72635-8

No. 72635-8-I

In the Court of Appeals of the State of Washington Division I

JOHN M. KALAHAR AND PEGGY L. KALAHAR,

Appellants,

v.

ALCOA INC.,

Respondent.

Respondent's Brief

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I. Introduction

The Court should affirm the trial court's order granting summary judgment to Respondent Alcoa, Inc. The Washington Supreme Court decided the issue presented here less than a year ago in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014). *Walston* requires affirmance of the trial court's summary judgment.

Walston considered whether the *Birklid* test's first prong—actual knowledge that injury was certain to occur—is satisfied by an employer's knowledge that an employee's exposure to asbestos exposure can cause mesothelioma. The *Birklid* test determines whether the "deliberate" injury exception to the state workers' compensation's exclusive remedy provision applies. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). *Walston* held as a matter of law that because the plaintiffs' own experts conceded that "asbestos exposure is not certain to cause mesothelioma," the employer cannot have "*actual knowledge* that injury was *certain to occur*." 181 Wn.2d at 397 (emphasis in original).

The Kalahars' experts in this case made the same admissions that asbestos exposure is never certain to cause mesothelioma. The Supreme Court has already ruled in *Walston* that an employer's knowledge of an employee's exposure to asbestos does not satisfy the deliberate injury exception because "asbestos exposure is not certain to cause

mesothelioma." *Id.* Accordingly, the Kalahars' claims fail as a matter of law, and the Court should affirm the trial court's grant of summary judgment.

II. Statement of Issues

1. Did the trial court correctly grant summary judgment for Alcoa under the Washington Supreme Court's recent holding in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014) that asbestos exposure is never certain to cause mesothelioma?

2. Is Alcoa also entitled to judgment as a matter of law under the second prong of the *Birklid* test where it is undisputed that Alcoa took affirmative steps to protect employees from the risks associated with asbestos exposure?

III. Statement of the Case

A. The Kalahars allege Mr. Kalahar had bystander exposure to asbestos between 1963 and 1971.

Appellant John Kalahar worked various jobs at the Alcoa plant known as the "Wenatchee Works" in Wenatchee, Washington from March 1963 to September 1963 and from June 1964 to April 1971. CP 36-39, 120-121. While Mr. Kalahar generally alleges bystander exposure to asbestos from others at the plant working with asbestos-containing products, he admitted that he does not know the composition of any dust

there, the concentration or level of his alleged personal asbestos exposure there, or whether his alleged personal exposure ever exceeded any industry or governmental standards in effect at the time. CP 122, 124-129, 134, 137, 142-143, 156-165, 178-181, 187-188.

B. Before Mr. Kalahar's employment, Alcoa already had an industrial hygiene program concerned with reducing dust levels at the facility.

Well before Mr. Kalahar worked there, the Wenatchee Works had an Industrial Hygiene Committee that took steps to reduce the risk of asbestos exposure to its workers. These efforts included controlling dust levels throughout the plant, installing ventilation and other engineering solutions to reduce asbestos exposure, changing procedures and the locations of work, and monitoring compliance with available personal safety equipment, such as dust masks for employees working directly with asbestos-containing products. CP 41-45, 49-109, 167-171.

C. Alcoa adopted stricter asbestos exposure standards than industry and governmental standards between 1963 and 1971.

The Kalahars seek to impose contemporary industrial hygiene standards based on current medical and other scientific knowledge on conduct and alleged asbestos exposures that occurred more than four decades ago. Mr. Kalahar's alleged exposure to asbestos at Wenatchee Works occurred during a very different time than today (or even later in the 1970s and 1980s). In fact, all of Mr. Kalahar's work at Alcoa predated

the creation of the federal Occupational Safety and Health Administration (OSHA) and the first federal regulations on asbestos exposure. *See* 59 FR 40694 (Aug. 10, 1994) (providing history of OSHA regulation of asbestos). Mr. Kalahar left Alcoa on April 12, 1971. CP 36-39, 120. The first OSHA regulation was not even promulgated until six weeks later on May 29, 1971. 59 FR 40694 (Aug. 10, 1994). But starting in 1964, Alcoa voluntarily adopted stricter asbestos exposure standards than the then-existing industry and governmental standards.[1] CP 99-109.

D. Alcoa took affirmative safety steps to reduce the potential risk of asbestos exposure to its employees during Mr. Kalahar's employment at the Wenatchee plant.

