

COURT OF APPEALS
DIVISION II

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Court of Appeals No. 42543-2

STATE OF WASHINGTON
BY
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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.

BRIEF OF PETITIONER BOEING

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I. INTRODUCTION

The superior court ruled that a former Boeing employee who developed mesothelioma 18 years after alleged workplace exposure to asbestos could proceed to trial on his claim that Boeing deliberately intended to cause his disease. This Court should reverse. Plaintiff's rightful remedy for his workplace injury is in the workers' compensation system, not a civil lawsuit against his former employer.

The workers' compensation system immunizes employers from suits by employees for workplace injuries unless the employee's injury "result[ed] ... from the *deliberate intention* of his or her employer to produce such injury." RCW § 51.24.020 (emphasis added). That exception to employer immunity is a narrow one: "'Deliberate intention' ... means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Birkliid v. The Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). Evidence that an employer knew that injury was probable or even substantially certain falls short of the certainty required by the statute. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 32, 109 P.3d 805 (2005).

The superior court's ruling defies the "deliberate intention" standard of the statute and contradicts several decisions from the Washington Supreme Court and Court of Appeals that apply *Birkliid*

strictly to require absolute certainty that the employee would be injured. Indeed, Division One has held that knowingly exposing employees to asbestos does not meet the deliberate-intent exception because “asbestos exposure does not result in injury to every person . . .” *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004). Walston presented no evidence that Boeing knew that he was certain to develop mesothelioma. In fact, his experts conceded, like the Court of Appeals in *Shellenbarger*, that asbestos exposure is not certain to cause any disease. That alone is enough to dismiss plaintiff’s case.

The superior court failed to apply established Washington case law. It instead adopted a novel interpretation of the deliberate-intent exception, under which an injured employee could surmount his employer’s statutory immunity from suit by showing one of the following: (1) an employer knew that its employees were merely being exposed to a hazardous substance or situation; (2) a high probability that at an unknown later date, some employee—not necessarily the plaintiff—would suffer some injury from a hazardous substance or situation; and (3) that mere exposure to a substance caused a change in the employee’s body at a cellular level, regardless of whether that exposure resulted in actual disease or injury.

No Washington appellate court has adopted any of those arguments, and for good reason. Any of those arguments would undermine the

carefully balanced workers' compensation scheme by expanding the deliberate-intent exception far beyond what the Legislature intended and open the floodgates to lawsuits against employers for workplace injuries. This Court should reverse and direct entry of judgment for Boeing.

II. ASSIGNMENT OF ERROR

The superior court erred in denying Boeing's motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

An employee may sue his or her employer for work-related injuries that result only "from the deliberate intention of his or her employer to produce such injury." RCW § 51.24.020. The "phrase 'deliberate intention' ... means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Birklid*, 127 Wn.2d at 865.

1. Where the deliberate-intent exception to employer immunity requires that an employer have actual knowledge that injury was certain to occur, does evidence that asbestos exposure causes only a risk of injury that is not certain to occur satisfy the exception?

2. Can an employee satisfy the deliberate-intent exception to employer immunity by showing a high probability that, at an unknown

later date, some employee—not necessarily the plaintiff—would suffer some injury from asbestos exposure?

3. Where Washington law treats the actual manifestation of disease as the relevant injury, does expert opinion that inhaling asbestos fibers itself constitutes an injury because those fibers can cause asymptomatic responses in the body at the cellular level establish injury for purposes of the statute?

4. Can evidence that the employer knew an employee was exposed to asbestos and that asbestos carries a risk of possible future injury constitute willful disregard of actual knowledge of a certain injury?

IV. STATEMENT OF THE CASE

A. Walston Claims Exposure to Asbestos at Boeing

Gary Walston worked as a hammer operator in Boeing's Hammer Shop in Seattle from 1956 to 1992. (CP 335-36, 341-42 (15:17-20, 18:23-19:14, 41:15-42:13)) The shop closed in 1992, and he retired in 1995. (CP 336 (19:1-14, 20:19-25)) The hammer machines dropped lead punches onto metal laid over pre-formed dies to form a shape for aircraft parts. (CP 373-74 (13:9-14:1)) A photograph of a hammer machine is in Appendix A.

While the parts made in the Hammer Shop did not contain asbestos (CP 341 (38:12-22)), the shop did use some asbestos in the fabrication

process until the 1970s. Shop workers built molds for the lead punches using plywood lined with an insulating board, with a packing compound to seal the joints. (CP 90-95 ¶¶ 41-49, 358 (108:9-109:7), 483, 513 (10:22-11:8, 130:14-131:2)) Before the 1970s, when Boeing introduced asbestos-free substitute materials, the insulating board was an asbestos-containing marinite, and the packing was a mixture of asbestos powder and oil. (CP 90-95 ¶¶ 41-49, 358 (108:9-109:7)) Walston claims that he was exposed to fibers released from cutting the marinite board and mixing the powder. (CP 347 (64:8-65:15))

Employees in the Hammer Shop who worked with hot materials wore protective apparel, some of which contained asbestos until suitable asbestos-free substitutes were found. (CP 98-104 ¶¶ 52-62) Walston also claims exposure to asbestos from those garments. (CP 347 (64:8-65:15))

Some of the insulation on steam pipes in the shop also contained asbestos. (CP 2138-39) In approximately 1960 and again in 1985, Boeing repaired the pipe insulation. (CP 354 (90:12-92:22)) Walston refers to the 1985 repair as the “moonsuit incident” because, as he described it, the repair workers who handled the insulation wore protective clothing and ventilators. (CP 355 (97:12-25)) Walston claims exposure to dust during those repairs, as well as during periodic repairs to ovens and heat treat tanks in the shop. (CP 347 (64:8-12)) Walston does not claim that he was

exposed to asbestos outside the Hammer Shop. (CP 341, 346 (38:12-22, 61:7-15))

B. Surveys of the Hammer Shop Did Not Show Asbestos Levels Above Regulatory Limits

In the early 1970s, federal and state regulators, under the Occupational Safety and Health Act (OSHA) and Washington Industrial Safety and Health Act (WISHA), implemented workplace regulations for asbestos. They established a permissible exposure limit of 5 fibers per cubic centimeter of air, time weighted over an eight-hour day (which was reduced in 1976 to 2 fibers per cc, and later reduced more). 37 Fed. Reg. 11318, 11320 (June 7, 1972) (codified at 29 C.F.R. § 1910.93a); WAC § 296-62-07517(2) (May 7, 1973). The regulations required protective measures like employee changing rooms if asbestos levels exceeded the permissible exposure limit. 37 Fed. Reg. at 11321 (June 7, 1972); WAC § 296-62-07517(4)(d).

