

No. 42543-2

**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.

BRIEF OF RESPONDENTS

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I. INTRODUCTION AND SUMMARY

In considering this appeal, the Court should consider first what this case is *not* about. This case does *not* challenge the legislative conclusion that the vast majority of workers who suffer workplace injuries should be compensated for those injuries through the worker compensation system. This case does *not* question that the exception to this rule — which applies when an employer deliberately intends to injure a worker — is a narrow exception. To meet the requirements of the “deliberate intent” exception set forth in RCW 51.24.020 an employee must show that his employer had *actual knowledge* that *an injury was certain* to occur and that the employer *willfully disregarded* that knowledge. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). This case does *not* ask the Court to apply the “deliberate intent” exception simply because a business historically used asbestos in its operations before it fully appreciated the risks. And finally, this is *not* a case where Gary Walston asks the Court to equate risk with injury, as Boeing wrongly suggests.

Rather, this *is* a case in which Boeing knew by 1985 that forcing its employees to inhale asbestos fibers caused immediate scarring of lung tissue and long-term injuries including mesothelioma. One of Mr. Walston’s co-workers had already died of mesothelioma from inhaling asbestos fibers in the Hammer Shop where he worked alongside Mr. Walston, and Boeing had received a number of other claims by his co-workers whose lungs were

injured when they were forced to inhale asbestos on the job.

Yet armed with that knowledge in 1985, Mr. Walston's supervisor criminally forced him to work for an entire month — unprotected and over his and his co-workers' protests — while asbestos abatement contractors wearing respirators and "moon suits" worked above them removing asbestos insulation from overhead steam pipes, showering him and his co-workers with asbestos fibers that they inhaled and which then lodged in their lungs.

Boeing had detailed, documented knowledge that stripping asbestos from overhead steam pipes presented an extraordinary danger and would cause certain injury to workers in the vicinity, but instead of protecting Mr. Walston, Boeing willfully disregarded its knowledge of certain injury and told him to "go back to work."

Mr. Walston has presented through direct and circumstantial evidence — as is necessary to prove an adversary's subjective intent — a genuine dispute for trial concerning Boeing's willful disregard of its actual knowledge that forcing him to inhale asbestos fibers was certain to cause injury.

Just as it sought to do in *Birklid*, Boeing seeks here to circumscribe the "deliberate intent" exception so as to write it out of the law. In *Birklid*, Boeing urged that it should remain within the protective cloak of the worker compensation laws if it deliberately injures its workers "so long as that conduct was *reasonably calculated to advance an essential business*

purpose.” *Birklid*, 127 Wn.2d at 862 (emphasis added). Because the *Birklid* Court rejected Boeing’s “business purpose” argument, Boeing attempts here to achieve the same result indirectly by claiming that Boeing should only be responsible for deliberately injuring its workers if (a) Boeing had knowledge that a specific plaintiff — not some of its workforce — would be certainly injured by Boeing’s deliberately harmful conduct; (b) a plaintiff’s injury is obvious and immediate, excluding more harmful internal and latent occupational injuries about which Boeing knew but the worker did not; and (c) the certain injury is a compensable injury under the worker compensation law, even when Boeing is certain it is causing immediate worker injuries that will later ripen to compensable injuries. This Court should reject Boeing’s attempts to obliterate the “deliberate intent” exception and to impose new requirements that do not exist. As the *Birklid* Court observed, the “deliberate intent” exception is narrow, but “[e]mployers who engage in such egregious conduct should not burden and compromise the industrial insurance risk pool.” *Id.* at 859.

II. ISSUE PRESENTED

Has Plaintiff Mr. Walston presented a triable question whether in 1985, Boeing had actual knowledge of certain injury that it disregarded when it ordered Mr. Walston, after he expressed concern for his safety, to “go back to work,” and forced him to toil under a month-long shower of asbestos fibers while asbestos abatement workers in “moon suits” with

respirators worked above him on overhead steam pipes?

III. STATEMENT OF THE CASE

A. **Mr. Walston Was an Exemplary Career Employee of Boeing Who Was Forced to Inhale Asbestos Fibers in Order to Do His Job.**

In 1956, two years after leaving high school, Plaintiff Gary Walston began work for Boeing where he remained until retiring in 1995. CP 1634 (15:18-23). Mr. Walston spent 35 years working in the Boeing Hammer Shop, until it closed in 1992. CP 1635 (18:23-19:6). The Hammer Shop was part of the Fabrication Division and was located along the Duwamish River in south Seattle, close to Boeing Field as part of the Plant 2 complex. It took its name from the large, stationary machines used to shape the metal plane parts. CP 1635-36 (18: 18-20, 21:14-25, 22: 1-5).

There is no question that throughout much of his career at Boeing, Mr. Walston was forced to inhale asbestos fibers. Boeing made asbestos products; it used asbestos products in its manufacturing processes; and its buildings contained many asbestos products. *See* CP 2049-50; CP 2080-89; CP 2100-25; CP 1743 (56:21-25); CP 2143 (51:1-52:3). And Mr. Walston's work exposed him to asbestos dust from those products. CP 1661 (122:21-25, 126:19-127:6).

Mr. Walston was diagnosed with pleural mesothelioma in August of 2010 at the age of 73, and since then has endured multiple rounds of chemotherapy. CP 2784-85. Although the treatment appears to have

slowed the progression of his cancer, mesothelioma is invariably fatal. CP 1060 (¶ 7). Mr. Walston's only documented asbestos exposure was his work at Boeing, and for purposes of this appeal, he has established that his inhalation of asbestos fibers while working at Boeing caused him to get mesothelioma. *Id.*

Mr. Walston does not accuse Boeing of deliberately intending to injure him by exposing him to asbestos throughout his 38-year career at Boeing. Rather, Gary has presented compelling evidence that Boeing deliberately caused him certain injury in 1985 when Boeing forced him — under protest — to work for a month under asbestos abatement contractors who showered him with asbestos fibers while he worked. Accordingly, Mr. Walston details here the evidence that Boeing forced him to inhale asbestos fibers in 1985 and that Boeing knew exactly what it was doing to him.

B. In 1985, Mr. Walston's Supervisor Forced Him to Work Through a Month-Long "Asbestos Rain" While Asbestos Abatement Contractors Worked Above Him.

The Hammer Shop contained an extensive network of overhead asbestos-insulated steam pipes running throughout the shop. CP 2013-14 (17:22-18:7); CP 2539 (Tamura Dep. at 22:23-25:11). The insulation on these overhead steam pipes in the Hammer Shop contained up to 50% amosite asbestos, one of the most carcinogenic forms of asbestos. CP 2184-85 (43:21-46:17).

In 1985, for a period of one month, asbestos abatement workers wearing protective “moon suits” with forced air respirators fed by hoses worked overhead in the Hammer Shop, moving down each line of hammers and dropping asbestos dust and debris to the shop floor. CP 1646 (65:19-66:2); CP 1655 (99:1-3); CP 1657 (106:23-107:4); CP 2614-15). As the asbestos abatement workers approached Mr. Walston’s work area, he had to cover his toolbox with a piece of plastic to keep asbestos rain from falling into his tool box. CP 1653 (93:3-18). As the asbestos rain fell, Mr. Walston and his co-workers continued to work at their work stations, without any protective clothing or respirators to prevent them from inhaling the falling asbestos fibers. CP 1654-55 (97:12-98:9). Gary testified that when the Hammer Shop workers complained to their supervisor about the danger to them, the supervisor rebuffed them and told them to keep working:

Q. [W]ere you working on the hammer machine at the time they were doing these repairs on the steam lines?

A. Right.

Q. And did you have any protective equipment?

A. No, none.

Q. Did you ask for any?

A. I know I did and several other guys asked the boss why we had to stay in there working while they were doing that when we had no protection, and he just said go back to work.

