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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

JOHN M. KALAHAR and PEGGY L. KALAHAR, husband and wife,

Appellants,

v.

ALCOA, INC.,

Respondent.

REPLY OF APPELLANTS

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I. INTRODUCTION

Alcoa's argument that mesothelioma can never constitute an "injury" under RCW 51.24.020 contravenes the Legislature's expressly-contemplated inclusion of occupational disease in the statute and gives employers unconstrained latitude to intentionally inflict disease-causing injuries upon their employees. The Supreme Court's holdings in *Birklid v. Boeing Co.*, 127 Wn. 2d 853, 904 P. 2d 278 (1995) and *Walston v. Boeing Co.*, 181 Wn. 2d 391, 334 P.3d 519 (2014) do not countenance such an irrational result. Neither the Legislature nor the Supreme Court intended to foreclose diseased workers from bringing intentional injury claims—no matter how flagrant and outrageous an employer's conduct.

The factual circumstances under which John Kalahar sustained his injurious asbestos exposure at Alcoa are analogous to the facts in *Birklid.* The Washington Supreme Court has had multiple opportunities to reconsider, and refine or overturn *Birklid*—most recently in *Walston*—but has declined to do so. The Kalahars have created a dispute of material fact based on Alcoa's willful concealment and misrepresentation of asbestos hazards from John Kalahar and similarly situated workers who all sustained contemporaneous physical symptoms of asbestos exposure. This evidence distinguishes the present case from *Walston,* and places it squarely within the decisive authority of *Birklid.* The Court should therefore reverse the

Superior Court's grant of summary judgment to Alcoa and remand this case for trial.

II. RESTATEMENT OF THE CASE

A. Alcoa Ignores Conflicting Evidence Regarding Actual Knowledge and Willful Disregard of Asbestos Injuries Among Plant Workers.

Alcoa argues it "did not take lightly its responsibilities to monitor workplace toxins and other safety hazards" and devotes several pages of its brief to describing its alleged "attempts to reduce the risk of asbestos exposure to its employees" during Mr. Kalahar's employment at the Wenatchee plant. *See* Respondent's Brief at 5-8. However, contrary evidence in the record establishes, at a minimum, factual disputes regarding whether Alcoa willfully concealed its extensive knowledge of asbestos disease and injury resulting from daily exposures sustained by John Kalahar and similarly situated workers.

Alcoa misleadingly draws only the most favorable inferences from the Wenatchee Works industrial hygiene "surveys" prepared by Alcoa personnel in the late 1960s. While the surveys confirm Alcoa's knowledge that engineering controls and personal protection were necessary to protect workers from injurious asbestos exposures, they do not establish that any such measures were actually implemented at the Wenatchee plant. Indeed, the testimony of John Kalahar, John Cox and John Melton directly contradict the inferences that Alcoa asks this Court to draw from the surveys, and strongly

suggests that the recommended industrial hygiene practices were never implemented at the Wenatchee plant.[1]

Alcoa's factual assertion that it "took seriously" the protection of its employees from injurious asbestos exposures is further contradicted by testimony from John Kalahar and his co-workers that Alcoa affirmatively misrepresented asbestos hazards to its employees. Mr. Kalahar himself described how he and his coworkers complained to Alcoa management regarding the injurious nature of asbestos, but "were told that it was safe...It was a company line ..." CP 636-37. John Cox likewise related that he asked Alcoa supervisory personnel in the 1960s whether there was any toxic risk posed by working with asbestos, but "was informed that Alcoa had done a study and it had been proven it would not harm you." CP 604. Consistently, John Melton, testified that when air sampling was being conducted at the plant in the 1970s, Alcoa refused to disclose the purpose of the sampling to workers. CP 805. Finally, Alcoa reprimanded a worker for posting an article regarding

