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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

THE BOEING COMPANY,

Respondent.

MEMORANDUM OF AMICUS CURIAE
UNITED STEELWORKERS LOCAL 12-369
IN SUPPORT OF REVIEW

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

RAP 13.4(h) requires an amicus curiae to describe its interest in a case before the Court. Amicus curiae United Steelworkers Local 12-369 ("USW") has done so in its motion for leave to file a memorandum in support of review.

B. STATEMENT OF THE CASE

USW acknowledges the factual recitation in the Walstons' petition for review, the answer of respondent Boeing Company ("Boeing"), the Walstons' reply, and the Court of Appeals' published opinion.

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED¹

Modern Washington law on direct actions under RCW 51.24.020 emanates from this Court's decision in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995), a toxic exposure case in which the plaintiffs stated a claim under RCW 51.24.020 for their injuries sustained when Boeing forced them to inhale toxic fumes from phenol formaldehyde resin. The Court there noted that "Boeing . . . knew in advance its workers would become ill from the phenol-formaldehyde fumes, yet put the new resin into production." *Id.* at 863.

¹ This Court is fully familiar with the criteria governing acceptance of review in RAP 13.4(b). USW believes review is merited here under RAP 13.4(b)(1, 2, 4).

Nothing in *Birklid* required that such injury be *immediately manifested*. The Court of Appeals' published opinion required immediate manifestation of injury (*Walston v. Boeing Co.*, ___ Wn. App. ___, 294 P.3d 759 (2013)),² effectively immunizing employers in Washington from deliberately exposing their workers to known injurious toxic substances so long as a worker does not immediately experience injury or succumb due to the exposure to the toxic substance.³ That is not the lesson to be learned from *Birklid* or case law since it was filed,⁴ nor does this argument comport with sound public policy.

Since *Birklid*, employees have met the definition of deliberate intention when an employer knowingly and continuously exposed

² Boeing asserts in its answer to the petition for review that the Court of Appeals did not actually mandate that a worker's injury be immediately manifested. Answer at 4-5. That is not true. The Court of Appeals specifically indicated that the immediate manifestation of injury in *Birklid*, *Hope*, and *Baker* was the fact that distinguished those cases from the present case. 294 P.3d at 766.

³ This is reminiscent of Boeing's argument in *Birklid* that there is no deliberate intent to injure so long as the employer's injurious conduct "was reasonably calculated to advance an essential business purpose." *Id.* at 862. Under this formulation, virtually any deliberately injurious conduct by an employer was exempt from an RCW 51.24.020 action because conduct no matter how deliberately obtuse to its potential to injure workers could be justified to spur production or otherwise advance the employer's needs.

⁴ This Court's decision in *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005), for example, does not alter the import of *Birklid*. It was not a toxic exposure case. There, a mentally disabled student injured several teachers. The student had injured other students and staff about 96 times during the school year, and seven of those injuries resulted in worker compensation claims. *Id.* at 24. The Court held that the teachers could not show that the employer actually knew that they would suffer injury. *Id.* at 34. In effect, the employer could not predict the student's free will, and that unpredictability broke the causal chain between the employer's actions and the employee's injury.

employees to toxic substances. In *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001), *overruled on other grounds by Vallandigham*, Division I held that an employer acted intentionally when it knew cleaning chemicals caused rashes but still required employees to use them. In *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501, *review denied*, 129 Wn.2d 1021 (1996), an opinion authored by then Judge Charles Wiggins, Division II held that an employer had actual knowledge that injury was certain when employees were exposed to chemicals and complained of breathing difficulties, skin rashes, nausea and headaches.

Neither *Hope* nor *Baker* mandated that the injury be manifested immediately. In *Baker*, the employees were exposed to various chemicals. The opinion does not indicate every exposed employee's injuries were immediately manifested. The *Baker* court stated: "General Plastics' supervisors knew that the employees were suffering from chemical-related illnesses and that, unless the working environment was changed, continuing injury was certain." 80 Wn. App. at 783. In fact, the testimony there reflected exposure of workers to toxic chemicals over a period of weeks. The injuries were not necessarily immediate. One employee was exposed to toxic substances in his first three weeks of employment. The exposure resulted in breathing problems that led to bronchitis and pneumonia. *Id.* at 778. Immediate injury due to exposure

was not required. Similarly, in *Hope*, the plaintiff was exposed to harsh chemical cleaners for *seven months* at her workplace in a supermarket, and she and other employees experienced serious rashes on their hands, arms, legs, and chests. *Id.* at 188-89. Division I did not require an immediate manifestation of harm. *See also, Katanga v. Praxair Surface Technologies, Inc.*, 2009 WL 506832 (W.D. Wash. 2009) (employer knew that explosions in a room where the plaintiff worked had occurred previously, were on-going, and were certain to continue; citing *Birkliid*, *Baker*, and *Hope*, court permitted direct action); *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001) (airline flight attendants exposed to hazards of second-hand smoke from smokers; court found that direct action for chronic injuries from long-term toxic exposure was proper, citing *Birkliid*).

The lesson to be learned from *Birkliid*, *Hope*, and *Baker* is that the test under RCW 51.24.020 is whether the employer deliberately intended to injure the employee where the employer knew the employee was certain to be injured, but forced the employee to sustain such injury anyway. *Nothing* about that test, focused as it should be on the employer's conduct, requires any examination of *how fast* the worker's injury comes to light. An employer can know that injury to employees is certain to occur from exposure to radiation, asbestos, benzene, or other toxics, even though the

injury from such exposures may have long latency periods. The employer incurs liability when it chooses deliberately to put the worker in harm's way for production or other profit-producing rationales.⁵

Washington prides itself on a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). In the industrial insurance setting, the *Birklid* court rejected the notion that "the blood of the workman is a cost of production." *Birklid*, 127 Wn.2d at 874. USW's reading of *Birklid*, *Hope*, and *Baker* is consistent with Washington law's special concern about toxic exposure in the workplace.⁶

