brief.

B. STATEMENT OF THE CASE

USW acknowledges the factual recitation in the parties’ supplemental briefs and the Court of Appeals’ published opinion.

Several factual points in this case, however, bear emphasis as this Court addresses the question of whether the Estate of Gary G. Walston¹ and Donna Walston (“Walston”) have a direct action under RCW 51.24.020 against the Boeing Company (“Boeing”) for its deliberate injury of Gary Walston.

First, lost in Boeing’s discussion of the facts in its supplemental brief is the incident in which asbestos fibers rained down on Gary Walston for a month in 1985 while asbestos abatement occurred in the Hammer Shop. CP 1655-56, 2042.² The employees of contractors working on that

¹ Gary Walston died on April 29, 2013, three years after the initial filing of this case.

² Under the liberal substantial factor test for causation in *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987); *Montaney v. J-M Manufac. Co., Inc.*, ___ Wn. App. ___, ___ P.3d ___, 2013 WL 6761929 (2013); *Morgan v. Aurora Pump Co.*, 159 Wn. App. 724, 248 P.3d 1052, review denied, 172 Wn.2d 1015 (2011); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 157 P.3d 406 (2007), review denied, 162 Wn.2d 1022 (2008); and *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 14 P.3d 789 (2000), review denied, 143 Wn.2d 1015 (2001) a plaintiff in an asbestos injury case need not

job wore “moon suits.” When Walston and his fellow workers asked for the same protection, Boeing’s supervisor rebuffed them, telling them to go back to work. Why were such moon suits necessary as protection for the contractor’s employees and not Walston? Inferentially, such protective equipment was necessary to prevent asbestos injuries and the diseases associated with them.

Second, mesothelioma is invariably fatal as it was in Gary Walston’s case, and *results usually only from inhaling asbestos*. CP 2829, 2834, 2852. Gary Walston’s asbestos-related injury occurred only in the course of his Boeing employment.

Third, Dr. Brodtkin’s testimony creates at least a fact question here as to the certainty of injury. Dr. Brodtkin made clear that each exposure to asbestos is injurious, although the symptoms of such injury may be manifested at a later time. CP 2860-62.

C. SUMMARY OF ARGUMENT

The definition of injury in RCW 51.24.030 makes clear that if an employer intentionally forces a worker to inhale a toxic substance like asbestos knowing that such inhalation will result in an injurious process

identify the precise asbestos fiber of the precise asbestos manufacturer, retailer, or user to establish that the defendant’s conduct was a substantial factor in the plaintiff contracting the asbestos-related disease. Even short exposures to asbestos may result in liability.

and the worker, in fact, then experiences an asbestos-related injury, the worker has a claim against the employer under RCW 51.24.020.

This Court's decision in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995) does not require in an RCW 51.24.020 toxic injury case that the injury to the worker be immediate or visible. Similarly, *Birklid* does not require that every worker similarly forced to inhale the toxic substances at the work site must experience a compensable injury in order for the worker to recover.

This reading of *Birklid* is consistent with the express language of the statute and is consistent with Washington's special concern regarding toxic substances in the workplace, particularly those with long latency periods between exposure and disease.

D. ARGUMENT

(1) Under RCW 51.24.020/.030, Walston Had an Action Against Boeing for Deliberate Injury after *Birklid*

The core argument advanced by Boeing is its contention that there should be a difference between the certainty of an "injurious process" and the certainty of injury. Boeing Suppl. br. at 6-7. But Boeing's argument on that point betrays a fundamental misunderstanding of RCW 51.24.020/.030 and merely re-introduces Boeing's concept of deliberate injury set forth in *Birklid* and rejected by this Court there. Under Boeing's

analysis, no action under RCW 51.24.020 *would ever be possible* if an employer deliberately forced a worker to inhale a toxic substance that resulted in a disease with a long latency period.

Boeing says that even though there is evidence that Boeing knew it was causing injury to Walston's lungs, that injury is irrelevant—the relevant injury is mesothelioma and Boeing did not know with certainty that Walston would get mesothelioma from the certain lung injury that Boeing was inflicting on him.³ Boeing relies on RCW 51.24.030(3) to say that the “injurious process” is not what matters under the deliberate intent exception because the statute defines “injury” for purposes of deliberate intent. Boeing Suppl. br. at 6-7.