Alcoa and the Wenatchee Works did not take lightly its responsibilities to monitor workplace toxins and other safety hazards. During Mr. Kalahar's tenure at Wenatchee, Alcoa regularly performed industrial hygiene surveys of the various areas of the plant to identify and correct safety issues. CP 41-45, 49-109. Documentation indicates

[1] Before OSHA was created in 1971 and promulgated its asbestos standards, the Association of Governmental Certified Industrial Hygienists (AGCIH) recommended an asbestos exposure limit of 5 million particles per cubic foot of air (5 mppcf) on an eight-hour time-weighted average (roughly 30 fibers/cc), and some states (including Washington State) adopted this standard. *See* CP 273-324. Neither the ACGIH, nor the State of Washington, had a short-term exposure limit as long as the time-weighted average was 5 mppcf. *See id.* However, in 1964, Alcoa voluntarily implemented a short-term limit of 20 mppcf. CP 99-109. Further, by 1969, Alcoa had voluntarily adopted an even stricter company-wide 8-hour time-weighted average of 2 mppcf, even though the standard set by the State of Washington was still 5 mppcf. CP 49. Mr. Kalahar admitted that he does not know his level of exposure to asbestos or whether that exposure was above or below any industry or governmental standards in effect at the time. CP 122, 124-129, 134, 137, 142-143, 156-165, 178-181, 187-188.

numerous attempts to improve safety conditions, including controlling dust levels throughout the plant, installing ventilation and other engineering solutions to address asbestos exposure, and monitoring compliance with available personal safety equipment, such as dust masks for potliners and other employees working with asbestos-containing products. *Id.*

During Mr. Kalahar's time at the Wenatchee Works, Alcoa made numerous attempts to reduce the risk of asbestos exposure to its employees, including but not limited to the following:

- In 1964, Alcoa installed special ventilation equipment in the Carpenter Shop for the saw used to cut Marinite board. This reduced the asbestos exposure to less than 1 mppcf on an elapsed time basis (and even less on an 8-hour time-weighted average) in the saw operator's breathing zone – well below the then-applicable standard of 5 mppcf. CP 99-104, 204-205. Based on the test and the information then available, Alcoa's industrial hygienist stated: "I feel it can be concluded that installation of the exhaust hood has removed any health hazard due to dust generated by sawing." *Id.*
- In 1966, Alcoa conducted an industrial hygiene survey that found "good" to "excellent" conditions, but it still instructed workers to wear masks in areas of high dust concentrations. CP 64-65.

- In 1967, Alcoa upgraded the ventilation equipment for the saw in the Carpenter Shop when a change in the thickness of Marinite boards created additional dust. CP 80-83.
- In 1967, Alcoa conducted regular industrial hygiene surveys throughout the plant. The surveys inspected dust levels, cited workers who were not wearing dust masks while working with asbestos-containing materials, and noted recommendations and changes to work practices with respect to asbestos-containing materials. CP 67-68, 74-86.
- In 1967, Alcoa conducted air sampling for asbestos in the Machine Shop where Mr. Kalahar was assigned. CP 107-109. When the results demonstrated levels far below the maximum allowable concentration that Alcoa had adopted, Alcoa's industrial hygienist stated, "our test indicates that the dust concentration in the workman's breathing zone is well below the recommended threshold limit for asbestos, and I cannot conclude that any significant hazard exists at this time." *Id.* Despite this, he recommended additional exhaust ventilation be added in anticipation that the work might increase, thus increasing potential exposures. *Id.* The recommended ventilation was then installed. *Id.*
- Alcoa installed a ventilated Marinite sanding table in the Machine

Shop where molds were being refurbished, and in the late 1960s built a separate mold room to protect employees such as Mr. Kalahar from asbestos exposure related to the removal of Marinite and refurbishment of molds by others. CP 123-124.

- In 1968, Alcoa industrial hygiene surveys found that safety conditions throughout the plant were generally good, provided reminders to supervisors about ventilation practices, and noted that potlining crew members were wearing dust mask. CP 88-94.
- In 1969, Alcoa surveys again found generally good conditions throughout the plant, recommended increasing the fan motor size in the exhaust ventilation system, but reminded that "[t]he use of dust masks while handling asbestos should be re-emphasized by the foreman and made a standard practice." CP 96-97.
- In 1969, Alcoa made work practice changes following a grievance regarding asbestos dust from the digging of transfer troughs inside the brick masons shop. CP 41-43, 130-133. Alcoa moved the digging of the transfer troughs outdoors and repaired a fan in the shop that improved ventilation, and Mr. Kalahar's union indicated that it was satisfied with Alcoa's solution to the problem. *Id.*
- By January 1970, Alcoa required all operators to wear adequate dust masks in the brick masons room. CP 49.

- Alcoa provided workers with lockers and showers to wash off any dust at the end of shifts as well as yearly physical exams that included chest x-rays. CP 47, 135-136, 138-140, 166, 182-185.

E. Mr. Kalahar admitted that Alcoa took steps to reduce the risk of asbestos exposure.

The record is thus clear that Alcoa took multiple steps to address and reduce their employees' exposure to asbestos at the Wenatchee Works. Mr. Kalahar himself conceded that Alcoa took affirmative steps to reduce asbestos exposure, but he insisted that Alcoa was "negligent" because it knew there was a "risk" of injury and its steps were ineffective in hindsight. CP 144-145, 196-197. When asked what exactly Alcoa did wrong, Mr. Kalahar responded that Alcoa was "negligent" because it knew that there was a "***risk***" of injury from asbestos exposure, not that he was ***certain*** to contract mesothelioma or suffer any other specific injury:

> [Q] Do you know what the evidence is that you've seen?
>
> A Yeah, it – it looked like ***negligent*** behavior on the behalf of Alcoa is the way I put it.
>
> Q Okay. Negligent in what way?
>
> A ***Negligent*** in that they knew there was a ***risk*** and didn't do anything about it.