⁵ Division II in its opinion at 11 relies on *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 103 P.3d 807 (2004), *review denied*, 154 Wn.2d 1021 (2005). That case did not rely on the immediate manifestation principle and instead focused on whether the injury from asbestos exposure was certain to occur. Here, there was a genuine issue of material fact on that issue because *Boeing* knew of the hazards of asbestos exposure and there was expert testimony that asbestos exposure certainly results in harm to those exposed, at the cellular level. 294 P.3d at 760-63. Boeing cites *Department of Labor & Industries v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991) in its Answer at 11 for the proposition that the date an occupational disease manifests itself controls as to the applicable schedule of worker compensation benefits. While true, that is not the critical issue. A worker exposed to asbestos is *injured* in the course of employment even though the disease becomes symptomatic years later. Washington courts have clearly held that a worker's claim arises for purposes of the applicable law when the worker is exposed to asbestos, not when he or she discovers the asbestos-related injury. See, e.g., *Mavroudis v. Pittsburgh Corning Corp.*, 86 Wn. App. 22, 34 n.14, 935 P.2d 684 (1997) (citing cases). A claim accrues for purposes of the statute of limitations only when the worker is aware of the elements of his or her claim. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 693 P.3d 687 (1985). See also, *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 306-07, 849 P.2d 1209 (1993) (workers who breathed asbestos fibers during their employment suffered injury in the course of their employment and employer is liable for entire duration of exposure under last injurious exposure role).

⁶ That special consideration, manifested in statute and case law, should animate this Court's interpretation of deliberate intent to injure under RCW 51.24.020 for toxic

Birklid's formulation of deliberate intent to injure is clear. The Court of Appeals' insistence that every person exposed to a toxic substance must immediately manifest injury is pernicious, guts *Birklid*, and leaves employers free to force their employees to experience the deleterious effect of known toxic substances. An example posed below was an employer directing an employee to handle radioactive material.⁷ There is little question that the employee would be injured by such exposure, even though the harm might be manifested later. The radioactive material example is not an idle one.⁸

exposure of workers by an employer. Washington's Worker and Community Right to Know Law, RCW 49.70, articulates a special concern for workers potentially exposed to toxic chemicals. RCW 49.70.010. Similarly, Washington's citizens established an aggressive public policy by initiative to clean up the effects of toxic contamination in the Model Toxics Control Act, RCW 70.105D.010. The Legislature specifically exempted exposure to hazardous substances from several liability in its 1986 Tort Reform efforts.

This Court in *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989) held that exposure to asbestos qualified as an exposure to a hazardous substance under RCW 4.22.070(3)(a), thereby allowing a plaintiff to sue defendants for joint and several liability, notwithstanding the enactment of several liability for most torts in the 1986 Tort Reform Act. *Id.* at 667-69.

These authorities evidence a special public policy in Washington law for those who are exposed to toxic substances generally and in the workplace.

⁷ Boeing conceded in the trial court that forcing an employee to handle plutonium would subject the employer to a claim under RCW 51.24.020 as such conduct was "a classic intentional tort." CP 5746-47, 5770. Indeed, such conduct is tantamount to an assault for the reasons articulated in Walston's petition at 14-15. Yet the Court of Appeals' insistence on an immediate manifestation of injury would allow an employer to escape liability.

⁸ In *Tulloh v. Goodyear Atomic Corp.*, 639 N.E.2d 1203 (Ohio App. 1994), the court authorized an action by an employee against his employer where that employer deliberately exposed him to radioactive materials. Similarly, in *Day v. NLO*, 851 F. Supp. 869 (S. D. Ohio 1994), a federal district court certified a class of employees and

Unfortunately, in toxics cases, many of the health consequences or diseases have long latency periods. Not every person exposed to toxic substances will immediately manifest injury.⁹ This is certainly true for asbestosis and mesothelioma.

This Court should also reject an immediate manifestation of injury requirement for direct actions under RCW 51.24.020 because such an approach does not comport with sound public policy. Many employees face serious jeopardy to their health at work from exposure to toxic substances and worker compensation may not provide sufficient remedy for the long-term effects of such occupational injuries.¹⁰ Mesothelioma and other cancers take *years* to develop, and do not show immediate symptoms. Thus, employees have difficulty proving not only that they

others to pursue an action against a manufacturer of nuclear weapons components that exposed the class members to radiation. The case presented difficult questions of law where the class members had not yet contracted cancer, but had emotional distress arising from their present fear that they would do so in the future. *See also, In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124 (9th Cir. 2002) (class action of persons exposed to radiation emanating from Hanford Nuclear Reservation since World War II).

⁹ *See, e.g., Koslop v. Cabot Corp.*, 631 F. Supp. 1494 (M.D. Pa. 1986) (authorizing direct action against employer for risk of contracting beryllium-related diseases). *See generally*, "Recovery for Exposure to Beryllium," 116 A.L.R. 6th 143 (2006) (collecting cases regarding beryllium exposure; 10 to 30 year latency period for beryllium-related lung disorders). *See also, Smith v. Monsanto Co.*, 822 F. Supp. 327 (S. D. W. Va. 1992) (direct action against employer for PAB exposure; PAB exposure results in diseases with long latency periods).

¹⁰ The National Institute for Occupational Safety and Health estimates that toxic chemical exposure in the workplace accounts for four to ten percent of all cancer deaths in the United States; that is roughly 24,000 deaths annually. Elizabeth M. Ward, *et al.*, *Priorities for Development of Research Methods in Occupational Cancer*, 111 Environ. Health Perspect. 1-12 (2003), <http://dx.doi.org/10.1289/ehp.5537>.

suffered a workplace injury but that an employer actually knew that a carcinogenic hazard would certainly injure an employee. These diseases also require very expensive treatment. A statutorily fixed worker compensation settlement will not always cover the necessary treatment, and workers may go undercompensated without the ability to recover in tort.

The Court of Appeals' treatment of direct actions under RCW 51.24.020 in its published opinion will fail to adequately deter employers from forcing their employees to encounter toxic hazards that jeopardize their long-term health. This Court recognized that one of the law's key purposes is deterrence. *Birklid*, 127 Wn.2d at 874 (citing *Provost v. Puget Sound Power & Light Co.*, 103 Wn.2d 750, 753, 696 P.2d 1238 (1985)). Hazards in the workplace have changed, and employers can more easily conceal their wrongdoing. Michelle Gorton, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 *Envtl. L.* 811, 823 (2000). As discussed previously, many illnesses from toxics develop slowly, and employees do not always understand the danger they face. Therefore, employers may decide to withhold information about a toxic hazard, especially if the injury from the toxic exposure will not show immediate symptoms. This Court must deter wrongdoing and incentivize employers

to protect employees—thus fulfilling the purpose of the law—by rejecting the Court of Appeals' immediate harm analysis.

