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COURT OF APPEALS
DIVISION II

2012 NOV 14 PM 3:02

STATE OF WASHINGTON

Court of Appeals No. 42543-2 BY Ch
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**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

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

Respondents,

v.

THE BOEING COMPANY,

Petitioner.

**PETITIONER BOEING'S RESPONSE TO BRIEF OF
AMICUS CURIAE WASHINGTON STATE LABOR COUNCIL**

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I. INTRODUCTION

The Industrial Insurance Act eliminates tort liability for workplace injuries except in the narrow category of cases in which an “injury results to a worker from the deliberate intention of his or her employer to produce such injury.” RCW 51.24.020. In *Birklid v. Boeing Co.*, the Supreme Court construed the statutory phrase “deliberate intention . . . to produce such injury” to mean that “the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.” 127 Wn.2d 853, 865, 904 P.2d 278 (1995). As explained in Boeing’s principal briefs, Boeing had no knowledge that Walston was certain to be injured as a result of his workplace exposure to asbestos; Walston produced no evidence suggesting that Boeing had such knowledge; and Boeing is therefore entitled to summary judgment. That does not mean that Walston may not seek compensation for his injuries, only that he must do so through the statutory workers’ compensation system, not through an action in tort.

Implicitly acknowledging that Boeing’s interpretation of current law is correct, amicus Washington State Labor Council focuses on criticizing the *Birklid* standard and urging the adoption of a more relaxed interpretation of “deliberate intention.” Its arguments are misdirected because, as a decision of the Supreme Court, *Birklid* is binding on this

Court. In any event, *Birklid* correctly interpreted Washington’s Industrial Insurance Act. The decision reflects a long-settled construction of that statute, and there is no basis for overruling it.

Amicus’s efforts to apply *Birklid* fare no better. Like Walston, amicus can point to no evidence in the record showing that Boeing had “actual knowledge that an injury was *certain* to occur.” *Birklid*, 127 Wn.2d at 865 (emphasis added). The exception set out in RCW 51.24.020 is therefore inapplicable to this case.

II. ARGUMENT

A. **This Court Is Bound by the Supreme Court’s Decision in *Birklid***

Amicus devotes much of its brief (at 13-18) to arguing that the Court should abandon the *Birklid* standard and should instead adopt the approach of the *Restatement (Second) of Torts*, under which an employee may bring a tort action if the employer acted with knowledge that injury was “substantially certain” to result. Whatever the merits of those arguments, they are presented in the wrong forum. *Birklid* is a decision of the Washington Supreme Court, and it is therefore binding on this Court. *See In re Le*, 122 Wn. App. 816, 820, 95 P.3d 1254 (2004), *aff’d sub nom. In re Domingo*, 155 Wn.2d 356, 119 P.3d 816 (2005).

B. *Birklid* Correctly Construed the Statute’s “Deliberate Intention” Standard

In any event, amicus’s criticisms of *Birklid* lack merit. Amicus advances three arguments for adopting the Restatement’s standard instead of *Birklid*, but none withstands scrutiny.

Amicus first observes (Br. 15) that “not every person exposed to toxic substances will immediately manifest injury.” That argument appears to rest on the premise that *Birklid* permits liability only when an employer inflicts an injury on an employee and the injury manifests itself immediately. That is incorrect. The *Birklid* test requires that the injury be certain, but it does not require that it be immediate. An employer who willfully disregards actual knowledge that an injury is certain to occur is subject to tort liability even if the injury will not manifest itself for some time. Amicus’s suggestion (Br. 15) that *Birklid* is inappropriate in the context of injuries that “may have a long latency period” is therefore misplaced.

Second, amicus suggests (Br. 15) that adopting the *Restatement*’s standard is necessary in order “to deter employers from intentionally harming employees.” But employers who engage in such egregious conduct already face numerous serious consequences: possible criminal liability, enforcement action by regulatory agencies, tort liability to the

extent it is permitted by *Birklid*, and, presumably, difficulty in attracting and retaining employees. Amicus offers no reason to believe either that the intentional infliction of harm is inadequately deterred by those consequences or that replacing *Birklid* with the *Restatement* standard would provide significantly greater deterrence.