In response to the regulations, Boeing took steps to ensure that its employees were not exposed to asbestos above permissible levels. Boeing issued industrial hazard bulletins on asbestos in December 1972. (CP 75-78, 106-09, 111-18) The bulletins described Boeing's understanding that asbestos hazards created a *potential* for injury, not certain injury. They

said that inhalation of asbestos “over prolonged periods may result in lung damage.” (CP 77-78 ¶¶ 16-18, 106, 112)

In 1973, Boeing’s Industrial Hygiene Department surveyed the Hammer Shop for asbestos. (CP 78-80 ¶¶ 19-23, 138-149) The survey sampled three work operations for “representative exposure data” and found that “[a]ll samples which were collected during these operations were well within permissible exposure limits.” (CP 79-80 ¶¶ 22, 138-140)

The Industrial Hygiene Department surveyed the Hammer Shop again in July 1977. (CP 80-81 ¶¶ 24-25, 151-66) That survey also did not identify any asbestos in the Hammer Shop above the permissible exposure limit, which by then was 2 fibers per cubic centimeter. (CP 82-83 ¶ 27) The 1977 survey included the cutting of asbestos-containing marinite millboard to determine the asbestos fiber count. The board consisted of wood and silicate material. Although the survey noted that the particles were “too numerous to count,” many of the particles were not asbestos, so the result did not indicate regulatory limits were exceeded. (*Id.*)

C. Boeing Removed Asbestos From Fabrication Processes in the 1970s and Took Other Measures to Prevent Exposure

In February 1977, Boeing adopted a policy to minimize its use of asbestos. Boeing sought substitutes for asbestos materials used in

fabrication processes, facilities, equipment, and apparel. (CP 88-90 ¶¶ 38-40, 97-98 ¶ 51, 185-86, 188-96, 238, 240, 242, 246)

In the 1970s, Boeing investigated, tested, and implemented substitutes for the asbestos-containing marinite boards, packing compound, and protective apparel used in the Hammer Shop. (CP 90-95 ¶¶ 41-49, 98-104 ¶¶ 52-62, 198-33, 248-83) Boeing prescribed additional measures to reduce exposure in the interim, such as requiring employees to use ventilators. (CP 188-89) Hammer Shop supervisors also issued a directive that “outline[d] organizational duties and responsibilities to insure asbestos equipment and handling are within correct established directives”—such as inspection of asbestos-containing apparel. (CP 95-97 ¶ 50, 235-36)

D. Denial of Summary Judgment and Interlocutory Review

Walston sued Boeing for workplace asbestos exposure and Saberhagen for supplying asbestos-containing products to Boeing. (CP 1-4, 12-16) The superior court dismissed the claims against Saberhagen. (CP 5724-25)

Boeing moved for summary judgment, arguing that it was entitled to employer immunity under the Industrial Insurance Act. (CP 24-71) Summary judgment is appropriate when the record shows that “there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law.” CR 56(c). The superior court denied Boeing’s motion. (CP 5709-10) It provided no written explanation for its ruling, but said that it adopted “the reasons cited by the plaintiff.” (RP 55) The court’s full oral ruling is reproduced in Appendix B.

This Court granted discretionary review. (Letter from David C. Ponzoha, Court Clerk, Washington State Court of Appeals, Division Two, to all counsel (Sept. 13, 2011)) It reviews an order denying summary judgment *de novo*. *Vallandigham*, 154 Wn.2d at 26.

Walston’s wife, Donna, brought a separate claim of emotional distress from alleged secondary exposure to asbestos. (CP 3, 15) She voluntarily dismissed that claim. (CP 5717-18) The only claims on appeal arise from Walston’s alleged occupational exposure at Boeing.

V. ARGUMENT

A. **Workers’ Compensation Is an Employee’s Exclusive Remedy for Workplace Injuries Unless the Employer Deliberately Intended to Injure the Employee**

In the Industrial Insurance Act, the Legislature abolished the jurisdiction of courts to hear nearly all claims against an employer arising from workplace injuries. RCW § 51.04.010. The Act was “the product of a grand compromise” and gave employers “immunity from civil suits by workers” in return for giving injured workers “a swift, no-fault compensation system for injuries on the job.” *Birklid*, 127 Wn.2d at 859.

That immunity is intended not only to shelter the employer from civil liability, but also from the burdens of trial. *See Vallandigham*, 154 Wn.2d at 35 (requiring summary judgment for employer).

A narrow exception exists, however, that allows an employee to sue an employer for work-related injuries that “result ... from the deliberate intention of his or her employer to produce such injury.” RCW § 51.24.020. The “phrase ‘deliberate intention’ ... means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.” *Birklid*, 127 Wn.2d at 865. The “*Birklid* test can be met in only very limited circumstances where continued injury is not only substantially certain, but *certain* to occur.” *Vallandigham*, 154 Wn.2d at 32 (emphasis in original). The exception is narrowly construed to preserve the “legislative policy mandating employer immunity.” *Birklid*, 127 Wn.2d at 859-60; *see also Vallandigham*, 154 Wn.2d at 29. Courts applying the deliberate-intent exception thus routinely hold that employers are entitled to summary judgment and that the employee’s remedy is through workers’ compensation. *See, e.g. Vallandigham*, 154 Wn.2d 16; *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998); *Shellenbarger*, 125 Wn. App. 41.

The deliberate-intent exception requires that the employer have a specific intent to injure the employee. *Folsom*, 135 Wn.2d at 664. “Mere

negligence does not rise to the level of deliberate intention,” nor do “[g]ross negligence and a failure to follow safety procedures.” *Id.* at 664-65.

“Disregard of a *risk* of injury is not sufficient ...; *certainty* of actual harm must be known and ignored.” *Vallandigham*, 154 Wn.2d at 28. And “[e]ven an act that has *substantial certainty of producing injury* does not rise to the level of specific intent to cause injury.” *Folsom*, 135 Wn.2d at 665 (emphasis added); *accord Vallandigham*, 154 Wn.2d at 27-28. Put simply, “[c]ertainty leaves no room for chance.” *Shellenbarger*, 125 Wn. App. at 47.

This Court has repeatedly affirmed the limited application of the deliberate-intent exception. For example, where an injured employee showed that other employees and customers injured themselves in the same area, it was “arguably foreseeable, or maybe even substantially certain, based on prior accidents and the floor’s condition that [plaintiff] might injure herself,” but the evidence was nevertheless insufficient “to prove that [the employer] had actual knowledge of *certain* injury.” *Howland v. Grout*, 123 Wn. App. 6, 8, 10, 11-12, 94 P.3d 332 (2004). *See also Brame v. Western State Hosp.*, 136 Wn. App. 740, 748, 150 P.3d 637 (2007) (“Foreseeability is not enough to establish deliberate intent to injure an employee, nor is an admission that injury would probably occur.”).

B. Asbestos Exposure Is Not Certain to Cause Injury

Walston must show that Boeing knew that his injury was *certain* to occur, not just that it was possible, probable, or almost certain. He did not. The case law and the evidence presented to the superior court—including testimony from Walston’s own experts—confirm that exposure to asbestos is not certain to cause injury and, thus, does not meet the deliberate-intent exception.