A determination by this Court reaffirming that when an employer forces an employee's toxic exposure is a deliberate attempt to injure under RCW 51.24.020 would also help to regulate workplace safety more efficiently.¹¹ As the *Birklid* court stated, innocent employers should not bear the insurance cost of employers who willfully injure employees. *Birklid*, 127 Wn.2d at 874. Making employers pay for injuries occasioned by toxic exposure presents an economically efficient means to regulate occupational hazards. Under the Court of Appeals' analysis, employers would have an incentive to force employees' exposure to toxic hazards and let the worker compensation safety net subsidize their conduct, at the expense of other employers who do not deliberately injure their employees.

D. CONCLUSION

The Court of Appeals' adoption of an immediate manifestation of injury principle in its published opinion is pernicious. It is injurious to USW's members and thousands of Washington's workers who are forced

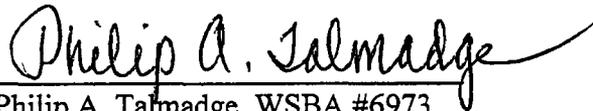
¹¹ OSHA currently oversees occupational safety regulation, but struggles with the growing need for regulation and the lack of public funds needed to oversee employee safety. Gorton, *supra*, 30 Env'tl. L. at 832. Commentators have noted that tort liability will incentivize employers to comply with OSHA regulation, even when OSHA cannot perform frequent inspections. *Id.* at 838-40.

to encounter toxic materials in the workplace that cause them harm, including diseases with long latency periods.

Under *Birklid*, recognizing its special treatment of forced worker exposure to toxic substances, Walston stated a cause of action for deliberate injury under RCW 51.24.020 when Boeing required him to inhale asbestos, knowing of the harm occasioned by such toxic exposure. This Court should grant review. RAP 13.4(b)(1), (2), (4).

DATED this 24th day of April, 2013.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

No. 42543-2-II

v.

THE BOEING COMPANY; and
SABERHAGEN HOLDING, INC., as
successor to TACOMA ASBESTOS
COMPANY and THE BROWER COMPANY,
Appellants.

PUBLISHED OPINION

Van Deren, J. — The Boeing Company appeals the trial court's denial of its motion for summary judgment under RCW 51.04.010 and RCW 51.24.020, which provide that workers' compensation is the exclusive remedy for injured employees subject to the industrial insurance act (IIA), title 51 RCW, absent an employer's deliberate intention to cause such injury. Because Boeing met its burden to show that no disputed material facts exist here, the burden shifted to Walston to raise a material factual dispute about whether Boeing had actual knowledge that the complained-of asbestos exposure was certain to cause injury and that Boeing willfully disregarded that knowledge. Walston failed to meet that burden; thus, we reverse the trial court's order and remand for entry of an order granting summary judgment to Boeing.

FACTS

Gary Walston worked in Boeing's hammer shop at plant 2 in Seattle from 1956 to 1992. Hammer shop workers fabricated a variety of metal airplane parts. Walston asserts that "[d]uring his employment at Boeing, he worked with and around asbestos containing products from various sources and inhaled asbestos fibers into his lungs." Clerk's Papers (CP) at 13. Walston claims that the asbestos exposure at issue occurred when he worked around other employees who were repairing pipe insulation that contained asbestos.¹

The hammer shop had asbestos-insulated pipes running the length of the shop ceiling and from the ceiling to the hammer machines. In January 1985, Boeing assigned maintenance workers to repair the pipe insulation because a white powdery substance determined to be asbestos was flaking and falling from the overhead pipes. The maintenance workers re-wrapped the overhead pipes to contain the flaking asbestos insulation.

While performing this work, the maintenance workers used ventilators and were fully enclosed in protective clothing that the hammer shop workers referred to as "moon suits." CP at 2014. Walston and the other hammer shop workers continued to work during the repairs without protective clothing or respirators.

The 1985 repairs created visible asbestos dust and debris that fell on Walston and the other hammer shop workers. Walston covered his tool box with plastic to stop the dust from

¹ Walston identifies other sources of asbestos exposure, such as cutting asbestos board; mixing asbestos powder and oil in the lead plate area; and wearing gloves, coats, and leggings issued to shop employees. But the issue on appeal is whether there is a material issue of fact about whether Boeing deliberately injured Walston—had actual knowledge of certain injury and willfully disregarded that knowledge—by exposing him to asbestos when abatement contractors repaired asbestos insulation on overhead pipes in the hammer shop in 1985.

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accumulating in it. Hammer shop workers, including Walston and John Stewart, asked their supervisor whether they could leave their workstations or wear protective gear during the pipe repair. The supervisor told them to "go back to work" but recommended that the workers avoid working directly under the overhead repairs.² CP at 1655. Walston said that the repairs lasted approximately one month, but Stewart recalled that the repairs were finished in only a few days.

There is no dispute that Boeing was aware that asbestos was a hazardous material well before the 1985 "moon suit incident" in the hammer shop. Walston's evidence shows that Boeing was aware of the dangers associated with asbestos exposure, including manifestation of asbestos-related diseases decades after initial exposure.³ The record includes memoranda from Boeing

² Stewart also complained to his union about the asbestos exposure, and the union recommended that he write a letter documenting the exposure for his medical file.

³ For example, in December 1972, Boeing issued Industrial Hazards Control Bulletin (IHCB) No. 5, which warned that asbestos dust was "[d]angerously toxic" and that "[i]nhalation of asbestos dust or fibers over prolonged periods may result in lung damage." CP at 5238. On July 18, 1977, industrial hygiene engineers, Richard H. Kost and Rick Carbone, wrote a memorandum stating that asbestosis results from chronic inhalation of asbestos dust, and that bronchial cancer is associated with asbestos exposure 20 to 30 years after initial exposure. The same document explained the effect of asbestos inhalation on the lungs, "Lung fibrosis is characteristic of asbestos is with fibrotic lesions tending to be diffuse and predominating primarily in the basal portions of the lung" and "pulmonary fibrosis, -pleural plaques and calcification are early radiologic findings occurring after 20 years of exposure to asbestos and may be found in the absence of any other disease symptoms." CP at 5247.

