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DIVISION II

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STATE OF WASHINGTON

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No. 42543-2-II

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO**

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

Respondents,

v.

THE BOEING COMPANY,

Petitioner.

**RESPONDENTS' RESPONSE TO BRIEF OF *AMICI CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS AND
WASHINGTON SELF-INSURERS ASSOCIATION**

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I. INTRODUCTION

Respondents Gary G. Walston and Donna Walston (“Plaintiffs” or “Mr. Walston”) file this response to the brief submitted by *amici curiae* Association of Washington Business and Washington Self-Insurers Association (collectively “AWB”).

II. ARGUMENT

The Grand Compromise. AWB spends much of its brief lecturing the Court about the historical framework of the “grand compromise” underlying Washington workers’ compensation law. *See* AWB Brief at 3-7. But Mr. Walston does not challenge the legislative conclusion that the vast majority of workers who suffer workplace injuries should be compensated for those injuries solely through the workers’ compensation system. The legislature’s “grand compromise,” however, acknowledged that a no-fault workers’ compensation system should not incentivize employers to send their employees into harm’s way. As the *Birklid* Court observed, the “deliberate intention” exception is narrow, but “[e]mployers who engage in such egregious conduct should not burden and compromise the industrial insurance risk pool.” *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995); *see also id.* at 874 (rejecting the notion

that “the blood of the workman is a cost of production,” which “no longer represents the public policy or the law of Washington”).

The Deliberate Intention Exception is Narrow. Mr. Walston also does not question that the deliberate intention exception to the rule of employer tort immunity is a narrow exception. Thus, AWB’s claim that Mr. Walston seeks to “ero[de]” (AWB Brief at 3) the governing standard is simply impertinent. AWB’s citations to cases decided prior to *Birklid* also are not helpful, as the *Birklid* Court articulated the standard by which Washington courts are governed today. See AWB Brief at 6-9. Under *Birklid*, an employee is required to show that his employer had *actual knowledge* that *an injury was certain* to occur and that the employer *willfully disregarded* that knowledge. *Birklid*, 127 Wn.2d at 865. On the record of this case, Mr. Walston is entitled to have a jury decide if Boeing intentionally injured Mr. Walston under the *Birklid* test.

The *Birklid* record demonstrated that Boeing “anticipated” based on pre-production experience that *some* of its workers would get sick when Boeing commenced resin production, but Boeing did not know which workers would get sick, what the specific injuries would be, whether the injuries would be compensable, or the severity of

illnesses workers would experience. *See* Respondents' Brief at 27-28 (citing *Birklid*, 127 Wn.2d at 853, 856-57, 857 n.2 & 871, and Clerk's Papers of material provided to the Superior Court further documenting the *Birklid* record). AWB acknowledges as much in its Brief when it states that the Boeing supervisor "predicted" that injuries would recur to "some" workers once production began. AWB Brief at 10 (citing *Birklid*, 127 Wn.2d at 856). Boeing did not know and had no way of knowing that all of its workers would get sick or if specific plaintiffs would get sick. Any suggestion otherwise is sheer invention and unsupported by the *Birklid* record.

Nonetheless, the *Birklid* Court held that plaintiffs had presented evidence that Boeing willfully disregarded its knowledge of certain injury when it ordered workers to continue working. The Court explained:

The central distinguishing fact in this case from all other Washington cases that have discussed the meaning of "deliberate intention in RCW 51.24.020 is that Boeing here knew in advance *its workers* would become ill from the phenol-formaldehyde fumes, yet put the new resin into production. After beginning to use the resin, Boeing then observed *its workers* becoming ill from the exposure. In all the other Washington cases, while the employer may have been aware that it was exposing *workers* to unsafe conditions, its workers were not being injured until the accident leading to litigation occurred.

Birklid, 127 Wn.2d at 863 (emphasis added). *Birklid*'s holding that knowledge of certain injury does not require knowledge of which worker would get sick or the specific injury that will occur has been followed consistently by Washington appellate courts. See *Baker v. Shatz*, 80 Wn. App. 775, 783-84, 912 P.2d 501 (1996); *Hope v. Larry's Markets*, 108 Wn. App.185, 194, 29 P.3d 1268 (2001).

