

No. 88511-7

**SUPREME COURT OF
THE STATE OF WASHINGTON**

DONNA WALSTON, individually and as personal representative of the
Estate of Gary Walston,
Petitioner,

v.

THE BOEING COMPANY,
Respondent.

AMICUS BRIEF OF AGC OF WASHINGTON

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Petitioner urges this Court to adopt a new tort liability framework based on undetectable, cellular-level effects of exposure to hazardous substances. The implications of embracing petitioner's liability framework extend well beyond asbestos and well beyond the employment relationship. Petitioner's tort framework contradicts the Industrial Insurance Act's definition of "injury," and would foster litigation that would affect both employers and other businesses whose operations emit a substance with cellular effects on the body, however slight and however unlikely to progress to a clinically recognized disease.

I. The workplace tort liability framework plaintiff urges this Court to adopt contradicts the "injury" requirements of the Industrial Insurance Act.

The Industrial Insurance Act became law because the Legislature found tort suits did far more damage to employment relations and to the public welfare than whatever benefits they achieved for claimants. The Act therefore eliminated employer tort liability, except in the narrow instance provided for in RCW 51.24.020. That statute includes "injury" requirements that are dispositive to this case. The legal framework plaintiff urges this Court to adopt not only contradicts the Act's provisions regarding injury, but would create chaotic litigation in a wide variety of other workplace exposure events.

A. In enacting the industrial insurance act, the legislature eliminated court jurisdiction over employee tort claims, except as explicitly provided for in the act.

A little over a century ago, the legislature determined that the tort system for compensating employee injuries ill served the public interest.

The Industrial Insurance Act begins with the legislature's declaration:

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker.¹

From that indictment of the tort system in the context of employee-injury claims, the legislature abolished the entire system, eliminated courts' jurisdiction over employee tort suits, and allowed future civil actions only as explicitly provided for in the Act:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and

¹ RCWA 51.04.010.

civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.²

The sole exception to employer immunity allowed by the Act is set forth in RCW 51.24.020:

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.

B. Plaintiff proposes that this court establish a new framework for allowing employee tort claims in cases of workplace exposure to a harmful substance.

Plaintiff urges this Court to adopt a new framework for determining whether, in cases of workplace exposure to a harmful substance, an employee's tort claim may proceed to trial despite the employer's statutory immunity:

This Court should hold...that an employer deliberately intends injury when the employee can show: (1) the employer knowingly and deliberately forced the employee to suffer a toxic insult over the employee's objection; (2) the employer knew that the coerced toxic insult would produce a certain injurious process in the employee; (3) the employer knew that such certain injurious process had in the past produced employee

²

Id.

illnesses; and (4) the employee's compensable injury was produced in the injurious process.³

Plaintiff's argument that this Court should design and impose this new employer liability framework in cases of toxic exposure is untethered from the Industrial Insurance Act language enacted by the legislature. Plaintiff candidly acknowledges the breadth of judicial discretion that it is asking this Court to exercise:

The Court must decide if forcing a worker to suffer an invisible battery that may kill him is less blameworthy than forcing a worker to suffer relatively trivial but visible injuries, such as headaches or watery eyes, as was the case for a number of the *Birklid* plaintiffs. The Court of Appeals' decision in effect says that an employer who slowly poisons his employees is less culpable than one who gives his workers a headache. This Court should amend that faulty moral calculus.⁴

What plaintiff proposes is not what the law requires. "It is neither the function nor the prerogative of courts to modify legislative enactments." *Anderson v. City of Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87, 88 (1970). "The court will not read into a statute matters which are not there nor modify a statute by construction." *King County v. City of Seattle*, 70 Wn.2d 988, 991, 425 P.2d 887, 889 (1967).

Where "a statute is clear on its face, its meaning [should] be derived from the language of the statute alone." [Citations.] "Courts should assume the Legislature means

³ Supplemental Brief of Petitioner, p. 7.

⁴ Supplemental Brief of Petitioner, p. 12.

exactly what it says” in a statute and apply it as written. [Citations.] Statutory construction cannot be used to read additional words into the statute.

Densley v. Department of Retirement Systems, 162 Wn.2d 210, 219, 173 P.3d 885, 889 (2007).

As discussed below, the new framework proposed by plaintiff for employee claims in toxic exposure cases would require this Court to rewrite specific, defined terms in RCW 51.24.020.