An undated document titled "Information about Asbestos," authored by Dr. Barry E. Dunphy, Manager at Boeing Corporate Occupational Medicine, states:

Breathing air which contains hazardous amounts of asbestos fibers causes no discomfort or warning sign at the time of exposure. Ten or more years after breathing air that contains hazardous amounts of asbestos, a serious lung disease called "asbestosis" may slowly begin to develop. Asbestosis causes scarring of the lungs, which may lead to severe impairment of breathing, and even death. Breathing air which contains hazardous amounts of asbestos can also cause an increased risk of lung cancer fifteen to fifty years after exposure. The risk of developing lung cancer due to asbestos is much greater among smokers than among non-smokers. Individuals exposed to hazardous amounts of asbestos may also be at increased risk of developing cancers of the larynx, esoph[ag]us, stomach

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industrial hygiene engineers discussing the risks associated with asbestos exposure, surveys and investigations conducted at Boeing to determine levels of exposure, and procedures and recommendations for reducing worker exposure to asbestos.⁴

Between October 1978 and 1986, Boeing received at least three workers' compensation

and large intestine.

CP at 2616.

⁴ IHCN No. 5, issued in 1972, stated that workers should avoid breathing asbestos dust or fibers, and that respirators should be used for the removal or demolition of asbestos insulation or coverings.

A Boeing industrial hygiene investigation conducted on May 14, 1977, revealed that removal of asbestos-containing materials would result in excessive asbestos exposure. Based on that investigation, Kost recommended that Boeing limit asbestos exposure in work environments, train employees about the hazards of asbestos and the importance of following procedures and precautions, evaluate current respiratory requirements and equipment, and provide easier access to protective equipment.

In January 1978, N.P. Novak, a Boeing industrial hygiene engineer, wrote in a memorandum evaluating asbestos use that due to the carcinogenic potential of asbestos, the National Institute for Occupational Safety and Health recommended setting the exposure limit at the lowest level detectable by available analytical techniques. He explained that the recommended standard was "intended to protect against the noncarcinogenic effects of asbestos, and substantially reduce the risk of asbestos-induced cancer." CP at 3231. He wrote in a parenthetical that "[o]nly a ban can assure protection against the carcinogenic effects of asbestos." CP at 3231.

In 1980, Boeing industrial hygiene engineer Thomas P. O'Keeffe reported on a survey taken to evaluate possible employee exposures to asbestos from falling insulation matter. O'Keeffe wrote that air samples indicated that ambient levels of asbestos were well below 0.1 fibers per cubic centimeter, but he recommended that fallen insulation material should be cleaned up and handled as asbestos and that Boeing should take actions to remove the ceiling insulation or bind it to prevent it from falling on employees and possibly increasing asbestos levels in the ambient air.

In 1982, Novak wrote that stripping and removing asbestos insulation on pipes generates the highest airborne concentrations of asbestos out of any operations monitored at Boeing. In April 1983, J.W. LaLonde, the Boeing fabrication division safety manager, ordered asbestos ceiling insulation to be encapsulated or sealed to eliminate a source for potential employee overexposure in a building at Boeing's Auburn facility. The memorandum stated that although the levels of asbestos fibers were not such that would lead to asbestosis, "Boeing Medical-Occupational Health [wa]s concerned about the possibility of lower exposures leading to lung cancer and mesothelioma." CP at 5305.

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claims based on asbestos-related injuries at Boeing facilities in Renton and Auburn. Also, in 1981, another hammer shop employee, who worked there from 1957 to 1975, sued an asbestos manufacturer based on his developing cancer from asbestos exposure in Boeing's hammer shop.⁵ In the late 1980s, Boeing received similar workers' compensations claims alleging asbestos related injuries, including mesothelioma, which is cancer in the lung lining.

Walston's experts, Dr. Arnold Brody, a cellular biologist; Dr. Richard Lemen, an epidemiologist; and Dr. Carl Brodtkin, a physician who examined Walston's medical records; variously opined that exposure to asbestos causes cellular level lung injury that increases the risk of developing an asbestos-related disease.⁶ But these same experts also admitted that no amount

⁵ Although the employee did not sue Boeing, Boeing became aware of the lawsuit at least by February 6, 1985, when it received a request for third-party discovery.

⁶ Dr. Brody explained in his declaration that when humans breathe asbestos fibers, the body has good defense mechanisms for shielding and clearing the fibers out of the lung. But if an individual is repeatedly exposed, some proportion of the fibers will cause scarring and injury at the cellular level. Visible scar tissue in the lungs caused by exposure to asbestos fibers is asbestosis. Asbestos can also cause mesothelioma and bronchogenic carcinoma (lung cancer) because lung cells divide to replace injured ones, thereby increasing the opportunity for cancer to develop. Dr. Brody declared, "The more often an individual is exposed [to asbestos], the more of these cellular and molecular injuries are sustained and the more likely the individual is to develop cancer[.]" *but* "[n]ot all injuries result in asbestosis or cancer." CP at 1025-26 (emphasis added). He also opined that a person "exposed to asbestos at levels above background can sustain microscopic injury to their lung tissue" within 48 hours of exposure to asbestos, and if the person continues to be exposed to asbestos, the early microscopic injuries "can result in clinical manifestation of disease decades after the initial exposures." CP at 1026.

Similarly, Dr. Lemen, who helped draft the initial Occupational Safety and Health Administration asbestos exposure standards in the early 1970s, declared that every "exposure to asbestos constitutes an injury in and of itself," but "*not every injurious exposure to asbestos manifests itself in asbestosis disease.*" CP at 1065 (emphasis added). And Dr. Brodtkin testified in his deposition that an asbestos fiber in the lungs creates an inflammatory response at the cellular level that an individual is not aware of. He said that persons with only ambient exposure to asbestos breathing in the city of Seattle, for example, may have asbestos fibers in their lungs causing the same type of cellular inflammation injury but, at such a low concentration, there is not a demonstrated increased clinical risk of disease. A cellular injury from asbestos exposure puts a person at an increased risk for asbestos-related disease, but it does not mean that disease will

occur.

