No. 42543-2

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

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

Respondents,

v.

THE BOEING COMPANY,

Petitioner.

FILED
COURT OF APPEALS
DIVISION II
2012 OCT 29 PM 1:38
STATE OF WASHINGTON
BY DEPUTY

BRIEF OF AMICI CURIAE ASSOCIATION OF WASHINGTON BUSINESS AND WASHINGTON SELF-INSURERS ASSOCIATION

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I. INTRODUCTION

This brief is filed by the Association of Washington Business and the Washington Self-Insurers Association on behalf of over 8,000 employers in the state of Washington who are profoundly concerned with the Respondents' effort to unravel the carefully crafted compromise in the Industrial Insurance Act, which provides sure and certain relief to injured workers in exchange for immunity from civil suits for employers. On this discretionary review, amici urge the court to reverse the denial of summary judgment to The Boeing Company ("Boeing") and direct that judgment be entered in its favor.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. The Association of Washington Business

The Association of Washington Business ("AWB") is the state's chamber of commerce and largest general business membership organization, representing over 8,000 employers from every major industry sector and geographical region of the state. AWB members range from large, highly visible, multi-national corporations to very small businesses. Collectively, they employ over 650,000 people in Washington. AWB is also an umbrella organization which represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in the appellate courts as amicus

curiae on issues of substantial interest to its statewide membership. AWB members are covered under the state's workers' compensation laws, either as employers who obtain industrial insurance through the state fund or who self-insure. Judicial interpretation and application of the laws related to workers' compensation, including that system's fundamental guarantee of immunity from suit for workplace injuries and occupational diseases, are of great interest to these employers.

B. The Washington Self-Insurers Association

The Washington Self-Insurers Association ("WSIA") is a non-profit business association formed in 1972 to represent the interests of members who self-insure for workers' compensation in Washington State. Today, the WSIA has 385 members to whom it provides a variety of educational, training, business assistance, and governmental relations services with respect to workers' compensation laws and regulations, workplace safety, and accident prevention. Self-insured employers pay workers' compensation benefits directly from their general assets and pay an administrative assessment to the Department of Labor & Industries ("Department"). They operate under the same laws and rules that apply to the state fund, subject to audit and oversight by the Department. Accordingly, WSIA has a direct interest in maintaining the integrity of the

no-fault system, including the bar against work-related injury suits against employers.

III. ISSUE OF CONCERN TO AMICI CURIAE

Whether, as a matter of law, the trial court should have found on summary judgment that Mr. Walston failed to demonstrate Boeing had actual knowledge that an injury to him was certain to occur and willfully disregarded that knowledge. *Cf. Br. of Pet.* at 3 (Assignment of Error 1, Issues 1-4).

IV. STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the brief of Petitioner Boeing at 4-9.

V. ARGUMENT

Amici seek to focus first on the rigorous deliberate intent standard of the Industrial Insurance Act ("IAA" or "Act") and the underlying policy reasons supporting it, and second on the harmful consequences to the employer community of accepting Walston's novel cellular level injury theory.

A. THE "GRAND COMPROMISE" OF WORKERS' COMPENSATION IS SURE AND CERTAIN RELIEF FOR THE WORKER IN EXCHANGE FOR EMPLOYER IMMUNITY FROM SUIT; PUBLIC POLICY DEMANDS THIS COMPROMISE BE VIGOROUSLY PROTECTED FROM EROSION.

Washington's IIA has been in existence since 1911. Laws of 1911, ch. 74. Since the Act, and its system of workers' compensation, has been a part of our culture for over a century, it is easy to forget that the creation of a "no fault" system was a marked deviation from common law, where employers and workers were left to fight on-the-job injury claims against one another in the courts, with strong comparative fault defenses available to the employer and unlimited potential damages to the prevailing worker. Under the workers' compensation system, however, "fault" is no longer an issue. Workers receive benefits without regard to fault. In exchange, employers, *even if at fault in causing an injury*, are immune from civil liability.

