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No. 88511-7

**IN THE SUPREME COURT OF
WASHINGTON**

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

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

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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I. IDENTITY OF THE PETITIONER

Plaintiff Donna Walston, individually and as personal representative of Gary Walston, who passed away while this appeal was pending, is the Petitioner.

II. COURT OF APPEALS' DECISION

On January 29, 2013, the Court of Appeals, Division II (hereafter "Court of Appeals"), issued its published decision reversing the trial court and dismissing Plaintiff's suit against Boeing. *Walston v. Boeing Co.*, 173 Wn. App. 271, 294 P.3d 759 (Wash.App. Div. 2).

III. ISSUE PRESENTED FOR REVIEW

Should the Court reverse the Court of Appeals' holding that in cases of forced toxic exposure, an employee cannot meet the "deliberate intent" exception set forth in RCW 51.24.020 unless workers become immediately and "visibly sick" from the toxic insult, and hold instead, consistent with the rule enunciated in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995), that an employer deliberately intends injury when the employee can show: (1) the employer knowingly and deliberately forced the employee to suffer a toxic insult over the employee's objection; (2) the employer knew that the coerced toxic insult would produce a certain injurious process in the employee; (3) the employer knew

that such certain injurious process had in the past produced illness or death in employees; and (4) the employee's compensable injury was produced by the certain injurious process.

IV. STATEMENT OF THE CASE

Gary Walston ("Walston") spent 38 years working for Boeing, from 1963 to 1995. CP 1635 (18:23-19:6). While throughout his early Boeing career, Walston was forced to inhale asbestos fibers, this case is about a singular, egregious ordeal in 1985, long after Boeing had learned that asbestos was a toxic exposure that killed some of its employees. Here are the material facts, which the Court of Appeals accepted for purposes of its decision. *See* 173 Wn. App. at 273-77.

In 1985, Walston's supervisor coerced him — over his objection — to work for a month under asbestos abatement contractors who wore "moon suits" and showered him with asbestos dust while he worked below them. When Walston and his co-workers protested and asked for protective equipment, their Boeing supervisor told them to "go back to work." CP 1655-56 (98:4-19, 101:4-9, 104:6-21); *see also* CP 2042 (illustration showing 1985 asbestos abatement above workers in the Hammer Shop) (copy attached as Appendix A hereto).

One of Walston's experts, Dr. Brodtkin, concluded that Walston's month-long 1985 ordeal was a substantial contributing factor to his contracting mesothelioma in 2010 and was "likely by far . . . the highest level of exposure experienced by Walston" during his Boeing career. CP 2873 (118:23-119:15).

The year 1985 was 13 years *after* OSHA promulgated emergency regulations to protect workers from asbestos exposure. By then, Boeing knew that asbestos dust was "*dangerously toxic*" and that workers required protection from inhalation. CP 5238 (Industrial Hazards Control Bulletin No. 5) (emphasis added). Boeing also knew that *any* amount of asbestos dust could harm its workers. CP 3231 ("*[o]nly a ban can assure protection against the carcinogenic effects of asbestos.*") (emphasis added). And Boeing knew that the specific work performed in 1985 required respiratory protection not only for the abatement workers in "moon suits," but also for workers standing below them. CP 5308; CP 5238; CP 5314.

By 1985, Boeing knew that its workers who breathed asbestos fibers on the job had suffered lethal diseases. Indeed, by 1985, one of Walston's Hammer Shop co-workers had died from exposure to asbestos, and over the years approximately sixty Boeing workers have

died from asbestos-related diseases. See CP 5371-72 CP 5321; CP 5323; CP 5425-5676.