Mesothelioma is a rare disease that can occur without asbestos exposure. (CP 294-99 ¶¶ 27-36) Exposure to asbestos is not certain to cause it; even with substantial asbestos exposure, mesothelioma is rare. (CP 286-287 ¶ 8, 304-05 ¶¶ 46-48) It is not possible to predict who in a population exposed to asbestos, if anybody, will develop mesothelioma or any other asbestos-related disease. (CP 287 ¶ 9, 304-05 ¶¶ 45-48) Walston’s experts conceded those facts. (CP 51-52, 592-93 (43:7-18, 46:10-22, 48:5-9), 621 (14:17-18, 14:23-15:2), 636-37 & 639 (29:7-30:5, 32:17-24, 38:22-39:5), 684 (162:10-14, 165:21-23), 713, 719 (38:14-16, 63:3-8)) That alone established that Boeing could not have had actual knowledge that an injury (in this case, Walston’s mesothelioma) was certain to occur, and, thus, the superior court should have granted summary judgment.

While breathable asbestos fibers are a hazard and exposed individuals have a risk of developing an asbestos-related disease, those qualities do not establish the certainty of injury required to surmount the workers' compensation bar. A case from Division One involving workplace asbestos exposure held exactly that. Specifically, the court held that an employer was entitled to summary judgment on an employee's claim because it was not certain that asbestos exposure would cause an asbestos-related disease. *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 103 P.3d 807 (2004).

Gerald Shellenbarger worked at the Longview Fibre paper mill from the 1960s to the 1990s. 125 Wn. App. at 43. He claimed exposure to asbestos from maintenance work, the production process, and pipe insulation. *See id* at 43-44. Longview Fiber used asbestos as a pitch control agent, and Shellenbarger slashed open and dumped bags of raw asbestos in the machines, causing "clouds of visible dust [to] encircle his work area." *Id.* at 44. Maintenance work involved blowing dust off the machines, causing dust to fill the air. *Id.* Employees were also exposed to asbestos in products such as dryer felts, machine hoods, and pipe coverings. *Id.* And Shellenbarger recalled pieces of the old pipe covering falling to the floor and blowing around the work area when new insulation was being installed. *Id.* at 44.

Longview “became aware of the dangers of asbestos sometime in the 1960s.” 125 Wn. App. at 44. It began air sampling in 1972, which did not show asbestos above permissible levels in Shellenbarger’s work area, and it stopped using raw asbestos as a pitch control agent in late 1977. *Id.* at 45.

The court held that Longview was entitled to summary judgment because plaintiff could not prove that his employer had actual knowledge of certain injury. The employer’s continued use of asbestos even *after* learning that a hazard existed was insufficient, as a matter of law, to establish actual knowledge of certain injury. The “relevant inquiry is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury.” 125 Wn. App. at 49. “Washington courts have repeatedly held that known risk of harm or carelessness is not enough to establish certain injury, even when the risk is substantial.” *Id.* at 47.

As the court recognized, “[n]ot everyone who inhales asbestos develops lung disease” *Id.* at 45. It rejected the premise, which is necessarily part of Walston’s claim, that exposure to asbestos causes certain injury: “We know now that asbestos exposure does not result in injury to every person, and the evidence does not suggest Longview Fibre believed otherwise 30 years ago.” 125 Wn. App. at 49.

The material facts in *Shellenbarger* and this case are indistinguishable. Asbestos exposure is not certain to cause any asbestos-related disease. Longview “believed the workplace was safe.” 125 Wn. App. at 49. As evidenced by surveys of the Hammer Shop showing no exposures above permissible levels, Boeing also believed the workplace was safe. (CP 78 ¶ 19, 82 ¶ 27) Longview substituted non-asbestos materials in the 1970s. 125 Wn. App. at 44-45. Boeing also substituted non-asbestos materials in the 1970s. (CP 88-104 ¶¶ 37-104) The evidence did not suggest that Longview believed asbestos exposure results in injury to every person; indeed, the opposite is true. 125 Wn. App. at 49. The same is true for Boeing. (CP 77-78 ¶¶ 16-18)

Other states with a similar deliberate-intent exception have also rejected employee asbestos-exposure claims against their employers. Michigan, for example, uses a formulation nearly identical to *Birklid*'s. *See Agee v. Ford Motor Co.*, 208 Mich. App. 363, 364, 528 N.W.2d 768 (1995) (reversing denial of summary disposition to employer). In *Agee*, Ford employees were exposed to asbestos in manufacturing processes. The employees argued that Ford “knew that asbestos exposure would lead to certain injury to at least some of its employees,” and proffered expert opinion that “injury was certain to occur to about one-third of the employees at [Ford’s] plant as a result of asbestos exposure.” *Id.* at 366.

Although Ford's documents showed that some air samples exceeded regulatory limits, the court held that Ford's knowledge of the general risks of asbestos did not equate to actual knowledge of certain injury and reversed the denial of Ford's motion for summary judgment. *Id.* at 366-67. Other courts have reached the same conclusion.¹

C. Unlike Exposure to Some Toxic Substances, Asbestos Exposure Does Not Cause Immediate, Observable Injury to Employees

Washington courts have held in three cases that plaintiffs met the deliberate-intent exception by establishing that their employers had actual knowledge of certain injury because the employers saw their employees falling ill contemporaneous with exposure to a toxic substance. *Birkliid*, 127 Wn.2d 853; *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001); *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996). None of

¹ See, e.g., *Copeland v. Johns-Manville Prods. Corp.*, 492 F. Supp. 498 (D. N.J. 1980) (holding that employees suing employer for asbestos injury could not state a claim under New Jersey's intentional wrong exception); *Tysenn v. Johns-Manville Corp.*, 517 F. Supp. 1290, 1293 (E.D. Pa. 1981) (granting summary judgment to employer because employer's conduct, "however negligent or reckless" in exposing employees to asbestos, did not rise to the level of an intentional tort); *Hartline v. Celotex Corp.*, 272 Ill. App. 3d 952, 651 N.E.2d 582, 209 Ill. Dec. 404 (1995) (affirming dismissal of counts that alleged intent to kill employees with asbestos exposure for failure to state a claim under Illinois intentional tort exception); *McMullen v. Classic Container Corp.*, 1997 WL 33344482, *1 (Mich. Ct. App. 1997) (affirming summary judgment to employer; the "fact that [the employer] may have known of the general risks posed by asbestos removal is not sufficient to establish actual knowledge of certain injury"). Boeing's research did not locate any cases that permitted a civil employee claim for asbestos exposure under any standard resembling deliberate intent to injure. Plaintiffs did not identify any such case in their briefing to the superior court.

those cases involved asbestos exposure. All involved chemicals that caused observable injuries to exposed employees that the employers knew would continue with further exposure.

The facts of those cases expose the gulf between the evidence that Washington courts regard as sufficient to create a fact issue under the *Birkliid* test and the insufficient evidence that Walston presented to the superior court. In *Birkliid*, employees exposed to phenol-formaldehyde resin experienced contemporaneous dizziness, dryness in the nose and throat, burning eyes, upset stomach, dermatitis, rashes, nausea, and headaches. 127 Wn.2d at 856. Some passed out at work. *Id.* *Baker* and *Hope* also involved employees whose employers observed them falling ill from chemical exposure. *Baker*, 80 Wn. App. at 778-79; *Hope*, 108 Wn. App. at 189.