Q. Who was this person who said go back to work?

A. I'm pretty sure that one was Dennis Nadeau, the supervisor.

* * *

Q. What specifically do you remember asking Dennis Nadeau to do or to allow you to do?

A. Well, I asked if we couldn't get some protective stuff to wear or get out of the area and not have to work there while they were doing that, and that's when *we were told just go back to work.*

* * *

Q. Did you ask Mr. Nadeau for any personal protective equipment like respirators, hoods, anything like that, to protect yourself from what you thought was a hazard with this repair?

A. Well, I mentioned it to him . . . couldn't we get something to wear. That's what he decided, *just go back to work.*

Q. How many times did you raise this concern with Mr. Nadeau?

A. Just the one time really.

Q. Why didn't you raise it again with Mr. Nadeau?

A. Well, I just like to follow what the boss says. I mean, that was my way of thinking. . . . If the boss says you do this or you don't do this, that's the way I worked.

CP 1655-56 (98:4-19, 101:4-9, 104:6-21) (emphasis added); *see also* CP 2042 (illustration showing 1985 asbestos abatement above workers in the Hammer Shop) (copy attached as Appendix A hereto).

John Stewart served as the shop steward for the Hammer Shop in 1985. While operating his hammer, he noticed white powdery dust falling from the overhead steam pipes onto his head. He took a sample of the

material and gave it to a supervisor to test whether the powder contained asbestos. The test confirmed that the sample contained asbestos. CP 2014 (18:10-16, 19:3-8). Several days later, abatement personnel showed up in the Hammer Shop dressed in “moon suits” and wearing respirators and began working on the overhead pipes from cherry pickers. Asbestos rain began falling on Mr. Stewart and his co-workers, and he complained to Dennis Nadeau, his supervisor:

Q. [W]hat was . . . the substance of your complaint?

A. Well, I said, “This is crazy. These guys are above us. They are re-wrapping asbestos pipe. It’s still falling down.” You know, when you touch the pipe, it was very old, and it was still coming down. And I says, “They are in moon suits, and we’re just standing down here below them. This is just totally crazy to have one guy wearing a moon suit and the guy below him with no protection.”

Q. And was the dust coming down on you?

A. It was coming down everywhere.

Q. And was it visible?

A. Yeah.

Q. And what did Mr. Nadeau say when you complained?

A. Well, he just said, “Move out of the way. Don’t work underneath them.” I said, “You don’t have to tell us that. We’re not going to.” We moved.

Q. But they didn’t give you any sort of respiratory devices?

A. No.

CP 2014 (20:13-21:7).

Trying to escape the asbestos dust was “like trying to get out of the way of somebody smoking in the same room as you.” CP 2014 (19:17-25); CP 2042. Mr. Stewart testified that no effort was made to clean up the asbestos dust and debris that had fallen to the shop floor and that several other Hammer Shop employees, including Mr. Walston, complained to the shop supervisor about the falling asbestos rain. CP 2015 (23:18-25); CP 2016 (27:10-25). Mr. Stewart also testified that he did not observe any air monitoring performed by Boeing while this asbestos was falling on him and his co-workers, including Mr. Walston. CP 2015 (23:15-17). When Mr. Stewart failed to get any relief from Hammer Shop supervisors, he spoke to his union and then wrote a January 16, 1985 letter documenting how he was forced to breathe asbestos fibers in the Hammer Shop for his medical file. CP 2015 (24:4-22).

Mr. Walston’s co-worker, Mr. Hiroshi Tamura, also testified that workers came into the Hammer Shop with white body suits and respirators and worked on asbestos insulation on the overhead steam lines. CP 2540 (26:3-18). Like Mr. Walston and Mr. Stewart, Mr. Tamura complained to Hammer Shop supervisors about the falling asbestos rain and was similarly rebuffed:

- Q. [T]ell me . . . about what you remember about people coming in to work on the steam pipes with asbestos on them.
- A. I remember them coming in with the complete suit and face mask, and they were taking the asbestos off

the pipe. And I objected — I told the boss, I said, “Why do they have protection that we don’t have any protection, but we had to continue working?”

- Q. Do you recall what your boss said when you complained about the lack of protection?
- A. Keep working.
- Q. Can you tell me whether or not while the people were working on the steam pipes who had the protection that you just described, whether or not any debris came down near where you were working?
- A. There was a few — a few coming down. That’s when I objected, and I told the boss, I said, “How come they have protection and we don’t have it?”

* * *

- Q. Why did you want protection like they had?
- A. Well, I know that asbestos is bad for you. . . You hear a lot about the asbestos from the shipyards and somewhere like that . . . [W]hen you find out it’s asbestos . . . how come we can’t have protection like they are when they were taking the thing apart?

CP 2539-40 (25:14-27:2).

Documents produced by Boeing further corroborate that Boeing conducted asbestos abatement work in the Hammer Shop in January 1985. *See, e.g.*, CP 2614-15.

Dr. Brodtkin concluded that this month-long “asbestos rain” in the Hammer Shop under which Boeing forced Mr. Walston to work “likely by far would be the highest level of exposure experienced by Mr. Walston in all the activities described.” CP 2873 (118:23-119:15).

C. Boeing Had Actual Knowledge of Certain Injury that It Willfully Disregarded.

What did Boeing know when it told Mr. Walston, over his protest, to “go back to work” unprotected under asbestos abatement contractors in moon suits and forced him and his co-workers in the Hammer Shop to breathe asbestos fibers for a month in 1985?

1. By 1985, Boeing Knew that Breathing Any Asbestos Fibers Was Dangerous to Mr. Walston.

In 1957, Boeing knew that asbestos fibers were “hazardous material” and that asbestos “was hazardous to human health.” CP 3452 (36:11-25). Boeing knew that workers who inhaled asbestos fibers got asbestosis, cancer and mesothelioma in vastly greater numbers than the general population. CP 5246-47. When the U.S. Department of Labor passed OSHA regulations in 1972, requiring employers to commence air monitoring and meet excursion limits for asbestos within 6 months, it imposed those requirements on Boeing with urgency “in view of the *undisputed grave consequences from exposure to asbestos fibers*” and because “*lives of employees are at stake.*” 1972 OSHA Asbestos Standard, 37 Fed. Reg. 11318 (emphasis added). In December of 1972, Boeing responded and expressed its knowledge that asbestos dust is “*dangerously toxic*” and mandated that in the event of an asbestos spill, the contaminated area must be evacuated and then cleaned by personnel wearing approved respiratory protection. CP

5238 (Industrial Hazards Control Bulletin No. 5) (copy attached as Appendix B hereto).

Boeing knew that *any* amount of asbestos fibers could harm its workers. In 1978, Boeing recognized that there is no known safe threshold for breathing asbestos fibers and that “[o]nly a ban can assure protection against the carcinogenic effects of asbestos.” CP 3231 (emphasis added). And in 1983, Boeing’s Fabrication Division, where Mr. Walston worked, acknowledged that inhaling asbestos fibers below permissible levels could “lead[] to lung cancer and mesothelioma . . .” CP 5305.

2. By 1985, Boeing Knew that Workers in the Vicinity of Asbestos Abatement Were Endangered and Required Protection.

Boeing knew that its workers were endangered by nearby asbestos abatement work, in particular. In 1977, Boeing understood that disturbing overhead pipe insulation posed an extreme threat to workers. CP 5307-10. Boeing acknowledged, with specific reference to “stripping and removal of asbestos containing pipe insulation,” that “[r]emoval of asbestos-containing materials will result in excessive asbestos exposures.” CP 5309. Boeing further recognized that during any such asbestos abatement work, “[a]ll workers in the area” should be provided with protective equipment including “an approved respirator for protection.” CP 5308; *see also* CP 5238 (Boeing safety bulletin stating that “[i]n the event asbestos dust is spilled,” area must be “evacuate[d]” and any “[p]ersonnel cleaning the area

shall wear approved respiratory protection”) (Appendix B hereto).