[1] For example, a survey report dated March 1967 states that a "new marinite sanding table exhaust system" for the "Shop Building" is in *design*, CP 765, 767, but the next month it is reported that Marinite sawing is a problem in the carpenter shop area due to the increased thickness of Marinite slabs and the fact that the present exhaust inlets are "unsatisfactory." CP 776. Likewise, a 1969 survey report states, "The use of dust masks while handling asbestos *should be re-emphasized* by the foreman *and made a standard practice*." CP 786 (emphasis added). However, the testimonial evidence in the record demonstrates that no respiratory protection was ever provided to workers exposed to asbestos at any point during Mr. Kalahar's tenure at Alcoa Wenatchee. Similarly, the record is devoid of any evidence that any attempt was made to control Marinite dust in the machine shop until the late 1960s.

the hazards of asbestos, which would have alerted employees to the dangers of asbestos, including its carcogenicity. CP 835-36.

Alcoa's statement of the case is not only inconsistent with the testimony in the record, but also highlights the factual disputes between the parties regarding Alcoa's willful disregard and concealment of its extensive knowledge of asbestos hazards and the injurious exposures being sustained by its workers. Alcoa's sanitized version of its industrial hygiene practices at Wenatchee may ultimately be credited by a jury; however, to the extent Alcoa's practices are relevant to the legal issues before this Court, factual disputes regarding Alcoa's knowledge and conduct regarding injurious asbestos exposures by its employees preclude summary judgment in this case.

B. John Kalahar's Subjective Understanding of Alcoa's Conduct is Irrelevant to the Court's Inquiry Under RCW 51.24.020.

Alcoa relies on John Kalahar's testimony regarding his personal beliefs about Alcoa's conduct for legal conclusions regarding the "negligence" of Alcoa with respect to the asbestos exposures he sustained and the certainty of his development of mesothelioma. *See* Alcoa's Response at 8-9. As Alcoa knows, John Kalahar is neither a lawyer nor a physician. That Mr. Kalahar, a lay witness, characterized his employer's conduct as negligent and creating a "risk" of injury—rather than a certainty under *Birklid*—is therefore inapposite.

The absurdity of Alcoa's reliance on John Kalahar's statements in response to directed questioning is borne out by consideration of the converse

situation. If counsel had elicited testimony from Mr. Kalahar that he believed Alcoa deliberately intended to cause him injury or willfully disregarded actual knowledge that his mesothelioma was certain to occur, Alcoa would never argue that the intentional injury issue should be resolved in Plaintiffs' favor. Mr. Kalahar did not offer legal opinions in this case and Alcoa's exploitation of his testimony to that effect is unfair, inaccurate, and should be disregarded by this Court. ER 701; 702.

III. ARGUMENT

A. *Walston* Did Not Modify *Birklid* or Strike the Plain Language of RCW 51.24.020.

In the 20 years since *Birklid* was decided, the Supreme Court has had three opportunities to overturn or modify its holding: *Walston v. Boeing Co.*, 181 Wn. 2d 391, 334 P.3d 519 (2014); *Vallandingham v.. Clover Park Sch. Dist. No. 400* , 154 Wn. 2d 16, 109 P.3d 805 (2005); *and Folsom v. Burger King*, 135 Wn. 2d 658, 661, 958 P.2d 301 (1998). However, in none of these opinions did the Supreme Court express *any* criticism of *Birklid*'s holding or suggest that a different result should have been reached in that case. Instead, the Court distinguished each case factually from *Birklid* without any modification of *Birklid*'s holding.

In its earliest opportunity to revisit *Birklid*, the Supreme Court in *Folsom* applied the *Birklid* framework to find that an employer had no actual knowledge that injury was certain to occur when a former employee murdered

two other employees in the course of a robbery at the Burger King franchise where they worked. 135 Wn. 2d at 661, 667. The Court reasoned that, although the employer may have known of the assailant's "criminal history, of his sexual harassment of female co-workers, that the back door entrance did not have a security peephole and did not lock properly, that keeping cash in the restaurant may invite theft, and that there was no active security system," such negligent acts did not rise to the level of certainty discussed in *Birklid*. *Id.* at 667.

