

No. 88511-7

IN THE SUPREME COURT OF WASHINGTON

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

**DONNA WALSTON, individually and as personal representative of
the Estate of Gary Walston,**

Petitioners,

v.

THE BOEING COMPANY,

Respondent.

**BRIEF OF COALITION FOR LITIGATION JUSTICE, INC.,
CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, NFIB SMALL BUSINESS LEGAL CENTER,
AMERICAN TORT REFORM ASSOCIATION, AMERICAN
INSURANCE ASSOCIATION, PROPERTY CASUALTY
INSURERS ASSOCIATION OF AMERICA, NATIONAL
ASSOCIATION OF MUTUAL INSURANCE COMPANIES,
AND AMERICAN CHEMISTRY COUNCIL AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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OTHER AUTHORITIES

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U.S. Government Accountability Office, *Asbestos Injury Compensation:
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QUESTION PRESENTED

Whether an employer may be held liable in tort for post-exposure asymptomatic subcellular changes that merely reflect an increased risk of disease to some employees (not necessarily the plaintiff) under the very narrow “deliberate intention” to injure exception to the Industrial Insurance Act (IIA), Washington’s workers’ compensation law.

STATEMENT OF INTEREST

As organizations that represent companies doing business in Washington and their insurers, *amici* have a substantial interest in ensuring that the balance sought to be achieved by the IIA is maintained and that Washington employers do not face excessive and unpredictable tort liability. The IIA provides the exclusive remedy for occupational injuries, except as provided in RCW 51.24.020 (“deliberate intention” to injure exception).

For decades, this Court has respected the legislative intent embodied in the IIA by narrowly interpreting the “deliberate intention” phrase in RCW 51.24.020, as in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278, 285 (1995). The Court of Appeals followed this Court’s precedent. This Court should affirm the ruling of the Court of Appeals and reaffirm *Birklid*.

STATEMENT OF FACTS

Amici adopt Respondent's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the “grand compromise” that produced the IIA over a century ago, workers “were given a swift, no-fault compensation system” for occupational injuries and “[e]mployers were given immunity from civil suits by workers.” *Birklid*, 127 Wn.2d at 859, 904 P.2d at 282. The IIA contains a very narrow exception, RCW 51.24.020, that allows employees to sue their employers for injuries resulting from a “deliberate intention” to injure. This narrow exception was never intended to swallow the IIA's exclusive remedy rule.

More than “four generations of Washington judges” have rejected invitations by plaintiffs to adopt an expansive interpretation of the deliberate intention to injure. 127 Wn.2d at 865, 904 P.2d at 285. Instead, Washington courts have shown “appropriate deference...to the legislative intent embodied in” the IIA. *Id.* For example, in *Birklid*, this Court interpreted the IIA to require a plaintiff to show that “the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge” before a tort remedy is available. *Id.*

Plaintiffs-Petitioners seek to erode, if not eviscerate, the IIA's exclusive remedy construct in asbestos and other toxic tort cases. Their

approach would give employees a full-blown tort cause of action against their employers for injuries from any number of hazardous, occupational exposures. These would include mesothelioma claims of the type that are recruited continuously by plaintiffs' law firms in television ads and on the Internet.

Many industries and operations involve work with or around dangerous substances, and thus present an inherent risk that someone might get sick. Petitioners would like this Court to declare that any employer who is engaged in hazardous materials operations has deliberately intended to injure its work force simply because there is a possibility that such work may produce asymptomatic subcellular changes that may result in disease to some person. This expansive interpretation of RCW 51.24.020's "deliberate intention" to injure exception to the IIA would not be consistent with the legislature's intent or a century of court interpretations of the IIA. Risk of disease does not equal malice. That was made clear in *Birklid*.