On April 7, 1982 Boeing industrial hygienist N.P. Novack reported that “[t]he operations that we have monitored that generate the highest airborne concentrations of asbestos are stripping and removal of asbestos insulation on pipes.” CP 5314. In June 1985, Boeing industrial hygienist Chris Bang described elaborate procedures necessary to protect Boeing employees from inhaling asbestos fibers when working in the vicinity of asbestos abatement projects:

A glove bag method was utilized to encapsulate the portion of pipe insulation to be removed at the site, thus containing the asbestos laden material in the bag. Only portions of the insulation were removed, enough so that the pipe could be cut into sections, and brought to a remote site for complete removal of asbestos insulation. A fully enclosed area was built outside the . . . building where the sections of pipe could be stripped *without exposing Boeing employees*.

CP 2606 (emphasis added). Boeing’s CR 30(b)(6) designee acknowledged that the Bang memo reflected Boeing’s knowledge in 1985 about the dangers to workers working beneath pipe insulation asbestos abatement contractors. CP 2575 (18:9-20:19).

Boeing also knew that loose asbestos falling from pipe insulation, as Mr. Stewart described was occurring in the Hammer Shop in 1985, was a danger to workers below. In January 1980, Boeing expressed its knowledge of the danger to workers working below when loose asbestos insulation fell

to the floor, and it described necessary protective measures to protect workers. CP 2647-48.

3. By 1985, Boeing Knew that Forcing Its Workers to Breathe Asbestos Fibers Had Caused and Was Causing Certain Injury.

By 1985, Boeing knew that breathing asbestos fibers in its workplace had caused and was causing certain injuries to its workers. Throughout the 1980s, Mr. Walston's co-workers made a variety of worker compensation claims for chronic illnesses cause by their forced inhalation of asbestos fibers on the job. In January 1981, Boeing received a claim from an employee alleging chronic obstructive pulmonary disease and possible asbestos fiber inhalation. CP 5321. In February 1982, Boeing received a claim for injuries related to asbestos inhalation from a 24-year employee who had worked as a plumber throughout Plant 2. CP 5323. In June 1983, Boeing received a claim from a maintenance plumber alleging respiratory disorders resulting from breathing asbestos fibers. CP 5321.

Indeed, by early 1985, if not sooner, Boeing knew that one of Mr. Walston's co-workers had died from breathing asbestos fibers in the Hammer Shop. In 1981, a Mr. Walston's Hammer Shop co-worker, Berthold Altenburg, filed suit against Johns-Manville based on his diagnosis of cancer from asbestos exposure in the Boeing Hammer Shop. CP 5371. Mr. Altenburg died in 1984. CP 5372 (¶¶ 8-11). Third-party discovery to Boeing was documented in February 1985 correspondence. CP 2614.

In April 1985, a Boeing worker made a claim alleging asbestosis, and in February 1986 another Boeing worker made a claim alleging asbestosis. CP 5321. In September 1989, Boeing received a mesothelioma claim from a 31-year employee who worked as a structural test mechanic. CP 3468-69. Two months later, in December 1989, Boeing received an asbestosis claim from a sheet metal worker who described tearing out insulation on duct work and plumbing in Plant 2. CP 5363-64; CP 5367; *see also* p. 33, below (Board of Industrial Insurance Appeals decisions describing additional worker compensation claims against Boeing in the 1980s for confirmed asbestos diseases).

And Boeing knew, as discussed below, that by 1985 it was common scientific knowledge that workers are injured immediately from inhaling asbestos fibers, which scar lung tissue when they lodge in the lung and immediately begin to impair lung function. As Boeing stated in a 1977 memorandum written by its industrial hygiene managers discussing the pathology and toxicology of airborne asbestos, although asbestos-related diseases may not be diagnosed until years later, the “fibrotic lesions” and other precursor injuries are all traceable to “initial contact” with asbestos fibers. CP 5247.

Since Mr. Walston’s retirement in 1995, the number of his co-workers (documented cases, not including additional worker compensation claims described below) who have died or are dying from mesothelioma (at

least 32 cases), lung cancer (at least 6 cases), and asbestosis (at least 5 cases) has reached epidemic proportions. CP 5425-26; *see also* CP 5427-5676.

a. Mr. Walston Presented Three Experts Who Testified that When Boeing Forced Mr. Walston to Breathe Asbestos Fibers, It Caused Him Certain Injury.

In the Superior Court, Dr. Arnold Brody testified that an individual exposed to asbestos fibers at levels greater than background sustains an immediate and palpable injury:

Every time the subject is exposed to asbestos, more fibers will be transported to the connective tissue space to cause scar tissue . . . [¶] Based upon my 35 years of research and my professional training and experience, it is my opinion that injury occurs at the alveolar within 48 hours of exposure to asbestos, and I have described sub-cellular injury as well as activation of genes and cell division at the pleura within hours post-exposure. Almost simultaneously with the time asbestos fibers enter the alveoli, the initial injuries take place that lead to scar tissue formation and accelerated cellular division.

CP 1024-26 (¶¶ 7 & 10). Mr. Walston's two other experts, Drs. Brodtkin and Lemen, agreed. Dr. Brodtkin testified that "[t]he process of tumor initiation happens in short order after the exposure. The interaction between an asbestos fiber and the DNA can . . . happen . . . fairly shortly after exposure." CP 2850 (27:24-28:2). Dr. Richard Lemen testified that "every exposure to asbestos above background constitutes an injury that the OSHA regulations were designed to prevent." CP 1065 (¶ 11). These three expert opinions reflect long-held common knowledge in the scientific, medical and

occupational health communities, which includes Boeing's industrial hygiene managers.

b. Since 1973, Courts Around the Country Have Recognized that Inhaling Asbestos Constitutes Bodily Injury.

Every federal circuit that has considered this question, going back to 1973, has agreed that inhalation of asbestos constitutes a bodily injury. *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), the seminal appellate decision in asbestos litigation, was a products liability action brought against asbestos manufacturers to recover based on their failure to warn of the dangers involved in handling and inhaling asbestos. *Id.* at 1081-82. In discussing the medical evidence, the Fifth Circuit found that "asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible." *Id.* at 1083.

Similarly, in *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), the court summarized the "medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter," and it held, based on that evidence, that the inhalation of asbestos commences an "injurious process" that constitutes "injury" under insurance covering claims for bodily injuries. *Id.* at 1046. *See also, e.g., Insurance Co. of North America v. Forty-Eight Insulations*,

633 F.2d 1212, 1223 (6th Cir. 1980) (recognizing medical knowledge that inhalation of asbestos constitutes bodily injury); *Porter v. American Optical Corp.*, 641 F. 2d 1128, 1145 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981) (same); *ACandS, Inc. v. Aetna Casualty and Surety Co.*, 764 F.2d 968, 972 (3d Cir. 1985) (same).

c. Washington Courts Have Long Recognized that Breathing Asbestos Fibers Causes Certain Injury to the Lungs.

Washington courts also have long recognized the scientific understanding that breathing asbestos fibers causes injury. In *Koker v. Armstrong Cork*, 60 Wn. App. 466, 804 P.2d 659 (1991), the plaintiff had inhaled asbestos in the workplace before 1981 but was diagnosed with asbestos disease after enactment of the 1981 Tort Reform Act. The defendant argued that the Tort Reform Act applied because the plaintiff had not become injured until after the Act became law. The Court of Appeals disagreed:

[A] claim arises when *the injury-producing event* takes place, not when the claim is filed. . . . Here the exposure to asbestos was in the late 1960s, the 1970s and 1980s. Because the harm here results from exposure (continuous in nature), it appears that substantially all of the events which can be termed “*injury producing*” occurred prior to the adoption of the Act.

Id. at 663-64 (emphasis added; citations omitted); *see also Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635, 865 P.2d 527 (1993) (holding that where mesothelioma victim was exposed to asbestos in shipyards in 1950s

and 1960s, but asbestos disease was not diagnosed until 1987, the “injury producing events” occurred before Tort Reform Act of 1981).