The Court's next opportunity to modify *Birklid* arose in *Vallandingham*, wherein two teachers brought suit against their school district for physical injuries inflicted by a severely disabled special education student. 154 Wn. 2d 16. In that case, the Court recognized that the injury-causing incidents were infrequent and irregular. *Id.* at 19. The trial court granted summary judgment for the defendant and the Supreme Court agreed, holding that due to the unpredictable nature of special education students, at no point could the school district have known for certain that injury to staff would continue. *Id.* at 36. In reaching its decision, the Court reasoned that the impact of the chemicals in *Birklid* was predictable, whereas injuries from the student were not predictable. *Id.*

Finally, in *Walston v. Boeing Co.,* the Court distinguished *Birklid* on its facts:

> In *Birklid*, we considered for the first time a situation in which an employer knew in advance that its workers would become ill from the use of a new resin, yet still decided to put the resin into production. The employer then observed its workers becoming ill from the exposure. We held that deliberate intention includes when the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge...

181 Wn. 2d at 396 (internal citations and quotations omitted). The Court held that Walston failed to raise "an issue of material fact as to whether Boeing had actual knowledge that injury was certain to occur." *Id.* One of the key distinguishing factors underlying the *Walston* Court's 5-4 holding was the absence of any evidence of immediate physical symptoms experienced by Mr. Walston and his co-workers at the time of exposure. *Id.* at 398. However, had the facts in *Walston* been more similar to those presented in *Birklid*, the Supreme Court would have held that the intentional injury exception applied.

B. Alcoa's Construction of RCW 51.24.020 Excludes Occupational Disease, Contravening the Plain Language of the Statute.

Alcoa acknowledges that "there is nothing in the WIIA indicating that the Legislature intended to treat a disease...differently from any other injury for purposes of the deliberate injury exception simply because of its potential latency." Alcoa's Response at 28. Nevertheless, Alcoa argues that "no[t] every occupational disease is encompassed within the statutory definition of 'injury' for purposes of the WIIA's deliberate injury exception." *Id.* Yet Alcoa fails to offer an explanation of how, practically, the intentional injury exception can *ever* be satisfied in the occupational disease context.

There is no dispute that, under the plain statutory language of RCW Chapter 51.24, occupational disease falls within the intentional injury exception to the Industrial Insurance Act. "Injury" is overtly defined for purposes of the intentional injury exception to include occupational disease. RCW 51.24.030(3) ("'injury' shall include any physical or mental condition, *disease*, ailment or loss, including death, for which compensation and benefits are paid or payable") (emphasis added). Yet, Alcoa's position alters the legislative choice to include occupational disease in the intentional injury exception espoused by the legislature, effectively rewriting RCW 51.24.030(3) to omit "disease" entirely. The inescapable extension of Alcoa's position is that, because occupational disease processes are never certain and often latent, disease will always be excluded from the purview of RCW 51.24.020 and will effectively be removed from the intentional injury exception.

Alcoa's argument that mesothelioma can never be subject to an intentional injury claim relies on language from *Walston* that "asbestos exposure is not certain to cause mesothelioma or any other disease" because it merely creates "a risk of disease." 181 Wn.2d at 397. However, nowhere in *Walston* does the Supreme Court indicate any intention to alter the scope of RCW 51.24.020 to exclude occupational diseases. "Courts do not, however, favor repeals of settled principles by implication." *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn. 2d 22, 26, 380 P.2d 730, 732 (1963). Nevertheless,

Alcoa contends that *Walston* impliedly removed the term "disease" from RCW 51.24.030(3) without any explanation of how the Legislature could have defined deliberate injury to encompass occupational disease, yet contemplated a framework that ensures no occupational disease claim will ever rise to the level of an intentional injury.