Dr. Brodtkin also described the process by which asbestos fibers cause mesothelioma. He explained that asbestos exposure sufficient to overcome the body's defenses causes a direct genetic injury to an individual's deoxyribonucleic acid (DNA). Then "subsequent injuries and exposures [to asbestos] over many generations of cells . . . increase the changes in the DNA, the behavior of the cells, [and] potentially alter[s] cellular division." CP at 2850. Eventually, clinical tumors and clinical illnesses develop. Mesothelioma is a tumor in the lining of the lung or pleura. Dr. Brodtkin testified that the sub-clinical process and tumor initiation caused by the interaction between the asbestos fiber and the DNA begins shortly after inhalation, but that process does not produce symptoms of illness. The "time between exposure and development of illness is called the 'latent period.'" CP at 2850. Asbestos-related diseases have a prolonged latent period, often decades. For mesothelioma, an average latency may be 35 years. The "latency is one of sub-clinical effects, where there is injury to the DNA, tumor initiation and tumor promotion" but "[i]t's not until the . . . change in the behavior of the cells, and the development of a clinically apparent tumor, that one gets the clinical illness, . . . and usually diagnoses are obtained at that time." CP at 2850.

Dr. Brodtkin related that the relationship between exposure to asbestos and risk of mesothelioma is called "dose response." CP at 2853. Medical science has not determined whether there is a threshold exposure below which there is no clinically significant increased risk and above which there is a clinically significant increased risk; but as dose ranges increase, so does the risk of mesothelioma. There is no level of exposure to asbestos that will guarantee that the exposed person develops mesothelioma or other asbestos related disease. "Mesothelioma is a - overall, a rare disease. As dose increases, the risk for [m]esothelioma increases[,] . . . but . . . there is not an exposure which all individuals will develop [m]esothelioma" or other asbestos related diseases. CP at 2855. Mesothelioma is extremely rare in the general population, including exposed workers. But among certain groups of workers with the highest cumulative asbestos exposure, such as asbestos insulators, the rate of mesothelioma rises to nine percent.

When asked whether asbestos exposure is certain to cause injury, Dr. Brodtkin said:
[I]n terms of the exposures that I have evaluated with . . . Walston, [it] would certainly cause increased risk for injury . . . [but] . . . it doesn't guarantee that disease will occur."

....
But a hypothetical individual with similar exposure [as Walston], I can't say with certainty that they would develop disease. They would have increased risk for disease. They would likely have injury at a cellular level, but whether that would eventually be manifest by disease, I couldn't say with certainty.

CP at 2865 (emphasis added). Dr. Brodtkin clarified that in an isolated incident, exposure to asbestos is not certain even to cause injury at the cellular level, but significant asbestos exposure over time is likely or almost certain to cause cellular injury. Dr. Brodtkin characterized Walston's career exposure as significant exposure over time and testified that Walston's proximity to a larger scale rip out or removal of pipe insulation, which was described as the "moon suit incident" by Walston and his co-workers, represented a very significant exposure—likely the highest level of exposure experienced by Walston.

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of exposure to asbestos is certain to result in disease.

In 2010, Walston was diagnosed with mesothelioma. Walston sued Boeing, alleging that he contracted mesothelioma as a result of his exposure to asbestos while working at Boeing.⁷ Boeing moved for summary judgment dismissing Walston's claims because it was entitled to employer immunity under the exclusivity provisions of the IIA. The trial court denied Boeing's motion for summary judgment. We granted Boeing's petition for discretionary review of the trial court's denial of its summary judgment motion.

ANALYSIS

I. Standard of Review

We review a trial court's denial of a motion for summary judgment *de novo*. *Baker v. Schatz*, 80 Wn. App. 775, 782, 912 P.2d 501 (1996). "Summary judgment should only be granted if after considering all the pleadings, affidavits, depositions or admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as a matter of law." *Baker*, 80 Wn. App. at 782.

⁷ By the time Walston was diagnosed with mesothelioma he was over 65 years old and a combination of Medicare and his supplemental medical insurance policy covered his medical costs. Thus, he never applied for workers compensation benefits since he could not get wage loss and had no out-of-pocket expenses related to the disease.

Donna Walston also brought claims against Boeing for (1) her own alleged exposure to asbestos based on laundering her husband's asbestos-laden work clothes and (2) loss of consortium arising out of her husband's exposure and injury. By stipulation, Donna Walston's claims arising from her own alleged exposure to asbestos, including fear of future cancer, were dismissed. Her claims for loss of consortium remain pending, but they are not the focus of this appeal. The Walstons also sued Saberhagen Holdings for supplying asbestos-containing products to Boeing; but the trial court dismissed the claims against Saberhagen.

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II. Washington's Industrial Insurance Act

The IIA created a swift and certain no-fault workers' compensation system for injured employees in exchange for granting employers immunity from lawsuits arising from workplace injuries. RCW 51.04.010; *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). But employers who deliberately injure their employees are not immune from civil suits by employees who are entitled to compensation under the IIA.⁸ RCW 51.24.020 provides:

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

(Emphasis added.) Washington courts have consistently interpreted RCW 51.24.020 to require proof of the employer's specific intent to injure an employee before the employee can maintain a separate cause of action against a covered employer. *Vallandigham*, 154 Wn.2d at 27.

Until 1995, our courts applied the "deliberate intention" exception to the workers' compensation statute only where there had been a physical assault by one worker against another. *See, e.g., Perry v. Beverage*, 121 Wash. 652, 655, 659-60, 209 P. 1102 (1922), 214 P.146 (1923) (supervisor struck employee in the face with a water pitcher during an argument); *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 7, 9, 856 P.2d 410 (1993) (forklift driver purposely crushed another worker between two drums). But in 1995, in *Birklid v. Boeing Company*, our Supreme Court held that "deliberate intention" is not limited to physical assaults but includes

⁸ "Employers who engage in such egregious conduct should not burden and compromise the industrial insurance risk pool." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995).