Similarly, in a case analyzing when damage occurred and triggered coverage under a homeowner’s insurance policy, the Washington Supreme Court recognized that bodily injury from asbestos begins when asbestos is inhaled. As the Court explained, “*initial inhalation of asbestos fibers causes tissue damage* and thus, a covered injury has occurred at the inception of exposure.” *Villella v. Public Employees Mutual Ins. Co.*, 106 Wn.2d 806, 813, 725 P.2d 957 (1986) (emphasis added).

In *Kilpatrick v. Dept. of Labor & Industries*, 125 Wn.2d 222, 883 P.2d 1370 (1995), Justice Madsen observed that “[a]sbestos inhalation starts an injurious process . . . The fibers insidiously injure the lungs throughout the period of exposure.” *Id.* at 234 (Madsen, J., dissenting) (citing Irving J. Selikoff & Douglas H.K. Lee, *Asbestos and Disease* (1978), at 145-47) (emphasis added).¹

¹ On these pages that Justice Madsen cited from the landmark 1978 work, *Asbestos and Disease*, Drs. Selikoff and Lee describe the injury caused when asbestos is inhaled: “The initial lesion occurs with the lodgement of asbestos fibers in the alveoli . . . Cellular degeneration takes place and the reticulin fibers are gradually replaced by collagen with obliteration of the alveoli.” *Asbestos and Disease* at 145. Boeing’s industrial hygiene managers learned of Dr. Selikoff’s studies on asbestos causation of injury by the mid-1960s, when those studies were reported in multiple issues of *Industrial Hygiene Digest*, to which Boeing’s industrial hygienists subscribed. See, e.g., CP 4618; CP 3450 (27:14-28:12, 29:2-15); CP 1064 (¶ 9).

d. Boeing Was Aware of the Common Knowledge that Inhaling Asbestos Constitutes Certain Injury.

Boeing disputed the testimony of Plaintiff's experts in Superior Court, but when it was Boeing that was seeking compensation, and not its workers, Boeing readily reached the same conclusion as Mr. Walston's experts. In *Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869, 784 P.2d 507 (1990), Boeing sought insurance coverage from its liability insurers for environmental response costs for contamination that occurred over many years. *Id.* at 873-75. In seeking coverage, Boeing analogized to "the related context of long-term exposure to asbestos . . . [where] an asbestos manufacturer may be held jointly and severally liable . . . '[a]s long as there was inhalation exposure . . . during a policy period.'" Boeing described the period that commences with and follows the inhalation of asbestos as "the gradual injury process."²

² Boeing's Reply Memorandum Regarding Its Motion for Summary Judgment Re: Scope of Triggered Coverage in *Boeing v. Aetna*, U.S. District Court for Western District of Washington, Case No. C86-352WD, dated April 18, 1991, at 17-18 (citing *Keene Corp.*, 667 F.2d at 1048) (copy attached as Appendix C hereto). Plaintiffs ask this Court to take judicial notice of this public court record, a certified copy of which is attached hereto. *See* ER 201(b)(2) (court may judicially notice records "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); ER 201(f) ("Judicial notice may be taken at any stage of the proceeding"); *State v. Royal*, 122 Wn.2d 413, 418, 858 P.2d 259 (1993) (stating that courts may take judicial notice of court records and taking judicial notice of court records submitted on appeal).

4. Boeing Willfully Disregarded Its Knowledge of Certain Injury When It Ordered Mr. Walston to “Go Back to Work” While Asbestos Rain Fell.

As discussed above, Boeing knew that disturbing asbestos in overhead steam pipes produced “excessive asbestos exposures” to workers in the vicinity. CP 5309. Boeing knew that such work required respiratory protection to workers in the vicinity of the work. CP 5308; CP 5238. Boeing knew of certain injury to all workers who were forced to inhale asbestos fibers. *See* pp. 14-20 & nn.1-2, above. And it knew that some of Mr. Walston’s co-workers had already made and were continuing to make asbestos injury claims. *See* pp. 14-16, above. Armed with that knowledge, Mr. Walston’s supervisor told him to “go back to work.” CP 1655 (98:4-99:3). As a dutiful Boeing employee, that is exactly what he did.

Dr. Longo had this to say about Boeing’s conduct:

I've never seen anything like that. I was astonished. I showed this to our [industrial hygiene] chair, and he used words like criminal that they would do something like that. You know, I've never ever testified about the behavior of a particular company involving . . . their employees' use of asbestos products, but this is such an outrageous example of complete disregard for the workers in that facility that I would have to. I don't think under good conscience I couldn't say anything else.

CP 2230-31 (92:20-93:5).

Dr. Lemen, who was personally involved in promulgating the original OSHA asbestos regulations in 1971, testified concerning the wide

chasm between Boeing's knowledge as articulated in 1972 in Boeing's Bulletin No. 5 and its actions as exhibited on the Hammer Shop floor:

Industrial Hazards Control [Bulletin No. 5] of The Boeing Company, dated December 1972 . . . does have . . . language in it that would have been used in protecting workers and actions that would be used in protecting workers. For example, talking about the dangerous properties of the dust and how inhaling the dust and fibers could result in lung damage. It talks about how to avoid breathing the fibers. It talks about employee change rooms and how two clothes lockers per employee regularly working in the location should be provided, implementation of bags and other materials to seal the clothing and the waste material. And then it has caution labels that talk about being in place in the area. It also has special requirements on air monitoring, medical examinations, and storage and disposal. And then it gives some technical data on asbestos.

Now . . . if it were implemented, would be fairly appropriate. But I don't see the connect between . . . Industrial Hazard Control Bulletin Number 5 and what either Mr. Walston or his coworkers said actually was going on in the plant. I don't see that there is any connection between the two. If you take it face value . . . that what Mr. Walston and his coworkers said is true then this Industrial Hygiene Control Bulletin Number 5 was never implemented.

CP 3373 (69:19-70:24).

Dr. Egilman similarly concluded that Boeing willfully disregarded actual knowledge of injury certain from breathing asbestos fibers. CP 3429 (189:4-22). Simply put, “. . . before '72 they didn't follow Walsh-Healey and after '72 they didn't follow OSHA [N]ot only was it willful, it was illegal.” CP 3429 (189:9-12):

[I]f you combine all three documents, there's no safe level except banning, the disease takes 35 years, and then they don't comply with any of the safety precautions or inform the workers of the risk. Then those three things together indicate that . . . *they either knew or thought that some people were going to get sick but it was going to take a long time.*

CP 3429 (191:23-192:5) (emphasis added); *see also* CP 3425 (176:6-9); CP 5314-15 (April 7, 1982 memorandum written by Boeing's industrial hygiene manager stating that "a significant number of cases of asbestos" occurred at exposures below threshold limits).

IV. ARGUMENT

A. Standard of Review and Summary Judgment Standards.

In reviewing the Superior Court's denial of Boeing's motion for summary judgment under *Birklid*, this Court applies the same standard as the Superior Court. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003). As the Court in *Birklid* itself instructed, all the "facts and inferences from the facts . . . must be viewed in a light most favorable to the non-moving party," *Birklid*, 127 Wn.2d at 863 n.7, in this case, Gary Walston. Under that standard, this Court should affirm the Superior Court's order denying summary judgment to Boeing unless, after reviewing all the evidence and drawing all reasonable inferences in favor of Mr. Walston, this Court concludes that there are no genuine issues of material fact and that Boeing is entitled to judgment as a matter of law. *Denaxas*, 148 Wn.2d at 662; CR 56(c).