It is not surprising, however, that Plaintiffs-Petitioners would try once again to pierce the IIA's exclusive remedy rule, especially in an asbestos case. Now that over 100 companies have been forced into bankruptcy due to asbestos-related liabilities, including virtually all major manufacturers of asbestos-containing thermal insulation products,

plaintiffs' lawyers have cast a wider net to ensnare solvent defendants. See Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation 2* (RAND Corp. 2011); Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009).¹

This Court should not eviscerate the IIA and make Washington an outlier state that subjects employers to tort liability for risks of harm in the workplace. A clear majority of states limit exceptions to the exclusivity of workers' compensation laws, consistent with *Birkliid*, to situations in which an employer acted with the specific intent to injure an employee. See Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 103.03 (2011) [hereinafter "Larson & Larson"]. Courts have rejected application of a deliberate intent exception in toxic tort and other cases involving facts well beyond those alleged in this case.

This Court should affirm the decision of the Court of Appeals and reject Petitioners' attempt to impose new and expansive tort liability on Washington employers.

¹ As explained *infra*, scores of trusts collectively holding *billions* of dollars in assets have been set up in bankruptcy to pay personal injury claims against former asbestos defendants.

ARGUMENT

I. PETITIONERS ARE ATTEMPTING TO PIERCE THE IIA'S EXCLUSIVE REMEDY TO EXPAND ASBESTOS LITIGATION TO ADDITIONAL, SOLVENT EMPLOYER DEFENDANTS

Petitioners seek an unprecedented expansion of tort liability for employers in this case. They want to eviscerate the IIA's exclusive remedy provision and transform workers' compensation claims for occupational exposure-related injuries into full-blown tort claims. If successful, Washington employers previously exempted from tort liability under the IIA – and the careful balance at the heart of what the *Birklid* Court called the “grand compromise” – will be upset. *Birklid*, 127 Wn.2d at 859, 904 P.2d at 282. *Birklid* maintains the balance sought to be achieved by the IIA and helps ensure that Washington employers do not face excessive and unpredictable liability. It should be reaffirmed here.

For many years, asbestos litigation typically pitted a worker “against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant's work site or other exposure location.” James S. Kakalik et al., *Costs of Asbestos Litigation* 3 (1983). Most of the traditional defendants, including almost all makers of asbestos-containing insulation products, eventually sought bankruptcy court protection.

“Following the bankruptcies of those frontline defendants... plaintiff attorneys shifted their litigation strategy away from the traditional thermal insulation defendants and towards peripheral and new defendants....” Mark Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations from 1991-2010*, 27:1 Mealey’s Litig. Rep.: Asbestos 1 (Oct. 10, 2012). Significantly more defendants began to be named in plaintiffs’ complaints. See Charles E. Bates et al., *The Naming Game*, 24:1 Mealey’s Litig. Rep.: Asbestos 4 (Sept. 2, 2009) (“As the bankrupt companies exited the tort environment, the number of defendants named in a complaint increased, on average, from fewer than 30 on average to more than 60 defendants per complaint.”). As a result, “[p]arties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use.” American Academy of Actuaries’ Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends*, Amer. Acad. Actuaries 1, 3 (Aug. 2007).

One former asbestos plaintiffs’ lawyer candidly described the asbestos litigation as an “endless search for a solvent bystander.” Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 Mealey’s Asbestos Bankr. Rep. 5 (Feb. 2002) (quoting Mr. Scruggs).

This Court witnessed this trend at work in two recent cases which involved an attempt by plaintiffs to hold makers of pumps and valves liable for harms allegedly caused by asbestos-containing replacement parts manufactured or sold by third parties or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale. *See Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 398, 198 P.3d 493 (2008); *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008). The Court applied traditional tort law principles and rejected the claim. The Court held, “a manufacturer has no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in products it did not manufacture and for which the manufacturer was not in the chain of distribution.” *Braaten*, 165 Wn.2d at 398, 198 P.3d at 504 (2008) (citing *Simonetta*).