And Boeing knew in 1985, because it was common scientific knowledge¹ and Boeing had dozens of highly qualified industrial hygienists familiar with the scientific literature, that workers' lungs were injured immediately from inhaling asbestos fibers, which scar lung tissue when they lodge in the lung and immediately begin to

¹ See, e.g., *Kilpatrick v. Dept. of Labor & Industries*, 125 Wn.2d 222, 883 P.2d 1370 (1995) (“[a]sbestos inhalation starts an injurious process . . . The fibers insidiously injure the lungs throughout the period of exposure.” *Id.* at 234 (Madsen, J., dissenting) (citing Irving J. Selikoff & Douglas H.K. Lee, *Asbestos and Disease* (1978), at 145-47) (emphasis added); *Villella v. Public Employees Mutual Ins. Co.*, 106 Wn.2d 806, 813, 725 P.2d 957 (1986) (“initial inhalation of asbestos fibers causes tissue damage and thus, a covered injury has occurred at the inception of exposure.”); *Krivanek v. Fibreboard Corp.*, 72 Wn. App. 632, 635, 865 P.2d 527 (1993) (holding that where mesothelioma victim was exposed to asbestos in shipyards in 1950s and 1960s, but asbestos disease was not diagnosed until 1987, the “injury producing events” occurred before Tort Reform Act of 1981). See also *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (“asbestos fibers, once inhaled, remain in place in the lung, causing a tissue reaction that is slowly progressive and apparently irreversible.”); *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (discussing “medical evidence that the body incurs microscopic injury as asbestos fibers become lodged in the lungs and as the surrounding tissue reacts to the fibers thereafter”); *Insurance Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212, 1223 (6th Cir. 1980) (recognizing medical knowledge that inhalation of asbestos constitutes bodily injury); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981) (same); *ACandS, Inc. v. Aetna Casualty and Surety Co.*, 764 F.2d 968, 972 (3d Cir. 1985) (same).

impair lung function. CP 5247. Dr. Brody testified that an individual exposed to asbestos fibers at levels greater than background sustains an immediate injury that is not observable. CP 1024-26 (¶¶ 7 & 10). Boeing did not challenge Dr. Brody's testimony because its industrial hygienists had long been familiar with the 1978 Selikoff text (CP 4618; CP 3450 (27:14-28:12, 29:2-15); CP 1064 (¶ 9), the 1977 *Toxicology* text (CP5268 and CP 5277), and the 1977 NIOSH report—all of which say the same thing as Dr. Brody. (CP 1979, 5307).

Thus, in 1985, when Boeing forced Walston to work for a month under an asbestos rain – over his protest and plea for protection – Boeing knew it was injuring Walston. Dr. Longo had this to say about Boeing's 1985 conduct:

I've never seen anything like that. I was astonished. I showed this to our [industrial hygiene] chair, and he used words like criminal that they would do something like that. . . . [T]his is such an outrageous example of complete disregard for the workers in that facility . . .

CP 2230-31 (92:20-93:5). Employers have been put in federal prison for similar conduct.²

² See, e.g., *United States v. Starnes*, 583 F.3d 196, 219 (3d Cir. 2009) (affirming 33-month prison sentences for employers who failed to provide

V. SUMMARY OF ARGUMENT

Birklid v. Boeing Co., 127 Wn.2d 853, 904 P.2d 278 (1995), ushered Washington into the modern era – one where workers may be more at risk from toxic than from physical assaults by their employers. This Court is asked here to determine whether a jury may decide if Boeing deliberately intended injury when Boeing knew that unprotected exposure to asbestos had produced diseases in its workers in the past, Boeing knew that exposure to airborne asbestos produces an injurious process in all workers' lungs, and Boeing forced Walston – over his protest -- to work unprotected under asbestos abatement workers who wore moon suits, knowing that Walston would inhale asbestos and injure his lungs.

The Court of Appeals held that a jury should not be permitted to decide if Boeing deliberately intended injury, because (1) Walston and his co-workers did not become immediately and visibly ill while

workers with personal protective equipment during asbestos abatement project and instructed workers to engage in work practices that created visible asbestos dust); *United States v. Rubenstein*, 403 F.3d 93, 101 (2d Cir. 2005) (upholding criminal conviction of defendant who hired workers to remove asbestos-containing pipe insulation, failed to tell the workers that they were removing asbestos, and directed them to remove the insulation by using a knife or scissors).

asbestos abatement occurred overhead, and (2) Boeing did not know with certainty that Walston would get mesothelioma. 173 Wn. App. at 282-85. Walston submits that is not what *Birklid* teaches.