Under the IIA compromise, workers who sustain injuries or develop diseases in the course of their employment are entitled to substantial benefits. In addition to medical benefits, RCW 51.36.010, workers are entitled to receive wage loss benefits, RCW 51.32.090, vocational rehabilitation, RCW 51.32.095, awards for permanent partial disabilities, RCW 51.32.080, and, in the event of permanent inability to work, a lifetime pension, RCW 51.32.060. Where death results, benefits are also paid to the worker's survivors, RCW 51.32.050. All of these benefits are provided without regard to fault on the part of either the employer or the worker. The worker receives full benefits even if the

employer was *not* at fault. The worker receives full benefits even if the worker was at fault in causing his or her injury or contributing to the circumstances of his or her occupational disease.

The costs of this industrial insurance program are borne primarily by employers. In the case of a self-insured employer, the employer pays most all of the benefits associated with an allowable workers' compensation claim. RCW 51.14.010(2). Employers who obtain industrial insurance through the state fund pay for employees' claims through the assessment of premiums, which are based on the relative risk and experience of the industry in which the employer is engaged. RCW 51.16.035. A particular employer can be assessed a premium greater than that applicable to the employer's industry where the employer's claims costs are excessive. WAC 296-17-850. Workers pay one half of the medical costs premium (workers of self-insured employers pay no medical aid assessment), RCW 51.16.140, and one half of the premium necessary to support cost-of-living increases to persons receiving monthly pension benefits. RCW 51.32.073. Accident fund assessments (e.g., for temporary, permanent, or total disability benefits or death) are paid wholly by the employer.

While workers receive this "sure and certain" relief provided under the Act, RCW 51.04.010, employers receive immunity from civil

liability to employees for any personal injuries occurring during the course of employment. Specifically, the IIA:

> 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 51.04.010 (emphasis added). This is the quid pro quo at the heart of the "grand compromise" of the workers' compensation system, *Birklid v. Boeing*, 127 Wn.2d 853, 859 904 P. 2d 278 (1995) (citing *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916)), "the workman contributing his reduced damages, the employer getting that and conceding more liabilities." *Stertz*, 91 Wash. at 602.

The Supreme Court has stressed that the statutory bar against civil claims for workplace injuries is to be enforced strictly:

> In effect, the Act "immunizes" from judicial jurisdiction all tort actions which are premised upon the "fault" of the employer vis-à-vis the employee. The determination to abolish judicial jurisdiction over such "immunized" conduct was a legislative policy decision. The wisdom of that decision is not a proper subject of our review.

Seattle First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 242, 588 P.2d 1308 (1978). The Supreme Court's interpretation of the breadth

of the statutory bar has been constant over many years. In *Thompson v. Lewis County*, 92 Wn.2d 204, 208-09, 595 P.2d 541 (1979), the court stated:

> The cases are legion where it has been held that common-law actions have been abolished as between employee and employer when based upon injury or death of the employee, and that the workmen's compensation act provides the exclusive remedy. . . .
>
> . . . Our statute has always been one of the most stringent in the elimination of causes of action against employers.

Accord West v. Zeibell, 87 Wn.2d 198, 201, 550 P.2d 522 (1976) ("Our statute is of the broadest, most encompassing nature. . . ."); *see also Corr v. Willamette Indus., Inc.*, 105 Wn.2d 217, 219, 713 P.2d 92 (1986) ("The Legislature has abolished common law actions between employee and employer for personal injuries suffered by the employee in the workplace. RCW 51.04.010. The workers' compensation act provides the exclusive remedy in such cases.").

1. "Deliberate Intention" Requires a Specific Intent to Injure.

The maintenance of the grand compromise depends upon the narrowness of the sole exception to the rule of employer immunity – an employer may be held liable to a worker for damages "[i]f injury results from the deliberate intention of his or her employer to produce such injury[.]" RCW 51.24.020.

There is a long and clear line of authority in Washington articulating what is required to show this "deliberate intention," and the provision has been "consistently interpreted . . . to require a specific intent to injure." *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 355, 734 P.2d 961 (1987). In the early case of *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 205 P. 379 (1922), it was held that an employer's knowledge of a dangerous and unsafe condition (a defective boiler) was insufficient to establish the deliberate intent to produce injury. Quoting *Jenkins v. Carman Manufacturing Co.*, 79 Or. 448, 155 P. 703 (1916), the court noted:

> We think by the words "deliberate intention to produce injury" that the lawmakers meant to imply that the employer must have determined to injure an employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross.

Delthony, 119 Wash. at 300.