The instant case is the latest chapter of the never-ending search for still-solvent deep pockets in asbestos cases. The IIA’s “deliberate intent” exception was never intended to be the cart to help plaintiffs on this path.

Furthermore, altering the law in the manner sought by Petitioners is not necessary to secure adequate compensation for persons with occupationally-related asbestos diseases. Asbestos claimants are able to obtain recoveries from trusts created to pay claims relating to the many companies that have declared bankruptcy. So far, over sixty trusts have

been established to collectively form a \$36.8 billion privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. See U.S. Government Accountability Office, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, GAO-11-819, at 3 (Sept. 2011); see also Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (2010 Rand Corp.). “Trust outlays have grown rapidly since 2005.” Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (Rand Corp. 2011).

“For the first time ever, trust recoveries may fully compensate asbestos victims.” Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey’s Asbestos Bankr. Rep. 1 (Nov. 2006). For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts, see Charles E. Bates et al., *The Naming Game*, 24:15 Mealey’s Litig. Rep.: Asbestos 1 (Sept. 2, 2009), and could receive as much as \$1.6 million. See Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey’s Litig. Rep.: Asbestos 27 (Feb. 3, 2010). Funds available from such trusts are available to Washington asbestos claimants along with funds from ordinary tort system defendants.

**II. AN EXPANSIVE INTERPRETATION OF THE IIA'S
NARROW "DELIBERATE INTENT" EXCEPTION
WOULD VIOLATE THE LEGISLATIVE INTENT
EMBODIED IN THE IIA AND LEAD TO LITIGATION
THAT THE LEGISLATURE SOUGHT TO AVOID**

The IIA, like other workers' compensation systems nationwide, reflects a historic trade-off between workers and employers regarding workplace injuries. The IIA created a swift and certain no-fault workers' compensation system for injured employees in exchange for granting employers immunity from lawsuits arising from occupational injuries. The system reduces costs and fosters predictability.

It is inconceivable that the legislature would have ever embraced the "carve-out" Petitioners now seek from the IIA. Petitioners apparently want a system where they receive a no-fault recovery for injuries that result from exposures that were not known at the time to be hazardous, while also being able to pursue a full tort recovery with pain and suffering if they are able to prove fault. The worker wins in both situations. What does the employer receive in return? No immunity. That would completely upset the balance the legislature struck in the IIA.²

² See generally Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405, 411-13 (1988) (finding that most courts and legislatures are resisting the pressure to erode the exclusive remedy principle of workers' compensation laws).

This Court should respect the “grand compromise” embodied in the IIA and follow generations of Washington courts that have respected the legislature’s intent to make the IIA the exclusive remedy for injured workers except in the narrowest of circumstances not present here.

A. The Careful Balance Struck by the IIA and Recognized by this Court for Over a Century Would be Lost if the IIA’s Exclusive Remedy May Be Bypassed Based on An Employer’s Mere Knowledge of a Risk of Disease

Workers’ compensation laws were intended to provide the exclusive remedy for accidental injuries in the workplace. In contrast, under Petitioners’ theory, any employee in an occupation involving potential exposure to toxic substances or other dangerous conditions known to an employer could bring a tort claim if injured.

An employer’s knowledge of a *risk* of injury from exposure to a toxic substance is not equivalent to the proverbial “punch in the face” by a supervisor that is the core of the deliberate intent exception. *See, e.g., Perry v. Beverage*, 121 Wn. 652, 660, 209 P. 1102, 1105 (1922), *aff’d in relevant part*, 121 Wn. 652, 214 P. 146 (1923). Nor is exposure to asbestos certain to cause illness. *See Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004). Knowledge of a risk is not the same as a deliberate intent to injure. *See Vallandingham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 28, 109 P.3d 805 (2005).