Third, amicus contends (Br. 17) that “expanding tort liability will incentivize employers to comply with” regulations of the Occupational Safety and Health Administration. Under current law, of course, “failure to observe safety laws or procedures does not constitute specific intent to injure.” *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005). But even under the test amicus advocates, a violation of OSHA regulations would be neither a necessary nor a sufficient condition for liability. Thus, even if enhancing the enforcement of a federal regulatory scheme were an appropriate objective of Washington tort law, amicus’s proposal would do little to achieve it.

In urging the Court to replace *Birklid* with the test adopted by courts in various other States interpreting their own workers-compensation statutes, amicus overlooks the Supreme Court’s admonition that “our Industrial Insurance Act is unique and the opinions of other state courts are of little assistance in interpreting our Act.” *Dennis v. Dep’t of Labor & Indus.*, 109 Wn. 2d 467, 482-83, 745 P.2d 1295 (1987). In *Birklid*, the

Court emphasized “the narrow interpretation Washington courts have historically given to RCW 51.24.020,” as well as “the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010.” 127 Wn. 2d at 865. Based on those considerations, the Court expressly rejected the “substantial certainty” test that amicus advocates. *See id.; accord Vallandigham*, 154 Wn.2d at 32 (reaffirming that “the first prong of the *Birklid* test can be met only in very limited circumstances where continued injury is not only substantially certain, but *certain* to occur”).

Those considerations have even greater force now that 17 years have passed since the *Birklid* decision. As the Supreme Court has observed, “[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *Friends of Snoqualmie Valley v. King Cty. Boundary Review Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992) (brackets in original)). Even if this Court had the authority to overrule *Birklid*, there is no basis for doing so.

C. Walston Has Presented No Evidence That Would Satisfy the *Birklid* Standard

To the extent amicus addresses existing law, its efforts are devoted to attacking a straw man. Amicus argues (Br. 4) that “nothing in *Birklid* required that *every* employee exposed suffer injury, or that such injury be *immediately manifested*,” but Boeing has not contended otherwise. What matters under *Birklid* is the employer’s knowledge of certainty of injury to the plaintiff. *See* 127 Wn.2d at 865. If all other employees also suffered injury, and if the injuries were immediately manifested, those facts might have some evidentiary value in tending to establish the employer’s actual knowledge of certain injury to the plaintiff. Likewise, if other employees were not injured, or if the injuries were not apparent at the time, those facts might tend to disprove the employer’s actual knowledge that the plaintiff was certain to suffer injury. In either case, however, those facts would not themselves be legally determinative.

Amicus relies (Br. 6) on *Hope v. Larry’s Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001), and *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996), which allowed employees to pursue tort actions for injuries sustained as a result of their exposure to chemicals. Amicus asserts, without citation, that in those cases, “not every employee exposed suffered injuries.” In fact, both *Hope* and *Baker* involved willful disregard of

certain injuries to the plaintiffs because, in both cases, the plaintiffs *themselves* complained to their employers that they were suffering injuries from the chemicals to which they were exposed, yet the employers continued to expose them to the chemicals. *See Hope*, 108 Wn. App. at 189-90 (noting that Hope experienced “rashes and blisters” and that she told her supervisor “that the chemicals were causing her rash”); *Baker*, 80 Wn. App. at 778 (noting that Baker experienced “breathing difficulties, skin rashes, nausea and headaches” and that he complained to his employer at least three times). No similar evidence of certain injury is present in this case. *See Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004) (“asbestos exposure does not result in injury to every person”).

Finally, amicus cites (Br. 6-8) statutes regulating toxic substances. Neither of the cited statutes amended RCW 51.24.020, and neither provides a basis for altering *Birklid*'s interpretation of that provision. More importantly, neither of them establishes that Boeing had actual knowledge that Walston's exposure to asbestos was certain to produce injury. Because there is no such evidence in the record, Boeing is entitled to summary judgment.

III. CONCLUSION

The Court should reverse and direct entry of judgment for Boeing.

Respectfully submitted.

DATED: November 14, 2012

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DECLARATION OF SERVICE

On said day below I deposited in the U.S. Mail a true and accurate copy of PETITIONER BOEING'S RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON STATE LABOR COUNCIL to the following:

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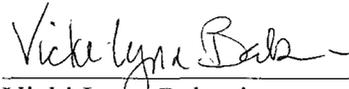
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 14, 2012, at Seattle, Washington.



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