CP 144-145 (emphasis added).

But Mr. Kalahar further conceded that Alcoa took affirmative steps to reduce the risks of potential asbestos exposure to its employees:

> Q Now, we've gone through some documents today, which showed certain steps that Alcoa took during your employment there to address asbestos exposure; construction of the mold room, the installation of a hood over the saw in the carpenters' shop where Marinite was being cut, the use of masks or the – the directive that masks be used by brick masons who were digging out troughs. You testified earlier that you did not believe Alcoa took any steps to address asbestos and the potential for asbestos exposure, and yet we've looked at these -- these actions that were taken by Alcoa. I understand you may think they were inadequate looking back. But is it your contention that these did not even constitute steps that Alcoa took to address the potential hazards of asbestos exposure?
>
> A ***They may have been steps, but they weren't enough***, and they didn't protect me, and I have mesothelioma. And they marched me out into areas and worked with materials that as ***looking back*** caused things like asbestosis and mesothelioma. . . .

CP 196-197 (emphasis added).

Thus, even the Kalahars concede that Alcoa took affirmative steps to reduce asbestos exposure at Wenatchee Works. They argue only that those steps "weren't enough" when "looking back" in hindsight of the eventual diagnosis. *Id.*

F. Mesothelioma is the only alleged injury at issue.

Mr. Kalahar was not diagnosed with any asbestos-related condition (mesothelioma) until 2014 – more than forty years after he left Alcoa. CP 141, 336. There is no evidence that Alcoa knew Mr. Kalahar would develop mesothelioma more than forty years after he stopped working there. Nor is there any evidence that any Wenatchee Works employees

were diagnosed with mesothelioma before 1971, when Mr. Kalahar left Alcoa. Further, there is no evidence that Alcoa had actual knowledge before 1971 that asbestos as used in its plants was certain to cause mesothelioma in any employee, much less Mr. Kalahar.[2]

G. The Kalahars' experts agreed that exposing a worker to asbestos is not certain to cause disease.

The testimony of the Kalahars' own medical experts – the only medical evidence in the appellate record – was that asbestos exposure, at any level, is not certain to cause mesothelioma. Dr. Andrew Churg, current chair of the U.S.-Canadian Mesothelioma Panel, admitted that establishing a level of exposure to asbestos that is certain to cause mesothelioma is "an unprovable proposition":

> [Q.] My question was, is there a level of exposure to asbestos that will definitely cause a mesothelioma to develop in an individual exposed to that asbestos?
>
> A. No.
>
> * * *

[2] Mr. Kalahar's work at the Wenatchee Works (he left Alcoa employment in April 1971) preceded all OSHA regulations regarding asbestos, the first of which was not proposed until May 1971 and not formally adopted until 1972. 59 FR 40694 (Aug. 10, 1994); *see also* CP 36-39, 120-121. To demonstrate the changing knowledge base and standards concerning the risks of disease from asbestos exposure, the federal regulatory standard for asbestos exposure has been reduced more than 99% since OSHA issued its first temporary standard (12 f/cc) in May 1971 – and 98% since its first permanent standard (5 f/cc) in 1972 – to the current standard (0.1 f/cc) adopted in 1996. *Id.*; 29 C.F.R. § 1910.1001(c).

Q. Is there some generally accepted source of medical knowledge that regards exposure to asbestos as certain to cause injury, that you're aware of?

A. *Not that I know of, no. For my money, that's an unprovable proposition. . . .*

CP 211, 214-215 (emphasis added); *see* CP 212-213, 216-217.

The Kalahars' experts conceded that the overwhelming majority of people with occupational exposure to asbestos even at the highest known levels will never develop mesothelioma. CP 211-217, 223-230, 237-239. Dr. Churg noted that the "worst case reported scenario" involved workers who manufactured asbestos-containing cigarette filters, but "only 18 percent" of those workers developed mesothelioma. CP 211-213.

Similarly, with regard to workers who directly used asbestos-containing products (as opposed to manufacturing an asbestos product like the cigarette filters), the Kalahars' expert Dr. Arnold Brody conceded that only a "very small number" of workers with significant occupational exposure will develop mesothelioma. CP 223-224. In fact, Dr. Brody admitted that the worst occupational group – insulators whose full-time job was to install and remove asbestos-containing insulation – was no higher than 10 percent:

Q. Would it be fair to say that even in the most highly exposed groups, you've never seen an occurrence of mesothelioma higher than 10 percent?

A. That's what I'm saying, yes.

CP 224.

As a result, Dr. Churg concluded that there was no way to know at the time of asbestos exposure if it would result in a particular worker developing mesothelioma:

> Q. But at the time of the – at the time of the exposure you can't tell whether the result will, in fact, occur?
>
> A. That's right.

CP 215.