**B. Asymptomatic Subcellular Changes
Are Not Compensable Injuries**

In addition to basing assertion of the deliberate intent exception on a risk of injury, Petitioners rely on an unsustainable definition of what constitutes a compensable injury. Since exposure to asbestos was not certain to lead Petitioner to develop mesothelioma, Petitioner creatively alleges that Respondent Boeing's "toxic insult" was certain to begin an "invisible injurious process" of "undetectable" subcellular changes. But a process of subcellular change, even if verifiable, is not a physical injury.³

Under Petitioners' novel definition of injury, an employer's knowledge that workers are exposed to substances that are "certain" to have some effect within the body is sufficient to constitute a deliberate intent to harm the employee. There are thousands of chemicals or substances, such as dusts, mixtures, paints, fuels, and solvents that, if inhaled, ingested, or absorbed, can find their way into the bloodstream,

³ See, e.g., *In re Massachusetts Asbestos Cases*, 639 F. Supp. 1, 2 (D. Mass. 1985) ("[T]he first appearance of symptoms attributable to [asbestos] constitutes the injury."); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (no cause of action for claimants without functional impairment); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 30 (Ariz. App. 1987) (subclinical asbestos-related condition was insufficient to support a cause of action); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 542 (Me. 1986) (explaining that inhalation of asbestos dust does not constitute physical harm giving rise to a claim under state defective products statute); *Owens-Illinois v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. Spec. App. 1991) (workers with pleural plaques or pleural thickening without health significance did not have legally compensable claims), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md. 1992); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (asymptomatic pleural thickening is not actionable).

lungs, or other organs and are capable of causing harm. *See Occupational Safety & Health Admin., OSHA Occupational Chemical Database.* Exposure, however, does not necessarily cause a compensable injury. Some level of exposure may be unavoidable, even if an employee uses protective equipment, and is accepted within permissible levels under federal law as part of many jobs. *See 29 C.F.R. pt. 1910 subpart Z* (establishing permissible exposure levels (PELs) for various substances).

This Court should reaffirm that a manifest physical injury, not mere exposure to a substance that causes an asymptomatic subcellular change, is the trigger for a workers' compensation claim, and, by extension, a tort claim under the deliberate intent exception.

C. Asbestos-related Injuries Fall Within the IIA and Do Not Constitute Intentional Torts

Based on these principles, courts around the country have rejected attempts by employees to pursue asbestos and other toxic tort claims against employers outside of the workers' compensation system.

"A clear majority of states," consistent with Washington law, require a plaintiff to show that an employer intended to harm an employee to meet the intentional tort exception to workers' compensation exclusivity. Matthew K. Brown, Note, *How Exclusive is the Workers' Compensation Exclusive Remedy? 2010 Amendments to Oklahoma's*

Workers' Compensation Statute Shoot Down Parret, 65 Okla. L. Rev. 75, 80 (2012) (surveying intentional tort exceptions and case law).⁴ Under this approach, courts recognize that claims alleging that an employer knew that exposure to a hazardous condition in the workplace *might* cause an injury, but nevertheless required such work, do not satisfy this standard. See Larson & Larson, § 103.03 (providing national perspective on necessity of actual intent to injure in order to transform a workplace injury into a tort claim). These rulings maintain the integrity of the workers' compensation system.

In reviewing the decisions of other jurisdictions, the Supreme Court of Nebraska recently summarized the high bar that plaintiffs must hurdle to demonstrate that an exception to the exclusivity of workers' compensation for intentional conduct should apply:

It is the "almost unanimous rule" that any intentional conduct exception to workers' compensation exclusivity rule cannot be "stretched to include accidental injuries caused by gross, wanton, wil[l]ful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury." In other words, even in jurisdictions recognizing some intentional injury exception to the

⁴ Washington's neighboring states apply an intentional tort exception that similar to, if not more exacting, than Washington. 65 Okla. L. Rev. at 113-31. Broadening Washington's intentional tort exception and increasing the tort liability of Washington employers for unintentional workplace injuries could lead businesses to consider relocating to other states.

workers' compensation exclusivity rule, knowingly permitting a hazardous work condition, knowingly ordering employees to perform an extremely dangerous job, willfully failing to furnish a safe place to work, willfully violating a safety statute, or withholding information about worksite hazards, still falls short of the kind of actual intention to injure that robs the injury of accidental character. Even in jurisdictions adopting an intentional tort exception, anything short of genuine and specific intent to injure by the employer or the alter ego of the employer will fall within the exclusivity of the workers' compensation act.