The courts in each case held that the employees' claims could proceed because the employer *saw* injury occurring at the time of exposure, knew that the injuries would continue with further exposure, and, nevertheless, continued to use the chemical. *Birkliid*, 127 Wn.2d at 863 (noting that the employer “knew in advance its workers would become ill” but used the chemical anyway, and “*observed its workers becoming ill* from the exposure”) (emphasis added); *Hope*, 108 Wn. App. at 193-94 (reasoning that in “cases involving chemical exposure, the

repeated, continuous injury and the observation of the injury by the employer can satisfy the ‘actual knowledge’ prong”) (emphasis added); *Baker*, 80 Wn. App. at 783 (“plaintiffs have alleged facts supporting an inference that General Plastic’s supervisors knew that the employees were suffering from chemical-related illnesses and that, unless the working environment was changed, *continuing injury was certain*”) (emphasis added). In other words, it was the “repeated, continuous injury and the observation of the injury by the employer” that established that the employer had actual knowledge of certain injury as required by *Birklid*. *Vallandigham*, 154 Wn.2d at 31.

Here, in contrast, there was no evidence that Walston or his fellow employees exhibited any contemporaneous, observable injuries to which Boeing failed to respond. Indeed, Walston did not develop any symptoms of his illness until almost two decades after the Hammer Shop closed and he had retired from Boeing.

Walston urged the superior court to ignore the *Birklid* test, reject *Shellenbarger*, and find that the facts of his case were the same as the chemicals that caused injuries observed by the employers contemporaneous with exposure in *Birklid*, *Hope*, and *Baker*. But the *Birklid*, *Hope*, and *Baker* courts did not, as Walston argued, apply a special rule to chemical exposures. Rather, that case law turns on the

characteristics of those chemicals to cause immediate, observable, and certain injury to the exposed employees. Asbestos does not share any of those characteristics; even Walston's experts conceded that.

D. Walston Presented No Evidence that Boeing had Actual Knowledge that Asbestos Is Certain to Cause Injury

Boeing never had actual knowledge that injury from asbestos was certain to occur to Walston or any other employee. (CP 78 ¶ 18) Indeed, Walston's own experts testified that under current medical science in 2011, asbestos is not certain to cause an asbestos-related disease. (CP 51-52, 592-93 (44:3-25, 46:15-22, 48:5-49:15), 621 (14:23-15:2), 636-38 (29:7-30:5, 32:17-20, 38:22-39.5), 683-84 (162:10-13, 165:21-23)) Given that testimony, Walston cannot, as a matter of law, prove that decades earlier Boeing had superior information establishing that it had actual knowledge of certain injury in this case.

The industrial hazard bulletins that document Boeing's understanding of asbestos hazards at that time speak in terms of risk, not certainty, of injury: exposure to asbestos "may result in lung damage." (CP 77-78 ¶¶ 16-17, 106-07, 112-18) Further, Boeing's surveys did not identify any asbestos above permissible exposure limits in the Hammer Shop. (CP 78-83 ¶¶ 19-27)

The evidence that Walston presented to show that Boeing had actual knowledge of certain injury, discussed more fully below, was insufficient as a matter of law for two principal reasons. First, the evidence related to knowledge of asbestos *hazards* or *potential* injury, rather than the required *certainty* of injury. The law is well settled, however, that an employer's knowledge of a risk of injury does not satisfy the deliberate-intent exception. *Vallandigham*, 154 Wn.2d at 28. Second, the evidence related to what Boeing *could* or *should* have known, rather than what it *actually* knew. Any inquiry into what Boeing could or should have known is not relevant because it would import a negligence standard into the deliberate-intent exception, which is prohibited. *Id.* at 35.

1. Evidence Regarding Knowledge of Statutes and Regulations

Walston argued that Boeing's knowledge of statutes and regulations regarding asbestos was "direct evidence of the company's actual knowledge of the dangers of this toxic substance." (CP 990) But the "failure to observe safety procedures and laws governing safety" does not constitute a "specific intent to injure." *Birklid*, 127 Wn.2d at 860. And if failure to observe safety rules does not meet the burden, the mere knowledge of safety rules similarly fails to establish actual knowledge of certain injury.

In any event, knowledge of a substance’s dangers or a risk of injury is not enough to establish actual knowledge of injury certain to occur. *Vallandigham*, 154 Wn.2d at 28. Where the evidence “establish[es] that [the employer] had knowledge of the dangers of asbestos, ... 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 48-49.

2. Documents and Testimony Regarding Asbestos Hazards

There is nothing in Boeing documents or witness testimony that establishes that Boeing had actual knowledge that asbestos was certain to cause injury to Walston or any other employee. The evidence on which Walston relied to establish Boeing’s purported knowledge focused on the hazardous properties of asbestos—not its certainty to cause injury. For example, Walston cited the Boeing industrial hazard bulletins, which say that asbestos “may result in lung damage,” but do not indicate that Boeing had any knowledge or belief that asbestos was certain to cause injury.

(CP 77-78 ¶ 17, 106, 112)

Walston’s reliance on “several documents from the 1970s” to argue that “Boeing explicitly acknowledged the carcinogenic properties of asbestos” is also misplaced. (CP 1001) Knowing about the carcinogenic properties of asbestos, *i.e.* its hazards, is not equivalent to knowing that

anyone exposed is certain to develop an asbestos-related disease. Put another way, Boeing's recognition that asbestos may be hazardous does not establish any belief, much less actual knowledge, that exposure was certain to cause injury.

3. Knowledge Purportedly Available From Other Sources

Walston developed evidence through the use of outside sources to establish what Boeing could or should have known about asbestos, rather than what it actually knew. For example, Walston asserted that Boeing or its employees had memberships in the Industrial Hygiene Foundation and other safety organizations, which included access to literature abstracts "about the effects of asbestos exposures." (CP 997-1000) Walston also asserted that because Boeing used asbestos in the fabrication process it should be "held to the knowledge and skill of an expert"— though it is not clear what that means. (CP 989)

That evidence does not establish actual knowledge of certain injury for two reasons. First, the "knowledge" contained in the materials is that asbestos creates hazards, which is a point that is neither material nor disputed. Walston pointed to nothing in the materials that says asbestos exposure is certain to cause injury. The Industrial Hygiene Digests that Boeing may have received as a member of the Industrial Hygiene Foundation contained brief abstracts of hundreds of articles. The abstracts

on which Walston relies add up to about two pages in 1,500 pages of abstracts. (CP 4313, 4377, 4417, 4451, 4454, 4489, 4618, 4708 (abstracts cited by Walston at CP 998-99); 3572-5079 (Industrial Hygiene Digests)) And the abstracts contain a few lines summarizing an article. To the extent they address asbestos, they speak in terms of risk rather than certain injury.