If the Court of Appeals' approach were adopted, it would exempt deliberate employer misconduct that is far more troublesome than ever was displayed in *Birklid*. This Court should reject the notion that Washington employers enjoy tort immunity for their invisible batteries simply because their employee victims do not exhibit immediate and visible symptoms of illness and no one can say with certainty whether they will die from the invisible injuries inflicted by their employers.

This Court should hold, instead, and consistent with *Birklid*, that an employer deliberately intends injury when the employee can show: (1) the employer knowingly and deliberately forced the employee to suffer a toxic insult over the employee's objection; (2) the employer knew that the coerced toxic insult would produce a certain injurious process in the employee; (3) the employer knew that such certain injurious process had in the past produced employee illnesses; and (4) the employee's compensable injury was produced by the injurious process.

VI. ARGUMENT

A. **The Record Presents A Triable Claim That Boeing Deliberately Intended to Produce Walston's Injury.**

The worker compensation system provides the sole remedy for workplace injuries with the sole exception set forth in RCW 51.24.020, which 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.) In *Birklid*, this Court observed that the only case where the “deliberate intent” exception had been met was when an employer physically assaulted an employee. *Birklid*, 127 Wn. 2d at 861, citing *Perry v. Beverage*, 121 Wash. 652, 209 P. 1102 (1922). Noting that the legislature did not limit the exception to physical assaults, this Court held that deliberate intent is established when an employer (1) had actual knowledge (2) that an injury was certain to occur, and (3) willfully disregarded that knowledge. *Birklid*, 127 Wn.2d at 865.

Here, Boeing agrees that if an employer forced a worker to handle Plutonium with no protection while the employer watched

from behind a lead shield, it “would be a classic intentional tort”: “I don’t see how that wouldn’t fall under the physical assault or battery that would have been actionable under preexisting law [prior to *Birklid*].” CP 5746-47 (23:18-24:8); CP 5770 (47:20-25). Boeing’s concession is sensible and consistent with the law. *See, e.g., Birklid*, 127 Wn. 2d at 861; *Gulden v. Crown Zellerbach, Inc.*, 890 F.2d 195 (9th Cir. 1989) (jury entitled to decide if employer deliberately intended injury by forcing workers to clean PCBs from floor without protection resulting in their absorption of 6 to 10 times acceptable body burden of PCBs); *Swope v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002) (jury entitled to decide if employer deliberately intended injury when it forced employee, suing for battery, into repeated exposure to ozone without ventilation aware that such repeated insults to lungs caused injury); *United States v. Madigar*, 46 M.J. 802 (1997) (defendant x-ray technician’s administration of unnecessary x-rays to female recruits was sufficient physical touching to support assault and battery conviction).

In *Gulden*, for example, the court held that a jury could infer Crown Zellerbach's deliberate intent to injure based on the following circumstantial evidence:

(1) Crown Zellerbach ordered Gulden's and Steele's contact with toxic levels of PCBs without any protective clothing; (2) Crown Zellerbach ordered that contact to continue not for just a short period but for a period of five days; (3) during this five-day period, Crown Zellerbach knew that Gulden's and Steele's clothing was soaked with PCBs; (4) Crown Zellerbach had been warned that the concentration of PCBs greatly exceeded levels authorized by the Environmental Protection Agency standards; and (5) Crown Zellerbach assigned the task of cleanup to two temporary workers unfamiliar with such work rather than contracting with specialists as it had in the past.