Teague v. Crossroads Co-op. Ass'n, 834 N.W.2d 236, 244 (Neb. 2013)

(alterations in original) (quoting Larson & Larson, §§ 103.03, 103.06).

The Nebraska court noted that in the dozen jurisdictions providing a broader definition of "intentional," litigation over whether the injury was "substantially certain" to occur "interjects complexities, costs, delays, and uncertainties into the compensation process." *Id.* at 245. These attributes are contrary to the purpose of workers' compensation laws, which legislatures adopted to "bring about a speedy settlement of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities." *Id.* See also *Abbott v. Gould, Inc.*, 443 N.W.2d 591 (Neb. 1989) (claims by smelting plant workers subjected to inhalation of harmful airborne particles and fumes fell within the exclusivity provision of the workers' compensation act).

Courts have long followed similar reasoning in the context of asbestos litigation. For example, in *Joyce v. AC & S., Inc.*, 785 F.2d 1200, 1206 (4th Cir. 1986), the Fourth Circuit, interpreting Virginia's Workers' Compensation Act, found that the plaintiff's allegation that his employer "knowingly exposed him to asbestos, but not that this exposure was designed to cause asbestos-related diseases . . . fails to allege the sort of intentional conduct by [an employer] that would remove his claim from the ambit of the Act." *Id.* at 1207.⁵

Although an employer may have general knowledge of the dangers of asbestos, courts recognize that failure to provide adequate protective equipment is not a deliberate act intended to injure an employee. Consider, for example, *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448 (6th Cir. 2002), which involved facts well beyond those alleged in this case. After a contractor refused to rip up carpet from asbestos tile because of the risk of asbestos exposure, a school district

⁵ A New Jersey Supreme Court decision allowed an asbestos tort claim against an employer to proceed, but in different factual circumstances. In *Millison v. E.I. du Pont de Nemours & Co.*, 501 A.2d 505 (N.J. 1985), the court found that the exclusivity provision barred a claim alleging that an employer intentionally exposed an employee to asbestos, but allowed a claim for aggravation of existing diseases where company physicians actively misled employees regarding results of physical examinations. As the *Millison* Court recognized, "[t]here is a difference between, on the one hand, tolerating in the workplace conditions that will result in a certain number of injuries or illnesses, and, on the other, actively misleading the employees who have already fallen victim to those risks of the workplace." *Id.* at 516.

used its custodians to do the work with virtually no safety precautions. The custodians “chiseled, chipped, pounded, pulverized, hammered, and jack hammered the tiles,” exposing them to asbestos. *Id.* at 450. They sued the school district, claiming development of respiratory irritations and other physical and psychological problems. *See id.* at 451. The court found that the custodians’ claims fell within the workers’ compensation act. *Id.* at 454-56. While some of the defendants knew the general dangers associated with asbestos exposure, did not provide adequate training to employees, and did not furnish adequate protective devices, the court found that the plaintiffs failed to show the defendants had actual knowledge that injury was certain to occur and willfully disregarded that knowledge. *See id.* at 455-56.

