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IN THE SUPREME COURT OF
WASHINGTON

(Court of Appeals No. 42543-2-II)

DONNA WALSTON, individually and as Representative of the
Estate of GARY WALSTON,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

PLAINTIFF-PETITIONER'S ANSWER TO AMICUS BRIEFS
FILED BY (1) THE COALITION FOR LITIGATION JUSTICE,
INC., *ET AL.*, (2) AGC OF WASHINGTON, AND (3)
ASSOCIATION OF WASHINGTON BUSINESS, *ET AL.*

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I. INTRODUCTION

The Amicus Briefs¹ filed in support of Respondent Boeing should help this Court distinguish what *is* at issue from what *is not* at issue in this appeal.

What is at issue. Amici assert that RCW 51.24 “includes “injury” requirements that are dispositive to this case.” AGC Br. at 1. Petitioner Donna Walston (“Walston”) could not agree more. This case stands or falls on the language the Washington Legislature chose to define “injury” in RCW 51.24 and this Court’s precedents interpreting that statute – not on language in other state’s statutes or case law. Amici simply misunderstand the significance of the words chosen by the Legislature. By defining “injury” to include “disease” for purposes of the “deliberate intent” exception, the Legislature envisioned circumstances where an employer deliberately intends to produce disease and thus is subject to suit outside the worker compensation system. Boeing and Amici tell the Court that an employer could never deliberately intend to produce disease, because the employer could never be “certain” that its employee would get a “disease,”

¹ See Brief of Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, NFIB Small Business Legal Center, American Tort Reform Association, American Insurance Association, Property Casualty Insurers Association of America, National Association of Mutual Insurance Companies, and American Chemistry Council in Support of Respondent (Jan. 10, 2014) (“Coalition Br.”); Brief of Amicus Curiae Association of Washington Business and Washington Self-Insurers Association (Jan. 10, 2014) (“AWB Br.”); Amicus Brief of AGC of Washington (Jan. 10, 2014) (“AGC Br.”).

just as Boeing could not have been certain that Mr. Walston would get mesothelioma when it forced him over his protest to work under an asbestos rain. But such arguments read out of the statute the Legislature's express intention to include "disease" within the ambit of what an employer can deliberately intend to produce. It is for this Court to interpret that language, not to ignore it, and to make sense of the statute. Walston has provided a principled way for the Court to take account of all the language in the statute and to make sense of it.

What is not at issue. Amici spend most of their briefs making points that are irrelevant to this appeal. They consist of (1) "Henny Penny" arguments that have no place in a case where all agree that that the deliberate intent exception to the Industrial Insurance Act ("IIA") is and should remain narrow, and (2) pejorative and extra-record *ad hominem* arguments that are beneath the Court's dignity and thus require little response.

II. ARGUMENT

A. Under RCW 51.24.020, an Employer May Be Sued for Deliberately Intending to Produce "Disease"

Walston has presented a substantial and uncontroverted record that in 1985 Boeing knew that it was producing a certain "injurious process" in Mr. Walston when it forced him, over his protest, to work for over a month under workers in moon suits who rained down asbestos upon him. Boeing and Amici cite RCW 51.24.030(3) to say that the injury that matters with

respect to the deliberate intent exception to the IIA is the “disease” of mesothelioma, and that Boeing could never know for certain that Mr. Walston would get that disease. *See* Boeing Suppl. Br. at 6-7; AGC Br. at 9. But it is that very statute that unravels their argument.

RCW 51.24.030(3) provides: “For the purposes of this chapter, “injury” shall include any physical or mental condition, *disease*, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.” (Emphasis added.) The legislative inclusion of the term, “disease” for purposes of application of the “deliberate intent” exception is decisive here. The IIA did not always cover “disease.” RCW 51.08.100 defined “injury” narrowly as “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom,” as AGC itself observes. AGC Br. at 7. The Legislature added “occupational disease” in RCW 51.08.140 as a basis for compensation under the IIA. The Legislature has generally maintained the distinction between “injury” – defined as a sudden and traumatic event – and “occupational disease,” which generally occurs as the result of a long-term injurious process to the worker’s body.