AWB says that the "central distinguishing fact" in *Birklid* was Boeing's "actual knowledge *inferred* by the observable symptomatic injuries to workers" from the pre-production experience. AWB Brief at 11 (emphasis added). That central fact nonetheless permitted the Boeing supervisor only to "predict" or "infer" future injuries. *Birklid*, 127 Wn.2d at 856. The supervisor had no way to know who would get sick or the severity of the illness, yet the *Birklid* Court held that Boeing had willfully disregarded its actual knowledge of *certain* injury. *Birklid*, 127 Wn.2d at 865-66. AWB's claim (AWB Brief at 12) that *Birklid* requires proof of the employers' knowledge that all exposed workers would suffer a certain disease is thus completely inconsistent with the tenets of *Birklid* itself.

The record in this case demonstrates that a jury could well find the same "central distinguishing fact" in this case. Boeing knew of

certain injury to all workers who were forced to inhale asbestos fibers because inhaling such fibers commenced “an injurious process.” *See* Respondents’ Brief at 14-20 & nn.1-2 & 34-38. And Boeing knew that some of Mr. Walston’s co-workers had already made and were continuing to make asbestos injury claims. *Id.* at 14-16. Armed with that knowledge, Boeing ordered Mr. Walston to “go back to work” in an asbestos rain. CP 1655 at 98:4-99:3.¹

Mr. Walston Has Shown that Boeing Knew of Certain

Injury. AWB is wrong when it claims that Boeing disregarded only its knowledge of the *risk of injury* or *risk of a potential hazard*, which Washington courts have held is insufficient to establish intentional harm. *See* AWB Brief at 15-17. The record demonstrates that Boeing disregarded more than a “risk of a potential hazard.” There are many substances the exposure to which presents only a risk of injury, but

¹ Mr. Walston demonstrated that Boeing ordered Mr. Walston to “go back to work” and inhale asbestos fibers knowing it would cause him injury. *See* Respondents’ Brief at 5-23 and evidence cited. Arguments about whether Boeing acted intentionally (multiple witnesses testified the supervisor ordered workers to go back to work after workers raised concerns about breathing asbestos fibers) or that the exposure was not significant (Mr. Walston had to shut his lunch box to prevent asbestos fibers from falling into it and his experts hold the opinion it was the single greatest asbestos insult to his lungs) should be for the jury.

asbestos is not one of them. *See* Respondents' Brief at 16-17 (citing testimony of experts regarding the injury caused by inhalation of asbestos).² Mr. Walston presented evidence that well before he was ordered to work under an asbestos rain in the Hammer Shop in 1985, Boeing knew that the inhalation of asbestos causes certain injury to lung tissue in the worker. *See* Respondents' Brief at 11-20. Boeing itself described the inhalation of asbestos as commencing a "gradual injury process." *Id.* at 20. Its only uncertainty about the injury from inhaling asbestos was the extent to which such injuries would manifest in serious disease, an uncertainty that was also present in *Birklid*.

² AWB suggests that an affirmance of the Superior Court's denial of summary judgment under the egregious facts of this case would open the floodgates and "expose employers to a virtually infinite variety of workplace-related suits." AWB Brief at 17. But this argument ignores the distinctive and uniquely injurious characteristics of asbestos that distinguish it from other contaminants and as to which Mr. Walston presented un rebutted expert testimony. *See* CP 1024-26 & 1056-58 (Dr. Brody Decl., ¶¶ 7 & 10 and Ex. B & C) ("Every time the subject is exposed to asbestos, more fibers will be transported into the connective tissue space to cause scar tissue. When . . . exposed individuals exhibit scar tissue in their lungs as a result of inhaling asbestos fibers, that is asbestosis . . . Almost simultaneously with the time asbestos fibers enter the alveoli, the initial injuries take place . . . [I]njuries occur at the alveolar within 48 hours of exposure."); CP 588 (Dr. Brodtkin Dep. at 27:24-25) ("The process of tumor initiation happens in short order after exposure").

AWB asks this Court to disallow the jury from considering the direct and circumstantial evidence of Boeing's willful disregard of its actual knowledge that forcing Mr. Walston to inhale asbestos fibers was certain to cause injury. That is not the appropriate function of an appellate court.