The Kalahars' own experts conceded that asbestos exposure is never certain to cause mesothelioma. Thus, there is no evidence in the summary judgment record that exposure to asbestos – either at Mr. Kalahar's undefined level or at *any* level – is certain or even likely to cause mesothelioma.

IV. Argument

A. *Walston* controls the outcome of this appeal.

The outcome of this appeal is controlled by a recent Washington Supreme Court decision largely ignored in the Kalahars' brief: *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014). In *Walston*, the Washington Supreme Court reiterated that, as a matter of law, an employer's knowledge that asbestos exposure to its employees can cause mesothelioma does not establish a "deliberate" injury under the

Washington Industrial Insurance Act's ("WIIA") intentional injury exception. The reason is that "asbestos exposure is not certain to cause mesothelioma" and thus the employer cannot have "*actual knowledge* that injury was *certain to occur*." 181 Wn.2d at 397 (emphasis in original) (applying *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005) and *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995)). *Walston's* reasoning and holding require that the trial court's decision be affirmed.

1. Per *Walston*, exposing a worker to asbestos is not certain to cause disease.

As in this case, the plaintiff in *Walston* sued his employer seeking to recover damages after contracting mesothelioma. 181 Wn.2d at 394-95. Mr. Walston attempted to avoid the immunity provided to employers under Washington's workers' compensation system by alleging that his employer, Boeing, deliberately injured him. *Id.* Under the WIIA, an employer deliberately injures an employee, and loses its immunity, if the employer has actual knowledge that an injury is certain to occur and willfully disregards that knowledge. *Id.* at 396. The trial court denied summary judgment to Boeing, this Court reversed and remanded for rendition of an order granting summary judgment, and the Supreme Court affirmed this Court's judgment. *Id.* at 395.

Mr. Walston's claim against Boeing was based on his exposure to asbestos in 1985. By 1985, Boeing knew asbestos was a hazardous material. *Id.* In fact, Boeing knew of several prior claims based on asbestos exposure at the same facilities, including a co-worker who had developed cancer after working in the same shop with Mr. Walston. *Walston v. Boeing Co.*, 173 Wn. App. 271, 276, 294 P.3d 759 (2013). Yet Boeing nevertheless ordered the plaintiff to "go back to work," without protective gear, directly underneath where other workers, who were wearing "moon suits" and ventilators, were rewrapping overhead pipes to encapsulate flaking asbestos insulation, thereby creating dust and debris that fell into plaintiff's work area. *Walston*, 181 Wn.2d at 394.

The plaintiff produced testimony from his medical experts that plaintiff's exposure at Boeing caused his mesothelioma. Dr. Arnold Brody opined that asbestos exposure creates an immediate injury at the cellular level, but another of the plaintiff's experts – Dr. Andrew Churg – conceded that "asbestos exposure is not certain to cause mesothelioma or any other disease." *Id.* at 394, 398.

As *Walston* reiterated, the "deliberate intention" requirement is "a high standard that is met in Washington only when an employer had actual knowledge that an injury was certain to occur." *Id.* at 396 (citing *Birklid*, 127 Wn.2d at 864-65). Substantial certainty or gross negligence is not

sufficient to satisfy this standard. *Id.* at 396-97 (citing *Birklid*, 127 Wn.2d at 863-65).[3] Further, the deliberate-intention standard is not satisfied by disregarding a *risk* of injury or showing that the employer knew that "someone, not necessarily the plaintiff" was certain to be injured. *Id.* at 397 (citing *Vallandigham*, 154 Wn.2d at 21, 28, 36; *Birklid*, 127 Wn.2d at 863-65).

Applying these principles, the Supreme Court held as a matter of law that because "asbestos exposure is not certain to cause mesothelioma," an employer cannot have "*actual knowledge* that [the plaintiff's mesothelioma] was *certain to occur*":

> The holdings from *Birklid* and *Vallandigham* are binding on this case. As the experts in this case acknowledge, asbestos exposure is not certain to cause mesothelioma or any other disease. It does cause a *risk* of disease, but as we have previously held, that is insufficient to meet the *Birklid* standard. Walston has not raised an issue of material fact as to whether Boeing had *actual knowledge* that injury was *certain to occur*. And 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*. Therefore, the Court of Appeals properly remanded for entry of an order granting summary judgment to Boeing.

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[3] "Neither gross negligence nor failure to observe safety procedures and laws governing safety constitutes a specific intent to injure." *Birklid*, 127 Wn.2d at 860; *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 494, 84 P.3d 1231, 1239 (2004) ("Mere negligence, gross negligence, failure to follow safety procedures, and even an act that has a substantial certainty of producing injury does not rise to the level of deliberate intention.") (citing *Folsom v. Burger King*, 135 Wn.2d 658, 664, 958 P.2d 301, 305 (1998)).

Id. at 397 (emphasis in original); *see also Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 45, 49, 103 P.3d 807 (2004) ("We know now that asbestos exposure does not result in injury to every person, and the evidence does not suggest Longview Fibre believed otherwise 30 years ago.").