C. The tort framework proposed by plaintiff conflicts with the industrial insurance act, and would do violence to the legislature’s establishment of limited judicial jurisdiction.

The exemption from employer immunity provided for in the Act is RCW 51.24.020. The focus of the parties’ briefing in this case, and of previous Washington caselaw applying RCW 51.24.020, has been on the “deliberate intention” element of the statute. But the AGC of Washington submits that in the present case a different portion of the statute is dispositive.

Plaintiff alleges an intentional exposure to a harmful substance, causing an injurious process that led many years later to the development of a fatal disease. Plaintiff variously contends that the injury for which

relief is sought is the eventual disease⁵, or the injurious process that led to the disease⁶, or the microscopic, “not observable” cellular injury presumed to occur upon the initial inhaling of asbestos fiber⁷.

Regardless of plaintiff’s characterization of the injury for which relief is sought, a court must apply RCW 51.24.020 using the meaning of “injury” intended by the legislature when it said:

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.

The statute permits a cause of action only where the employer deliberately intended to produce the injury that in fact results from the employer’s wrongful conduct. That is the unambiguous meaning of the phrase ‘such injury’ in RCW 51.24.020.

⁵ CP 1 (Plaintiff’s Complaint is “for personal injuries caused by exposure to asbestos fibers, resulting in mesothelioma, an invariably fatal cancer of the lining of the lung.”); CP 2 (“Gary Walston was exposed to asbestos fibers from insulation products installed by Brower and as a proximate result has contracted mesothelioma.”).

⁶ Supplemental Brief of Petitioner, p. 12 (“[E]ach of those deliberate invisible batteries produces a certain injurious process.”).

⁷ Supplemental Brief of Petitioner, p. 5 (“[A]n individual exposed to asbestos fibers at levels greater than background sustains an immediate injury that is not observable.”); *Id.*, p. 14 (“[The] workplace injury was the scarring of his lung tissue when Boeing forced him to inhale asbestos on the job in 1985.”).

Equally significant, the legislature defined “injury” as used in the Industrial Insurance Act. Indeed, the Act includes two definitions for that term: A general one, and a specific one applicable to RCW 51.24.020. The general definition of “injury” in the Act provides:

"Injury" means 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). This definition applies everywhere in the Act, “[u]nless the context indicates otherwise.” RCW 51.08.010.

The Act also includes another definition of “injury” applicable for the entirety of RCW Chapter 51.24: “For the purposes of this chapter, “injury” shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.” RCW 51.24.030(3).

A microscopic, “not observable” cellular change upon every inhalation of asbestos fiber is not “injury” as defined in the Act. It is not a “physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.” Plaintiff admits as much. *See* Supplemental Brief of Petitioner, pp. 14-16 (acknowledging that cellular injuries from forced toxic exposure are not compensable injury for purposes the ‘deliberate intent’ exception to

employer immunity, and that the employee must establish that the toxic exposure resulted in compensable injury such as a chronic disease). Even without plaintiff's admission, undetectable cellular change does not meet the threshold definition of injury as either "[compensable] under this title,"⁸ nor as "a sudden and tangible happening, of a traumatic nature".⁹

Likewise, the 'injurious process' that plaintiff posits as what ought to be sufficient injury does not meet the Act's definition. An invisible, injurious process that goes undetected for years or decades is no more a compensable injury under the Act, nor a sudden and tangible happening of a traumatic nature, than is the cellular trauma from each inhalation of asbestos fibers.

The only injury in the present case that meets the legislature's definition of "injury" is the severe and ultimately fatal disease that (as alleged by plaintiff) eventually *resulted* from asbestos inhalation. Plaintiff's mesothelioma meets the definition in RCW 51.24.030(3). Cellular trauma upon asbestos fiber inhalation, and the injurious process initiated with that inhalation, do not.

To meet the requirements of RCW 51.24.020, plaintiff must show not only "injury" (which in this case means the eventual disease), but also

⁸ RCW 51.24.030(3).