890 F.2d at 197. Addressing the circumstantial evidence in *Gulden*, the Washington Self Insurers Association told the court in *Baker v. Schatz*, 80 Wn. App. 775, 783-84, 912 P.2d 501 (1996) that "[i]t can probably be said of . . . *Gulden* that the employer[] knew their actions were certain to injure their employees." Appendix B hereto.

Yet the record here is at least as compelling:

(1) Boeing ordered Walston to breath asbestos fibers without protective clothing or a respirator; (2) Boeing ordered that offensive contact to continue not for just a short period but for a period of approximately one month; (3) during that time, Boeing knew that asbestos was falling from the pipes overhead, workers were complaining and that protective gear was necessary, as evidenced by the abatement workers in "moon suits" working overhead; (4) Boeing knew that such

forced inhalation of asbestos injured workers' lungs and had produced diseases in some of them; and (5) despite Walston's and other co-workers' requests for respirators and protective equipment, Boeing denied their requests and told Walston to "go back to work."

See Brief of Respondents (hereinafter "Respondents' Brief"), Case No. 42543-2 at 4-23, and Clerk's Papers citations therein.

Boeing cannot meaningfully distinguish the record here from *Gulden* or the Plutonium example or the forced ozone exposure in *Swope* or the unnecessary x-rays in *Madigar*. Yet none of these cases involved immediate and visible injury, which the Court of Appeals erroneously postulated is required to prove deliberate intent.

The Court of Appeals also found it dispositive that in 1985 Boeing did not know that its coercive conduct would cause Walston to get mesothelioma. But the legislative test is whether Boeing deliberately intended "*to produce* such injury." Boeing deliberately intended to force Walston to inhale asbestos and *to produce* lung injuries, which is the only way *to produce* mesothelioma.

Individual sensitivities to a toxic insult will always render uncertain predicting whether someone will get a disease, as it would in the Plutonium, PCBs, ozone and x-ray examples discussed above. Yet

each of those deliberate invisible batteries produces a certain injurious process.

When this Court concluded in *Birklid* that a jury was entitled to decide if Boeing deliberately intended injury, Boeing did not know the specific illnesses that workers would get or which workers would get sick when it commenced phenolic resin production (*see* Respondents' Brief at 27-30). Boeing did know that it was producing an injurious process in all its phenolic resin production workers and that some workers had gotten sick in the past. That was enough, and Walston has presented similar evidence here.

The Court must decide if forcing a worker to suffer an invisible battery that may kill him is less blameworthy than forcing a worker to suffer relatively trivial but visible injuries, such as headaches or watery eyes, as was the case for a number of the *Birklid* plaintiffs. The Court of Appeals' decision in effect says that an employer who slowly poisons his employees is less culpable than one who gives his workers a headache. This Court should amend that faulty moral calculus.

B. Taking Account of Boeing's Knowledge That It Produced Certain Injury To Walston's Lungs Does Not Expand the *Birklid* Test.

Boeing suggests erroneously that taking account of Boeing's knowledge that it produced certain injury to Walston's lungs is inconsistent with the narrow exception to the worker compensation scheme and will open the floodgates. (Answer to Petition for Review ("Answer") at 10-13.) The Court should not be persuaded by such hyperbole. Walston does not claim that workers are entitled to compensation for "cellular injuries" that occur from inhaling asbestos fibers, but under Washington law, a jury may take account of Boeing's knowledge that it has produced such certain injury under the *Birklid* test when a worker *does* suffer a compensable injury.

Under the Industrial Insurance Act, worker compensation is only paid to workers injured in the course of their work. *See* RCW 51.04.010 (worker compensation is limited to workers "injured in their work"). It does not apply to workers who are not injured until after they cease working for an employer. Because Boeing claims that the worker compensation system is Walston's "rightful [and sole] remedy" (Brief of Petitioner Boeing, Case No. 42543-2, at 1), it necessarily concedes that Walston was "injured" during his

employment, and not when he was diagnosed with mesothelioma in 2010. That workplace injury was the scarring of his lung tissue when Boeing forced him to inhale asbestos on the job in 1985. That injury, during his employment, is also a relevant injury for purposes of examining Boeing's "actual knowledge" under the *Birkliid* test.