The Supreme Court further rejected the plaintiff's argument that manifesting a different type of injury or symptom at the time of exposure was sufficient because it would be inconsistent with the standard developed in *Birklid* and *Vallandigham* requiring "certainty" that the plaintiff would later develop mesothelioma:

> Under *Birklid*, a risk of injury is insufficient to meet the deliberate intention standard. The asymptomatic cellular-level injury here is not itself a compensable injury. *See, e.g.*, *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 125-28, 814 P.2d 626 (1991) (holding that a disease does not occur on exposure; it occurs when it manifests itself). Instead, as Walston's experts acknowledge, the asymptomatic cellular-level injury resulting from the exposure to asbestos created a risk of compensable injury. Thus, even if Boeing had actual knowledge that exposure to asbestos would cause asymptomatic cellular-level injury, the *Birklid* deliberate intention standard would not be met.

Walston, 181 Wn.2d at 398.

Accordingly, Boeing was entitled to summary judgment in *Walston* as a matter of law because its act of intentionally exposing the plaintiff to asbestos that Boeing knew was hazardous was not certain to cause him to

contract mesothelioma. *Id.* at 398-99.

2. The Washington Supreme Court's reasoning and holding in *Walston* require affirmance.

Just as in *Walston*, the Kalahars have not raised an issue of material fact here whether Alcoa "had *actual knowledge* that injury was *certain to occur*." *Walston*, 181 Wn.2d at 397 (emphasis in original). Again, as the Kalahars' own experts concede, it is a scientifically-established fact that asbestos exposure "is not certain to cause mesothelioma or any other disease." *Id.* And the fact that asbestos exposure poses a *risk* of disease is not sufficient to satisfy *Birklid*'s second prong. *Id.* Thus, even if, as the Kalahars contend, Alcoa exposed Mr. Kalahar to asbestos knowing that doing so posed a risk that he would contract mesothelioma, that is not sufficient to trigger the deliberate-injury exception.

The crux of the Supreme Court's holding in *Walston* was that even in 1985 – 14 years *after* Mr. Kalahar last worked at Alcoa – Boeing still could not *know* that the plaintiff's mesothelioma was *certain* to occur because asbestos exposure is never certain to cause mesothelioma. The court in *Walston* specifically stated that "[a]s the experts in this case acknowledge, asbestos exposure is not certain to cause mesothelioma or any other disease" and that the "*risk* of disease" that it does cause mesothelioma "is insufficient to meet the *Birklid* standard." *Walston*, 181 Wn.2d at 397.

Here, the Kalahars (who are represented by the same plaintiffs' attorneys as Mr. Walston) have used the same plaintiff's medical experts as Mr. Walston. And those experts have provided the same testimony that was considered by the Supreme Court in *Walston* in concluding that "asbestos exposure is not certain to cause mesothelioma or any other disease." *Id.* at 394, 398 (citing testimony of plaintiffs' experts Dr. Andrew Churg and Dr. Arnold Brody). As in *Walston,* Dr. Churg admitted in this case as well that asbestos exposure, at any level, is never certain to cause mesothelioma or any other disease:

> [Q.] My question was, is there a level of exposure to asbestos that will definitely cause a mesothelioma to develop in an individual exposed to that asbestos?
>
> A. No.
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> * * *
>
> Q. Is there some generally accepted source of medical knowledge that regards exposure to asbestos as certain to cause injury, that you're aware of?
>
> A. Not that I know of, no. For my money, that's an unprovable proposition. . . .

CP 211, 214-215; *see* CP 212-213, 216-217.

In fact, the Kalahars' medical experts conceded that the overwhelming majority of people who are exposed to asbestos, even those at the highest recorded occupational exposure levels, will never develop

mesothelioma. CP 211-217, 223-230, 237-239. Because the Kalahars' own medical experts concede that asbestos exposure at any level is never certain to cause mesothelioma and that the contrary is "an unworkable proposition," it is a factual and legal impossibility that Alcoa had "actual knowledge" before 1971 that Mr. Kalahar's exposure to asbestos was "certain to cause" his mesothelioma four decades later. *Walston,* 181 Wn.2d at 397; CP 211, 214-215. Accordingly, *Walston* has already decided the controlling issue here and established the applicable rule: as a matter of law, the Kalahars cannot prove Alcoa knew his mesothelioma was certain to occur.

3. *Walston* rejected the Kalahars' argument that evidence of another injury at the time of exposure creates actual knowledge that mesothelioma was certain to occur.

None of the arguments raised by the Kalahars change the outcome of this case under *Walston*'s unequivocal holding that asbestos exposure is never certain to cause mesothelioma. Still, in an effort to distinguish this case from *Walston*, the Kalahars point to the Supreme Court's comment that "[s]ince immediate and visible injury was not present in this case, Mr. Walston could not use that to show that Boeing had knowledge of certain injury." *Walston*, 181 Wn.2d at 397-98.