Our courts have indicated that even proof of "serious and willful misconduct," such as knowingly refusing to comply with safety statutes, is insufficient to prove the requisite specific intent. *Winterroth v. Meats, Inc.*, 10 Wn. App. 7, 12, 516 P.2d 522 (1973); *Peterick v. State*, 22 Wn. App. 163, 189, 589 P.2d 250 (1978), *overruled on other grounds, Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985) ("allegations of calculated evasionary conduct in violation of

recognized safety standards," even if true, failed to establish intent). In *Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 534 P.2d 596 (1975), a worker sustained an eye injury when a saw's rotating cutter head broke loose, breaking a protective plexiglass shield. The worker produced evidence showing such accidents occurred with frequency, and that the shields proved to be inadequate. The worker claimed that the employer had not taken adequate protection against such accidents, and thereby acted "with knowledge that its actions were substantially certain to produce injury." *Higley*, 13 Wn. App. at 271. The court held that this would be insufficient to establish the deliberate intention required by the Act. In *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 547 P.2d 856 (1976), an employee was injured after allegedly being instructed by a supervisor to circumvent a safety feature of a 90-ton press. The Supreme Court continued to adhere to *Delthony* and its progeny, and found that the IIA provided the employee's exclusive remedy because an employee must prove a specific intent by the employer to produce injury in order to sustain a civil action. *Foster*, 86 Wn.2d at 583-84.

2. The *Birklid* Standard Defines "Deliberate Intention".

In contrast to decisions that described actions that did *not* constitute deliberate intention, the Supreme Court, in *Birklid*, "undert[ook] to say what actions *do* constitute 'deliberate intention.'" *Birklid*, 127

Wn.2d at 862 (emphasis in original). In that case, the court described that during pre-production testing, the employer became aware that the use of a phenol-formaldehyde resin during the production of interior parts of its airplanes caused production workers to become sick. *Id.* at 856-57. During the pre-production testing, the employer observed and documented dizziness, nose and throat dryness, burning eyes, and upset stomach among some workers. *Id.* A supervisor in charge of the testing predicted that injuries would recur during actual production. *Id.* at 856. Notwithstanding these observations, production continued without remedial measures. *Id.* As production went online, some workers sustained the injuries that were observed during preproduction testing. *Id.*

The Supreme Court sought to articulate a standard for the deliberate intent exception that would preserve the intended scope of the grand compromise. Declaring that "[t]he statutory words must . . . mean something more than assault and battery[,]" the court first considered the facts of the case before it, which the court stated "served to illuminate the meaning of the statute":

> The central distinguishing fact in this case from all the other Washington cases that have discussed the meaning of 'deliberate intention' in RCW 51.24.020 is that Boeing here knew in advance its workers would become ill from the phenol-formaldehyde fumes, yet put the new resin into production. After beginning to use the resin, Boeing then observed its workers becoming ill from exposure. In all the other Washington cases, while the employer

> may have been aware that it was exposing workers to unsafe conditions, its workers were not being injured until the accident leading to litigation occurred. There was no accident here. The present case is the first case to reach this court in which the acts alleged go beyond gross negligence of the employer, and involve willful disregard of actual knowledge by the employer of continuing injuries to employees.

Id. at 863 (footnote omitted). Key to this discussion – its "central distinguishing fact" – is the actual knowledge inferred by the observable symptomatic injuries to workers from the resin and the continued exposure to the resin despite those observations.

In light of this circumstance and to fashion its rule, the court then turned to "[t]he judicial and legislative experience with similar facts in other states[,]" in order to derive "direction on an appropriate definition of RCW 51.24.020." *Id.* The court reviewed the "substantial certainty" and "conscious weighing" approaches of several jurisdictions (including Oregon, which has adopted "conscious weighing"), and rejected both as too expansive:

> We are mindful of the narrow interpretation Washington courts have historically given to RCW 51.24.020, and of the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010.

Id. at 865. Instead of adopting a looser test, the Supreme Court adopted the more restrictive "certain injury" approach, holding "the phrase 'deliberate intention' in RCW 51.24.020 means the employer had actual

knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* To effectuate the grand compromise, that standard is meant to be restrictive, not expansive, and it remains unchanged in the law to the present day.