Second, the fact that people or organizations other than Boeing had knowledge of asbestos hazards is not evidence that Boeing had actual knowledge that exposure to asbestos was certain to cause injury. The indisputable fact is that Boeing did not then, and does not now, have actual knowledge that asbestos is certain to cause injury. (CP 75-78 ¶¶ 10-18)

4. Workers' Compensation Claims

During his employment, Walston visited Boeing medical facilities quarterly; he reported no lung or asbestos-related conditions during that time. (CP 387-88, 411-12 (68:1-8, 16-19, 70:6-71:3, 73:13-25 & Ex. 15 at 1-2)) Because Walston never told Boeing that he believed he had been injured by asbestos exposure, *e.g.*, by filing a workers' compensation claim, Boeing did not learn of Walston's injury until he filed this lawsuit in 2010, eighteen years after the Hammer Shop closed and 15 years after he retired. (CP 405 (139:25-140:6))

Walston nevertheless argued that a small number of workers' compensation claims filed by other employees showed that Boeing had actual knowledge of certain injury from asbestos exposure. (CP 1008-10) The Supreme Court addressed that issue in *Vallandingham* and held that even though numerous employees had filed workers' compensation claims alleging injuries caused by the same source as those sustained by plaintiffs, the other workers' compensation claims were not enough to establish actual knowledge of certain injury. *Vallandigham*, 154 Wn.2d at 34. That was because even with the claims, "the school district still could not have been *certain* at that point that staff injury would continue." *Id.*

The same is true here. The fact that a small number of Boeing employees had filed workers' compensation claims for injuries from asbestos exposure does not establish that Boeing had actual knowledge that asbestos was certain to cause injury.²

E. This Court Should Reject Walston's Novel Attempts to Redefine "Certainty of Injury" and Turn "Deliberate Intent" Into Negligence

Because Walston could not satisfy the certainty-of-injury requirement, he urged the superior court to change the standard in three ways. First, Walston argued that the "certainty of injury" standard was

² Several of the claims Walston cited were found not to involve asbestos exposure. (CP 1104-05 ¶¶ 4-8, 5698)

satisfied if employees were simply exposed to an increased risk of injury. Second, he argued that “certainty” was established if some employee at some unknown future time would suffer some injury. Third, he argued that the relevant “injury” was not Walston’s mesothelioma, but the cellular level response to inhaling asbestos fibers, which produces no symptoms and requires no medical treatment. All three attempts at expanding the deliberate-intent exception are in direct conflict with existing statutes and case law.

1. Risk of Injury Is Not Certainty of Injury

Walston conceded that asbestos exposure is not certain to cause an asbestos-related disease to any given exposed individual. The most his experts could say is that asbestos exposure increases the risk of developing an asbestos-related disease such as Walston’s mesothelioma. (CP 52, 714-15 (45:13-46:1), 603 (86:19-24)) Walston thus framed the issue in the superior court in terms of exposing employees to a *risk* of injury: “Did Boeing have actual knowledge that its employees were being exposed to asbestos at dangerous levels.” (CP 963)

But, as explained above, evidence that employees are being exposed to asbestos and that the exposure increases the risk of mesothelioma cannot, as a matter of law, satisfy the deliberate-intent requirement. The case law is well established on that point: “Washington

courts have repeatedly held that 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. “Disregard of a *risk* of injury is not sufficient,” rather it is “*certainty* of actual harm [that] must be known and ignored.” *Vallandigham*, 154 Wn.2d at 28. “Simply exposing employees to unsafe conditions is not enough.” *Valencia v. Reardan-Edwall Sch.* *Dist. No. 1*, 125 Wn. App. 348, 351, 104 P.3d 734 (2005).

Walston’s evidence on risk of injury, as opposed to the certainty of injury, was insufficient to meet the legal standard and was not a legitimate basis for the superior court to deny Boeing’s motion for summary judgment.

2. Evidence that Asbestos Exposure May Cause Injury to Some Employee at Some Time Cannot Satisfy the Certainty Element

Walston also tried to turn ‘risk’ into ‘certainty’ by arguing that based on the odds some unknown employee, at some unknown time, was certain to be injured from asbestos exposure. (CP 973-74) But the deliberate-intent statute and the cases interpreting it do not allow claims based on the probability or even certainty of injury to some *unidentified* employee. The text of the statute focuses on the employer’s intent to cause the specific plaintiff-employee’s injury. It allows an employee to sue only if “injury results to a worker from the deliberate intention of his

or her employer to produce *such injury*.” RCW § 51.24.020 (emphasis added). The “such injury” language refers to the plaintiff’s injury, not to a general category of injuries suffered by others.

The Supreme Court in *Birkliid* confirmed that reading when it considered and rejected an interpretation of the deliberate-intent exception that would have allowed claims based on certainty of injury to some unidentified employee. The Court noted that the test applied by Oregon courts focused 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.” *Birkliid*, 127 Wn.2d at 865 (emphasis added). The Court rejected that standard as too expansive. *Id.* at 865; *see also Vallandigham*, 154 Wn.2d at 28 (reiterating that the certainty of injury prong is narrow and that *Birkliid* rejected the Oregon test); *cf. Agee*, 208 Mich. App. at 367 n.3 (recognizing that nearly “all unsafe conditions in the workplace could be characterized as certain to lead to injury to some employees at some time,” and that accepting evidence that one in three employees would develop asbestos disease “as a sufficient showing of certain injury” would result in a “slippery slope”).

Consistent with the Supreme Court’s rejection of the “injury to somebody” approach, at least four Court of Appeals cases have barred employee claims because the plaintiff could not show certainty of injury to

the *specific* plaintiff. See *Garibay v. Advanced Silicone Materials, Inc.*, 139 Wn. App. 231, 236, 238, 159 P.3d 494 (2007) (noting that the employer “knew or should have known that rupture of this pipe was imminent or even certain to occur eventually,” but the standard requires “actual knowledge that an injury was certain to occur to Mr. Garibay”); *Schuchman v. Hoehn*, 119 Wn. App. 61, 65, 72, 79 P.3d 6 (2003) (affirming summary judgment to employer despite employer’s testimony that it “knew this was going to happen, we just didn’t know when” because the employer did not know that plaintiff “was certain to be the injured party”); *Goad v. Hambridge*, 85 Wn. App. 98, 104, 931 P.2d 200 (1997) (holding that “the Goads have presented no evidence that [the employer] knew Mr. Goad’s injury was certain to occur. At best, [the employer] knew of the *potential* of an injury similar to Mr. Goad’s, which is not enough to satisfy the *Birkliid* standard.”); *Valencia*, 125 Wn. App. at 352 (rejecting employee claim even though employer knew lift would cause someone injury because no evidence could support a finding that plaintiff was certain to be injured).

And even an employer’s knowledge, based on prior injuries, that *some workers* would likely be injured does not show deliberate intent to injure. For example, employees at a psychiatric hospital tried to rely on “the history of patient-to-staff assaults” to prove actual knowledge of

certain injury. *Brame*, 136 Wn. App. at 749. This Court held that “the past assaults of hospital patients on hospital staff are not sufficient to create a certainty that any individual patient will assault any individual staff member.” *Id.* At most, “past patient-to-staff assaults demonstrate ... that such assaults are foreseeable, not that they are certain.” *Id.* Walston’s attempt to similarly expand the deliberate-intent exception should also fail.