This Court's analysis should start with the language of the statutes at issue here. RCW 51.24.020 provides employees a direct action against employers who deliberately injure them. RCW 51.24.030 defines injury. RCW 51.24.030(3) states: “For the purposes of this chapter, 'injury' shall

³ But this Court's decisions on asbestos have recognized that injury dates from exposure. In *Department of Labor and Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), for example, this Court recognized that the injury to the worker from inhaling asbestos occurred during his employment when exposure to asbestos occurred and the disease produced from that injury was covered by the Industrial Insurance Act even though the disease symptoms were manifested years later. *See also, Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 34 n.14, 935 P.2d 684 (1997) (citing cases). *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991) cited by Boeing in its supplemental brief at 9, is consistent with *Fankhauser*. It holds that for purposes of calculating industrial insurance *benefits*, the schedule in existence as of the date the disease was manifested controls. This only makes sense as that is when the employee faces the medical costs, not the earlier exposure date.

include any physical or mental condition, *disease*, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.” (emphasis added). The reference to disease is important. The Industrial Insurance Act did not always cover disease. RCW 51.08.100 defined “injury” narrowly as “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.” The Legislature later added “occupational disease” in RCW 51.08.140 as a basis for compensation; but it did not define “occupational disease” as an “injury.” The Legislature maintained a distinction between “injury” – defined as a traumatic event—and “occupational disease,” which occurs as a result of a long-term injurious process to the worker's body.

As to the deliberate injury actions, the Legislature has brought traumatic events and occupational diseases together. RCW 51.24.030 defines “injury” for purposes of RCW 51.24.020 as including *both* traumatic injuries and “disease.” Thus, in adopting a separate definition of injury in RCW 51.24.030 to apply to actions under RCW 51.24.020, the Legislature did not intend to simply utilize the statutory definitions in RCW 51.08.100 and .140. *State v. Wright*, 54 Wn. App. 638, 642, 774 P.2d 1265 (1989) (Legislature’s express inclusion of certain conditions or provisions excludes the implications of others).

A sensible interpretation of RCW 51.24.020 and RCW 51.24.030 means that a worker may prove an employer's deliberate intent by showing that the employer deliberately disregarded its knowledge that it was causing its worker to suffer a certain "injurious process." How else could a worker demonstrate that his or her employer deliberately intended a "disease"? An employer will never know with certainty that its workers will suffer a disease at some point in the future—the only thing the employer can know with certainty is that it is causing a certain "injurious process" that could produce an occupational disease.

In the absence of such an interpretation, no Washington worker could ever meet the test under RCW 51.24.020 for injuries that had some latency period before producing compensable injuries – i.e., "diseases" – because it will *always be impossible* for a worker to prove that the employer knew that the certain injurious process it was causing would result in an occupational disease. Such an absurd result⁴ is contrary to the statutory language, as well as *Birklid*.⁵

⁴ Statutes should be interpreted sensibly to avoid strained or absurd results *Lowy v. Peace Health*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012).

⁵ Boeing strongly supported SB 5651 in the 1997 legislative session. It passed the Senate, requiring that a plaintiff prove that "the specific purpose of the employer's conduct was to bring about [the worker's] injury." The House committee version was even more direct indicating that the employer *must intend the injury*, not the act causing the injury. The bill failed. See Appendix. Boeing seeks a judicial interpretation of RCW 51.24.020 and .030 that is essentially the same as SB 5651, rejected by the Legislature. While the Legislature's failure to enact a measure is not evidence of legislative intent,

Modern Washington law on direct actions under RCW 51.24.020 emanates from this Court's decision in *Birklid*, a toxic injury case in which the plaintiffs stated a claim under RCW 51.24.020 for their injuries sustained when Boeing forced them to inhale toxic fumes from phenol formaldehyde resin. The Court there noted that "Boeing . . . knew in advance its workers would become ill from the phenol formaldehyde fumes, yet put the new resin into production." *Id.* at 863. *Nowhere* did the *Birklid* court state that the employer had to know that each of its employees who inhaled a toxic substance would become ill or that the injury had to manifest itself immediately.

Ironically, throughout its supplemental brief, Boeing now invokes *Birklid*, a case in which it was the defendant, as the reason this Court should adopt a rule in toxic cases that effectively immunizes employers who deliberately force their employees to inhale toxic substances and those employees are sickened or die as a result. Indeed, in *Birklid*, Boeing argued to this Court that there is no deliberate intent to injure so long as the employer's injurious conduct "was reasonably calculated to advance an essential business purpose." *Id.* at 862. Under this formulation,

State v. Conte, 159 Wn.2d 797, 813, 154 P.3d 194 (2007), it is an important explanation of why the Legislature has for 19 years acquiesced in this Court's interpretation of RCW 51.24.020. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) (Legislature is presumed to be aware of judicial interpretations of statutes and failure to amend such a statute after a judicial interpretation indicates legislative acquiescence in the judicial interpretation).

virtually *any* deliberately injurious conduct by an employer was exempt from an RCW 51.24.020 action because conduct, no matter how deliberately obtuse to its potential to injure workers, could be “justified” because it spurred production or otherwise advance the employer’s needs.