A notable exception to this framework is RCW 51.24, the statute codifying the deliberate intent exception, where the Legislature brought together sudden and traumatic events and gradually occurring occupational

diseases when it defined “injury” for purposes of applying the “deliberate intent” exception. RCW 51.24.030 defines “injury” for purposes of RCW 51.24.020 as including *both* sudden injuries *and* “disease,” which develops over time.

Because “injury” is defined as “disease” for purposes of application of the deliberate intent exception, and because “disease” is the compensable injury at issue here, RCW 51.24.020 should be read as follows:

If [*disease*] results to a worker from the deliberate intention of his or her employer *to produce such [disease]*, the worker or beneficiary of the worker shall have . . . cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

(Emphasis added.) The Court is thus tasked with determining how a worker can show that his employer deliberately intend “*to produce such disease,*” as RCW 51.24.020 expressly contemplates.

In *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995), this Court did not address injury as “disease,” but it did address injuries associated with toxic insults and elaborated what a worker must prove in order to establish his right to sue outside the worker compensation system. The Court held that the worker may prove his employer’s “deliberate intent” when an employer (1) had actual knowledge (2) that injury was certain to occur, and (3) willfully disregarded that knowledge. *Birklid*, 127 Wn.2d at 865. Applying that standard to Mr. Walston’s disease, Amici and Boeing say an employer *never* can deliberately intend to cause “disease,”

because an employer can never know that disease is certain to occur when it forces an employee into a repeated toxic insult. Boeing Supp. Br. at 6-7; AGC Br. at 7-8.

In essence, Boeing and Amici tell this Court that the Washington Legislature has provided workers with the narrow right to sue their employer when the employer deliberately intends to “produce” disease, but because an employer never can know that disease will be certain to occur, that narrow right is a phantom. Such an argument writes the term “disease” out of RCW 51.24.030 and ignores that the employer’s intent is an intent “to produce” the resultant disease. It is patently untenable on the one hand to acknowledge that the Legislature expressly contemplated that a worker could prove that his employer deliberately intended “to produce” disease, and on the other to employ a test that makes it impossible to prove what the Legislature expressly contemplated. Statutes should be interpreted sensibly to avoid strained or absurd results. *See Lowy v. Peace Health*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). In interpreting statutes, this Court interprets them so as to give meaning to *all* the words chosen by the Legislature. *See State Dep’t of Transp. v. James River Ins. Co.*, 176 Wn.2d 390, 397-98, 292 P.3d 118 (2013) (rejecting interpretation of statute that did not account for or explain all the words chosen by the Legislature); *American Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2004)

(holding that all the words in a statute “have meaning,” and “are not superfluous”).

Walston submits that the statutory definition of injury as disease and the principles announced in *Birklid* require this Court to give meaning to the term “disease” and not to write it out of RCW 51.24, as Boeing and Amici would have the Court do. The Legislature found that an employer may deliberately intend “to produce such [disease],” and it is for this Court to articulate how an employee may prove that under Washington law. Walston has provided standards of proof for an employee that are stringent and are consistent with the principle that the deliberate intent exception is narrow. The employee must prove: (1) the employer knowingly and deliberately forced the employee to suffer a toxic insult over the employee’s objection; (2) the employer knew that the coerced toxic insult would produce a certain injurious process in the employee; (3) the employer knew that such certain injurious process had in the past produced disease in its employees; and (4) the employee’s compensable disease was produced by the coerced injurious process. *See* Petitioner’s Supp. Br. at 7.

This test does not deviate from RCW 51.24.020 and .030 – it respects the statute and it gives meaning to each term in the statute. And this test does not deviate from but is faithful to *Birklid*. *Birklid* did not address “disease” but acute illnesses caused by forced exposure to

phenolic resins. The *Birklid* record demonstrates, however, that Boeing did not know the precise illnesses workers would get; it did not know that all exposed workers would get sick (in fact, it was a minority who got sick); and it did not know which employees would get sick, or in particular, whether plaintiffs would get sick. *See* Respondents' Br. at 26-30, Case No. 42543-2. What Boeing *did* know in *Birklid* is that some of its employees had become sick from working with phenolic resins in an unventilated space and that it was "predict[able]" that others would get sick if they were required to do so in the future. *Birklid*, 127 Wn.2d at 856; AWB Br. at 10.