B. Mr. Walston May Prove Boeing’s Actual Knowledge and Intent Using Circumstantial Evidence.

Because actual knowledge and intent often cannot be proven by direct or “smoking gun” evidence, they are generally proven by inference based on circumstantial evidence. *See, e.g., Queen City Farms, Inc. v. Central National Ins. Co. of Omaha*, 126 Wn.2d 50, 69, 882 P.2d 703 (1994) (“proof of state or mind normally is indirect or circumstantial”) (citation omitted); *Waite v. Whatcom County*, 54 Wn. App. 682, 686-87, 775 P.2d 967 (1989) (noting that “[i]t is often difficult to supply direct evidence of actual knowledge” and that “circumstantial evidence may support a finding of actual knowledge”) (reversing summary judgment, holding that circumstantial evidence of actual knowledge created material issue of fact); *State v. LaRue*, 5 Wn. App. 299, 306, 487 P.2d 255 (1971) (“Intent is a state of mind [and] must usually be proved by circumstantial evidence”). In evaluating circumstantial evidence of actual knowledge or intent, the fact finder’s role is indispensable. As one court explained in denying summary judgment in an employment discrimination case:

The courts are sensitive to the reality that ‘smoking guns,’ *i.e.*, direct evidence or admissions of an improper motive, are rarely available . . . By necessity, the jury must be permitted to draw inferences from evidence that permits either of two directly opposed propositions of fact . . . [O]nce the court finds such evidence, its function on summary judgment is exhausted . . . “[W]here motive, intent, subjective feelings and reactions, consciousness and conscience [are] to be searched, and examination and cross-examination are necessary instruments in obtaining the truth, summary judgment is inappropriate.”

Weidel v. Ashcroft, 234 F. Supp. 2d 5, 7 & 8 n.4. (D.D.C. 2002) (citation omitted). The jury also may take account of common knowledge in reaching its conclusions. *See Seeberger v. Burlington Northern Railroad Co.*, 91 Wn. App. 865, 868, 960 P.2d 461 (1998) (in determining facts, jury may draw reasonable inferences from “circumstantial evidence or common knowledge”).

Boeing seeks to undermine Mr. Walston’s extensive circumstantial evidence of Boeing’s knowledge and intent by claiming that no single component of Mr. Walston’s circumstantial evidence proves that Boeing willfully disregarded its knowledge of certain injury, or that because the evidence is circumstantial, the evidence somehow shows only negligence on Boeing’s part. *See Boeing Br.* at 20, 24 & 34. But a jury is entitled to look at *all* of the evidence and to evaluate it in totality, including drawing reasonable inferences from circumstantial evidence, to conclude that Boeing willfully disregarded its knowledge that it was causing certain injury when it forced Mr. Walston to inhale asbestos fibers as detailed on pages 21-23,

above. See *Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994) (reversing summary judgment, holding that circumstantial evidence of intent created material issue of fact).

Given Washington's adoption of liberalized proof standards in asbestos injury cases, it would be odd indeed to deny Mr. Walston normal inferences from the extensive circumstantial evidence he has presented here. See *Lockwood v. A.C. & S.*, 109 Wn.2d 235, 246 & 248, 744 P.2d 605 (1987); *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 32, 935 P.2d 684 (1997).

C. This Case Directly Parallels *Birklid* in the Quality of Evidence Showing Boeing's Actual Knowledge that It Was Causing Certain Injury to Workers and Its Willful Disregard of that Knowledge.

In *Birklid*, the Court acknowledged that historically the only case meeting the "deliberate intent" exception was an assault and battery case. *Birklid*, 127 Wn. 2d at 861 (citing *Perry v. Beverage*, 121 Wash. 652, 209 P. 1102 (1922)). The Court held that limiting the exception to assault and battery cases was too narrow a rule and proceeded to establish a principled test for meeting the exception. The Court held that deliberate intent is established when an employer (1) had actual knowledge (2) that an injury was certain to occur, and (3) it willfully disregarded that knowledge.

Birklid, 127 Wn.2d at 865. Close examination of the *Birklid* case demonstrates the remarkable parallels between this case and *Birklid*.

Birklid arose from Boeing's use of phenol formaldehyde resin at its Auburn fabrication facility between 1987 and 1988. *Birklid*, 127 Wn.2d at 856. During pre-production testing, the Boeing general supervisor wrote to Boeing administrators reporting that obnoxious odors were present and that some "employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach." *Id.* He stated that "[w]e anticipate this problem to increase as temperatures rise and production increases." *Id.* The trial and appellate record in *Birklid* is devoid of evidence that Boeing knew that exposure to the phenolic resins was certain to cause specific injuries other than those listed in the supervisor's report.

When resin production began in 1987, some workers experienced a range of general symptoms, including "dermatitis, rashes, nausea, headaches, tearing, dizziness, and faintness." *Birklid*, 127 Wn.2d at 857. Some workers suffered immediate, acute reactions, some developed symptoms over time, and the largest number had no symptoms. *Id.* at 857 n.2 & 871; CP 3183 (¶ 4); CP 3185-86 (¶ 10); CP 3194-95 (¶ 11); CP 3200-01 (¶¶ 8 & 12); CP 3212 (¶ 18); CP 3226 (¶ 15); *see also* CP 3166-67 (208:22-209:2) (*Birklid* plaintiff's testimony admitting that only "about half" of her co-workers developed symptoms). While a few developed long-term chronic illnesses from the exposures, *Birklid*, 127 Wn.2d at 871,

the great majority had no compensable injuries or no symptoms at all. *Compare* CP 2593 (90:10-91:9) (Boeing’s CR 30(b)(6) witness testimony that Auburn fabrication facility where phenol formaldehyde resin exposure occurred employed 100 to 200 workers) *with Birklid*, 127 Wn.2d at 857 n.2 (only about 20 of the workers sought treatment at Boeing’s in-house clinic) & *id.* at 853 (even fewer joined the *Birklid* suit).

The *Birklid* record demonstrates that Boeing “anticipated” — based on pre-production — that some of its workers would get sick when it decided to commence resin production, but it did not know which workers, what the specific injuries would be, whether the injuries would be compensable, or the severity of illnesses workers would experience. Plainly, Boeing did not know and had no way of knowing that all of its workers would get sick or if the specific plaintiffs would get sick.

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 the specific injury or which worker will get sick has consistently been followed 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).³

In *Birklid*, the Court found that plaintiffs had demonstrated Boeing's “willful disregard” because Boeing was aware of continuing injuries to its employees when it commenced resin production. Yet, armed with that

³ The Court of Appeals decisions that Boeing cites for the proposition that *Birklid* requires “certainty of injury to the *specific* plaintiff,” Boeing Br. at 27-28 (emphasis original), are unauthoritative and should not be followed. *Birklid* is clear and controlling on this point. In any event, the jury could reasonably infer on this record that Boeing did have certain knowledge that its deliberate actions would injure Mr. Walston and all of his co-workers.

understanding, Boeing supervisors ordered workers to continue to work even when they complained. *Birklid*, 127 Wn.2d at 863.

In this case, Gary Walston has presented a triable issue under *Birklid* that Boeing knew — when it forced him and his co-workers over their protest to inhale large quantities of asbestos fibers in 1985 under an asbestos rain, that Gary and his co-workers in the Hammer Shop suffered certain lung injuries from such forced inhalation of asbestos and that some of his co-workers already had suffered life-threatening diseases from their inhalation of asbestos at Boeing. Armed with that knowledge, Boeing told Mr. Walston and his co-workers to “go back to work,” CP 1655 (98:4-99:3), just as Boeing told its employees in *Birklid* when they experienced far less dangerous exposures. *Birklid*, 127 Wn.2d at 863.

Boeing makes a series of arguments about why Mr. Walston has not created a triable issue of fact under *Birklid*, but all of its arguments are unavailing and inconsistent with *Birklid*'s controlling precedent.