3. A Diagnosed Asbestos-Related Disease Such As Mesothelioma Is the Relevant “Injury,” Not the Asymptomatic Cellular Level Effects of Fiber Inhalation

Faced with his experts’ admissions that there is no certainty that any particular person exposed to asbestos will develop an asbestos-related disease, Walston urged the superior court to redefine the concept of “injury.” He asked the court to treat the relevant injury for purposes of the certainty requirement not as mesothelioma, which is a clinically recognized asbestos-related disease compensable under the Industrial Insurance Act, but as the body’s purported cellular level reactions to inhaling asbestos fibers. (CP 976-84; RP 20, 28) In other words, Walston argued that the exposure itself is the injury, and Boeing had actual knowledge that Walston was being exposed to asbestos.

Walston’s epidemiology expert opined that “from a perspective of occupational health, the exposure to asbestos constitutes an injury in and of itself.” (CP 1065 ¶ 11) His molecular biology expert opined that “a

person who is exposed to asbestos at levels above background can sustain microscopic injury to their lung tissue before 48 hours of the time of exposure.” (CP 1026 ¶ 10) The cellular injury that Walston’s experts described is indistinguishable from the “injury” the rest of us purportedly experience from breathing asbestos fibers in the ambient air. (CP 598 (68:19-69:13))

Putting aside the fact that Walston has not offered evidence that Boeing had actual knowledge that he was experiencing a cellular level change, the ramifications of Walston’s theory are sweeping. Treating exposure to fibers as the relevant injury would mean that an employee who inhales any level of asbestos fibers or other chemical molecule, dust, or obnoxious substance could seek compensation—regardless of the presence of disease or impairment—either from the workers’ compensation system or from the employer directly (if the employer knew about the exposure). The Legislature did not intend for such sweeping liability, and no court has so held.

Rather, the relevant “injury” for purposes of the deliberate-intent exception is a clinically recognized disease that is subject to medical diagnosis and treatment, not the cellular level or sub-clinical, asymptomatic reactions from exposure to a substance. The Act defines “injury” to “include any physical or mental condition, disease, ailment or

loss, including death, for which compensation and benefits are paid or payable under” title 51. RCW § 51.24.030(3). The key language is the last clause, which ties “injury” to compensability. A condition must be compensable under the Act to qualify as an “injury” in the deliberate-intent exception.

Neither exposure to asbestos nor the cellular level asymptomatic effects of inhaling fibers are compensable. An occupational disease becomes compensable only upon “manifestation” of disease, which is the “the date the disease required medical treatment or became totally or partially disabling, whichever occurred first.” WAC § 296-14-350(3). Further, the regulations under the Act that address asbestos speak in terms of asbestos disease, rather than mere exposure. *See* WAC §§ 296-14-400, 296-14-600. And Walston’s own experts conceded that inhaling asbestos fibers does not necessarily result in disease, medical treatment, or disability, even if it causes a cellular level reaction. (CP 598 (66:3-67:17), 1026 ¶ 10, 1065 ¶ 11))

The Supreme Court has also held that the relevant “injury” in an asbestos claim is the manifestation of a disease, not simply exposure to asbestos fibers. *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991). Benefits for occupational diseases are calculated based on the date of injury. *Id.* at 123-24. The issue in *Landon* was

“whether the date of injury is the date when a worker is exposed to the harmful materials or when a worker’s disabling disease first manifests itself.” *Id.* at 124. The Court cited several sections of the Industrial Insurance Act that “equate ‘injury’ with ‘disease.’” *Id.* at 124 & n.2. It held that the date of injury for calculating benefits is “the date the disease manifests itself,” not when the “last injurious exposure to the harmful material” occurred. *Id.* at 128.

The Court found “persuasive” a Ninth Circuit decision holding that “injury” from asbestos inhalation is the development of disease, not mere exposure. *Id.* at 125 (citing *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983)). “The average person ... would not consider himself ‘injured’ merely because the fibers were embedded in his lung.” 117 Wn.2d at 125 (quoting *Black*). “Rather, the average person would consider himself injured when the asbestos fibers finally cause asbestosis—a process that can take much longer than 20 years.” *Id.* (emphasis omitted). Asbestosis, like mesothelioma, is a clinically recognized disease.

Consistent with the Act’s linking of injury to disease, the Board of Industrial Insurance Appeals bases compensation on the manifestation of asbestos-related disease rather than exposure to fibers. *See In re Jones*, 2004 WL 2359782 at *2-3 (Wash. Bd. Ind. Ins. App. 2004) (holding that

claimant had a compensable occupational disease—asbestosis—as of the date it “became manifest,” which was seven years *after* claimant had “radiological evidence of asbestos exposure” but “no evidence of impairment related to asbestosis”); *In re Frost*, 1995 WL 613498 (Wash. Bd. Ind. Ins. App. 1995) (denying compensation even though asbestos fibers were found in deceased workers’ lungs, where worker was found not to have an asbestos-related disease).

Similarly, other courts have rejected legal theories that would allow a plaintiff to recover for asbestos exposure that lacks symptoms and is not recognized in a clinical setting. The U.S. Supreme Court has held that an employee exposed to asbestos “but without symptoms of any disease” cannot recover under the Federal Employers’ Liability Act “unless, and until, he manifests symptoms of a disease.” *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 426-27, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997). Allowing claims based on exposure to asbestos without disease would create a “threat of unlimited and unpredictable liability” and the “potential for a flood of comparatively unimportant, or trivial, claims.” *Id.* at 433 (quotation marks omitted). *See also Schweitzer v. Consolidated R. Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) (purported “subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff’s interest

required to sustain a cause of action under generally applicable principles of tort law”).

F. Walston Presented No Evidence that Boeing Willfully Disregarded Actual Knowledge of Certain Injury

Under *Birklid*, Walston must show that Boeing had actual knowledge that injury was certain to occur *and* willfully disregarded that knowledge. Because Boeing did not have actual knowledge that injury was certain to occur, it could not have willfully disregarded it, and this Court need not go further. *Vallandigham*, 154 Wn.2d at 34.

Plaintiff cannot establish willful disregard by pointing to insufficient remedial measures. *Vallandigham*, 154 Wn.2d at 18-19. Because the Supreme Court “has been abundantly clear that negligence, even gross negligence, cannot satisfy the deliberate injury exception,” it has also “reject[ed] any notion that a reasonableness or negligence standard should be applied to determine whether an employer has acted with willful disregard.” *Id.* at 35.

Walston’s evidence on willful disregard consisted of three alleged “deliberate acts” by Boeing: (1) untimely implementation of OSHA regulations, (2) failing to sufficiently protect employees during a pipe insulation repair in the Hammer Shop in the mid-1980s, and (3) use of asbestos powder in the Hammer Shop until 1992. (CP 1013-19) Walston

characterized those three “acts” as “deliberate” (CP 1014), even though the “required intention relates to the injury, not the act causing the injury.” *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 584, 547 P.2d 856 (1976). Regardless, Walston’s evidence does not establish the required willful disregard.