⁹ RCW 51.08.100.

that the employer deliberately intended “*such injury*.” No evidence exists for that. None was presented in opposition to Boeing’s motion for summary judgment. Plaintiff’s evidence suggests the employer deliberately exposed plaintiff to a toxic substance. Plaintiff argues for an inference that the employer therefore deliberately intended to cause invisible cellular trauma and/or an injurious process that might or might not have eventually resulted in a fatal disease. But that is not what the phrase “such injury” requires. It requires that plaintiff establish deliberate intent to cause injury meeting the statutory definition of injury, which in this case is plaintiff’s mesothelioma. And proof for that proposition does not exist.

So instead of meeting the explicit requirements of RCW 51.24.020, plaintiff urges that this Court effectively rewrite the statute to read:

If injury results to a worker from the deliberate intention of his or her employer to ~~produce such injury~~ *expose the worker to an injurious process*, 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

Such a result is not appropriate. *See State v. Delgado*, 148 Wn.2d 723, 730, 63 P.3d 792, 796 (2003) (“We will not ‘arrogate to ourselves the power to make legislative schemes more perfect, more comprehensive and more consistent.’”); *Aviation West Corp. v. Washington State Department*

of Labor & Industries, 138 Wn.2d 413, 432, 980 P.2d 701, 711 (1999) (“We cannot legislate in order to add to what the Legislature has already said.”); *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791, 795 (1998) (“Courts do not amend statutes by judicial construction, [citation], nor rewrite statutes ‘to avoid difficulties in construing and applying them.’”); *Associated General Contractors of Washington v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996, 1001 (1994) (“courts may not create legislation in the guise of interpreting it”).

Previous cases analyzing RCW 51.24.020 have involved situations where injury from the tortious conduct was immediate and obvious. *See Vallandigham v. Clover Park School District*, 154 Wn.2d 16, 20, 109 P.3d 805, 807 (2005) (battery); *Folsom v. Burger King*, 135 Wn.2d 658, 661, 958 P.2d 301, 304 (1998) (murder); *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 856, 904 P.2d 278, 281 (1995) (noxious chemical exposure causing nausea, headaches, dizziness, and unconsciousness); *Perry v. Beverage*, 121 Wash. 652, 209 P. 1102, 1103 (1922) *modified*, 121 Wash. 652, 214 P. 146 (1923) (assault and battery); *Crow v. Boeing Co.*, 129 Wn. App. 318, 321, 118 P.3d 894, 896 (2005) (knee injury from slip on scaffolding); *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 856 P.2d 410 (1993) (forklift driven into plaintiff); *Winterroth v. Meats, Inc.*, 10 Wn. App. 7, 8,

516 P.2d 522, 523 (1973) (hand caught in meat grinder). So the focus of those cases has been on the “deliberate intention” element of the statute.

By contrast, the present case involves asbestos exposure, where no immediate effects are detectable, and where just a fraction of individuals subjected to the exposure ever manifest significant injury, typically years or decades later. Other workplace exposure scenarios, such as those involving second-hand smoke or lead exposure, similarly manifest much later, and in only a fraction of people subjected to the exposure.

Petitioner’s proposed new tort framework would fundamentally recast the concept of “injury” in a way that could affect a far wider array of tort claims than those relating to the limited immunity exception embodied in RCW 51.24.020.

II. Plaintiff’s new employer tort liability framework not only conflicts with the Act, but would put resulting claims on a collision course with the statute of limitations.

The gist of plaintiff’s appeal is that when an employer willfully allows employee exposure to a material known to be harmful, the employer’s tort is so blatant and harmful that it should count as intentional “injury” under RCW 51.24.020. Indeed, as part of the liability framework urged by plaintiff, the harmful exposure must be so obvious and severe that the worker actually objected to it, and so severe as to be certain to harm the worker. Plaintiff’s framework would require:

- (1) the employer knowingly and deliberately forced the employee to suffer a toxic insult over the employee's objection;
- (2) the employer knew that the coerced toxic insult would produce a certain injurious process in the employee;
- (3) the employer knew that such certain injurious process had in the past produced employee illnesses;¹⁰

But those very characteristics, once embedded in the concept of "injury," would either force all exposed workers to sue within three years of any exposure or else risk forfeiture of their tort claims if serious illness developed at any later point in life.

In an ordinary personal injury action, the general rule is that a cause of action "accrues" at the time the act or omission occurs. In certain torts, however, injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action. The rule of law postponing the accrual of the cause of action is known as the "discovery rule".

White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687, 691 (1985) (citation omitted).