Familiar canons of statutory construction foreclose Alcoa's interpretation of RCW 51.24.020, which takes language out of the statutory exception that the Legislature crafted. This Court must give meaning to all words selected by the Legislature, avoiding interpretations that render language superfluous or lead to absurd outcomes. *See Lowy v. Peace Health*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012); *State Dep't of Transp. v. James River Ins. Co.*, 176 Wn. 2d 390, 397-98, 292 P.3d 118 (2013); *American Cont'l Ins. Co. v. Steen*, 151 Wn. 2d 512, 521, 91 P.3d 864 (2004). Moreover, courts "will not assume that the Legislature would effect a significant change in legislative policy by mere implication." *In re Marriage of Little,* 96 Wn. 2d 183, 634 P.2d 498 (1981). *See also State v. Calderon*, 102 Wn. 2d 348, 351, 684 P.2d 1293 (1984), *holding modified by State v. Oppelt*, 172 Wn. 2d 285, 257 P.3d 653 (2011). The statutory construction under Washington case law that Alcoa urges this Court to adopt defies each of these canons. If it is true that *Walston* stands for the proposition that occupational disease resulting from toxic exposure must be certain in the sense of 100% of exposed employees

contracting a particular disease after their exposure, then RCW 51.24.030(3)'s inclusion of the word "disease" is superfluous.

C. Alcoa's Argument that Mesothelioma Can Never Be Subject to an Intentional Injury Claim is Belied by the Plain Meaning of RCW 51.24.020, *Birklid*, and Simple Logic.

To affirm the trial court's summary judgment ruling, this Court would need to hold, as a matter of law, that a mesothelioma victim could *never* bring an intentional injury claim no matter what level of knowledge his employer possessed. Under the trial court's analysis, RCW 51.24.020 can never apply because mesothelioma does not manifest until decades after the worker's injurious asbestos exposure and most exposed workers do not develop malignancy. This interpretation is belied by the reasoning of *Birklid*, the legislative purpose of RCW 51.24.020, and basic fairness.

1. **Birklid** *Does Not Require 100% Certainty that Every Exposed Worker Will Develop Disease.*

Alcoa's interpretation of the deliberate injury exception makes it impossible for an employee to ever prove that his employer deliberately intended "*to produce such disease*," as RCW 51.24.020 and RCW 51.24.030(3) expressly contemplate. Because the standard is whether Alcoa intended "*to produce* such injury," RCW 51.24.020, and the only way "to produce" mesothelioma is to cause an individual to suffer the certain injurious process of forced and repeated inhalation of asbestos fibers, the Kalahars have

developed evidence creating an issue of fact under RCW 51.24.020 and case law construing the intentional injury exception.

The logical consequences and legal ramifications of Alcoa's statutory construction are staggering and lead to absurd results. If Alcoa's interpretation of RCW 51.24.020 is allowed to stand, Hanford workers required to clean up plutonium without monitoring or protection could never sue their employers because it is not "certain" that any particular employee will develop leukemia. An employer could shoot an employee in a game of Russian Roulette and avoid (civil) liability because the chances were only one in six that the pistol would fire. More analogously, an employer could force employees to work day in and day out in a facility where the atmosphere was saturated with benzene, but because it is never "certain" that any particular individual will develop disease, an intentional injury claim would not lie. Finally, an employer could mail employee newsletters in envelopes filled with anthrax, but because not every employee who opens a letter will inhale or ingest injurious quantities precipitating meningitis, organ failure, or other infection, the employer would be free from civil liability.

While Alcoa may seek to dismiss these examples as hyperbolic, they are the natural and inescapable result of the statutory construction that Alcoa proposes. Moreover, Alcoa fails to explain how employer misconduct can result in criminal prosecution, yet avoid civil liability. An employer who hires

itinerant day laborers to strip asbestos from pipes and boilers without respiratory protection is subject to criminal prosecution under the Clean Air Act. *See, e.g., United States v. Starnes*, 583 F.3d 196 (3rd Cir. 2009) (affirming 33 month prison sentences for employers who failed to provide their workers with any personal protection devices during asbestos abatement project and instructed workers to engage in asbestos work-practices that created visible asbestos dust); *United States v. Rubenstein*, 403 F.3d 93 (2nd Cir. 2005) (upholding 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); *United States v. Hunter*, 193 F.R.D. 62 (N.D.N.Y. 2000) (defendant employed and supervised workers while they removed asbestos pipe insulation from a building, never told them their work involved asbestos, and never provided them with respirators or other protection). Nevertheless, under Alcoa's interpretation, conduct that would send an employer to federal prison should be shielded from civil liability.