Not Everyone Gets Mesothelioma. Boeing argues that not everyone who inhales asbestos gets mesothelioma, and that Plaintiffs cannot show that Boeing knew that Mr. Walston would get mesothelioma. Boeing Br. at 25-28. As shown above, the argument misconstrues the law and is irrelevant to determining if the “deliberate intent” exception is met under *Birklid*. See pp. 27-31, above. *Birklid* requires Mr. Walston to show that Boeing knew that *some* workers were being injured when forced to inhale

asbestos fibers. Mr. Walston has demonstrated that when Boeing told him to “go back to work” without respirator protection in an asbestos rain for one month, Boeing knew that *all* workers suffered injury to lung function from breathing asbestos,⁴ and that many of its workers had suffered and were suffering a wide range of acute and chronic ailments from inhaling asbestos.

Compensable Injury. Boeing also claims that even if it is not necessary to show that Boeing knew that Mr. Walston would suffer a specific certain injury, the injury about which it was required to have knowledge must be a “compensable” injury under worker compensation law. Boeing Br. at 30-33. The Court should reject Boeing’s argument on three fronts. First, the argument ignores that Boeing *was* aware that a number of Mr. Walston’s co-workers had suffered compensable injuries before it forced him to “go back to work” and inhale asbestos fibers. *See* pp. 14-16, above. Second, *Birklid* itself proves Boeing wrong. There, Boeing had knowledge of a number of minor injuries, but there is no indication that they were compensable under the worker compensation law.

⁴ *See* pp 14-20 & nn.1-2, above. Boeing suggests that if the injury to workers caused by their forced inhalation of asbestos fibers is the relevant injury under *Birklid*, it would mean that any employee who inhales any “dust” could seek compensation. Boeing Br. at 30. Boeing offers no citation for its wild exaggeration. As Boeing itself recognizes, asbestos is uniquely dangerous. *See, e.g.*, CP 3231; CP 5237-41; CP 5305. Its attempt to equate asbestos with ordinary dust is frankly offensive.

See Birklid, 127 Wn.2d at 856 & 857 n.2; *see also* pp. 27-29, above. And third, Boeing's reading of the worker compensation statute, *see* Boeing Br. at 29-34, is contrary to the plain language of the statute, Washington case law, and Board of Industrial Insurance Appeals decisions in asbestos cases, and it contradicts Boeing's own contention that Mr. Walston's "rightful remedy for his workplace injury is in the worker compensation system." *Id.* at 1.

Under the Industrial Insurance Act, worker compensation is only paid to workers *injured in the course* of their work. *See* RCW 51.04.010 (worker compensation is limited to workers "injured in their work"); RCW 51.32.010 (workers compensation covers "[e]ach worker injured in the course of . . . employment"). It does not apply to workers who are not injured until after they cease working for an employer. By definition, if Mr. Walston's rightful remedy were in the worker compensation system, as Boeing claims, that would necessarily mean he was "injured" during his employment. That injury was the scarring of his lung tissue each time Boeing forced him to inhale asbestos on the job. Accordingly, that injury, during his employment, is also the relevant injury for purposes of the "actual knowledge" prong of the *Birklid* test.

This result is compelled by the Washington Supreme Court's decision in *Department of Labor and Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993). The workers in that case breathed asbestos

fibers for 30 years during their employment but were not diagnosed with asbestos-related disease until long after they had stopped working. *Id.* at 306-07. The Court held that because they “were exposed to asbestos during employment” and their asbestos diseases diagnosed years later were traceable to that employment, they were injured “in the course of employment” and thus were entitled to benefits. *Id.* at 309.

The Board of Industrial Insurance Appeals has followed *Fankhauser* in similar scenarios involving retired Boeing workers. *See, e.g., In re Burness*, 1995 WL 613420, *2-3 (Wash. Bd. Ind. Ins. App. 1995) (affirming pension for spouse of Boeing worker who died as a result of “injurious exposure” during employment at Boeing prior to 1981, even though worker did not file compensation claim until late 1980s after he retired and was diagnosed with asbestos-related pulmonary disease); *In re Presley*, 1994 WL 76779, *1-3 (Wash. Bd. Ind. Ins. App. 1994) (affirming award to employee who worked at Boeing and was “expos[ed] to asbestos fibers when using asbestos gloves” for years after World War II, then filed compensation claim in late 1980s after she retired and was diagnosed with asbestos-related lung disease).

The cases and Board decisions cited by Boeing (Boeing Br. at 31-33) are not on point, because they all involve the different question of when an injury becomes manifest and “compensable” under the Industrial Insurance Act. Mr. Walston does not claim that workers are entitled to compensation

for sub-clinical injuries that occur from inhaling asbestos fibers, but under Washington law, the above authorities establish that the injuries they suffer when they are forced to inhale asbestos are “injuries” for purposes of the *Birklid* test.

Safe Exposures. Boeing also says that Mr. Walston did not suffer exposure to asbestos below safe levels (Boeing Br. at 35-36), but that is the same argument that Boeing lost in *Birklid*. The *Birklid* court rejected the contention because Boeing knew its workers had gotten sick from exposure to “so-called ‘safe’ levels of exposure.” *Birklid*, 127 Wn.2d at 857. That holding applies with full force here. Moreover, as discussed above, Boeing failed to monitor the airborne asbestos levels when it forced Gary Walston to work through the month-long asbestos rain, CP 2015 (23:15-17), exposure which Dr. Brodtkin testified was “likely by far . . . the highest level of exposure experienced by Mr. Walston” during his 38-year career at Boeing. CP 2873 (118:23-119:15). And even if Boeing had conducted such monitoring as the asbestos was falling around Mr. Walston, Boeing knew that there was no safe level of asbestos inhalation because, in Boeing’s own words, “[o]nly a ban can assure protection against the carcinogenic effects of asbestos.” CP 3231; *see also* pp. 11-14, above.

Open and Immediate. Much as Boeing tried to undermine the deliberate intent exception in *Birklid*, Boeing also claims that Washington law requires a worker’s injury to be immediate and observable to qualify for

the “deliberate intent” exception. *See* Boeing Br. at 16-18. Yet nowhere does *Birklid* impose such a requirement. Boeing relies on the fact that in *Birklid* and two other chemical exposure cases, the workers’ symptoms were immediate and observable to the employer (*id.* at 14), but Boeing confuses the distinction between the facts of a particular case and the legal requirements for meeting the “deliberate intent” exception.

The first legal requirement as stated in *Birklid* is that a plaintiff show his employer knew of certain injury. Immediate and observable symptoms from chemical exposures provide evidence that an employer has actual knowledge that some of its workers suffer certain injury, but that is not the only way a plaintiff can prove knowledge of certain injury. The husband who slowly poisons his wife with arsenic knows he is causing certain injury, even though the injury is not immediate or observable. According to Boeing, it could never be subject to the “deliberate intent” exception as long as it deliberately subjects its employees to subtle injuries that were not immediately observable and did not become debilitating until after the employee retired and was long gone. But like the poisoning husband, the

employer who knows it is causing unseen, latent injuries to its employees while its employees remain ignorant of those injuries⁵ is more — not less — culpable than the employer who knowingly causes minor but immediately observable injuries.⁶

Willful Disregard. Boeing contends that because it did not have knowledge it was causing certain injury to its workers, it could not have willfully disregarded that knowledge. Boeing Br. at 34. By the same token, given that Mr. Walston *has* demonstrated that Boeing knew it had caused and was causing certain injury to employees who were forced to inhale asbestos, the evidence supporting willful disregard is obvious. Just as in *Birklid*, Mr. Walston’s supervisor ordered him to “go back to work” when he complained about working in an asbestos rain in 1985. The insulation had just been tested and confirmed as containing asbestos. CP 2014 (18:10-16, 19:3-8). The asbestos abatement workers wore respirators and moon

⁵ The great disparity between employers’ and employees’ knowledge of the toxic exposures to which employers subject employees led to the Legislature’s 1984 enactment of the Worker and Community Right to Know Act, RCW 49.70.010 *et seq.* See *Birklid*, 127 Wn.2d at 857 n.1.