3. Risk of Potential Hazard is Not Enough.

Since *Birklid*, the appellate courts of our state have repeatedly required a plaintiff to show evidence of an employer's willful disregard of actual knowledge that the employee was certain to be harmed. In order to avoid summary judgment after *Birklid*, the plaintiff must present evidence that the employer had actual knowledge borne out of observation of the employees' injuries as they were happening, yet willfully disregarded that knowledge and continued to subject its employees to the same conditions.[1]

The clear majority of cases decided since *Birklid* demonstrate that the standard is not met at summary judgment by anything less than actual knowledge of certain injury to the employee and willful disregard of that

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[1] *See, e.g.*, *Baker v. Schatz*, 80 Wn. App. 775, 784, 912 P.2d 501 (1996) (finding genuine issue of material fact as to whether the employer had actual knowledge of certain injury because the plaintiff presented evidence that "General Plastics knew its employees were being injured by the working environment at the plant and that if the environment was not altered, it would, with certainty, continue to injure them.").

knowledge, facts that are simply not present in this case.[2]

Notably, our Supreme Court's only relatively recent review of the *Birklid* standard was *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005), where the court again affirmed the extraordinarily narrow circumstances where deliberate intent to injure can be inferred. There, special education teachers sued the school district

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[2] *See, e.g., Folsom v. Burger King*, 135 Wn.2d 658, 667, 958 P.2d 301 (1998) (knowledge of employee's violent criminal past, combined with insecure operation of fast food store, did not equate to actual knowledge that employee would murder other employees in the course of a robbery of store); *Goad v. Hambridge*, 85 Wn. App. 98, 104, 931 P.2d 200 (1997) (employer's failure to equip a wood planer with safety devices or warn of potential danger despite being aware of the risk of injury did not equate to deliberate intent to injure employee, because "[a]t best, [employer] knew of the potential of an injury . . . which is not enough to satisfy the *Birklid* standard.") (emphasis in original); *Henson v. Crisp*, 88 Wn. App. 957, 961-62, 946 P.2d 1252 (1997) (summary judgment affirmed where assistant manager shot toy gun at other employee, causing emotional distress, because there was no evidence that the manager knew of the plaintiff's extreme fear of guns and that under *Birklid*, gross negligence as evidenced by the "[d]isregard of a known risk of harm is insufficient; the certainty of the actual harm must be known and ignored . . . it is the injury, not merely the conduct, which must be intentional[.]"); *Judy v. Hanford Envt'l Health Foundation*, 106 Wn. App. 26, 33, 22 P.3d 810 (2001) (summary judgment affirmed because physician's report to employer enumerating employee's physical limitations may have suggested risk of occupational injury, but this is insufficient to demonstrate actual knowledge of certain injury); *Schuchman v. Hoehn*, 119 Wn. App. 61, 72, 79 P.3d 6 (2003) (summary judgment affirmed where employer admitted knowing someone would eventually be injured by ice auger, but such admission did not constitute actual knowledge of certain injury to specific employee.); *Valencia v. Reardan-Edwall School Dist. No. 1*, 125 Wn. App. 348, 352, 104 P.3d 734 (2005) (summary judgment affirmed where employer's knowledge of dangerous device "still would not support a finding that the District had 'actual knowledge' that 'an injury was certain to occur'" to employee.); *Brame v. Western State Hosp.*, 136 Wn. App. 740, 749, 150 P.3d 637 (2007) (summary judgment affirmed because hospital employees could at most demonstrate foreseeable, not certain, future assaults by psychiatric patients); *Garibay v. Advanced Silicon Materials, Inc.*, 139 Wn. App. 231, 238-39, 159 P.3d 494 (2007) (summary judgment affirmed where employee's evidence that pipe rupture was imminent or even certain to eventually occur "may constitute negligence or even gross negligence" but not actual knowledge of certain injury.).

because of injuries arising from assaults by a disabled student. The court, as in the substantial majority of post-*Birklid* cases, affirmed summary judgment because even the substantial certainty that a violent student's assaults against staff would continue, because unpredictable, the evidence of substantial certainty was insufficient to demonstrate actual knowledge of certain injury. *Vallandigham*, 154 Wn.2d at 33-34. "[W]e recognize that the first prong of the *Birklid* test can be met in only very limited circumstances where continued injury is not only substantially certain, but *certain* to occur." *Id.* at 32 (emphasis added).