Similarly, in *Coltraine v. Fluor Daniel Facility Servs. Co.*, 1994 WL 279964 (Tenn. App. June 22, 1994), construction workers sued their employer after they were required to work in close proximity to other workers who were removing asbestos from a building. The plaintiffs alleged that their employer “possessed the knowledge” that the asbestos was “toxic and hazardous and extremely dangerous to persons who were exposed to it and not protected.” *Id.* at *1. A Tennessee appellate court distinguished the plaintiffs’ allegation that the defendant subjected them to an “intentional and knowing *exposure*” from an “intentional harmful

result.” Id. at *4 (emphasis added). *See also Rodgers v. GCA Servs. Gr., Inc.*, 2013 WL 543828 (Tenn. App. Feb 13, 2013) (holding that school janitor’s allegation that her employer required her to clean toxic mold off walls, despite complaints, was not sufficient to subject employer to intentional tort liability).

A Louisiana appellate court has also recognized that an allegation of an intentional act “cannot substitute for the reality of the asbestos claim” and that “no one will seriously entertain a belief” that a company’s management desired for an employee to contract a disease or that development of an illness “was reasonably certain to follow their acts (or omissions).” *Gauthé v. Asbestos Corp. Ltd.*, 708 So. 2d 761, 762-63 (La. App. 1998) (claim did not meet the “very narrow exceptions for intentional torts” provided by the Louisiana Workers’ Compensation Act or Longshoreman and Harbor Workers’ Compensation Act).

Many other courts have similarly rejected attempts by plaintiffs to artfully plead around workers’ compensation exclusivity provisions by alleging that an employer “intentionally exposed” an employee to known health risks by assigning responsibilities that led to exposure, “deliberately” failed to protect workers, or withheld information about

workplace dangers, both with respect to asbestos⁶ and other toxic substances.⁷

Finally, the Larson treatise notes that in those states that require an intentional act to bypass the exclusive remedy provision, the rule is that:

Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully [sic] failing to furnish a safe place to work, willfully violating a safety statute, failing to protect employees from crime, negligent hiring, refusing to respond to an employee's medical needs and restrictions, allowing excessive levels of employee horseplay or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.....

[W]hat is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of the intentional versus the accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an

⁶ See, e.g., *Angle v. Alexander*, 945 S.W.2d 933, 935-36 (Ark. 1997); *Kaess v. Armstrong Cork Co.*, 403 N.W.2d 643, 644-45 (Minn. 1987); *Lee v. E.I. DuPont de Nemours & Co.*, 2008 WL 152894, at *6 (Ky. Ct. App. 2008).

⁷ See, e.g., *Rolon v. Ortho Biologics LLC*, 404 F. Supp.2d 409, 415-16 (D. Puerto Rico 2005) (sodium metabisulfite); *Frye v. Airco, Inc.*, 269 F. Supp.2d 743, 747-48 (S.D. Miss. 2003) (vinyl chloride and polyvinyl chloride dust); *Blanton v. Cooper Indus., Inc.* 99 F. Supp.2d 797, 805 (E.D. Ky. 2000) (chemicals); *Cerka v. Salt Lake County*, 988 F. Supp. 1420, 1422 (D. Utah 1997), *aff'd mem.*, 172 F.3d 878 (10th Cir. 1999) (contaminated air); *White v. Apollo-Lakewood, Inc.*, 720 S.W.2d 702, 702-03 (Ark. 1986) (toxic fumes); *Miller v. Ensco, Inc.*, 692 S.W.2d 615, 617-18 (Ark. 1985) (PCBs); *McCoy v. Liberty Foundry Co.*, 635 S.W.2d 60, 62-63 (Mo. Ct. App. 1982) (silica); *Conway v. Circus Circus Casino, Inc.*, 8 P.3d 837, 840 (Nev. 2000) (noxious fumes); *Fryer v. Kranz*, 616 N.W.2d 102, 108 (S.D. 2000) (hydrochloric acid fumes).

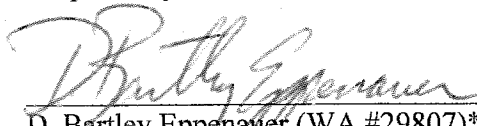
injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.

Larson & Larson, § 103.03 (footnotes omitted).

CONCLUSION

For these reasons, the Court should affirm the Court of Appeals.

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