In a prior case decided by the Supreme Court – *Birklid v. Boeing Co.* – employees suing for injury caused by toxic chemicals were able to

raise a fact question on deliberate intent by producing evidence that they suffered immediate and visible injuries (injuries, not symptoms). *Id.* But the immediate, visible injuries in *Birklid* were dermatitis, rashes, nausea, headaches, dizziness, and workers passing out on the job – the same injuries the workers were seeking compensation for. Also, the Boeing supervisor knew these injuries were reactions to working with the toxic substance. *Birklid*, 127 Wn.2d at 856, 863.

The Kalahars contend that Mr. Kalahar sustained immediate and visible effects (not injuries) in the form of (i) an itchy, fuzzy sensation on his face, and (ii) sneezing and blowing his nose. Br. at 17-18. Neither an itchy, fuzzy sensation on Mr. Kalahar's face nor sneezing and blowing his nose may be considered a "visible injury." Nor is there is anything in the record on appeal that those are symptoms of any asbestos-related disease, or that any Alcoa supervisor knew Mr. Kalahar's alleged sneezing and other effects were reactions to asbestos exposure, much less symptoms of an asbestos-related disease.

Finally, the court in *Walston* rejected the Kalahars' argument that it is enough to show that the plaintiff suffered some injury (the cellular injury in *Walston*, Mr. Kalahar's alleged sneezing and irritated skin here), even though it was a different injury than the mesothelioma they base their claims on. *Walston* explains that developing a different type of injury or

symptom at the time of exposure does not create "certainty" that the plaintiff would later develop mesothelioma. 181 Wn.2d at 398.

The court in *Walston* further observed that the alleged "cellular-level injury here is not itself a compensable injury" because a compensable injury under the WIIA arises only when the disease manifests, not when exposure occurred. *Id.* (citing *Dep't of Labor & Indus. v. Landon*, 117 Wn.2d 122, 125-28, 814 P.2d 626 (1991)). This is consistent with the plain statutory language that the deliberate injury exception applies only "[i]f injury results to a worker from the deliberate intention of his or her employer to produce *such* injury." RCW 51.24.020 (emphasis added). In other words, the exception only applies if the employee suffers the same injury that the employer intended to cause.

Here, the only injury alleged in the Complaint is Mr. Kalahar's mesothelioma, which he concedes was not diagnosed until 2014. CP 141, 336. Mr. Kalahar therefore did not have a compensable injury until 2014. *See Walston*, 181 Wn.2d at 398; *Landon*, 117 Wn.2d at 128. As the Washington Supreme Court has held, an asbestos-related occupational disease becomes a compensable injury under the WIIA "as of the date the worker's disease manifested itself, not the date of the worker's last exposure to the harmful materials." *Landon*, 117 Wn.2d at 123-25 (holding that asbestos-related disease becomes compensable when

diagnosed, not the date of last exposure and quoting Judge Learned Hand that "a disease is no disease until it manifests itself").[4] And to the extent that the Kalahars now claim that the sneezing and itching are compensable injuries under the WIIA, Mr. Kalahar has conceded that he never sought medical treatment for them, never filed a grievance or lawsuit against Alcoa about them, never pursued a workers compensation claim for them, and the statute of limitations on any such lawsuit or claim has long-since run. CP 1130-1132.

Just as the court in *Walston* rejected the plaintiff's argument that the employer's knowledge that asbestos exposure was causing cellular injury was sufficient to establish "certainty" about Mr. Walston's mesothelioma, any knowledge that Alcoa may have had that Mr. Kalahar was sneezing or had irritated skin, even if related to asbestos exposure, does not create the required "certainty" under the deliberate intention standard that his mesothelioma would occur. *Walston*, 181 Wn.2d at 398.

4. *Walston* already rejected the Kalahars' "substantial certainty" argument.

While the Kalahars spend page after page arguing that Alcoa knew

[4] This accords with the chapter establishing the right to compensation, which specifically provides that the date of the disease for determining compensation is *not the date of contraction*, but rather the date when the disease requires medical treatment or becomes disabling. RCW 51.32.180(b)(2) ("[F]or claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and *without regard to the date of the contraction of the disease* or the date of filing the claim.") (emphasis added).

asbestos was dangerous and that exposure could potentially cause an injury to Mr. Kalahar, their arguments amount to nothing more than a rehash of the "substantial certainty" argument that the Supreme Court rejected in both *Walston* and *Birklid*:

> Before adopting [*Birklid*'s] narrow test, we reviewed broader tests from other jurisdictions and rejected them. In particular, we considered a test that defined deliberate intention to include situations in which the injury is "'substantially certain to occur.'" We rejected that test and instead adopted a narrower test for Washington. Thus, "deliberate intention" is a high standard that is met in Washington only when an employer had actual knowledge that an injury was certain to occur. An act that has substantial certainty of producing injury is insufficient to meet that standard. Similarly, negligence – even gross negligence – is not sufficient to meet the "deliberate intention" standard.