1. An Alleged Violation of Safety Regulations Is Not Willful Disregard

Walston asserted that Boeing willfully disregarded OSHA regulations by failing to timely implement them. (CP 1014-16) He cited a few OSHA citations, but none involved any infractions in the Hammer Shop. (CP 1010-11) Even if Boeing had ignored OSHA regulations, the “failure to observe safety laws or procedures does not constitute specific intent to injure.” *Vallandigham*, 154 Wn.2d at 27; *see also Brame*, 136 Wn. App. at 746. Otherwise, the floodgates would open to employee claims based on any OSHA or WISHA citation.

Moreover, Walston presented no evidence that Boeing actually disregarded any OSHA or WISHA regulations in the Hammer Shop, much less willfully. The regulations did not prohibit asbestos use; rather, they established a permissible exposure limit. 37 Fed. Reg. 11318, 11320 (June 7, 1972) (codified at 29 C.F.R. § 1910.93a); WAC § 296-62-07517(2) (May 7, 1973). Boeing’s evidence that its surveys found no asbestos

exposure above the regulatory limits stands uncontradicted. (CP 78-80 ¶ 22, 82-83 ¶ 27, 138-40, 151-66))

2. Boeing Did Not Willfully Disregard Actual Knowledge of Certain Injury in Repairing Pipe Insulation in the Hammer Shop

Boeing repaired pipe insulation in the Hammer Shop that contained asbestos in January 1985. (CP 2615) Walston testified that the repair workers, who were handling the material, wore protective equipment, but that shop employees, who were not involved in the work and had no direct contact, did not. (CP 355 (97:12-98:9)) Walston and a few other employees asked their supervisor, Dennis Nadeau, why they had no protection, and Nadeau allegedly told them to get back to work. (CP 356 (98:10-19)) Because there was no evidence that Nadeau knew of employee injuries from asbestos, his instruction to return to work could not constitute willful disregard. Indeed, Walston acknowledged that no employee was injured from asbestos exposure when the repair work occurred. (CP 1018)

Moreover, the testimony on which Walston relied shows that, in fact, Walston's supervisor took prompt action when employees raised a concern. The shop steward at the time, John Stewart, testified that he took a piece of insulation that fell from the ceiling to a supervisor, and it was promptly tested. (CP 448-49 (61:21-62:11, 63:8-15, 63:17-24, 65:4-8))

The material contained asbestos, and within a few days Boeing had somebody re-wrap the pipes. (CP 449 (65:9-15)) The supervisor, Nadeau, allowed the employees to move away from the repair work. (CP 438, 449-50 (20:9-21:5, 65:25-66:6)) The workers did not raise concerns beyond Nadeau, their immediate supervisor. (CP 356-57 (101:13-17, 102:3-7, 11-19), 453 (81:21-23))

3. Walston's Speculative Testimony that Asbestos Powder Remained in the Hammer Shop Until 1992 Does Not Establish Willful Disregard

Boeing removed asbestos powder from the Hammer Shop by 1977. A memorandum recounting the Fabrication Division's policy to provide a substitute product said that the powder "has not been drawn by Shop A-3140 [the Hammer Shop], the former user, since August, 1977." (CP 93-94 ¶ 47, 227) When Boeing inventoried hazardous materials used in the Hammer Shop in the mid-1980s for its hazard communication book, it found no asbestos materials. (CP 1590, 1592, 1594 (7:21-8:3, 9:18-24, 14:5-8, 16:20-17:15, 22:8-10))

Walston disagreed and argued that Boeing used asbestos powder in the Hammer Shop until 1992. He relies on only his testimony that he saw paper bags with the word "asbestos" on them in the Hammer Shop throughout his employment. (CP 948-49, 1018-19) He testified, however, that he did not know the actual content of the bags. (CP 387 (66:3-7)) His

co-worker John Stewart testified that Boeing removed all of the asbestos materials, including the powder, from the fabrication processes many years before 1992. (CP 442 (36:20-24)) Moreover, “the simple fact that an employer’s remedial efforts” might have been ineffective does not support a finding of willful disregard. *Vallandigham*, 154 Wn.2d at 35.

If Hammer Shop workers used asbestos powder after 1977, they did so without Boeing’s knowledge and without observation of any injury at the time of exposure. Thus, even if the Court credits Walston’s speculative testimony, there is no basis to find that Boeing willfully disregarded actual knowledge of certain injury. To the contrary, Boeing believed, and its records demonstrate, that it had removed the asbestos powder by mid-1977, and that the workplace was safe. (CP 214-30) *See Shellenbarger*, 125 Wn. App. at 49 (affirming summary judgment to employer who used asbestos because evidence “indicates that Longview Fibre believed the workplace was safe”).

VI. CONCLUSION

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

DATED: January 13, 2012

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APPENDIX A



(Photograph of hammer machine, from CP 2006.)

APPENDIX B

Superior Court's Oral Ruling Denying Motion for Summary Judgment

For the reasons cited by the plaintiff, I'm going to be denying the motion for summary judgment. My focus with regard to the certainty of injury issue or the question of law in that regard would be to make sure that under these circumstances, dealing with a chemical such as asbestos where there are issues of fact as in this case, that the standard not be so narrowly interpreted so that it could never be applied or could never be tested in this regard even when there are serious questions of fact, which would be different from the situation in *Vallandigham*. And in *Shellenbarger*, as to plaintiffs, we would distinguish from this case, as opposed to what happened in that case.

(RP 55)

APPENDIX C

Statutory Texts

RCW § 51.04.010

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

RCW § 51.24.020

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.

APPENDIX D

Unpublished opinions cited in Boeing's brief:

McMullen v. Classic Container Corp., 1997 WL 33344482 (Mich. Ct. App. 1997).

Not Reported in N.W.2d, 1997 WL 33344482 (Mich.App.)
(Cite as: 1997 WL 33344482 (Mich.App.))

C

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

Diane McMULLEN, Beverly Henegar, Jody
McMullen, Shirley M. Monday, Casper C. Monday,
Casper W. Monday, Jr., Tina Marie Deaton Monday,
and James C. Deaton, Plaintiffs-Appellants,

v.

CLASSIC CONTAINER CORPORATION, River
Raisin Specialties, Don Beebe, Alan Mental, Larry
Dorazio, and Harry Dzierbicki, Defen-
dants-Appellees.

No. 181339.
July 15, 1997.

Before: YOUNG, P.J., and CORRIGAN and M.J.
CALLAHAN^{FN*}, J.

FN* Circuit judge, sitting on the Court of
Appeals by assignment.

UNPUBLISHED

PER CURIAM.

*1 Plaintiffs appeal from the circuit court's order dismissing their tort claims against defendants arising from exposure to asbestos in the workplace. Plaintiffs Diane McMullen and Shirley M. Monday (McMullen and Monday) are employees of defendant River Raisin. The remaining plaintiffs are family members of McMullen and Monday who reside with them. Defendant Classic Container Corporation and the remaining defendants^{FN1} participated in the removal of asbestos from River Raisin's building. According to plaintiffs' complaint, the improper removal work performed by defendants resulted in all plaintiffs being exposed to asbestos fibers.