⁶ At oral argument in the Superior Court, Boeing’s counsel conceded this point. When asked to respond to the example of an employer who forced a worker to handle plutonium with no protection while the employer watched from behind a lead shield, CP 5746-47 (23:18-24:8), Boeing’s counsel agreed that the “plutonium example . . . would be a classic intentional tort,” adding, “I don’t see how that wouldn’t fall under the physical assault or battery that would have been actionable under preexisting law [prior to *Birklid*].” CP 5770 (47:20-25).

suits, signifying Boeing's knowledge of the danger to Mr. Walston and his co-workers in the Hammer Shop, and the supervisor repeatedly told the workers to "go back to work" when they requested protection.⁷ CP 1655 (98:4-99:3).

Remarkably, Boeing says that there is no evidence that Boeing disregarded worker safety in the Hammer Shop during the 1985 asbestos rain, apparently based on testimony that the supervisor told some workers to step out from working directly underneath the asbestos abatement activity, as if that would do them any good. Boeing Br. at 37. The argument is laughable. In Boeing's view, even though Boeing's supervisor could have

⁷ Boeing also claims that there is no evidence that the specific supervisor knew that forcing Hammer Shop workers to toil under asbestos abatement contractors caused certain harm. Boeing Br. at 36. As in *Birklid*, the point is irrelevant, given principles of *respondeat superior*. See *Perry*, 121 Wash. at 659 (employee met "deliberate intent" exception and could sue employer for battery based on actions of employer's supervisor which were attributed to employer); see also *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). Moreover, a jury could well conclude that the Boeing supervisor who witnessed asbestos abatement contractors wearing respirators as they stripped asbestos that fell into Mr. Walston's work area knew exactly what he was doing.

gone to federal prison⁸ for ordering Gary Walston to “go back to work,” this Court should give Boeing a “pass.” That is not and cannot be the law of Washington. The willful disregard in *Birklid* is of the same character as Boeing’s willful disregard in this case, except that the gravity of the known injuries in this case is greater.

Under Washington law, a “battery” is any “harmful or offensive contact . . . resulting from an act intended to cause the plaintiff or a third person to suffer such contact.” *McKinney v. City of Tukwila*, 103 Wn. App. 391, 408, 13 P.3d 631 (2000). An “assault” is an act “of such a nature that causes apprehension of a battery.” *Id.* On this record, a jury could readily find that when Boeing forced Mr. Walston to work under the asbestos abatement personnel who showered him with falling asbestos during the 1985 “asbestos rain,” Boeing committed an assault and battery on Mr. Walston. Boeing apparently wants not only to eliminate the *Birklid* test, but also to eliminate the pre-*Birklid* law holding that an employer’s assault and battery meets the “deliberate intent” exception. *See also Restatement*

⁸ *See, e.g., United States v. Starnes*, 583 F.3d 196, 219 (3d Cir. 2009) (affirming 33-month prison sentences for employers who failed to provide workers with personal protective equipment during asbestos abatement project and instructed workers to engage in work practices that created visible asbestos dust); *United States v. Rubenstein*, 403 F.3d 93, 101 (2d Cir. 2005) (upholding criminal conviction of defendant who hired workers to remove asbestos-containing pipe insulation, failed to tell the workers that they were removing asbestos, and directed them to remove the insulation by using a knife or scissors).

(*Second*) of *Torts* § 18 at 31, comment c (“battery” includes deliberate action that causes another “to come into contact with a foreign substance in a manner which the other will reasonably regard as offensive”); *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195 (9th Cir. 1989) (holding that when an employer ordered workers to scrub PCBs from the floor on their hands and knees, with no protective clothing, it constituted a “battery,” that met the deliberate intent exception to the Oregon worker compensation law).⁹

D. *Shellenbarger* Does Not Control this Court’s Decision.

Boeing relies heavily on Division One’s decision of *Shellenbarger v. Longview Fibre Paper & Packaging*, 125 Wn. App. 41, 103 P.3d 807 (2004), to argue that it bars Mr. Walston’s suit. *See, e.g.*, Boeing Br. at 2, 10-15, 21, 26 & 38. *Shellenbarger* is readily distinguishable from Mr. Walston’s case and is not controlling here. In *Shellenbarger*, the plaintiff worked at Longview Fibre during two distinct periods, the first from 1956-65 and the second from 1976 to 1995. Mr. Shellenbarger experienced his only documented exposure to asbestos fibers during the first period, when

⁹ *See also* CP 5770 (47:20-25) & fn. 6, above (concession by Boeing’s counsel that forcing an employee to be exposed to plutonium without protection would “be a classic intentional tort” and “would have been actionable under preexisting law,” even prior to adoption of the *Birkliid* test.

he tore open and dumped bags of asbestos powder as part of his job from 1964-65. *Shellenbarger*, 125 Wn. App. at 43. Mr. Shellenbarger presented no evidence that Longview Fibre knew that inhaling asbestos dust was harmful at the time. The only evidence presented by plaintiff concerning Longview Fibre's knowledge was a 1964 report by Union Carbide concerning asbestos inhalation hazards, which it gave to some of its customers. While Longview Fibre was a customer, the court noted that "[t]here is no evidence to confirm that Longview Fibre received a copy of this report," *id.* at 44, and that "at best the evidence establishes that Longview Fibre *may have* received a report in 1964 on the dangers of asbestos." *Id.* at 48 (emphasis added). Mr. Shellenbarger simply failed to present sufficient evidence that Longview Fibre knew of the asbestos dust hazard when he was in fact exposed in 1964-65.

When Mr. Shellenbarger returned to work in 1976, the court found that Mr. Shellenbarger had presented sufficient evidence that Longview Fibre "had knowledge of the dangers of asbestos." *Id.* at 48. With respect to the second period, however, Mr. Shellenbarger failed to present evidence that he inhaled asbestos fibers, *id.* at 44, and Longview Fibre presented evidence that the air Mr. Shellenbarger breathed after 1976 was safe. *Id.* at 48. The court also noted that evidence of risk of harm is not the same as evidence of certain injury. *Id.*

The evidence that Mr. Walston has presented here is quite different and far more compelling. First, he has 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 to “go back to work” in 1985. Second, Boeing’s 1985 command to “go back to work” occurred long after Mr. Shellenbarger began breathing clean air at Longview Fibre. And finally, Mr. Shellenbarger presented no evidence of willful disregard comparable to Mr. Walston’s supervisor’s order, over his protest, that he “go back to work” in an asbestos rain.¹⁰

¹⁰ The cases that Boeing cites from other jurisdictions are also readily distinguished based on the differing facts in those cases and that this case is governed by Washington law. *See* Boeing Br. at 15-16 & n.1 (citing *Agee v. Ford Motor Co.*, 528 N.W.2d 768 (Mich. 1995), and other cases). These cases largely focus on the absence of *any* knowledge of certain injury. *See, e.g., Agee*, 528 N.W.2d at 770 (finding that “Plaintiffs have not offered proof that defendant had ‘actual knowledge’ that injury was certain to occur to any of its employees”). To the extent they suggest that an employer must have certain knowledge that the specific plaintiff would be injured, they are inconsistent with the Supreme Court’s decision in *Birklid*, and Boeing’s own concession at oral argument in the Superior Court that “we are not saying that you have to have 100 percent of exposed employees be injured.” CP 5770 (47:15-16). Mr. Walston has presented substantial evidence from which the jury can infer Boeing’s willful disregard of its own knowledge of certain injury caused by requiring him to “go back to work” and forcing him to be exposed to a month-long shower of asbestos. None of Boeing’s cases has facts even remotely comparable to the record here.

In *dicta*, the *Shellenbarger* court did make the following observation, which Boeing relies on to say that the Court should dismiss Mr. Walston's case:

We know now that asbestos exposure does not result in injury to every person, and the evidence does not suggest that Longview Fibre believed otherwise 30 years ago.