In *Department of Labor and Industries v. Fankhauser*, 121 Wn.2d 304, 849 P.2d 1209 (1993), the Court took account of what Boeing calls "cellular" injury in granting worker compensation benefits to workers exposed to asbestos. The workers in that case were not diagnosed with asbestos-related disease until long after they had stopped working. *Id.* at 306-07. The Court held that because they "were exposed to asbestos during employment" and their asbestos diseases diagnosed years later were traceable to that employment, they were injured "in the course of employment" and thus were entitled to benefits. *Id.* at 309. The Court should conclude that this case is no different with respect to Walston's workplace injury.

Boeing also suggests that if the Court were to acknowledge "cellular" injuries, the scope of the "deliberate intent" exception would become too broad. But this argument confuses a certain

injurious process with compensable injury. Boeing cites the Surgeon General's 2011 conclusion that cigarette smoke causes immediate damage to the body (Answer at 12), but the citation actually reveals Boeing's confusion. There is little question that forcing office workers today to toil in the deep blue haze of tobacco smoke would be an unacceptable employer practice. That is in part due to general knowledge of the injurious processes that such exposures are certain to produce. But the forced inhalation of tobacco smoke does not constitute a "compensable" injury in itself unless it produces a compensable injury. *Cf. Duncan v. Northwest Airlines, Inc.*, 203 F.R. D. 601, 604 (W.D. Wa. 2001) (court held that plaintiff could meet the "deliberate intent" exception based on allegation of forced exposure to second hand smoke on international flights to Asia, which produced allergic reactions in plaintiff). A worker forced into a toxic exposure still needs to prove that such forced exposure caused a compensable injury, which would be a daunting challenge with respect to chronic diseases whose etiology is multi-factorial.

Here, by contrast, Boeing failed to challenge Dr. Brodtkin's conclusion that Walston's coerced 1985 ordeal was the most

significant asbestos exposure Walston faced during his long career, and that it was a substantial contributing factor³ in causing his mesothelioma. CP 2873 (118:23-119:15).

By carefully delineating what an employee must establish with respect to his employer's deliberate intent to produce injury in the context of toxic insults, the "deliberate intent" exception to the worker compensation laws will remain a narrow exception. One would hope that it will continue to be the rare case where each of the following four criteria is met: (1) the employer knowingly and deliberately forces its employee to suffer a toxic insult over the employee's objection; (2) the employer knows that the coerced toxic insult will produce a certain injurious process in the employee's body; (3) the employer knows that such certain injurious process has in the past produced illness or death in employees; and (4) the employee's compensable injury was produced by the injurious process. Boeing's conduct here meets these criteria, and Petitioner

³ Washington has adopted liberalized proof standards in asbestos injury cases, including that a plaintiff is required only to show that a defendant's conduct was substantial contributing factor to a plaintiff's injury. See *Lockwood v. A.C. & S.*, 109 Wn.2d 235, 246 & 248, 744 P.2d 605 (1987); *Berry v. Crown Cork & Seal Co.*, 103 Wn. App. 312, 324-25, 14 P.3d 789

is entitled to have jury decide if Boeing deliberately intended to produce Walston's injuries.

C. The Record Here is Different Than in *Shellenbarger*, Which Is Not Controlling Precedent.

Unlike the record in *Shellenbarger v. Longview Fibre Paper & Packaging*, 125 Wn. App. 41, 103 P.3d 807 (2004), which involved a pre-Washington Product Liability Act ("WPLA") suit regarding asbestos exposure in the mid-1960's when it was unclear what Longview Fibre knew about asbestos risks (*see* Respondents' Brief at 39-42), Walston has presented evidence from which a jury could reasonably find that in 1985 Boeing knew that it produced certain injury in workers it forced to inhale airborne asbestos, which had in the past produced grave illness in workers.