2. **Birklid** *Does Not Preclude Claims for Latent Diseases Irrespective of the Knowledge Possessed by the Employer.*

Birklid properly places the focus of the intentional injury exception on the employer's knowledge and conduct, not the particulars of the disease or the immediacy of its progression. Where, as here, the trial court found that Alcoa knew that asbestos-exposed workers would develop disease, the manner

in which the disease manifests is not dispositive. Unlike benzene, methane, chlorine and other industrial toxins, asbestos fibers are odorless and invisible, having no "onion properties." Asbestos-exposed workers have no way of knowing they are sustaining injurious exposures in order to take corrective action to protect themselves. Moreover, by the time the disease progression becomes apparent, it is too late to halt the disease progression by removing the exposure source.

In the cases of latent diseases such as mesothelioma, the worker is entirely dependent on the employer's superior knowledge to prevent the injurious exposures that cause disease. To absolve the employer of civil liability simply because the disease manifests after employment removes the most serious injuries from civil enforcement and creates a perverse incentive for employers to intentionally subject employees to workplace toxins that cause fatal yet latent diseases, instead only protecting workers from chemical exposures that cause immediate but short-term physical effects.

In this case, the Kalahars furnished evidence that Alcoa had specific knowledge that asbestos caused disease in exposed workers, including mesothelioma. CP 452-53, 466-67, 483, 489-94. Alcoa also understood the concept of latency, and knew that asbestos-exposed workers would not manifest disease until decades after their exposure. CP 452. If Alcoa lacked contemporaneous knowledge of the latency of asbestos disease, the delayed

manifestation of the disease might be dispositive in determining whether an intentional injury claim lies. *See, e.g., Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807, 811 (2004) (intentional injury exception inapplicable where employer had only vague knowledge that asbestos was dangerous and no knowledge of disease latency). However, given the high level of knowledge Alcoa possessed regarding asbestos disease in general and latency in particular, the fact that John Kalahar's mesothelioma manifested decades after his injurious exposures cannot independently absolve Alcoa of civil liability under RCW 51.24.020.

D. *Birklid* Does Not Require Employer Knowledge that a Particular Employee Will Sustain Injury, Only that Similarly Situated Employees Will be Harmed.

Alcoa relies on *Walston* to support its argument that RCW 51.24.020 requires Plaintiffs to show that Alcoa had knowledge that John Kalahar would develop disease before liability can be imposed. The Court in *Walston* stated that "to the extent that Walston argues that the deliberate intention standard is satisfied as long as the employer knows that *someone*, not necessarily the plaintiff, is certain to be injured, this court already rejected that argument in *Birklid*." 181 Wn. 2d at 397. Given the facts of *Birklid* and the absurd extensions of Alcoa's statutory interpretation, *Walston* cannot be read to require an employer's specific knowledge of certain injury in one specific individual before the intentional injury

exception may be satisfied. Rather, *Walston* must be read to permit a plaintiff to satisfy the intentional injury exception by showing that an employer had actual knowledge of certain injury resulting in a particular cohort of workers, as opposed to the workforce at large.

Contrary to Alcoa's argument, there is no suggestion in *Birklid* that the same employees who complained about the effects of the resin fumes were precisely the same plaintiffs who brought suit, or that Boeing knew particular workers would be injured. *See* 127 Wn. 2d at 856-59. On the other hand, Boeing knew that employees who worked around phenol-formaldehyde resin would develop symptoms, not just that the resin might cause injury. *Id.* at 856-57. Analogously, in the present case, Alcoa knew that workers exposed to Marinite would develop symptoms, but not all would manifest asbestos-related disease after the latency period. Thus, *Birklid* simply requires proof of actual knowledge that a particular cohort of workers will sustain certain injury because intentional injury cannot be imposed on a "should have known" or constructive knowledge basis. Instead, an employer must know that identifiable workers would be harmed. The Kalahars have made that showing here.