FN1. Although plaintiff's complaint originally alleged that Mental was employed by River Raisin and that Beebe, Dorazio, and Dzierbicki were employed by Classic Con-

tainer, subsequent discovery revealed that they were employed by a third entity, First Street Rentals.

Plaintiffs sued defendants for 5 counts of negligence per se for violating various legal requirements regarding asbestos removal,^{FN2} in addition to counts alleging simple negligence, strict liability for abnormally dangerous activities, and respondeat superior liability for the negligence of their employees. The trial judge granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) and (8), finding that plaintiffs' complaint had not alleged facts which would avoid the exclusive remedy provision of § 131(1) of the Workers' Disability Compensation Act, M.C.L. § 418.131(1); MSA 17.237(131)(1), that the family-member plaintiffs were not members of the class which the statutes were designed to protect, and that asbestos removal was not an abnormally dangerous activity for which defendants could be found strictly liable. Plaintiffs moved to amend their complaint and for reconsideration, which the trial judge denied. We now reverse in part and affirm in part.

FN2. MCL 408.1059a; MSA 17.50(59a), M.C.L. § 408.1060a; MSA 17.50(60a); MCL 408.1060d; MSA 17.50(60d); MCL 408.1011; MSA 17.50(11); and 29 CFR 1926.58(f)(1).

I.

Plaintiffs argue that the trial court erred by finding McMullen's and Monday's claims barred by the exclusive remedy provision of § 131(1). We affirm the trial court's dismissal of McMullen's and Monday's claims against defendant River Raisin. We reverse the trial court's dismissal of McMullen's and Monday's claims against defendants Classic Container, Beebe, Dorazio, Mental, and Dzierbicki.

Plaintiffs assert that their complaint and affidavits alleged sufficient facts to bring their claims within the intentional tort exception to § 131(1), claiming that the facts showed that River Raisin had actual knowledge that injury was certain to occur and willfully disregarded that knowledge. We disagree. Plaintiffs allege only that defendant River Raisin knew that asbestos posed health hazards and that its removal work ex-

Not Reported in N.W.2d, 1997 WL 33344482 (Mich.App.)
(Cite as: 1997 WL 33344482 (Mich.App.))

posed McMullen and Monday to asbestos. There is no indication that River Raisin had actual knowledge that an injury was certain to occur under circumstances indicating a deliberate disregard of that knowledge. Travis v. Dreis & Krump Mfg., 453 Mich. 149, 180; 551 NW2d 132 (1996); Palazzola v. Karmazin Prods Corp., ___ Mich.App ___; ___ NW2d ___ (No. 180033, rel'd 4/22/97). The fact that River Raisin may have known of the general risks posed by asbestos removal is not sufficient to establish actual knowledge of certain injury. Agee v. Ford Motor Co., 208 Mich.App 363, 366-367; 528 NW2d 768 (1995).

*2 However, our review of the record reveals nothing which would indicate that the remaining defendants were either McMullen's and Monday's employer or co-employees under the exclusive remedy provisions of M.C.L. § 418.131(1); MSA 17.237(131)(1) and M.C.L. § 418.827(1); MSA 17.237(131)(827)(1). We therefore reverse the trial court's dismissal of McMullen's and Monday's claims against the remaining defendants. On remand the trial court must determine whether Classic Container is plaintiffs' employer under the "economic reality" test and therefore protected by the exclusive remedy provision of § 131(1). Wells v. Firestone Tire & Rubber Co., 421 Mich. 641, 646-650; 364 NW2d 670 (1984); Isom v. Limitorque Corp., 193 Mich.App 518, 521-523; 484 NW2d 716 (1992). The trial court should also determine whether defendants Mental, Beebe, Dorazio, and Dzierbicki are co-employees of McMullen and Monday and therefore immune from suit under § 131(1) and M.C.L. § 418.827(1); MSA 17.237(131)(827)(1). Holody v. City of Detroit, 117 Mich.App 76, 80-82; 323 NW2d 599 (1982).

II.

Plaintiffs argue that the trial judge erred by dismissing the family-member plaintiffs' claims for negligence per se and ordinary negligence. We affirm the trial court.

Plaintiffs assert that the trial court erred by finding that the family-member plaintiffs were not members of the class which MIOSHA and OSHA ^{FN3} were designed to protect. We disagree. The express language of OSHA and MIOSHA states that they are designed to protect employees by reducing safety and health hazards at places of employment. 29 USC 651(a), (b)(1); MCL 408.1011(1)(a); MSA 17.50(11)(1)(a); Swartz v. Dow Chemical Co., 414

Mich. 433, 438 n 3; 326 NW2d 804 (1982). The family-member plaintiffs were not in the class intended to be protected by MIOSHA and OSHA, and so cannot rely upon violations of those statutes to establish negligence. Klanseck v. Anderson Sales, 426 Mich. 78, 87; 393 NW2d 356 (1986); Zeni v. Anderson, 397 Mich. 117, 138; 243 NW2d 270 (1976).

FN3. Michigan Occupational Safety and Health Act, M.C.L. § 408.1001 et seq; MSA 17.50(1) et seq; and the federal Occupational Safety and Health Act, 29 USC § 651 et seq, respectively.

Plaintiffs further argue that the trial judge erred by dismissing the family-member plaintiffs' count of ordinary negligence. We find no error. Plaintiffs' negligence claim was based upon the aforementioned statutory violations and the fact that defendants' asbestos removal activities exposed them to asbestos dust brought home by McMullen and Monday. Under the facts asserted we find that defendants owed no duty to the family-member plaintiffs. Rogalski v. Tavernier, 208 Mich.App 302, 305-306; 527 NW2d 73 (1995); Colangelo v. Tau Kappa Epsilon, 205 Mich.App 129, 133-135; 517 NW2d 289 (1994).

III.

Plaintiffs claim that the trial court erred by dismissing their strict liability claim. We disagree. The facts asserted by plaintiffs do not show that defendants were engaged in an abnormally or inherently dangerous activity which would subject them to strict liability. Williams v. Detroit Edison Co., 63 Mich.App 559, 571-572; 234 NW2d 702 (1975); 3 Restatement Torts, 2d, § 520, p 36.

IV.

*3 Plaintiffs argue that the trial court erred by denying their motion to amend their complaint and by entering an order submitted under the 7-day rule over plaintiffs' objection. Reversal is not required. Plaintiffs did not offer any additional facts or theories which would cure the deficiencies in their complaint, so amendment would be futile. The trial court properly denied plaintiffs' motion to amend. MCR 2.118(A)(2); Formall v. Community Nat'l Bank, 166 Mich.App 772, 783; 421 NW2d 289 (1988). Although plaintiffs objected that the proposed order did not comply with the court's decision, they provided no explanation of the manner in which the order did not comply. Any error

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in entering the proposed order without a hearing was harmless. MCR 2.613(A).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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