Walston, 181 Wn.2d at 396-97 (citing *Birklid*, 127 Wn.2d at 860, 863-65); *Birklid*, 127 Wn.2d at 865 ("We decline to adopt the 'substantial certainty' test of Michigan, South Dakota, Louisiana, and North Carolina, or the Oregon 'conscious weighing' test. 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."). Rather, "[d]isregard of a *risk* of injury is not sufficient to meet [*Birklid*]; *certainty* of actual harm must be known and ignored." *Vallandigham*, 154 Wn.2d at 28 (emphasis in original).

Here, there is no evidence Alcoa had actual knowledge that asbestos exposure was certain to cause Mr. Kalahar's mesothelioma. Given that the Kalahars' own experts concede that Mr. Kalahar's mesothelioma was not certain to occur at any level of exposure, and that substantial certainty is insufficient, the Kalahars' claims fail.

5. *Walston* already rejected the Kalahars' "injury to somebody" argument.

Walston also rejected the Kalahars' argument that it is sufficient to show Alcoa knew that someone, not necessarily Mr. Kalahar, is certain to develop mesothelioma:

> And 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*. 127 Wn.2d at 865.

Walston, 181 Wn.2d at 397 (emphasis in original).

In fact, Washington courts have uniformly rejected the "injury to somebody" approach even when the employer admitted that it "knew this was going to happen, we just didn't know when."[5] Thus, the Kalahars

[5] *Schuchman* v. *Hoehn*, 119 Wn. App. 61, 65, 72, 79 P.3d 6 (2003) (no "certainty" as a matter of law despite employer's admission that "we knew this was going to happen" because employer did not know that plaintiff "was certain to be the injured party"); *accord Brame* v. *Western State Hosp.*, 136 Wn. App. 740, 748-49, 150 P.3d 637 (2007) (no "certainty" as a matter of law because "[f]oreseeability is not enough to establish deliberate intent to injure an employee, nor is an admission that injury would probably occur"); *Valencia v. Reardan-Edwall Sch. Dist. No. 1*, 125 Wn. App. 348, 352, 104 P.3d 734 (2005) (no "certainty" as a matter of law despite employer's pre-accident admission that lift device "was dangerous, and that it was going to cause harm to someone" because

cannot avoid the result dictated by the Supreme Court's holding in *Walston*.

6. The required intention relates to the injury – not the act causing the injury.

The Kalahars also erroneously focus their arguments on the employer's alleged intention to perform a dangerous act (or to misrepresent the dangerousness of an activity) rather than the deliberate intention to cause the injury at issue here. The Kalahars' arguments are wholly misplaced. As the Washington Supreme Court has explained in applying the deliberate injury exception, "the required intention relates to the injury, not the act causing the injury." *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 580, 584, 547 P.2d 856 (1976); *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004) (holding that "the relevant inquiry is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury.").

For example, the Supreme Court in *Foster* held that the "deliberate intention" exception did not apply as a matter of law to a case where the

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it did not establish actual knowledge that the "injury was certain to occur"); *Howland* v. *Grout*, 123 Wn. App. 6, 8, 10, 11-12, 94 P.3d 332 (2004) (no "certainty" as a matter of law even though employer knew that others had been injured in same area and it was "arguably foreseeable, or maybe even substantially certain, based on prior accidents and the floor's condition that [plaintiff] might injure herself"); *Goad* v. *Hambridge*, 85 Wn. App. 98, 104, 931 P.2d 200 (1997) (no "certainty" as a matter of law because "[a]t best, [the employer] knew of the *potential* of an injury similar to Mr. Goad's, which is not enough to satisfy the *Birklid* standard").

plaintiff injured his hand in a press after the employer knowingly disabled a safety device because the plaintiff did not show that the employer intended to cause the injury that he ultimately suffered. *Id.*; *see also Biggs v. Donovan-Corkery Logging Co.*, 185 Wn. 284, 285-88, 54 P.2d 235 (1936) (holding that the "deliberate intention" exception did not apply even though the employer violated state regulations for wire cable loads and "only laughed and continued to use" damaged wire cables when a worker called to his attention that the line was not fit for use). Thus, contrary to the Kalahars' arguments, it is the actual knowledge of certain injury, not intent to perform a dangerous act, that determines whether the deliberate injury exception applies.

The Kalahars' attempts to distinguish *Shellenbarger* are puzzling. They argue that "this Court's holding in *Shellenbarger* rested on the 'actual knowledge' prong of *Birklid*, not certainty of injury." Br. at 38. This is an obvious erroneous statement of law because, as Washington courts have repeatedly held, the first prong of the *Birklid* test is whether "the employer had *actual knowledge* that an injury was *certain to occur.*" *Walston*, 181 at 396 (quoting *Birklid*, 127 Wn.2d at 865) (emphasis in original); *Shellenbarger*, 125 Wn. App. at 46 ("Willful disregard of actual knowledge has two components. First, the employer must have had actual knowledge that injury was certain to occur.").