Boeing argued to the trial court and the Court of Appeals here that the exposed worker has a cause of action under RCW 51.24.020 *only* if the exposed worker was 100% certain to be injured from the exposure and that the injury immediately manifested itself. CP 44-47, 50-54, 62-65, 5729, 5770. Although nothing in *Birklid* required that such injury be *universal* to all exposed employees or that it be *immediately manifested*, the Court of Appeals agreed with Boeing ruling that an immediate manifestation of injury was critical before a cause of action in a toxic exposure case could be stated under RCW 51.24.020. *Walston v. Boeing Co.*, 173 Wn. App. 271, 284-85, 294 P.3d 759 (2013). This interpretation effectively immunizes employers in Washington who force the exposure of their workers to known injurious toxic substances so long as a worker does not immediately experience compensable injury or succumb from the exposure to the toxic substance. The Court of Appeals here specifically indicated that the immediate manifestation of injury in *Birklid* and other cases was the fact that distinguished those cases from the present case. *Id.* at 284. (“Here, unlike in *Birklid*, *Hope*, and *Baker*, where the injury to the

employees was immediate and obvious, Walston and his co-workers were not immediately or visibly injured by the exposure to asbestos.”). That is not the lesson to be learned from *Birklid* or case law since it was filed,⁶ nor does this argument comport with sound public policy.

In its supplemental brief at 6-7, Boeing tries to retreat from the implications of its own argument, claiming that it is not the immediacy of the manifestation of injury that is important but the certainty of compensable injury. Disregarding Boeing’s lack of candor in its discussion of its arguments below, Boeing has only dressed up the position it took in *Birklid*. Under Boeing’s conception of RCW 51.24.020, it must know that each and every exposed worker will suffer a compensable injury before a cause of action is stated, disregarding its forced exposure of workers to toxic substances *it knows* will result in an injurious process in all workers and will cause some to be ill. The level of certainty of injury argued for by Boeing was not present in *Birklid* and could not be present in the real world. That is why the toxic cases under RCW 51.24.020 are, and should be, to the contrary.

⁶ This Court’s decision in *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005), for example, does not alter the import of *Birklid*. It was not a toxic exposure case. There, a mentally disabled student injured several teachers. The student had injured other students and staff about 96 times during the school year, and seven of those injuries resulted in worker compensation claims. *Id.* at 24. The court held that the teachers could not show that the employer actually knew that they would suffer injury. *Id.* at 34. In effect, the employer could not predict the student’s free will, and that unpredictability broke the causal chain between the employer’s actions and the worker’s injury.

The policy reasons for direct employer liability under RCW 51.24.020 are also important to this Court's analysis of that statute. Where an employer deliberately injures its workers, that employer should not benefit from participation in the Industrial Insurance Act's Accident, Medical, and Pension Funds. *See* RCW 51.44.

The purpose of the Industrial Insurance Act is as its title describes—to provide insurance for on-the-job injuries to workers. Its premiums are calculated in a fashion “consistent with recognized principles of workers’ compensation insurance . . .” RCW 51.16.035(2). A central tenet of such insurance principles is to “stimulate and encourage accident prevention.” *Id.* Moreover, premiums are set by the classification of occupations or industries “in accordance with their degree of hazard.” RCW 51.16.035(1). The Department must also consider the effect of rates on the Accident and Medical Funds overall. *WR Enterprises v. Dep’t of Labor & Indus.*, 147 Wn.2d 213, 221-22, 53 P.3d 504 (2002).

An employer’s deliberate injury of a worker, be it a traumatic event like an assault, or a deliberate exposure of the worker to toxic substances that results in disease, skews this carefully calibrated system. The employer who deliberately exposes workers to toxic substances not only harms the workers, it harms other, responsible employers who pay

additional rates in the classification structure of the Act. *Other employers* should not have their industrial insurance premiums increased by the deliberate injurious conduct of an employer like Boeing here.⁷

(2) Washington's Special Concern for Preventing Worker Exposure to Toxic Substances Also Supports Walston's Interpretation of a Claim Under RCW 51.24.020

Washington law exhibits a special concern for preventing exposure of workers to toxic substances, manifested in statute and case law. That special concern should further animate this Court's interpretation of deliberate intent to injure under RCW 51.24.020 in toxic cases. Simply put, toxic exposure cases are unique. Washington's Worker and Community Right to Know Law, RCW 49.70, articulates a special concern for workers potentially exposed to toxic chemicals. RCW 49.70.010. Similarly, Washington's citizens established an aggressive public policy by initiative to clean up the effects of toxic contamination in the Model Toxics Control Act, RCW 70.105D.010. The Legislature specifically exempted exposure to hazardous substances from several liability in its 1986 Tort Reform efforts. Indeed, in *Sofie v. Fibreboard*

⁷ As the *Birklid* court stated, innocent employers should not bear the insurance cost of employers who willfully injure employees. *Birklid*, 127 Wn.2d at 874. OSHA currently oversees occupational safety regulation, but struggles with the growing need for regulation and the lack of public funds needed to oversee employee safety. Gorton, *supra*, 30 Env'tl. L. at 832. Commentators have noted that tort liability will incentivize employers to comply with OSHA regulation, even when OSHA cannot perform frequent inspections. *Id.* at 838-40. Making employers pay for injuries occasioned by toxic exposure presents an economically efficient means to regulate occupational hazards.