Under the principles outlined in *Birklid* and the requirements of RCW 51.24.030, Theresa Birklid would have been entitled to sue if the record had shown that Boeing knew from experience that forcing its workers to work with phenolic resins in an unventilated space "produced" a chronic disease (instead of acute injuries) in some of its workers, and that forcing them to do so in the future would predictably produce disease in some of them in the future. That scenario is this case.

Amici, Boeing and the Court of Appeals say that the deliberate intent exception applies only if the employer has knowledge of an "immediate and observable injury" to employees. AWB Br. at 11; Appellant's Br. at 16, Case No. 42543-2, 2013; *Walston v. Boeing Co.*, 173 Wn. App. 271, 285-85, 294 P.3d 759 (2013). To adopt such a position,

however, would be to ignore the applicable definition of injury, which includes “disease,” and to substitute a different definition of injury – the one in RCW 51.08.100, defining injury as a “a sudden and tangible happening, of a traumatic nature,” which both sides agree is inapplicable here.

B. While the Compensable Injury Here is “Disease,” the Injurious Process that Produced the Disease Bears on Application of the *Birklid* Rule.

Because Mr. Walston’s injury under RCW 51.24.030 is his “disease” of mesothelioma, Boeing and Amici say that the “injurious process” that produced Mr. Walston’s disease is irrelevant under the *Birklid* test. But the statutory test is whether Boeing intended “to produce such injury,” RCW 51.24.020, and the only way “to produce” mesothelioma is to deliberately cause the worker to suffer the injurious process of forced and repeated inhalation of asbestos fibers. Walston has presented substantial evidence that Boeing knew it was causing a certain injurious process in Mr. Walston by forcing him to work in an asbestos rain under asbestos abatement workers wearing moon suits. Indeed, for almost 50 years, courts – who, unlike Boeing, do not have a permanent staff of industrial hygienists – have recognized that inhalation of asbestos fibers commences an irreversible injurious process. *See, e.g., Kilpatrick v. Dept. of Labor & Industries*, 125 Wn.2d 222, 234 883 P.2d 1370 (1995) (“[a]sbestos inhalation starts an injurious process . . . The fibers insidiously injure the lungs throughout the period of exposure.” (Madsen, J., dissenting) (citing

Irving J. Selikoff & Douglas H.K. Lee, *Asbestos and Disease* (1978), at 145-47).)

This Court should rule that when Boeing's knowledge that it was forcing Mr. Walston, over his protest, to suffer a certain injurious and irreversible process is combined with Boeing's contemporaneous knowledge based on experience that forcing workers to suffer the same injurious process had produced diseases in its workers, the evidence is sufficient to meet the deliberate intent exception. Otherwise, the deliberate intent exception could never be met when the employer intends "to produce . . . disease."

This Court has previously recognized the significance of an "injurious process" in producing a compensable injury in the worker compensation context, and it should do so here. In *Dept. of Labor & Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), for example, workers 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. This 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).

Amici (AWB Br. at 18-19) cites *Dept. of Labor & Industries v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991), but that case is not inconsistent with *Fankhauser*. It simply concludes that the schedule for benefits under the worker compensation law should be as of the time of disease diagnosis, not the time of last injurious exposure, which makes sense given that medical bills generally are not incurred until the disease is manifest. Walston does not claim that workers are entitled to compensation for sub-clinical injuries that occur from inhaling asbestos fibers, and nor is it necessary for the Court to so conclude for Walston to prevail here. Nonetheless, under Washington law, the injurious process to which he was subjected while working brings his mesothelioma within the ambit of the IIA, and it is that same injurious process that is thus relevant to Boeing’s

knowledge and intent “to produce” injury for purposes of applying the *Birkliid* test when the compensable injury is a disease. *Cf. Koker v. Armstrong Cork*, 60 Wn. App. 466, 804 P.2d 659, 663-64 (1991) (court refused to apply 1981 Tort Reform Act to plaintiff diagnosed with asbestos disease after enactment of the 1981 Tort Reform Act, holding that “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); *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).