Boeing's attempt to minimize both its knowledge and its conduct is simply an argument with the evidence. Boeing's conduct occurred not in 1955, 1965 or 1975, but in 1985 – long after its industrial hygienists had warned the company about deadly diseases from asbestos exposure and the need to protect workers. In 1985, Boeing knew that some of its workers (and one of Walston's co-

(2000); *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 32, 935

workers in the Hammer Shop) had already died or become ill from forced inhalation of asbestos. *See* CP 5371-72 CP 5321; CP 5323; CP 5363-64 (documenting Boeing employee illnesses or death from asbestos exposure in 1981, 1983 and 1985). Boeing also knew, because it was common knowledge in the scientific community and among industrial hygienists by 1985, that it produced immediate invisible lung injuries in every employee it forced to inhale asbestos, and it knew that such injuries had produced illness or death in some of its workers in the past. CP 4618; CP 3450 (27:14-28:12, 29:2-15); CP 1064 (¶ 9), the 1977 *Toxicology* text (CP 5268 and CP 5277), and the 1977 NIOSH report (CP 1979, 5307). That abatement workers above Walston were wearing “moon suits” is proof-positive that Boeing knew it was producing injuries to Walston’s lungs. Despite that knowledge, Boeing told Walston and his co-workers to “go back to work,” CP 1655 (98:4-99:3), under an asbestos rain, over their futile protest.⁴

P.2d 684 (1997).

⁴ Boeing also says that it forced Walston to work under asbestos abatement workers only for a handful of days (Answer at 7), but Walston testified that the forced inhalation of asbestos fibers lasted “[a]bout a month” (CP1655 (99:3)), and he provided detailed testimony about why it took a month to wrap all the overhead pipes in the Hammer Shop (CP 1657

To the extent that *Shellenbarger* stands for the proposition that the “deliberate intent” exception cannot be established because of inherent uncertainty about whether an invisible toxic battery will also ripen into disease, this Court should reject *Shellenbarger*, which is not controlling here. To hold otherwise would be to invite the slow poisoning of Washington workers.

A jury is entitled to assess Boeing’s conduct to determine if it meets the “deliberate intent” exception. Consistent with this Court’s decision in *Birklid*, and the Court of Appeals’ decisions in *Baker v. Schatz* and *Hope v. Larry’s Markets*, 108 Wn. App.185, 29 P.3d 1268 (2001), *overruled on other grounds*, 154 Wn.2d, 109 P.3d 805 (2005), this Court should hold that a jury could reasonably infer Boeing’s deliberate intent to injure Walston. As the Court in *Gulden* aptly held:

Here, a jury could infer, from all the circumstances, that defendant failed to provide [safety equipment] *because* it wished to injure plaintiff... A specific intent to produce injury is not the only permissible inference to

(106:23-107:10)). Boeing also says that its supervisor responded to worker complaints about falling asbestos by telling them to move out from directly under the asbestos abatement workers. (Answer at 7.) But such a dismissive response, even if credited, is akin to telling a worker in an irradiated room to move to a different part of the room. Such a response does not mitigate, but exacerbates Boeing’s conduct.

be drawn from defendant's apparent obstinacy, but it is one that a jury should be permitted to consider. It is for the finder of fact, not the court on summary judgment, to determine what inferences to draw. Summary judgment is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.

890 F.2d at 197, quoting *Lusk v. Monaco Motor Homes, Inc.*, 97 Or.

App. 182, 775 P.2d 891, 895 (1989) (quotations, citations and

footnote omitted) (emphasis in original).⁵ This Court should reach the same conclusion.

VII. CONCLUSION

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

DATED this 9th day of August, 2013.

⁵ In *Birklid*, this Court discussed both *Gulden* and *Lusk* and declined to adopt Oregon's different formulation of what is required to prove "deliberate intent." *Birklid*, 127 Wn.2d at 865, 904 P.2d at 285. The standards for summary judgment in Washington and Oregon are the same, however.