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incidents where the employer (1) has “actual knowledge that an injury is certain to occur” and (2) “willfully disregard[s] that knowledge.” 127 Wn.2d 853, 865, 904 P.2d 278 (1995). The Court expressly rejected the more lenient “substantial certainty”⁹ and “conscious weighing”¹⁰ tests used by other states with similar “deliberate intention” statutory provisions. *Birklid*, 127 Wn.2d at 865.

III. Cases Applying the *Birklid* Standard

In *Birklid*, Boeing “[e]mployees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach[s]” during pre-production testing of a new material containing phenol-formaldehyde. 127 Wn.2d at 856 (quoting *Birklid* Clerk’s Papers at 115). A Boeing supervisor reported the employees’ symptoms, advised that the effects would likely worsen as production and temperatures increased, and requested improved ventilation in the work area. *Birklid*, 127 Wn.2d at 856. Boeing denied the request. *Birklid*, 127 Wn.2d at 856. Boeing proceeded with production of the new material and, as anticipated, its workers became sick. *Birklid*, 127 Wn.2d at 856.

When addressing the “deliberate intention” issue raised in the employees’ lawsuit subsequently filed against Boeing, our Supreme Court distinguished all prior cases decided under

⁹ Under the “substantial certainty” test, “[i]f the actor knows that the consequences are *certain*, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” *Birklid*, 127 Wn.2d at 864 (emphasis added) (internal quotation marks omitted) (quoting *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, 21-22, 398 N.W.2d 892 (1986)).

¹⁰ Oregon’s “conscious weighing” test focuses on “whether the employer had an opportunity consciously to weigh the consequences of its act and knew that someone, not necessarily the plaintiff specifically, would be injured.” *Birklid*, 127 Wn.2d at 865 (citing *Lusk v. Monaco Motor Homes, Inc.*, 97 Or. App. 182, 185, 775 P.2d 891 (1989) (interpreting Or. Rev. Stat. § 656.156(2))).

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the “deliberate intention” exception by explaining that in this instance Boeing knew in advance its workers would become ill. *Birklid*, 127 Wn.2d at 863. It held that in earlier cases, employers may have been aware that they were exposing workers to unsafe conditions, but workers were not being injured until accidents occurred. *Birklid*, 127 Wn.2d at 860-61, 863 (citing *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 580, 547 P.2d 856 (1976); *Biggs v. Donovan-Corkery Logging Co.*, 185 Wash. 284, 285-86, 54 P.2d 235 (1936); *Delthony v. Standard Furniture Co.*, 119 Wash. 298; 299-300, 205 P. 379 (1922); *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 354, 734 P.2d 961 (1987); *Peterick v. State*, 22 Wn. App. 163, 166-67, 189, 589 P.2d 250 (1977), *overruled on other grounds by Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 719-20, 709 P.2d 739 (1985)); *Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 270, 534 P.2d 596 (1975); *Winterroth v. Meats, Inc.*, 10 Wn. App. 7, 8, 516 P.2d 522 (1973). It further held that the Boeing employees presented sufficient evidence to justify a trier of fact’s finding that Boeing deliberately intended to injure them. *Birklid*, 127 Wn.2d at 865-66.

Following *Birklid*’s articulation of the proper standard to apply when employees covered by the workers’ compensation system allege a deliberate intent to injure, two cases—*Hope v. Larry’s Markets*, 108 Wn. App. 185, 193-94, 29 P.3d 1268 (2001), *overruled by Vallandigham*, 154 Wn.2d at 35, and *Baker*, 80 Wn. App. at 777-79—addressed employment situations involving employees who were repeatedly exposed to chemicals that made them visibly sick and who complained of illness and injury at the time of exposure. The employees in *Hope* and *Baker* satisfied the “actual knowledge” prong of the deliberate injury test by providing evidence that the employer knew that employees were suffering injuries from chemical exposure and that they would continue to do so until the exposure stopped. *Hope*, 108 Wn. App. at 194; *Baker*, 80 Wn.

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App. at 783-84. The employees in both cases also presented evidence relevant to the employers' "willful disregard" of that knowledge.¹¹ *Hope*, 108 Wn. App. at 194-95; *Baker*, 80 Wn. App. at 783-84. These cases held that the employees' evidence was sufficient to justify a trier of fact finding deliberate intention to injure and the employees were entitled to have a jury determine whether the employer deliberately intended to injure them, thus, precluding summary judgment in favor of the employer. *Hope*, 108 Wn. App. at 195; *Baker*, 80 Wn. App. at 784.

In *Shellenbarger v. Longview Fibre Company*—an asbestos exposure case—Division One of this court affirmed summary judgment for the employer, holding that a fact finder could not reasonably conclude that Longview Fibre had actual knowledge of certain injury. 125 Wn. App. 41, 43, 103 P.3d 807 (2004). *Shellenbarger* developed asbestosis and lung disease allegedly as a result of asbestos exposure during his employment at Longview Fibre Company. *Shellenbarger*, 125 Wn. App. at 43-45. The court reasoned that although the employer became aware of the dangers of asbestos, evidenced by the employer's warning employees in its "Special Hazards Manual" that asbestos could lead to asbestosis and advising employees to wear a respirator when around asbestos dust, knowledge of risk of injury is not knowledge of certain injury. *Shellenbarger*, 125 Wn. App. at 44-45, 48-49. The court held that "the relevant injury is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury." *Shellenbarger*, 125 Wn. App. at 49. The *Shellenbarger* court reiterated that under *Birkliid*, "known risk of harm or carelessness is not enough to establish certain injury, even when the risk is substantial." *Shellenbarger*, 125 Wn. App. at 47.

¹¹ The Supreme Court expressly disapproved of *Hope*, 108 Wn. App. at 194-95, insofar as it held that ineffective remedial measures satisfy the willful disregard prong of the *Birkliid* standard. *Vallandigham*, 154 Wn.2d at 35.