The suggestion that, under Washington case law interpreting the intentional injury exception, the Kalahars must show Alcoa knew Mr. Kalahar in particular would sustain injury is belied by the Court's holding in *Birklid*,

and was rejected long before *Birklid* expanded the deliberate injury standard. The case of *Weis v. Allen*, 147 Or. 670, 35 P.2d 478 (1934) forecloses the outlandish possibility that an employer could enjoy the protection of immunity when he or she utilizes a spring gun or other mechanism of creating a known or "certain" yet random risk of harm. The employer in *Weis* had placed a spring gun on a jobsite precipitating the accidental injury of an employee, although it could scarcely be disputed that no *particular* employee's injury or death could have been foreseen because a spring gun is arbitrary in its selection of a victim. In *Weis*, the employer argued, like Alcoa does here, that the deliberate injury exception could not apply because it was not certain that any particular employee would be injured by the spring gun. *Id.* at 482. That contention was rejected, as the Court stated: "It was not necessary here to prove that the defendant had singled the plaintiff out and set the gun with the express purpose of injuring him and no one else," because "[t]he act which the defendant did was unlawful and was deliberately committed by him with the intention of inflicting injury." *Id.* at 482-84. While *Weis* was decided by the Oregon Supreme Court, the Washington Supreme Court has expressly recognized the Oregon Court's holding as consistent with (pre-*Birklid*) Washington law. *See Biggs v. Donovan-Corkery Logging Co.*, 185 Wn. 284, 287, 54 P.2d 235 (1936); *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 582, 547 P.2d 856 (1976). Furthermore, it bears emphasis that *Birklid* liberalized the intentional

injury threshold under which *Weis* had previously been adopted, expressly foreclosing Alcoa's current position.

Once again, the logical consensus and legal ramifications of Alcoa's interpretation of *Walston* is legally untenable and facially absurd. Under Alcoa's interpretation, an employer could shoot a gun into a crowd of workers and escape liability because it was never certain which employee would receive the bullet. Likewise, an employer could knowingly serve E. coli contaminated meat to workers, but escape liability on the grounds that only some unidentified employees who lacked the intestinal antibodies capable of defeating the bacteria would be become sick.

Finally, Alcoa's argument that the Kalahars must show workers experienced—and Alcoa knew of—symptoms of the specific disease that ultimately manifests, is also foreclosed by *Birklid.* In *Birklid,* the intentional injury exception was satisfied notwithstanding the fact that the nature and severity of symptoms varied among Boeing employees and not all exposed workers developed symptoms of any kind. *Id.* at 863. Thus, Alcoa's specific symptom, specific injury, specific individual argument is without merit.

E. *Walston* Expressly Recognized that Contemporaneous Symptoms of Ultimate Injuries Constitute Evidence of Intentional Injury.

Alcoa's knowledge of actual symptoms of asbestos exposure coupled with its affirmative misrepresentations to workers regarding asbestos hazards distinguish this case from *Walston.* Alcoa ignores the factual distinctions

between *Birklid* and *Walston*, which are germane to the body of evidence put forth by the Kalahars. Specifically, Alcoa downplays extensive documentary and testimonial evidence—in particular, regarding workers' experiences of physical effects of Marinite exposure—in suggesting that the record is devoid of evidence of symptoms or effects related to asbestos exposures. *See* Alcoa's Response at 12-13. Indeed, Mr. Kalahar himself described his own experience of symptoms associated with breathing asbestos dust while cutting amosite cloth and working in clouds of Marinite dust in the sheet metal shop as well as the machine shop, which included symptoms of respiratory distress. CP 633-34, CP 1130. Symptoms resulting from cutting amosite asbestos cloth and Marinite—a product Alcoa was advised by the product's manufacturer to treat "as if it were asbestos fiber alone"—constitute contemporaneous physical effects of the inhalation of injurious quantities of asbestos fiber experienced by Alcoa employees. CP 462, 519. In addition, Plaintiffs offered evidence of symptoms experienced by Alcoa workers beside John Kalahar, including both Wenatchee plant employees and other Alcoa workers who similarly suffered physical effects from working in asbestos dust. John Cox described inhalation of dust during the machining or cutting of Marinite in the machine shop, which caused workers to develop sore throats. CP 603.