Finally, despite Walston's understandable effort to distinguish it, *Shellenbarger v. Longview Fibre*, 125 Wn. App. 41, 103 P.3d 807 (2004) is on all fours with this case. As here, Shellenbarger attempted to circumvent IIA immunity based on the employer's alleged deliberate intent to cause putative cellular level injury by permitting or requiring workplace exposure to asbestos. There, after discussing the employee's repeated exposure to asbestos fibers in the workplace over the course of his career, and the employer's gradual understanding of the potential dangers of asbestos exposure, the court honed in on the relevant inquiry: "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. Observing that Longview Fibre may have been

negligent in creating the circumstances where Shellenbarger was exposed to asbestos, the court nevertheless determined that a reasonable fact finder could not conclude Longview Fibre knew of certain injury to Shellenbarger. *Id.* at 49.

Shellenbarger was rightly decided. There, as here, the court was presented with an invitation to broaden the *Birklid* test to allow risk of harm to suffice for actual knowledge of injury and allow mere exposure to suffice for actual injury. The court rejected the invitation, acknowledging that these are not the relevant standards under the law. *Shellenbarger* should control here, as the relevant facts, as Boeing's briefing demonstrates, are very similar.

4. Employers Should Not Have to Defend Lawsuits Predicated on Knowledge of a Mere Risk of Injury.

The entire legal framework of the IIA's grand compromise is structured so that trial courts function as a gatekeeper in deliberate injury cases. Summary judgment is entirely proper where the plaintiff is unable to raise a genuine issue of material fact that the employer had actual knowledge of certain injury to the employee and acted in willful disregard of it. Deliberate injury cases should not go to the jury on anything less, and it is no accident that the vast majority of pre- and post-*Birklid* cases are summary judgment cases. Tacitly adopting a lower legal threshold or

equivocating on the rigor of the *Birklid* rule would certainly diminish the gatekeeper function of summary judgment and require employers not only to face the kind of liability the IIA was meant to abolish but to endure the expense and burden of preparing for a trial where the relevant inquiry and correctly applied legal standard in most cases will militate against the plaintiff.

Walston's case against Boeing, just like Shellenbarger's case against Longview Fibre, should have been dismissed on summary judgment. As *Birklid* and its progeny establish, mere knowledge of a risk of injury does not justify stripping away the employer's immunity from damages actions granted as part of the grand compromise – the fundamental building block of our workers' compensation law. In every case where an appellate court has found a genuine issue of material fact precluding summary judgment, the employee has demonstrated an employers' actual knowledge of previous injuries resulting from a reoccurring condition, and a subsequent affirmative decision by the employer to disregard that knowledge and continue to subject the employee to the injury-producing condition. But that is not the standard that Walston is seeking for this court to follow.

In this case, Boeing is spot on in its description of the legal standard Walston would have this court adopt to allow its claim to get to a

jury. Walston's case is wholly dependent upon the court determining that triable issues exist whether Boeing had substantial certainty or actual knowledge that employees were subject to a risk of injury as a result of workplace asbestos exposure, and allowed the exposure to go on. That is simply not the legal standard for avoiding summary judgment in Washington.

B. INJURY FOR THE DELIBERATE INTENTION EXCEPTION TO EMPLOYER IMMUNITY SHOULD NOT INCLUDE CELLULAR LEVEL CHANGES ALONE.

Woven throughout Walston's argument and indeed essential to his claim, is the novel theory that his "injury," for purposes of the IIA, is not the objectively manifested mesothelioma with which he was eventually diagnosed, but rather the *mere exposure* to asbestos which, he argues, works an injury at the cellular level at or very near the time of exposure. This position is not only unsupported by the IIA and case law, but is untenable from the standpoint of public policy as it would expose employers to a virtually infinite variety of workplace-related tort suits.