Corp., 112 Wn.2d 636, 771 P.2d 711 (1989), this Court held that exposure to asbestos qualified as an exposure to a hazardous substance under RCW 4.22.070(3)(a), thereby allowing a plaintiff to sue defendants for joint and several liability, notwithstanding the enactment of several liability for most torts in the 1986 Tort Reform Act. *Id.* at 667-69.

These authorities evidence a special public policy in Washington law for those who are forced to inhale toxic substances generally and in the workplace.⁸

Further, in toxics cases, many of the health consequences or diseases have long latency periods. Not every person exposed to toxic substances will immediately manifest injury.⁹ This is certainly true for asbestosis and mesothelioma.

Many workers face serious jeopardy to their health at work from exposure to toxic substances and worker compensation may not provide

⁸ Washington also prides itself on a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). In the industrial insurance setting, the *Birklid* court rejected the notion that “the blood of the workman is a cost of production.” *Birklid*, 127 Wn.2d at 874.

⁹ *See, e.g., Koslop v. Cabot Corp.*, 631 F. Supp. 1494 (M.D. Pa. 1986) (authorizing direct action against employer for risk of contracting beryllium-related diseases). *See generally*, “Recovery for Exposure to Beryllium,” 116 A.L.R. 6th 143 (2006) (collecting cases regarding beryllium exposure; 10 to 30 year latency period for beryllium-related lung disorders). *See also, Smith v. Monsanto Co.*, 822 F. Supp. 327 (S. D. W. Va. 1992) (direct action against employer for PAB exposure; PAB exposure results in diseases with long latency periods).

sufficient remedy for the long-term effects of such occupational injuries.¹⁰ Mesothelioma and other cancers take *years* to develop, and do not show immediate symptoms. Thus, workers have difficulty proving not only that they suffered a workplace injury but that an employer actually knew that a carcinogenic hazard would certainly injure an employee. These diseases also require very expensive treatment. A statutorily fixed worker compensation settlement will not always cover the necessary treatment, and workers may go undercompensated without the ability to recover in tort.

Since *Birklid*, employees have met the definition of deliberate intention when an employer knowingly and continuously exposed employees to toxic substances that cause a worker to experience an injurious process. In *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001), *overruled on other grounds by Vallandigham*, Division I held that an employer acted intentionally when it knew cleaning chemicals caused rashes but still required employees to use them. In *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501, *review denied*, 129 Wn.2d 1021 (1996), an opinion authored by then Judge Charles Wiggins, Division II held that

¹⁰ The National Institute for Occupational Safety and Health estimates that toxic chemical exposure in the workplace accounts for four to ten percent of all cancer deaths in the United States; that is roughly 24,000 deaths annually. Elizabeth M. Ward, *et al.*, *Priorities for Development of Research Methods in Occupational Cancer*, 111 Environ. Health Perspect. 1-12 (2003), <http://dx.doi.org/10.1289/ehp.5537>.

an employer had actual knowledge that injury was certain when employees were exposed to chemicals and complained of breathing difficulties, skin rashes, nausea, and headaches.

Neither *Hope* nor *Baker* mandated that the injury be manifested immediately or by every worker forced to experience a toxic substance. In *Baker*, the workers were exposed to various chemicals. The opinion does not indicate every exposed worker's injuries were immediately manifested. The *Baker* court stated: "General Plastics' supervisors knew that the employees were suffering from chemical-related illnesses and that, unless the working environment was changed, continuing injury was certain." 80 Wn. App. at 783. In fact, the testimony there reflected exposure of workers to toxic chemicals over a period of weeks. The injuries were not necessarily immediate. One worker was exposed to toxic substances in his first three weeks of employment. The exposure resulted in breathing problems that led to bronchitis and pneumonia. *Id.* at 778. Universal or immediate injury due to exposure was not required. Similarly, in *Hope*, the plaintiff was exposed to harsh chemical cleaners for *seven months* at her workplace in a supermarket, and she and other workers experienced serious rashes on their hands, arms, legs, and chests. *Id.* at 188-89. Division I did not require an immediate manifestation of harm. *See also, Katanga v. Praxair Surface Technologies, Inc.*, 2009 WL

506832 (W.D. Wash. 2009) (employer knew that explosions in a room where the plaintiff worked had occurred previously, were on-going, and were certain to continue; citing *Birklid*, *Baker*, and *Hope*, court permitted direct action); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001) (airline flight attendants exposed to hazards of second-hand smoke from smokers; court found that direct action for chronic injuries from long-term toxic exposure was proper, citing *Birklid*).¹¹

