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IN THE SUPREME COURT OF WASHINGTON

DONNA WALSTON, Individually and as Representative of the
Estate of GARY G. WALSTON,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

PETITIONER BOEING'S RESPONSE TO BRIEF OF
AMICUS CURIAE UNITED STEELWORKERS LOCAL 12-369

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INTRODUCTION

In *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995), this Court held the Industrial Insurance Act permits an employee to sue an employer for a workplace injury only when the employer has actual knowledge that the injury is certain to occur and acts in willful disregard of that knowledge. Because Walston has produced no evidence that Boeing knew he was certain to be injured by any exposure to asbestos in the workplace, the Court of Appeals correctly determined that Boeing was entitled to summary judgment on his tort claim. 173 Wn. App. 271, 294 P.3d 759.

Like Walston, amicus curiae United Steelworkers Local 12-369 struggles to articulate a rule that would permit Boeing to be liable on the facts of this case but would not require overruling *Birklid* and disregarding the text of the statute. The struggle is in vain. Under the rule proposed by amicus, employers would be liable in tort in essentially every workplace toxic-exposure case. That result is contrary to the statutory text and to nearly a century of settled law. This Court should reject it.

ARGUMENT

A. The text of RCW 51.24.020 forecloses amicus's argument

Amicus correctly observes (Br. 4) that “[t]his Court’s analysis should start with the language of the statutes at issue here.” But while

amicus repeatedly refers to RCW 51.24.020, the language of that provision appears nowhere in its brief. The omission is not surprising because the statutory text forecloses amicus's position.

Section 51.24.020 eliminates tort liability for workplace injuries except in the narrow category of cases in which an "injury results to a worker from the deliberate intention of his or her employer to produce such injury." RCW 51.24.020. By itself, the word "intention" negates the possibility that liability could be based on negligent or even reckless conduct. The addition of the word "deliberate" removes any doubt on the point. For that reason, as this Court explained more than 90 years ago, that language means "the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross." *Delthony v. Standard Furniture Co.*, 119 Wn. 298, 300, 205 P. 379 (1922) (citation omitted).

Although amicus explores the history of the statute—including an examination of a bill the Legislature did *not* enact (Br. 6 n.5)—it never comes to grips with the phrase "deliberate intention." That language simply cannot be stretched to cover exposure to hazardous substances that may or may not cause injury at some point in the future.

B. The statutory definitions of “injury” and “disease” do not support amicus’s argument

Rather than address the phrase “deliberate intention,” amicus argues (Br. 4-5) the statutory definitions of “injury” and “disease” support its position. Amicus emphasizes (Br. 5) that the definition of “injury” in RCW 51.24.030(3) includes both traumatic injuries and “disease.” That is correct, but it does not advance amicus’s argument.

Section 51.24.030(3) defines “injury” to include “any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.” That means for the purposes of the deliberate-intent exception, the relevant injury must be a compensable condition. The statutory definition thus forecloses the suggestion that asymptomatic, cellular-level damage—which is not compensable—may constitute an “injury.”

But, amicus asks (Br. 6), if cellular-level damage is insufficient, how “could a worker demonstrate that his or her employer deliberately intended a ‘disease’?” This Court’s decision in *Birkliid* answers that question, both legally and factually. Legally, workers can establish liability by demonstrating that “the employer had actual knowledge that an injury”—including a disease—“was certain to occur and willfully disregarded that knowledge.” *Id.* at 865. Factually, workers can carry

their burden in any number of ways. They can show that an employer “knew in advance its workers would become ill,” or that it saw some of its workers experience symptoms when exposed to a substance. *Id.* at 284. Or they can show that they experienced diseases like bronchitis or pneumonia when exposed. *Baker v. Schatz*, 80 Wn. App. 775, 778-79, 912 P.2d 501 (1996).

What plaintiffs cannot do is rely on the mere fact that some diseases have a latency period. Nor may they rely on the mere risk of disease. Instead, they must show knowledge on the employer’s part that disease was certain to occur. *Birkliid*, 127 Wn.2d at 865; *see Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 28, 109 P.3d 805 (2005) (“Disregard of a *risk* of injury is not sufficient,” but “*certainty* of actual harm must be known and ignored.”).

Here, Walston showed far less than certainty. His own expert conceded that asbestos exposure is not certain to result in disease. 173 Wn. App. at 286; CP 713 (Walston’s expert testified that “even in some of the highest exposed cohorts . . . only around 7, 8, 9 percent of the workers that have had high exposure to asbestos ever develop mesothelioma.”); *see also* CP 305 (“[M]esothelioma is a rare condition even after substantial exposure to asbestos.”). And even if he had presented contrary expert testimony, that still would not establish Boeing knew to a certainty that

disease would occur. Without that certainty, the observation that “injury” includes “disease,” or that some diseases have latency periods, is insufficient to defeat employer immunity.