C. Walston Has Presented Substantial Evidence that Boeing Deliberately Intended to Produce Walston’s Injury.

Amici also suggest that when an employer overrules its employees’ objections and knowingly forces them to suffer a forced and extended toxic insult, which the employer knows triggers an irreversible injurious process that has produced disease and death in its employees in the past, such conduct is not sufficiently morally culpable to satisfy the deliberate intent exception. AWB Br. at 7-9; Coalition Br. at 12-17. The argument makes no sense from a legal or moral perspective.

It simply cannot be the case that an employer who slowly poisons his employees (as in the case of Mr. Walston) is less culpable than one who

quickly gives his workers a headache and watery eyes (as was the case in *Birklid*). Neither Boeing nor Amici even tries to distinguish this case from the example of forced irradiation with plutonium (see Petitioner's Supp. Br. at 9), which Boeing conceded would be an assault that meets the elements of the deliberate intent exception. And the Washington Self Insurers Association (which signed the AWB Brief here) fails to reconcile the fact that it told one Washington appellate court that "[i]t can probably be said" that an employer who forces two workers to toil unprotected while cleaning PCBs for five days as their clothing got soaked with toxic material "knew their actions were certain to injure their employees" and thus could be sued outside the worker compensation system (Appendix B to Petitioner's Supp. Br.), while Mr. Walston, whom Boeing forced to work under an asbestos rain for over a month, which "produced" a life-ending disease as a consequence, somehow cannot.

The Coalition goes so far as to suggest that asbestos-related injuries can never be the basis for meeting the deliberate intent exception. Coalition Br. at 12-17. The argument simply ignores the clear legislative directive to the contrary. The notion that a fast poisoner can deliberately intend to injure, while a slow poisoner cannot, makes no sense. If anything, the law should be more vigilant against such slow poisoners because they are less likely to be detected and thus more likely to justify their intentionally harmful conduct. In *Birklid*, this Court flatly rejected Boeing's proposal

that an employer who “deliberately engaged in conduct that results in occupational injuries or disease within its workforce” cannot be said to have a “specific intent to injure members of that workforce for purposes of RCW 51.24.020 so long as that conduct was *reasonably calculated to advance an essential business purpose.*” 127 Wn. 2d at 862. With respect to “disease,” Boeing is trying to achieve precisely what the Court found so untenable in *Birklid*. The Court should not endorse a legal framework which licenses an employer to slowly poison its workers in the name of “an essential business purpose,” knowing that such poisoning had in the past produced disease in its workers and hoping that the delay in onset of the disease will somehow prevent detection of its deliberately coercive conduct or dilute its culpability for the dubious moral calculus it quietly struck years before when it forced workers into repeated toxic insults over their objection. Boeing and the Coalition need reminding that “[a]lthough . . . in 1916 everyone “agreed that the blood of the workman was a cost of production,” that statement no longer reflects the public policy or the law of Washington.” *Birklid*, 127 Wn.2d at 874 (citations omitted).

Amici also tell the Court that the “risk of disease does not equal malice,” (Coalition Br. at 3) and that Walston seeks to remove “any number of hazardous occupational exposures” from the worker compensation system. *Id.* But Walston does not equate malice with risk of disease, and nor does the standard Walston proposes swing open the barn door for all

hazardous occupational exposures. Walston has shown that in 1985 Boeing knew that Mr. Walston's coerced and extended toxic insult would trigger an irreversible injurious process in his body, and that other workers had died from just such an injurious process. Yet, when Mr. Walston asked for the same protection that Boeing afforded the abatement workers in "moon suits" working overhead, Mr. Walston's supervisor told him to "get back to work." Such conduct could give rise to federal criminal liability (see Petitioner's Supp. Br. at 5, n.2), and one would hope is not the norm in the workplace. Given the Legislature's special concern for toxic exposures in the workplace (*see* Brief or Amicus Curiae United Steelworkers Local 12-369 (Jan. 10, 2014) at 11-15), it would be strange indeed for this Court to adopt particularly lenient standards for employers who deliberately inflict toxic insults upon their workers, which they know could kill them.

Nor should responsible Washington employers be forced to subsidize irresponsible employers who deliberately harm their employees.

As this Court held in *Birklid*:

[O]ther employers should not have to share the risk under Washington's Industrial Insurance Act with an employer that has deliberately injured its employees. As we said in *Provost v. Puget Power*, 103 Wash.2d 750, 753, 696 P.2d 1238 (1985), "The exception [to the exclusive remedy provisions] is intended to deter intentional wrongdoing by employers."