1. Cellular Damage Alone Does Not Constitute an "Injury" under the IIA.

RCW 51.24.030 defines "injury," including for purposes of the "deliberate intention" exception to the IIA's exclusivity provision, as including "any physical or mental condition, disease, ailment or loss,

including death, for which compensation and benefits are paid or payable under this title." A change at the cellular level by itself is not a "condition, disease, ailment or loss . . . for which compensation or benefits are paid or payable" under IIA. This conclusion is the routine position of the Board of Industrial Insurance Appeals, which has long held in respiratory impairment cases that the impairment, rather than cellular damage, is the basis upon which compensation and benefits are paid or payable.[3]

That cellular damage, standing alone, is not an "injury" under the IIA is confirmed in *Dept. of Labor & Indus. v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991). In *Landon*, the employee developed an asbestos-related disease in 1986, three years after his last job-related exposure. *Landon*, 117 Wn.2d at 123. Landon sought benefits when his disease arose and the Department contended benefits accrued on the date of his last exposure – which would mean payment under a less generous benefits schedule. *Id.* The Department's argument in that case was similar to Walston's present-day theory:

[3] *See, e.g., In re Kinsley*, 1990 WL 255033 (Wn. Bd. Ind. Ins. App. 1990) (applying WAC regulations to determine level of impairment and compensation); *In re Pearson*, 1992 WL 322511 (Wn. Bd. Ind. Ins. App. 1992) (same); *In re Funston*, 1989 WL 253581 (Wn. Bd. Ind. Ins. App. 1989) (pleural plaquing evidenced by reduced pulmonary function, chest pains, and dyspnea rose to the level of an occupational disease); *In re Raymond*, 1992 WL 160693 (Wn. Bd. Ind. Ins. App. 1992) (applying *Dept. of Labor & Indus. v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991) to determine date of injury).

> The Department argues that the key element of "injury" is the harmful exposure, and consequently maintains that the injury occurs on the date of the worker's last injurious exposure.

Id. at 124. Rejecting the Department's theory, the Supreme Court explicitly held that a person is not "injured" for purposes of the IIA when asbestos fibers become embedded in the lung, but 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." *Landon*, 117 Wn.2d at 125 (quoting *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289-90 (9th Cir. 1983)). While an occupational disease such as work-related asbestosis or mesothelioma that manifests itself after exposure to asbestos is certainly compensable under the IIA, mere *exposure* to asbestos is neither compensable nor actionable under the IIA.

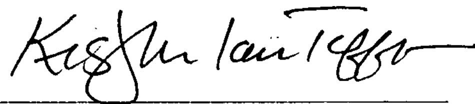
2. Public Policy Favors Rejecting Walston's Theory.

Rejecting Walston's cellular damage theory is not only a common-sense reading of the law, but is favored by public policy. As the continued litigation-related bankruptcy of traditional asbestos manufacturers and users makes clear, asbestos-exposure continues to be a major frontier of toxic tort litigation. Were the court to accept Walston's interpretation of the IIA, both as to "deliberate intention" and "injury," the courthouse doors will swing open to allow anyone claiming the slightest exposure to asbestos to seek civil damages in addition to IIA benefits from their

Washington employers. According to Walston, all that an employee needs to show in order to seek compensation in addition to that which is provided by the IIA is to show that the employer knew asbestos was potentially hazardous and that asbestos-containing materials were used or disturbed on the job, thereby exposing the worker to asbestos and causing ipso facto an "injury." Moreover, under Walston's theory of deliberate intention, there would be nothing to prevent employees from circumventing the exclusive remedy of the IIA when injured by any activity that has a known risk of injury, or by any hazardous substance listed on a Material Safety Data Sheet ("MSDS") providing notice of the substance's *potential* injurious effects. Not only would this have a profound impact on Washington trial court dockets, but it would unfairly burden Washington businesses with defending lawsuits that the Legislature decided long ago were best addressed exclusively by the IIA.

Respectfully submitted this 29th day of October, 2012.

ASSOCIATION OF WASHINGTON BUSINESS



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No. 42543-2

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

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

Respondents,

v.

THE BOEING COMPANY,

Petitioner.

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

I reside in the State of Washington, am over the age of eighteen, and not a party to this action. My business address is 1414 Cherry Street SE, Olympia, WA 98507. On October 29th, 2012, I served the following:

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE ASSOCIATION OF WASHINGTON BUSINESS AND WASHINGTON SELF-INSURERS ASSOCIATION

BRIEF OF AMICI CURIAE ASSOCIATION OF WASHINGTON BUSINESS AND WASHINGTON SELF-INSURERS ASSOCIATION

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

Executed on this 29th day of October, 2012, at Olympia, Washington.

Connie Grande