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Ten years after *Birkliid*, in *Vallandigham*, our Supreme Court further elaborated on the *Birkliid* standard. 154 Wn.2d at 29. In *Vallandigham*, school district employees sued to recover for injuries caused by a severely disabled special education student. 154 Wn.2d at 17. Although the student had allegedly injured staff members and students 96 times during one school year, our Supreme Court held that “the behavior of a child with special needs is far from predictable”; thus, the school district could not *know* that the child would continue to injure employees; and, thus, the school district could not be sued by employees for intentionally causing them injuries.

Vallandigham, 154 Wn.2d at 33-34. In distinguishing *Birkliid*, the Court recognized that the impact of exposure to a chemical is predictable in a way that the behavior of a special education student is not. *Vallandigham*, 154 Wn.2d at 24, 33-34. The Court emphasized that “[d]isregard of a *risk* of injury is not sufficient to meet the first *Birkliid* prong; *certainty* of actual harm must be known and ignored.” *Vallandigham*, 154 Wn.2d at 28.

IV. Walston’s Claim Does Not Satisfy the *Birkliid* Standard

Walston claims that he presented evidence raising a material factual dispute about whether Boeing had (1) actual knowledge that he was certain to be injured and (2) that Boeing willfully disregarded such knowledge. Walston argues that he—like the employees in *Birkliid*, *Hope*, and *Baker*—was injured as a result of being exposed to a substance at work that his employer knew was certain to injure him.

But the facts in *Birkliid*, *Hope*, and *Baker* differ from this case in an important way. When exposed to the injurious chemical, the *Birkliid*, *Hope*, and *Baker* employees became visibly sick—exhibiting symptoms such as passing out, dizziness, burning eyes, upset stomach, difficulty breathing, nausea, headaches, and skin rashes and blisters—and complained to their employers

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about the effect of the chemical exposure. *Birklid*, 127 Wn.2d at 856; *Hope*, 108 Wn. App. at 189-91, 194; *Baker*, 80 Wn. App. 778-79, 783-84. These employees' visible injuries and complaints created a reasonable inference that the employers had actual knowledge of certain injury to its employees. *Birklid*, 127 Wn.2d at 856, 863, 865-66; *Hope*, 108 Wn. App. at 194; *Baker*, 80 Wn. App. 783-84. In *Vallandigham*, our Supreme Court also acknowledged that "in cases involving chemical exposure, repeated, continuous injury and the observation of the injury by the employer can satisfy the first prong of the *Birklid* test." 154 Wn.2d at 30-31 (citing *Hope*, 108 Wn. App. at 193-94).

Here, unlike in *Birklid*, *Hope*, and *Baker*, where the injury to the employees was immediate and obvious, Walston and his co-workers were not immediately or visibly injured by the exposure to asbestos. Nor did they complain of injuries caused from their exposure to asbestos. Walston was not diagnosed with an asbestos related disease until 25 years after the "moon suit incident" in the hammer shop. The immediate visible effects of chemical exposure present in *Birklid*, *Hope*, and *Baker* provided the requisite material issue of fact relating to the employer's actual knowledge of certain injury. *Birklid*, 127 Wn.2d at 856, 863, 865-66; *Hope*, 108 Wn. App. at 194; *Baker*, 80 Wn. App. 783-84. But here, there is no material factual dispute relating to Walston's injury and Boeing's alleged actual knowledge that injury was certain to occur.

Walston argues that Washington has adopted a more liberal standard of proof in asbestos injury cases that allows his case to survive summary judgment. He relies on *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 248-49, 744 P.2d 605 (1987); *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 324-25, 14 P.3d 789 (2000); and *Mavroudis v. Pittsburgh-Corning Corp.*, 86

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Wn. App. 22, 32, 935 P.2d 684 (1997) to support this argument. *Lockwood, Berry, and Mavroudis* recognize that the peculiar nature of asbestos products and development of asbestos-related disease make it difficult to prove causation. *Lockwood*, 109 Wn.2d at 248-49; *Berry*, 103 Wn. App. at 323-25; *Mavroudis*, 86 Wn. App. at 31-33. For purposes of summary judgment and this appeal, Boeing does not deny that Walston produced evidence showing that his mesothelioma was caused by his exposure to asbestos while he was an employee at Boeing. Thus, the relaxed proof standard related to causation does not apply here, where the issue is whether Walston has provided evidence showing that Boeing had actual knowledge that its employees were certain to contract an asbestos-related disease. That issue requires wholly separate evidence.

Walston first attempts to bridge the gap between his injury and Boeing's alleged actual knowledge that injury was certain to occur by showing that even though its workers were not suffering immediate visible injuries, Boeing knew that diseases caused by asbestos exposure have long latency periods and that they materialize at some later date. He points to at least three workers' compensation claims against Boeing alleging asbestos-related injuries between 1978 and 1986, and a 1981 lawsuit by a Boeing employee against a third-party asbestos manufacturer that alleged asbestos-caused cancer.

But the record here does not support a holding that Boeing's awareness that some workers developed asbestos-related diseases raised a material issue of fact about whether Boeing knew that exposing employees to asbestos during the pipe repair in 1985 was certain to injure them. As Division One recognized in *Shellenbarger*, not everyone exposed to asbestos develops an asbestos related disease. 125 Wn. App. at 49. Even Walston's experts conceded that there is no known threshold of exposure to asbestos that results in certain asbestos related disease.

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Walston secondarily argues that certainty of injury can be shown through expert testimony that a cellular injury occurs when a person is exposed to asbestos and that the relevant injury is the cellular injury, not the disease contracted following a long latency period. Walston's experts described a subclinical¹² cellular inflammation caused by asbestos fibers that may result in abnormal cell division that increases the chance of a genetic defect in the division of cells, leading to cancer. We are mindful of the narrow exception the legislature provided and the strict standard announced by our Supreme Court in *Birkliid* that preclude holding that Walston has shown that Boeing had actual knowledge of certain injury in the absence of clinical symptoms and based only on asbestos-caused cellular inflammation and irregular cell division increasing the risk of an asbestos related disease. *See Vallandigham*, 154 Wn.2d at 28.

Walston also points to various internal Boeing documents discussing the risk of asbestos exposure and its potential to cause injury years after exposure. This evidence does show that Boeing knew that exposure to asbestos was dangerous to its employees because it increased the risk that an asbestos-related disease could materialize. Nevertheless, "the relevant inquiry is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury." *Shellenbarger*, 125 Wn. App. at 49. In *Birkliid*, our Supreme Court acknowledged that the deliberate intent exception was very narrow. 127 Wn.2d at 865.