(3) The Proper Rule for Toxic Substances Exposure in Deliberate Intent to Injury Cases

The Court of Appeals' insistence that *every* person exposed to a toxic substance must *immediately* manifest a compensable injury is

¹¹ Boeing argues in its supplemental brief at 17-19 that a narrow reading of *Birklid* is supported by cases from other jurisdictions. In effect, Boeing wants to narrow *Birklid*, effectively restoring the position it argued for in that case and that was rejected by this Court. But Boeing's argument is incorrect in the toxic exposure context. For example, Boeing claims that states like Louisiana and Oregon have narrowed the deliberate injury cause of action against an employer. This assertion is belied by case authorities from those jurisdictions involving toxic exposures. In Louisiana, *Broussard v. Smith*, 999 So. 2d 1171 (La. App. 2008) did not overrule *Major v. Firemen's Fund Ins. Co.*, 506 So. 2d 583 (La. App. 1987), a case in which the employer forced a worker to be exposed to toxic chemicals. See also, *Robinson v. North American Salt Co.*, 865 So. 2d 98 (La. App. 2003), *writ denied*, 860 So. 2d 1139 (2003) (upholding jury verdict in action against employer that forced maintenance workers to work in unsafe fashion on plant conveyor system that removed salt); *Quick v. Myers Welding & Fabricating Co.*, 649 So. 2d 999 (La. App. 1995), *writ denied*, 653 So. 2d 598 (1995) (dismissal of direct action reversed in case employer forced welder to encounter unsafe condition involving pure oxygen). Similarly, in Oregon, *Davis v. U.S. Employers Council, Inc.*, 934 P.2d 1142 (Or. App. 1997) did not overrule *Lusk v. Monaco Motor Homes, Inc.*, 775 P.2d 891 (Or. App. 1989), a case in which a direct claim was stated where an employer withheld respirators to painters using paints containing isocyanates. See also, *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 95 (9th Cir. 1989) (applying Oregon law, workers stated direct action against employer that forced them to clean up PCB spill on their hands and knees without protective clothing).

pernicious as it guts *Birkliid*, and leaves employers free to force their workers to experience the deleterious effect of known toxic substances.

An example posed below was an employer directing a worker to handle radioactive material. There is little question that the worker would be injured by such exposure, even though the compensable injury might be manifested later. But under Boeing's formulation of the *Birkliid* rule, if the exposure to radiation did not *universally* cause every employee exposed to such a level of radiation to be visibly injured, i.e., have radiation burns, the worker had no claim if the radiation exposure later manifested itself in diseases like cancer or sterility. Even though Boeing conceded in the trial court that forcing an employee to handle plutonium would subject the employer to a claim under RCW 51.24.020 as such conduct was "a classic intentional tort." CP 5746-47, 5770, and such conduct is tantamount to an assault for the reasons articulated in Walston's petition at 14-15, Boeing's attempt to distinguish that situation is unavailing to it. In some instances, workers' forced exposure to such toxic materials may not universally result in each exposed worker being injured.¹² Even in the case of

¹² The radioactive material example is not an idle one. In *Tulloh v. Goodyear Atomic Corp.*, 639 N.E.2d 1203 (Ohio App. 1994), the court authorized an action by an employee against his employer where that employer deliberately exposed him to radioactive materials. Similarly, in *Day v. NLO*, 851 F. Supp. 869 (S. D. Ohio 1994), a federal district court certified a class of employees and others to pursue an action against a manufacturer of nuclear weapons components that exposed the class members to radiation. The case presented difficult questions of law where the class members had not yet contracted cancer, but had emotional distress arising from their present fear that they

radioactivity exposure, not every worker exposed to plutonium is certain to suffer injuries or diseases; an employer that forces workers to suffer toxic exposures will *never* know which specific worker it will sicken.

The Court of Appeals' treatment of direct actions under RCW 51.24.020 will fail to adequately deter employers from forcing their workers to encounter toxic hazards that jeopardize their long-term health.¹³ This Court recognized that one of the law's key purposes is deterrence. *Birklid*, 127 Wn.2d at 874 (citing *Provost v. Puget Sound Power & Light Co.*, 103 Wn.2d 750, 753, 696 P.2d 1238 (1985)). Hazards in the workplace have changed, and employers can more easily conceal their wrongdoing. Michelle Gorton, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 *Envtl. L.* 811, 823 (2000). As discussed previously, many illnesses from toxics develop slowly, and employees do not always understand the danger they face. Therefore, employers may decide to withhold information about a toxic hazard, especially if the injury from the toxic exposure will not show immediate symptoms. This Court must deter wrongdoing and incentivize employers to protect

would do so in the future. *See also, In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124 (9th Cir. 2002) (class action of persons exposed to radiation emanating from Hanford Nuclear Reservation since World War II).