If a claimant knows of some injury from a tort, the cause of action accrues even though the claimant does not know the full extent of her damage. "The aggrieved party need not know the full amount of damage before the cause of action accrues, only that some actual and appreciable

¹⁰ Supplemental Brief of Petitioner, p. 7.

damage occurred.” *Johnson, Christenson, Viger Constructors, Inc. v. Perry, Shelton, Walker & Associates*, 133 Wn. App. 1008 (2006).

When the claimant knows of any appreciable harm, accrual occurs even if further harm has not yet occurred:

The statute of limitations is not postponed by the fact that further, more serious harm may flow from the wrongful conduct. We said in *Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724 (1954) (quoting 34 Am. Jur. *Limitation of Actions* § 160), *overruled in part by Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969) (establishing discovery rule):

Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

The adoption of the discovery rule in *Ruth* modified this statement by declaring the statute of limitations does not attach at once, but only upon discovery of the harm. Nevertheless, the essence of the statement remains the same: the running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur.

To hold otherwise would run contrary to important policy considerations such as Washington's strong preference for avoiding the splitting of causes of action. In effect, a plaintiff would have a new action for damages for each new condition that became manifest. This could also lead to the highly impractical consequence of multiple statutes of limitations applying to the same allegedly wrongful conduct. We reject an approach leading to such a result.

Green v. A.P.C., 136 Wn.2d 87, 96-97, 960 P.2d 912, 916 (1998) (citations omitted).

Until now, Washington courts have recognized that accrual of an asbestos claimant's cause of action may not occur until years after exposure, when an asbestos-related disease manifests itself. That recognition rests on the premise that until then the claimant's condition was latent, and earlier recognizable damage was neither known nor reasonably discoverable. See *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 354-56, 693 P.2d 687, 694-95 (1985) ("The application of the discovery rule to the present case reflects the latent nature of occupational diseases.").

The tort framework proposed by plaintiff runs against that premise. In plaintiff's view, willful workplace exposure to asbestos fibers or similar harmful materials, once objected to by an employee, is so blatantly harmful, with the certainty of both immediate cellular damage and of a continuous injuries process, to be actionable against the employer. But with rare exception, an employer would not have dramatically greater awareness of that injury than would be available to the employee upon diligent investigation.

The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff

must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered.

Green v. A.P.C., 136 Wn.2d 87, 96, 960 P.2d 912, 916 (1998). Plaintiff's tort framework thus would press exposed employees to sue within three years of any exposure, even if their chances of ever developing a serious exposure-related disease were slight, to avoid risk of the running of the statute of limitations. Indeed, plaintiff's tort framework would create that incentive for asbestos exposure claims (and similar claims) even against *non-employer* tortfeasors, and even for non-intentional torts.

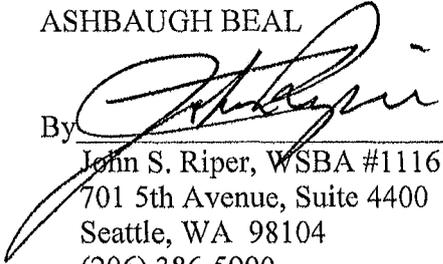
This case arises from a claim of intentional tort by an employer, a variety of claim that the legislature saw as a narrow exception to employer immunity that would likely arise only rarely. Before departing from existing law in a way likely to affect a far wider array of significant claims, this Court would want to explore those effects in detail. But the implications that plaintiff's legal framework would have on accrual of a wide range of toxic tort claims goes entirely unmentioned in plaintiff's briefing. Even if plaintiff's proposed framework were not barred by the explicit provisions of RCW 51.24.020 (which it is), this case would be a poor vehicle to embrace it.

Conclusion

The AGC of Washington urges that the opinion of the court of appeals be affirmed.

RESPECTFULLY SUBMITTED this 13~~th~~ day of January, 2014.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing *Motion of AGC of Washington for Leave to File Amicus Curiae Brief* has been made this 13th day of January, 2014, by sending copies thereof by email and first-class mail to the following counsel:

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Dear Clerk:

Please accept for filing the attached "Motion of AGC of Washington for Leave to File Amicus Curiae Brief." As detailed on the Certificate of Service, all counsel will receive a copy of the motion by first class mail. Additionally, some counsel are copied on this email.

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