More explicitly, employees at other Alcoa facilities reported to Alcoa management symptoms of asbestos exposure directly associated with the use

of Marinite, again, a product that Alcoa knew to treat as solely asbestos. Most overtly, in 1964, Alcoa's Research Laboratories recounted in an internal memorandum symptoms experienced by workers resulting from the use of Marinite which included "clogging of the sinus and difficulty in breathing" as well as skin irritation manifesting almost immediately upon commencing work with Marinite. CP 651. Alcoa's corporate industrial hygienist Thomas Bonney reiterated the same array of symptoms of respiratory distress among Alcoa workers fabricating Marinite, confirming that Alcoa received actual notice of such symptoms. CP 654; CP 657.

The *Walston* Court made clear its approval of the Court of Appeals' explanation that "immediate and visible injury is one way to raise an issue of material fact as to whether an employer had constructive knowledge that injury was certain to occur." 334 P.2d at 522. Unlike the plaintiff in *Walston* who was unable to present evidence of immediate, visible symptoms of injury, the Kalahars have heeded the *Walston* Court's invitation to present such evidence, thereby distinguishing the present case from *Walston*. The Kalahars have presented evidence that Alcoa employees complained of immediate, visible, physical effects of asbestos exposure, providing Alcoa notice that its workers were being injured by the asbestos dust in which they were repeatedly forced to work.

Alcoa argues that the Kalahars have not marshaled evidence of symptoms of asbestos exposure specifically, as opposed to dust inhalation and other noxious industrial environments encountered at Alcoa's facilities, including Wenatchee Works. This contention overlooks the testimonial and documentary evidence in the record showing Alcoa was informed, and in fact had actual knowledge, of workers experiencing respiratory symptoms associated with the use of asbestos Marinite board, a substance which Alcoa knew to present an exclusive asbestos dust-related hazard. Alcoa's local Wenatchee personnel also specifically knew of the injurious results of cutting Marinite without protection, as is evident in the 1964 "confidential" memorandum from Wenatchee Works industrial hygienist G.D. Bruno reciting that a study of the dust hazards associated with the cutting of Molten Metal Marinite was conducted, having been "precipitated by complaints" from carpenters that the cutting of Marinite produced "excessive dust." CP 567. Alcoa tellingly fails to address this evidence to reconcile the overt distinctions from *Walston*, which it insists is dispositive of the Kalahars' appeal.

F. Alcoa's Willful Disregard of Injury is Demonstrated by its Concealment and Misrepresentation of the Asbestos Hazard to Employees.

Plaintiffs presented evidence to the trial court that Alcoa willfully concealed the known hazards of asbestos used at its plants. Alcoa's emphasis on the steps it allegedly took to reduce certain risks, at best, confirms the

existence of factual disputes precluding summary judgment. In no event is judgment as a matter of law appropriate where the Kalahars have offered extensive evidence of Alcoa's insidious practice of misrepresenting and concealing the vast knowledge it held regarding the dangers of asbestos.

Alcoa's response largely ignores the evidence of Alcoa's affirmative conduct in lying to John Kalahar and other Alcoa workers, willfully concealing and misrepresenting the asbestos toxicity problem at its plants, including the Wenatchee facility. This evidence creates an issue of fact under *Birklid* as to Alcoa's willful disregard of actual knowledge of injury to employees. Consistent with the *Birklid* framework's application in this case, other jurisdictions perceive an employer's fraudulent misrepresentation of a known risk of harm to employees as rising to the level of an intentional injury. *E.g.*, *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 468, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); *Johnson v. W.R. Grace & Co.*, 642 F. Supp. 1102, 1103 (D. Mont. 1986); *Handley v. Unarco Indus., Inc.*, 124 Ill. App.3d 56, 72, 463 N.E. 2d 1011, 1023 (1984); *Martin v. Lancaster Battery Co., Inc.*, 530 Pa. 11, 606 A. 2d 444 (1992).