Risk of injury, even risk amounting to substantial certainty of injury, is not certain injury mandated

¹² A "subclinical" cellular inflammation would not be detectable as a disease in a medical examination. *See Stedman's Medical Dictionary* 1692 (26th ed. 1995) (defining "subclinical" as, "[d]enoting the presence of a disease without manifest symptoms; may be an early stage in the evolution of a disease"); *Webster's Third New International Dictionary* 2273 (2002) (defining "subclinical" as "marked by only slight abnormality and not being such as to give rise to overt symptoms : not detectable by the usual clinical tests").

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under the *Birklid* test. 127 Wn.2d at 865; *Vallandigham*, 154 Wn.2d at 28.

Walston has not directed us to any evidence in the record demonstrating that a material factual dispute about whether Boeing had actual knowledge in 1985 that asbestos exposure was certain to cause injury; nor did our independent search of the record uncover such evidence. Here, as in *Shellenbarger*, a reasonable fact finder could not conclude that the employer knew with certainty that any employee would be injured by asbestos exposure in the workplace. See 125 Wn. App. at 49. Under these facts (no actual knowledge of certain injury), we need not reach the second prong of the *Birklid* deliberate intent test, which considers whether the employer willfully disregarded actual knowledge of certain injury.¹³

¹³ Because most courts applying the *Birklid* test have held that the employer did not have actual knowledge that injury was certain to occur, few courts have considered whether an employer willfully disregarded such knowledge. See, e.g., *French v. Uribe, Inc.*, 132 Wn. App. 1, 12, 130 P.3d 370 (2006); *Crow v. Boeing Co.*, 129 Wn. App. 318, 330, 118 P.3d 894 (2005); *Shellenbarger*, 125 Wn. App. at 49; *Byrd v. Sys. Transp., Inc.*, 124 Wn. App. 196, 205, 99 P.3d 394 (2004). In *Stenger v. Starwood School District*, 95 Wn. App. 802, 813-16, 977 P.2d 660 (1999), *overruled by Vallandigham*, 154 Wn.2d at 35, and *Hope*, 108 Wn. App. at 194-95, Division One of this court focused on the adequacy or effectiveness of attempted remedial measures. In *Stenger*, school employees sued their school district to recover for injuries caused by a special education student. 95 Wn. App. at 803. Division One of this court held that “a jury could reasonably conclude that the [school d]istrict had actual knowledge that the staff would continue to be injured by [the student] in the future” and the district’s efforts to prevent injury were inadequate and, thus, amounted to willful disregard of certain injury. *Stenger*, 95 Wn. App. at 813-14, 816-17. The district did not file a petition for review with the Supreme Court, but the court’s holding in *Vallandigham*, on very similar facts, abrogated *Stenger*. See 154 Wn.2d at 31-32, 34-35.

Our Supreme Court in *Vallandigham*, did not reach the willful disregard issue in its analysis but, in dicta, it disapproved of the holdings in *Stenger* and *Hope* to the extent that they suggested a finding of willful disregard can be based on the simple fact that an employer’s remedial efforts were ineffective. *Vallandigham*, 154 Wn.2d at 34-35; see *Stenger*, 95 Wn. App. at 813; *Hope*, 108 Wn. App. at 195. The Supreme Court “reject[ed] any notion that a reasonableness or negligence standard should be applied to determine whether an employer has acted with willful disregard.” *Vallandigham*, 154 Wn.2d at 35. It held that willful disregard may not be met by showing that the employer’s remedial action is ineffective. *Vallandigham*, 154 Wn.2d at 28, 34-35.

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In sum, Boeing met its burden to show that there is no dispute of material fact that Boeing knew in 1985 that the pipe repairs in the hammer shop were certain to cause injury to its employees. After Boeing met its burden, the burden shifted to Walston to raise a genuine issue of material fact about Boeing's knowledge of certainty of injury to the Boeing employees in the hammer shop in 1985. See *Vallandigham*, 154 Wn.2d at 35. This he failed to do.

Because Walston has failed to carry his burden to demonstrate that there remains a material question of fact about Boeing's actual knowledge of certain injury as required by RCW 51.24.020, Boeing is immune from Walston's suit for workplace injury under RCW 51.04.10. Accordingly, Boeing is entitled to summary judgment as a matter of law. *Vallandigham*, 154 Wn.2d at 35.

We reverse the trial court's denial of Boeing's summary judgment order and remand to the trial court for entry of an order granting summary judgment to Boeing on Walston's claims.¹⁴

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, J.

¹⁴ Donna Walston's claims for loss of consortium arising from her husband's injury are still pending. Those claims are not addressed in this appeal, but because we hold that Boeing is entitled to summary judgment on her husband's personal injury claims, the trial court will undoubtedly address the continuing viability of her claims.

DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Motion for United Steel Workers Local 12-369 for Leave to File Brief of Amicus Curiae and Memorandum of Amicus Curiae United Steel Workers Local 12-369 in Support of Review In Supreme Court Cause No. 88511-7 to the following parties:

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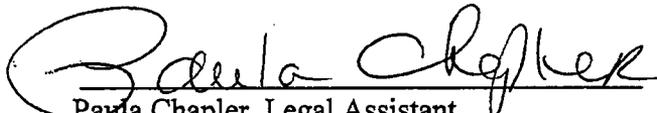
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 29, 2013, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Gary Walston, et al. v. The Boeing Company --Cause No. 88511-7

Rec'd 4-30-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Paula Chapler [<mailto:paula@tal-fitzlaw.com>]
Sent: Tuesday, April 30, 2013 9:50 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Gary Walston, et al. v. The Boeing Company --Cause No. 88511-7

Per Mr. Talmadge's request, attached is the Motion of United Steel Workers Local 12-369 for Leave to File Brief of Amicus Curiae and Memorandum of Amicus Curiae United Steel Workers Local 12-369 in Support of Review for filing in the following case:

Case Name: Gary G. Walston, et al. v. The Boeing Company
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