Id. at 49. The Court should be unpersuaded by this passing statement in *Shellenbarger* for a number of reasons. First, the passage is *dicta* and not critical to the *Shellenbarger* holding, which pivoted on failures of proof regarding knowledge and exposure. Second, as discussed above, the *Birklid* test does not require that a plaintiff prove that the employer knows that *all* of its employees who breathe asbestos will be injured. That was not the standard applied in *Birklid* and it is not the law. To the extent that *Shellenbarger* suggests otherwise it should be disapproved. And third, even if it were the law, unlike in *Shellenbarger*, the record before the Court in this case contains substantial evidence that every worker who was forced to inhale asbestos through the month-long January 1985 asbestos rain suffered certain injury and that Boeing knew that when it told Mr. Walston to "go back to work."

E. *Vallandingham* Does Not Control This Court's Decision.

Boeing also relies on *Vallandingham v. Clover Park School District*, 154 Wn.2d 16, 109 P.3d 805 (2005), to argue that Mr. Walston has failed to show knowledge of certain injury. *See, e.g.*, Boeing Br. at 1, 10-11, 20-21,

24 & 27. In *Vallandingham*, two teachers brought suit against their school district for physical injuries inflicted by a severely disabled special education student. *Vallandingham*, 154 Wn.2d at 17. While the school district knew that it was probable that the student would have other outbursts and injure teachers, it was not certain that would be the case. *Id.* at 24. The *Vallandingham* Court held that because special education students are unpredictable, at no point did the school district know that certain injury to staff would continue. *Id.* at 36.

In reaching that holding, the Court distinguished the “anticipated” impact of chemical exposures in *Birkliid* from the less predictable future behavior of the special education student. The Court explained:

[T]he employer in *Birkliid* was in a vastly different position than the employer in this case. While Boeing *knew* that the phenol-formaldehyde fumes would continue to make employees sick absent increased ventilation, the Clover Park School district could not know what R.M.’s behavior would be from day to day. No one could be sure that R.M.’s violent behavior would not cease as quickly as it began.

Id. at 33.

The *Vallandingham* holding reflects the sensible policy judgment that distinguishes the unpredictability of volitional human behavior¹¹ from

¹¹ *Brame v. Western State Hospital*, 136 Wn. App. 740, 150 P.3d 637 (2007), *see* Boeing Br. at 11, 28-29 & 35, is another example of a case where the court was unwilling to ascribe certainty to future human conduct given the inherently volitional nature of human conduct.

chemical reactions and biologically certain events. See *Katanga v. Praxair Surface Technologies, Inc.*, 2009 WL 506832, *3 (W.D. Wash. Feb. 27, 2009) (distinguishing *Vallandingham* based on its reliance on “the unpredictability in human behavior” and holding that plaintiff stated a claim under *Birkliid* based on certain knowledge of continuing chemical explosions). This case plainly falls in the *Birkliid* group of cases that recognize certainty in chemical and biological reactions. The scarring of Gary Walston’s lung tissue each time he inhaled asbestos fibers was an event over which he could exercise no volition, and human behavior had no impact on his injury. The only party whose behavior could have prevented Mr. Walston’s injury was Boeing, and it chose to willfully disregard what it knew and Gary’s welfare.

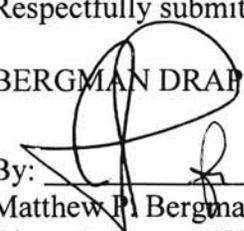
V. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Superior Court’s denial of summary judgment and remand the case for trial.

DATED this 27th day of February, 2012.

Respectfully submitted,

BERGMAN DRAPER LADENBURG, PLLC

By: 

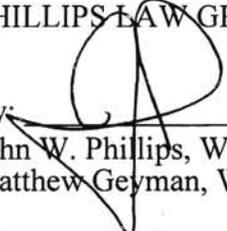
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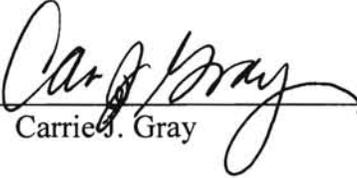
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that today I caused to be served a true and correct copy of
the foregoing document upon:

Brendan Murphy
Katherine C. Wax
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101
(Via Messenger)

DATED at Seattle, Washington this 27th day February, 2012.



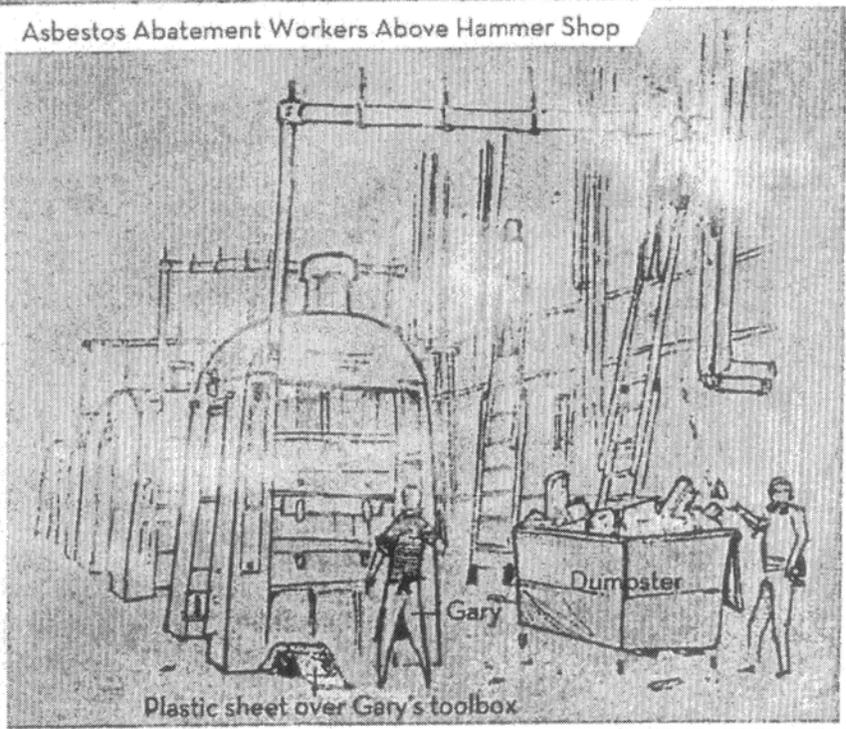
Carrie J. Gray

5 Asbestos Removal



EXHIBIT
3 1-26-11
Stewart

Asbestos Abatement Workers Above Hammer Shop



Plastic sheet over Gary's toolbox

D2-107502
THE BOEING COMPANY
INDUSTRIAL RELATIONS
DECEMBER 1972

INDUSTRIAL HAZARDS CONTROL BULLETIN NO. 5

ASBESTOS

Other Names: Actinolite, amosite, anthophyllite, chrysotile, crocidolite, tremolite.

Uses:

Fire blankets; fire insulation; some cements, grouts, plasters and mortars; pipe insulation; brake shoes.

Hazardous Properties:

Health Hazard

Dust

- (1) Dangerously toxic
- (2) Inhalation of asbestos dust or fibers over prolonged periods may result in lung damage.

Precautions:

1. Personal Protection

- a. Avoid breathing asbestos dust or fibers.
- b. Provide and use respiratory protection approved by Safety for pneumoconiosis-producing dusts:
 - (1) For emergency cleanup of asbestos dust.
 - (2) For handling or processing of asbestos or materials containing asbestos, as determined by Industrial Hygiene.
- c. Provide and use airline respirators (as approved by Safety) for operations involving the spraying of asbestos, the removal or demolition of pipes, structures or equipment covered or insulated with asbestos, and the removal or demolition of asbestos insulation or coverings.
- d. Provide and use coveralls, head coverings, gloves and foot coverings (approved by Safety) for employees exposed to asbestos in concentrations exceeding the ceiling value (see Tech. data, item 6) as determined by Industrial Hygiene.

EMERGENCY PROCEDURES

1. Spills: In the event asbestos dust is spilled, evacuate the area. The area shall be cleaned by vacuuming or wet sweeping. Personnel cleaning the area shall wear approved respiratory protection.