¹³ Under the Court of Appeals' analysis, employers would have an incentive to force workers' exposure to toxic hazards and let the worker compensation safety net subsidize their conduct, at the expense of other employers who do not deliberately injure their employees.

employees—thus fulfilling the purpose of the law—by rejecting the Court of Appeals' analysis.

Nothing about the *Birklid* test for deliberate injury, focused as it should be on the employer's conduct, requires an examination of the universality of injury or *how fast* the worker's injury comes to light. The key point is that *the plaintiff* was deliberately injured by the employer. An employer can know that injury to workers is certain to occur from exposure to radiation, asbestos, benzene, or other toxics, even though the compensable injury from such exposures may have long latency periods. The employer incurs liability when it chooses deliberately to put the worker in harm's way for production or other profit-producing rationales.¹⁴

Walston articulated the appropriate rule for a claim under RCW 51.24.020 in the toxic exposure setting in his supplemental brief at 7. An alternate formulation of the rule is that a worker states a direct action

¹⁴ The Court of Appeals relied on *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 103 P.3d 807 (2004), *review denied*, 154 Wn.2d 1021 (2005). *Walston*, 173 Wn. App. at 282-83. But that case did not rely on the immediate manifestation principle and instead focused on whether the injury from asbestos exposure was certain to occur. No expert testimony was offered on certainty of injury from asbestos exposure. *Shellenbarger*, 125 Wn. App. at 48-49. Here, there was a genuine issue of material fact on that issue because Boeing knew of the hazards of asbestos exposure, *Walston*, 173 Wn. App. at 274-75, and there was expert testimony that asbestos exposure certainly results in harm to those exposed, at the cellular level. *Id.* at 275-78. *See also, Speck v. Union Electric Co.*, 741 S.W.2d 280 (Mo. App. 1987) (claim against employer by workers' children as to asbestos exposure stated where employer withheld health information as to father).

when the employer forces the worker to be exposed to toxic substances, knowing that such toxic exposure is harmful given the properties of such a substance, and the worker experiences the harm associated with such a toxic exposure.

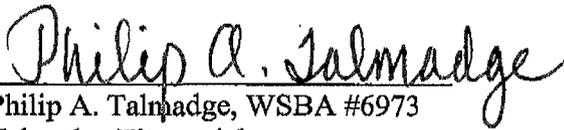
E. CONCLUSION

The Court of Appeals' adoption of an immediate manifestation of compensable injury principle in its published opinion is pernicious. It is injurious to USW's members and thousands of Washington's workers who are forced to encounter toxic materials in the workplace that cause them harm, including diseases with long latency periods.

The statutory language of RCW 51.24.020/.030 as interpreted by this Court in *Birklid* makes clear in toxic substances cases that the injury to the plaintiff need not be immediately manifested, nor does the injury have to be certain. Rather, to state a claim under RCW 51.24.020, the forced exposure of a worker to toxic substances must result in a certain injurious process that ultimately results in the employee's occupational disease. This interpretation comports with rationale for actions against employers under RCW 51.24.020.

DATED this 13th day of January, 2014.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, Washington 98188

(206) 574-6661

Attorneys for Amicus Curiae

United Steelworkers Local 12-369

APPENDIX

SENATE BILL 5651

State of Washington 55th Legislature 1997 Regular Session

By Senators Anderson, Newhouse, Schow, Horn and Oke

Read first time 02/05/97. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to restricting actions against employers under
2 industrial insurance; and amending RCW 51.24.020.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 51.24.020 and 1984 c 218 s 2 are each amended to read
5 as follows:

6 If injury results to a worker from the deliberate intention of his
7 or her employer to produce such injury, the worker or beneficiary of
8 the worker shall have the privilege to take under this title and also
9 have cause of action against the employer as if this title had not been
10 enacted, for any damages in excess of compensation and benefits paid or
11 payable under this title. For the purposes of this section, a worker's
12 injury does not result from the deliberate intention of his or her
13 employer unless the specific purpose of the employer's conduct was to
14 bring about that injury. The court shall determine, as a question of
15 law, the purpose of the employer's conduct.

--- END ---

1 SB 5651 - H COMM AMD 614

2 By Committee on Commerce & Labor

3 Strike everything after the enacting clause and insert the
4 following:

5 "NEW SECTION. **Sec. 1.** The legislature finds that the
6 historic covenant between workers and employers that resulted in
7 the industrial insurance system in Washington was intended to
8 provide both "sure and certain" relief to workers and foreclosure
9 of law suits against employers, without regard to questions of
10 fault by either party. However, this historic compromise also
11 recognized that employers who deliberately injured their employees
12 should not be immune from civil law suit. The legislature
13 therefore finds that the standard used for determining the injuries
14 for which employers can be subject to suit is critical to
15 maintaining the covenant between workers and employers. To protect
16 the no-fault system intended for industrial insurance, this
17 standard must narrowly limit suits against employers to situations
18 in which the employer determined to injure the employee and used
19 some means appropriate to that end.