C. Amicus inaccurately describes Boeing’s position

Amicus accuses Boeing of a “lack of candor” (Br. 9), alleging it made one argument to the courts below and makes a different argument now. The accusation is baseless. Boeing’s position throughout this litigation has been that there is no evidence from which a reasonable juror could conclude Boeing had actual knowledge that Walston’s injury would occur and that it deliberately disregarded that knowledge. Boeing made that argument in its summary-judgment motion, CP 54-61, in its brief to the Court of Appeals, Boeing C.A. Br. 19-24, 34-38, and in its briefing before this Court, Boeing Supp. Br. 5.

Amicus nevertheless ascribes to Boeing a position that is directly contrary to its actual position. According to amicus (Br. 4), “Boeing says that . . . there is evidence that Boeing knew it was causing injury to Walston’s lungs.” Not so. Boeing has consistently denied Walston’s novel theory of cellular-level injury, which has no basis in either law or fact.

Along similar lines, amicus claims (Br. 9) that Boeing is simply making the same argument it made in *Birklid*. Boeing’s argument there,

as the *Birkliid* Court explained, was that employers could not deliberately intend injury if their “conduct was reasonably calculated to advance an essential business purpose.” *Birkliid*, 127 Wn.2d at 862 (emphasis omitted). That is not Boeing’s argument here. Instead, Boeing has argued the evidence presented by Walston is insufficient to meet the test set out in *Birkliid*.

D. Amicus’s proposed test is contrary to this Court’s precedent

According to amicus (Br. 19), an employee may sue an employer in tort “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.” That test cannot be reconciled with this Court’s decision in *Birkliid*.

While this Court has declared that “the *Birkliid* test can be met in only very limited circumstances,” *Vallandigham*, 154 Wn.2d at 32, and has emphasized “the narrow interpretation Washington courts have historically given to RCW 51.24.020,” *Birkliid*, 127 Wn.2d at 865, amicus’s proposed rule would be met in virtually every circumstance where an employee worked around toxic substances and later developed a disease from those substances. In fact, the test proposed by amicus is strikingly similar to the “substantial certainty” and “conscious weighing”

tests that the *Birklid* Court considered and expressly rejected. Under the substantial-certainty test, “[i]f the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” *Id.* at 864 (citation omitted). Under the conscious-weighting test, an employer deliberately intends an injury when it “had an opportunity consciously to weigh the consequences of its act and knew that someone, not necessarily the plaintiff specifically, would be injured.” *Id.* at 865. But under amicus’s rule, employers would lose immunity not only when a substance is substantially certain to injure an employee, but also whenever the employer knows the substance is “harmful given the properties of such substance.” And employers would lose immunity not just a showing that they consciously weighed the risk of harm, but any time any employee “experiences the harm associated with such a toxic exposure.”

For that reason, amicus’s proposed rule would capture not just conduct that is negligent or reckless—which would itself represent a significant expansion of *Birklid*—it would also apply to conduct that fully complies with applicable safety regulations. For many toxic substances, even the current exposure limits set by the Occupational Safety and Health Administration do not reduce the risk of disease to zero, and therefore exposure that is consistent with governing regulations can still be

“harmful” in the sense contemplated by amicus. *See, e.g., Occupational Exposure to Asbestos*, 59 Fed. Reg. 40,964, 40,968 (Aug. 10, 1994) (recognizing that some risk of disease remains when workers are exposed to asbestos at the permissible exposure limit). More broadly, Walston’s own expert confirmed that routine substances like smog found in a city like Seattle can cause the same type of cellular injury that he attributed to asbestos. (CP 612.) Like Walston, amicus has identified no limiting principle that would allow Boeing to be held liable on the facts of this case without subjecting every employer in the state to liability for all diseases attributable to exposure to hazardous substances.

Given the breadth of employer activity that would be captured by the proposed rule, and the lack of any reference to employer intent, it is no exaggeration to call the rule a form of strict liability. Not only would such a rule stand in direct contradiction to the phrase “deliberate intent,” it would eliminate employer immunity in virtually every toxic exposure case. This Court should adhere to *Birklid* and reject amicus’s invitation to expand employer liability.

DECLARATION OF SERVICE

On this day I deposited in the U.S. Mail a true and accurate copy of the foregoing brief to the following:

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

DATED: February 5, 2014, at Seattle, Washington.

s/_____
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On behalf of Eric D. Miller, please accept the attached *Petitioner Boeing's Response to Brief of Amicus Curiae United Steelworkers Local 12-369* in Case No. 88511-7, Donna Walston, Individually and as Representative of the Estate of Gary G. Walston v. The Boeing Company.

Thank you very much for your assistance.

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