Despite the extensive knowledge possessed by Alcoa on asbestos disease, John Kalahar testified that he was never informed that asbestos was harmful or provided with respiratory protection at any point during his eight years of employment at Alcoa. *E.g.*, CP 636-37. The Wenatchee Works

"Industrial Hygiene Committee" that Alcoa touts as proof positive of its satisfactory industrial hygiene practices was an organization Mr. Kalahar had never heard of or seen during the years that he was employed by Alcoa. Moreover, contrary to Alcoa's factual contention that respiratory protection was used in the pot rooms, Mr. Kalahar testified that he had never observed *anyone* wearing respirators during potlining, furnace lining, sawing or sanding of Marinite in the machine shop, digging of troughs and crucibles, or mixing asbestos "feathers" in the brick masons' shop. CP 625-26, 628, 630, 635, 637. Mr. Kalahar never received warnings or respiratory protection when he personally cut amosite asbestos cloth and blew amosite dust off of his clothing with compressed air. CP 634. Dave Dorey, one of Mr. Kalahar's coworkers, similarly testified that he was never advised to wear respiratory protection, nor was he advised of the risks associated with asbestos insulation removal work. CP 642.

Alcoa's corporate witness also conceded the lack of information conveyed to Alcoa employees regarding the dangers of asbestos exposure, in stark contrast to Alcoa's vast institutional industrial hygiene and medical knowledge. *E.g.,* CP 432-40. Alcoa's CR 30(b)(6) witness acknowledged that there is no evidence that Mr. Kalahar was ever informed by Alcoa that he was being exposed to asbestos, was ever warned that exposure to excessive levels of asbestos was potentially hazardous, or was ever advised

to wear a respirator while working with asbestos or otherwise warned to avoid exposure to asbestos. CP 436. Nor is there any evidence that Alcoa attempted to educate Mr. Kalahar as to the asbestos toxicity problem or proper work techniques for controlling asbestos exposure. CP 437.

The body of evidence ignored by Alcoa in their responsive briefing is precisely the evidence that creates a dispute of material fact under *Birklid* when juxtaposed with Alcoa's portrayal of its knowledge and conduct with respect to the Wenatchee facility. Application of the *Birklid* test's "actual knowledge" and "willful disregard" criteria to the Kalahars' evidence turns on evaluation of Alcoa's subjective knowledge and intent, which are classic factual questions for trial, inappropriate for resolution on summary judgment. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661-62, 240 P.3d 162, 169 (2010); *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001); *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986).

V. CONCLUSION

RCW 51.24.020 creates an exception to workers' compensation exclusivity which extends to occupational disease, thereby precluding Alcoa's outlier position that employers may force their workers to sustain injurious toxic exposures that cause fatal disease, yet enjoy immunity because it is never "certain" that any disease will manifest. Because the

record, when taken in the light most favorable to the Kalahars, demonstrates an issue of material fact as to Alcoa's intentional injury of John Kalahar, summary judgment was erroneously granted. The Court should therefore reverse the Superior Court's grant of summary judgment and remand this case for trial.

DATED this 24th day of April, 2015.

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APPEAL NO. 72635-8

KING COUNTY SUPERIOR COURT NO. 14-2-08149-9

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

JOHN M. KALAHAR and PEGGY L. KALAHAR, husband and wife,

Appellants,

v.

ALCOA, INC., et al.

Respondent

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DECLARATION OF SERVICE

Shane A. Ishii-Huffer
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1 I, Shane A. Ishii-Huffer, declare and state as follows:

2 1. I am and at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.

3

2. On April 24, 2015, I caused to be served true and correct copies of:

4 a. Reply of Appellants; and

5 b. Declaration of Service, on the following;

6

7 **II. Via Electronic Mail and ABC Legal Messenger:**

8 **Alcoa, Inc.**

Mark B. Tuvim
9 Kevin J. Craig
GORDON & REES, LLP
10 701 Fifth Avenue, Suite 2100
Seattle, WA 98104

11

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

13

Dated at Seattle, Washington this 24th day of April, 2015.

14 BERGMAN DRAPER LADENBURG HART, PLLC

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16 Shane A. Ishii-Huffer

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