20 **Sec. 2.** RCW 51.24.020 and 1984 c 218 s 2 are each amended to
21 read as follows:

22 If injury results to a worker from the deliberate intention of
23 his or her employer to produce such injury, the worker or
24 beneficiary of the worker shall have the privilege to take under
25 this title and also have cause of action against the employer as if
26 this title had not been enacted, for any damages in excess of
27 compensation and benefits paid or payable under this title. For
28 the purposes of this section, a worker's injury does not result
29 from the deliberate intention of his or her employer unless the
30 employer had specific intent to injure the worker. The specific
31 intent required under this section must relate to the injury, not
32 to the act causing the injury. The employer has the specific
33 intent required under this section if the employer acts with the

1 objective or purpose to accomplish the worker's injury, using some
2 means appropriate to that end. The court shall determine, as a
3 question of law, the employer's intent."

4 Correct the title:

EFFECT: The amendment strikes the underlying bill and adds (1) an intent statement regarding the importance to the historic covenant between workers and employees of maintaining employer immunity from civil suits unless the employer determines to injure the worker, and (2) a requirement that to show "deliberate intention," there must be a finding that the employer has specific intent to injure the worker, which means that the employer acts with the purpose to accomplish the worker's injury.

SENATE BILL REPORT

SB 5651

As Passed Senate, March 17, 1997

Title: An act relating to restricting actions against employers under industrial insurance.

Brief Description: Restricting actions against employers under industrial insurance.

Sponsors: Senators Anderson, Newhouse, Schow, Horn and Oke.

Brief History:

Committee Activity: Commerce & Labor: 2/18/97, 2/28/97 [DP, DNP].
Passed Senate, 3/17/97, 26-23.

SENATE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass.

Signed by Senators Schow, Chair; Horn, Anderson and Newhouse.

Minority Report: Do not pass.

Signed by Senators Franklin, Fraser and Heavey.

Staff: Jonathan Seib (786-7427)

Background: Under Washington law, workers' compensation is generally the only remedy available to an employee injured in the course of employment. Lawsuits by an injured employee against his or her employer are not allowed. However, RCW 51.24.020 provides that if an injury results from the "deliberate intention" of an employer to produce the injury, the bar against suing the employer is removed and the employee is allowed to recover for any damages in excess of the workers' compensation benefits.

Early state court decisions interpreted this language to require that an employee, if he or she wanted to bring an action against an employer, show that the employer had a specific intent to injure the employee. In practice, this limited recovery outside of workers' compensation to only those cases where an employer had actually assaulted an employee.

In 1995, however, the state Supreme Court decided a case in which employees were exposed to noxious chemicals despite their employer's knowledge that such exposure was resulting in injury. In *Birklid v. Boeing*, the court held that under these circumstances, a jury was justified in finding that the employees had met the standard in RCW 51.24.020 such that recovery outside the limits of workers' compensation was allowed. In doing so, the court interpreted the phrase "deliberate intention" in RCW 51.24.020 to mean that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."

Summary of Bill: For purposes of allowing a cause of action against an employer for injuries resulting from the deliberate intention of the employer, it is provided that a worker's

injury does not result from the deliberate intention of his or her employer unless the specific purpose of the employer's conduct was to bring about the injury. The court is to determine, as a question of law, the purpose of the employer's conduct.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The interpretation given deliberate intent— in the *Birklid* case will result in more litigation, imposing enormous costs that will be particularly hard on small businesses. The new interpretation is almost impossible for employers to understand, leaving them to guess whether or not they are in compliance. If the same standard were imposed on employees under the workers' compensation system, they would oppose it.

Testimony Against: The interpretation of deliberate intent— articulated in *Birklid* is an appropriate one. It recognizes that an employer cannot wilfully sacrifice the health of its workers, even for legitimate business purposes. The interpretation of the law prior to this case made it virtually impossible to prove intentional injury. If that was actually what was intended, the law would have been written differently. The bill would give immunity to bad employers, to the detriment of employees and good employers.

Testified: PRO: V. Woolston, The Boeing Company; Clif Finch, Association of Washington Business; Charles Bush; CON: Randolph Gordon; Robert Dilger, Washington State Building Trades Council; Dan Sexton, United Association of Plumbers and Pipefitters; Mck Ludington, Machinists 751; Robby Stern, Washington State Labor Council; Johanna Wolf, Chemical Injury Coalition.

HOUSE BILL REPORT

SB 5651

As Reported By House Committee On:
Commerce & Labor

Title: An act relating to restricting actions against employers under industrial insurance.

Brief Description: Restricting actions against employers under industrial insurance.

Sponsors: Senators Anderson, Newhouse, Schow, Horn and Oke.

Brief History:

Committee Activity:

Commerce & Labor: 3/31/97, 4/3/97 [DPA].