127 Wn.2d at 873-74.

D. The Court Should Ignore Arguments That Don't Bear On this Appeal.

Amici suggest that this appeal undermines the “Grand Compromise” codified by the worker compensation laws (AWB Br. at 3-6; Coalition Br. at 2; AGC Br. at 2), but Walston agrees that the “deliberate intent” exception to the worker compensation laws is narrow and should remain narrow. The challenge here is to fashion a rule that honors the Legislature’s express conclusion that a worker may prove that his employer deliberately intended to produce his disease while at the same time keeping the exception narrow. Walston has proposed just such a rubric.

Amici also suggest that Walston seeks to create a “new tort liability framework” (AGC Br. at 1; *see* Coalition Br. at 11) through the creation of a tort for sub-clinical injuries, but that is not true and nor is such a tort necessary for Walston to prevail in this case. Mr. Walston has died of mesothelioma. He did not sue for the tort of “sub-clinical injury” but for a deadly disease he got because Boeing forced him to work under an “asbestos rain” for over a month despite his protest. The dilemma posited by AGC with respect to the statute of limitations (AGC Br. at 11-15) also rests on the faulty premise that Walston seeks to establish a new tort of subclinical injury. The only compensable injury in this case is mesothelioma, and under established Washington law Mr. Walston could not have sued regarding that injury until he was diagnosed.

Finally, Amici's pejorative and extra-record rhetoric about plaintiff lawyers "recruiting" asbestos victims and "searching for a solvent" defendant (Coalition Br. at 3, 5) are *ad hominem* arguments that require little response. The Coalition also suggests that this suit is an example of overreaching conduct by Walston's lawyers, and warns this Court not to become an "outlier." Counsel for the Coalition has made a career lobbying against stringent asbestos liability laws such as those in Washington, and often cites himself, as he has done in the Coalition Brief (at 4), with respect to articles he has written with Coalition funding.² Such solipsistic exercises certainly have their place in legislative lobbying, but they have little utility to a Court attempting to give meaning to all the words used by the Legislature and thus to find the law.

The Coalition filed a similar amicus brief, written by the same lawyers, in *Macias v. Saberhagen, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012), where it made similar arguments, with no record foundation, about manufacturers fleeing the country if the Court were to rule in favor of Mr.

² See, e.g., Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. Cooley L. Rev. 721 (2009); Mark A. Behrens & Frank Cruz-Alvarez, *Premises Owner Liability for Secondhand Asbestos Exposure: The Next Wave?*, 7:2 Engage – The J. of the Federalist Society's Prac. Groups 145 (Oct. 2006); "The Asbestos Litigation Crisis: The Tide Appears to be Turning," 12 Conn. Ins. L.J. 477 (2006). See Gary M. Paul, *Asbestos Litigation in California: A Response to Mark Behrens*, <http://www.simmonsfirm.com/blog/asbestos-litigation-in-california.html> (January 22, 2010).

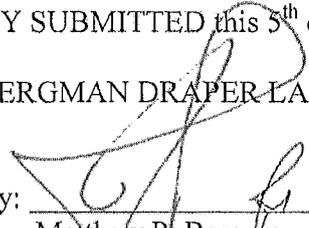
Macias. This Court had little use for such arguments in *Macias*, and it should draw the same conclusion here.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals and remand to the Superior Court for trial.

RESPECTFULLY SUBMITTED this 5th day of February, 2014.

BERGMAN DRAPER LADENBURG, PLLC

By: 

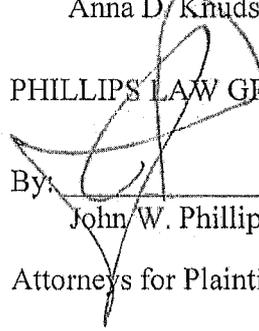
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DATED at Seattle, Washington this 5th day February, 2014.


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Dear Clerk of Court,

Attached for filing is the Plaintiff-Petitioner's Answer to Amicus Briefs filed by (1) The Coalition for Litigation Justice Inc., et. al., (2) AGC of Washington, and (3) Association of Washington Business, et. al. Thank you.

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