“Injury” Under the *Birkliid* Test. Finally, AWB repeats the arguments that Boeing made in its Opening Brief that knowledge of certain injury under *Birkliid* must mean knowledge of “compensable injury” under the workers’ compensation law. Under the Industrial Insurance Act (“IIA”), workers’ compensation is only paid to workers *injured in the course* of their work, and the IIA does not apply to workers who are not injured until after they cease working for an employer. *See* RCW 51.04.010 (compensation covers “workers, injured in their work”); RCW 51.32.010 (compensation covers “each worker injured in the course of his or her employment”). Yet AWB admits that Mr. Walston’s injuries would be covered under the IIA, because his lung tissue was scarred each time Boeing forced him to inhale asbestos during his work, even though his compensable injury under the IIA (mesothelioma) did not manifest until after he retired. *See* AWB Brief at 18-19 (citing *Dept. of Labor & Industries v.*

Landon, 117 Wn.2d 122, 814 P.2d 626 (1991)); see also *Dept. of Labor & Industries v. Fankhauser*, 121 Wn.2d 304, 306-09, 849 P.2d 1209 (1993) (decided after *Landon*, holding that because workers “were exposed to asbestos during employment” and asbestos diseases diagnosed years later were traceable to prior employment, they were injured “in the course of employment” and thus were entitled to benefits under the IIA).

AWB urges the Court to re-write the IIA and the *Birklid* test and require that Mr. Walston prove that Boeing had actual knowledge that ordering him back to work in an asbestos rain was certain to cause mesothelioma, a compensable injury under the IIA. This is a standard that no plaintiff could ever meet. And neither the language of RCW 51.24.020 nor the standard announced in *Birklid* requires the judicial insertion of the term “compensable” before “injury” in the statute. The injury that occurs in the course of one’s work — in this case injury to lung tissue from inhaling asbestos fibers — is the relevant injury for purposes of the “actual knowledge” prong of the *Birklid* test. Indeed, *Birklid* demonstrates this point. In *Birklid*, Boeing had certain knowledge of a number of past minor injuries, but there is no indication that the injuries were compensable under workers’

compensation law, or that Boeing knew that future injuries would be compensable. *See Birklid*, 127 Wn.2d at 856-57 n.2; *see also* Respondents' Brief at 27-29.

The Case Law. There is no question that Washington courts have been reluctant to ascribe knowledge of certain injury when it comes to predicting future volitional conduct by persons who might cause injury, as the decision in *Vallandigham v. Clover Park School Dist.*, 154 Wn.2d 16, 109 P.3d 805 (2005), makes clear. But there is also no question that our courts can and should distinguish between the “certainty” associated with predicting an unruly child’s future behavior and the “certainty” of physical reactions caused by chemical exposures. *See Katanga v. Praxair Surface Tech., Inc.*, 2009 WL 506832, *3 (W.D. Wash. Feb. 27, 2009) (distinguishing *Vallandigham* based on its reliance on “the unpredictability in human behavior” and holding that plaintiff stated a claim under *Birklid* based on certainty of knowledge of continuing chemical explosions).

Finally, AWB argues, as Boeing does, that Division One’s decision in *Shellenbarger v. Longview Fibre Paper & Packaging*, 125 Wn. App. 41, 103 P.3d 807 (2004), should be controlling here. While *Shellenbarger* involved workplace inhalation of asbestos fibers, there

is little else in the record of that case that resembles the record here. In *Shellenbarger*, the only documented exposure to asbestos fibers was in 1966 when there was no evidence that Longview Fibre knew that inhaling asbestos dust caused certain injury to workers' lungs. In 1976, when Mr. Shellenbarger returned to work, the court found that Longview Fibre "had knowledge of the dangers of asbestos" but that there was no evidence that Mr. Shellenbarger inhaled asbestos fibers at work in 1976 or thereafter. *Id.* at 48.

The record here is quite different, and 1985 is a very different moment in history than 1966 with respect to the knowledge of harm caused by asbestos. Mr. Walston presented evidence that Boeing knew some of its workers were getting diseases from asbestos inhalation and that all of them were injured by breathing asbestos fibers before Boeing ordered Mr. Walston in 1985 to "go back to work" in an asbestos rain. *See* Respondents' Brief at 5-20 (citing record). Mr. Walston's supervisor's order was made in the face of Mr. Walston's protest, echoed by his co-workers, expressing their fears regarding the asbestos falling on them. *Id.* at 5-10. And while both AWB and Boeing seize on *Shellenbarger*'s dicta to the effect that not everyone exposed to asbestos gets sick, the statement is not only dicta,

but it was made without any expert testimony or evidentiary record — plainly present in this case — establishing that every worker suffers injury from inhaling asbestos.

III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in Respondents' Brief, this Court should affirm the Superior Court's denial of summary judgment and remand the case for trial.

DATED this 14th day of November, 2012.

Respectfully submitted,

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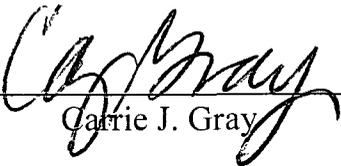
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