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass as amended. Signed by 5 members: Representatives McMorris, Chairman; Honeyford, Vice Chairman; Boldt; Clements and Lisk.

Minority Report: Do not pass. Signed by 4 members: Representatives Conway, Ranking Minority Member; Wood, Assistant Ranking Minority Member; Cole and Hatfield.

Staff: Chris Cordes (786-7103).

Background: A worker injured in the course of employment generally is compensated under the industrial insurance law for those injuries and is not permitted to bring a civil action against his or her employer. However, if the injury results from the deliberate intention of the employer to produce the worker's injury, the worker may bring suit against the employer for damages in excess of the benefits paid under the industrial insurance law.

What constitutes "deliberate intention" of an employer has been discussed in several Washington appellate court cases. A Washington Supreme Court decision in 1995 reviewed previous cases that required a specific intent to injure the worker by the employer. The court then held that "deliberate intention" means that the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

Summary of Amended Bill: The Legislature finds that the historic covenant between workers and employers that resulted in the industrial insurance system will not be maintained unless worker law suits against employers are limited to situations in which the employer determined to injure the worker.

To show "deliberate intention" to injure a worker, the court must find that the employer had specific intent to injure the worker. The employer has the specific intent required if the employer acts with the objective or purpose to accomplish the worker's injury, using some means appropriate to that end.

Amended Bill Compared to Original Bill: The amended bill deletes the definition of "deliberate intention" under which an employer would be found liable for a worker's injury if the specific purpose of the employer's conduct was to bring about the worker's injury. The amendment adds: (1) an intent statement regarding the importance to the historic covenant between workers and employees of maintaining employer immunity unless the employer determines to injure the worker; and (2) a definition of "deliberate intention" that requires a finding of specific intent to injure the worker.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: This legislation will not impact the outcome of the current court case. The facts in the current litigation have not yet been determined, but there are questions about the exposure to workers and the impact on workers, other than the offensive odor. Regardless of the outcome of that case, other employers could easily become the target of similar lawsuits. This change in the law is needed to avoid having the workers' compensation system become highly litigious and to be able to keep the relatively high benefit structure. The court's standard raises a problem -- for example, how would it apply to modern buildings that do not allow outside air? Could litigation be brought related to employee health problems related to indoor air quality? The worker's compensation no-fault system will be eroded unless the immunity standard is clear. Small businesses cannot afford any increase in litigation. Most small businesses are forced to settle doubtful cases because the cost of litigation is too high.

Testimony Against: In 86 years, only three cases have met the "deliberate intention" standard. There is no need to change the standard that all nine members of the court agree on. The question remains whether workers should be sacrificed when the employer has actual knowledge of injury. The bill creates an impossible standard by

requiring a showing of malice. Other incidences of employer knowledge of chemical-related problems have occurred. Testing for air contaminants is problematic since exposure depends on the work that is being done and testing gives time-weighted results. Workers have had to invest their own savings and family savings to fight for their right to benefits.

Testified: (In support) V. L. Woolston, The Boeing Company; Clif Finch, Association of Washington Business; and Carolyn Logue, National Federation of Independent Business. (Opposed) Randolph Gordon, Washington State Trial Lawyers Association; Theresa Birklid; Victoria Loney; and Roy Moore.

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Motion of United Steelworkers Local 12-369 for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae United Steelworkers Local 12-369 in Supreme Court Cause No. 88511-7 to the following parties:

Glenn S. Draper
Matthew P. Bergman
Anna D. Knudson
Bergman Draper Ladenburg, PLLC
614 1st Avenue, 4th Floor
Seattle, WA 98104

Brendan Murphy
Bruce Campbell
Katherine C. Wax
Perkins Coie LLP
1201 3rd Avenue, Suite 4800
Seattle, WA 98101-3099

Original efiled with:

Washington Supreme Court
415 12th Street W
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 13, 2014, at Tukwila, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: TLG Assistant
Subject: RE: Motion of United Steelworkers and Brief of Amicus Curiae Cause No. 88511-7

Received 1-13-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: TLG Assistant [mailto:assistant@tal-fitzlaw.com]
Sent: Monday, January 13, 2014 1:15 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: annak@bergmanlegal.com; glenn@bergmanlegal.com; matt@bergmanlegal.com; BMurphy@perkinscoie.com; BCampbell@perkinscoie.com; KWax@perkinscoie.com
Subject: Motion of United Steelworkers and Brief of Amicus Curiae Cause No. 88511-7

Good afternoon:

Attached please find the Motion of United Steelworkers and Brief of Amicus Curiae in Supreme Court Cause No. 88511-7 for today's filing. Thank you.

Sincerely,

Roya Kolahi
Legal Assistant
Talmadge/Fitzpatrick, PLLC

206-574-6661 (w)
206-575-1397 (f)
assistant@tal-fitzlaw.com