Respectfully submitted,

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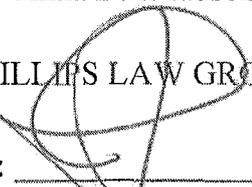
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DATED at Seattle, Washington this 9th day August, 2013.



Carrie J. Gray

5 Asbestos Removal



Asbestos Abatement Workers Above Hammer Shop

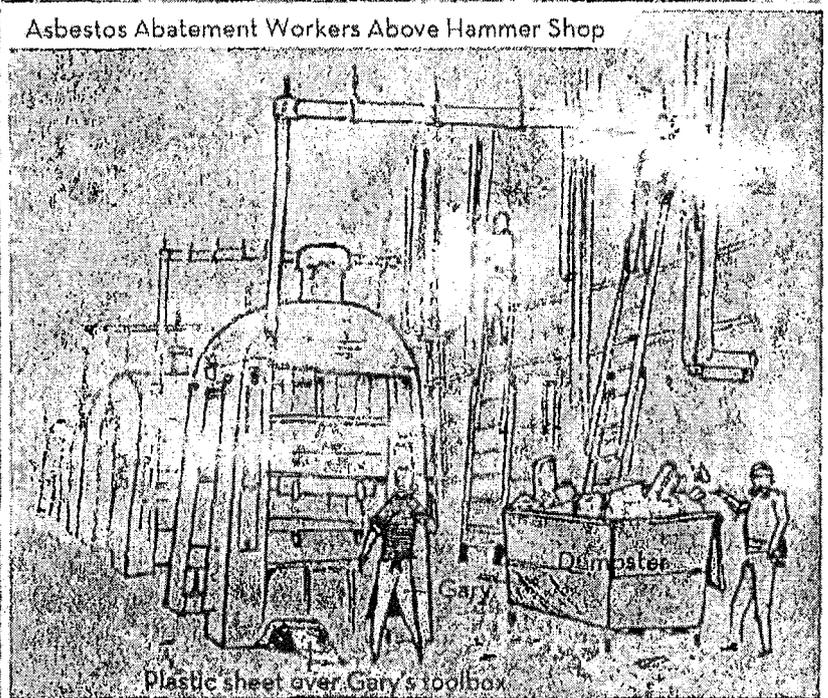


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T. Stewart

80/88

No. 17230-5-II

THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DANNY BAKER and TAMERA LEA BAKER,
husband and wife; JOHN SCHRADER, an
individual; KEVIN CISSELL, an
individual; ELMER F. MAXEY and
EUNICE M. MAXEY, husband and wife;
RUTH HUGHES, an individual; SHARON
OLSON, an individual; RUSSELL
HAROLD STEWART, an individual,

Respondents,

vs.

HENRY T. SCHATZ, d/b/a GENERAL
PLASTICS MANUFACTURING COMPANY,
a Washington Corporation,

Petitioners.

BRIEF OF AMICUS CURIAE
WASHINGTON SELF-INSURERS ASSOCIATION

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DIVISION II
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STATE OF WASHINGTON
BY JESSICA

The employer's claim that the respirator was too costly, coupled with the fact the state had not yet required their use and the fact the worker himself chose to continue working without a respirator, would seem to strongly militate against an inference of deliberate intent to injure. The facts of Gulden are perhaps more compelling. The evidence demonstrated that the employer was fully aware of the danger presented by the PCB's, and yet hired temporary and ill equipped employees to clean up a known highly toxic spill which trained specialists had been unsuccessful in doing.

It can probably be said of both Lusk and Gulden that the employers knew their actions were certain to injure their employees. Such knowledge is not evident in this case. Further, in Washington, even knowledge by the employer that injury is "substantially certain" to occur, is insufficient to prove intent. Higley, supra, 13 Wn. App. at 271. Knowledge of the risk of injury is not the same as an intent to harm.

The reliance by the employees in this case on

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