Moreover, this Court in *Shellenbarger* held that "a fact finder could not conclude that Longview Fibre knew injury was certain to occur" because "[w]e know now that asbestos exposure does not result in injury to every person, and the evidence does not suggest Longview Fibre believed otherwise 30 years ago." *Shellenbarger*, 125 Wn. App. at 49. Just as in *Shellenbarger*, "the relevant inquiry is not whether the employer knew it was performing a dangerous activity, but rather whether the employer knew of certain injury." *Id.* at 49.

Here, there is no evidence establishing actual knowledge of certain injury because, as the Kalahars' own medical experts concede, Alcoa could not have had actual knowledge that Mr. Kalahar's injury was certain to occur. Thus, Alcoa is entitled to summary judgment as a matter of law.

7. The Kalahars seek to re-write the WIIA's statutory definitions to avoid the requisite knowledge of certainty of injury.

The Kalahars' argument that the trial court's ruling removes "occupational disease claims from the intentional injury exception" has no basis in either fact or law. App. Br. at 25. The Kalahars attempt to modify the statutory definitions in the WIIA to somehow avoid the necessity to prove Alcoa's actual knowledge in the 1963-1971 timeframe when he worked there that Mr. Kalahar's mesothelioma was certain to occur at some unspecified point in the future. The Kalahars offer their own

definition of "disease" inconsistent with the WIIA's express terms. The WIIA's general definitions define "injury" as follows:

> "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

RCW 51.08.100.

The chapter governing the deliberate injury exception does not re-define "injury," but merely provides that "injury" includes any qualifying disease that compensation and benefits are payable for:

> For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

RCW 51.24.030(3).

Contrary to the Kalahars' argument on this issue, there is nothing in the WIIA indicating that the Legislature intended to treat a disease – even an occupational disease such as mesothelioma – differently from any other injury for purposes of the deliberate injury exception simply because of its potential latency. In fact, the court in *Walston* rejected the argument that an injury must be immediately visible to meet the requirements of "certainty":

> Walston contends that under the Court of Appeals' holding, deliberate intention can be found only when the injury is immediate and visible. This is an incorrect reading of the Court of Appeals opinion. The Court of Appeals explained

> 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. *Walston*, 173 Wn. App. at 284. The court noted that this was how the employees raised an issue of material fact in *Birklid* and other cases involving exposure to toxic chemicals. *Id.* Since immediate and visible injury was not present in this case, Walston could not use that to show that Boeing had knowledge of certain injury. However, the Court of Appeals did not hold that immediate and visible injury is the *only* way to show an employer's knowledge that injury was certain to occur.

Walston, 181 Wn.2d at 397-98 (emphasis in original).

Nor is every occupational disease encompassed within the statutory definition of "injury" for purposes of the WIIA's deliberate injury exception. As in *Walston*, the plaintiff must prove that at the time of the exposure, the employer had actual knowledge that the occupational disease at issue was certain to occur. *Id.* at 398-99. But again, as in *Walston*, the only evidence in *this* record is that asbestos exposure is never certain to cause *this* occupational disease, mesothelioma. Nothing in *Walston* or any other case precludes applying the deliberate injury exception to other occupational diseases that satisfy the statutory terms.[6] The Kalahars' failure to demonstrate Alcoa's knowledge of certainty that Mr. Kalahar would develop mesothelioma in no way prevents plaintiffs

[6] In fact, *Birklid* held that the deliberate injury exception applied to the occupational disease caused by the chemical exposure. Actual knowledge of certainty of injury was established because the company did nothing after the workers exposed to the chemical had become ill. That is not the case here.

with other occupational diseases from producing the required evidence that their employers had actual knowledge that their diseases were certain occur.

B. Alcoa is entitled to judgment as a matter of law under the second prong of the *Birklid* test because it is undisputed that Alcoa took steps to reduce the risks of asbestos exposure.

Alcoa is also entitled to judgment as a matter of law on a separate and independent basis from *Walston*. The Kalahars cannot satisfy the second prong of the *Birklid* test requiring proof that the employer "willfully disregarded" knowledge that the plaintiff's injury was certain to occur.

Even if *Walston* somehow did not apply, and the Kalahars could establish that Alcoa knew *at the time Mr. Kalahar worked there* it was certain that he would develop mesothelioma, their claims would still fail. They cannot prove that Alcoa "willfully disregarded" the knowledge that Mr. Kalahar's mesothelioma was certain to occur by taking no steps to improve worker safety.

The Washington Supreme Court has held that courts cannot consider the "effectiveness of a remedial measure" in determining whether an employer acted with "willful disregard." Thus, willful disregard cannot be established merely because "an employer's remedial efforts were ineffective." *Vallandigham*, 154 Wn. 2d at 34-35. Rather, the "willfully

disregarded" prong is satisfied only in cases when it was "clear that [the employer] made *no effort* of record to alter or improve the working environment." *Baker v. Schatz*, 80 Wn. App. 775, 784, 912 P.2d 501 (1996) (emphasis added).

In *Vallandigham*, the Supreme Court held that even though a severely disabled student had assaulted staff members on over one hundred different occasions, the school did not act with "willful disregard" when it failed to remove the student. The school had taken several steps to address the risks posed by the student, and it "could not have been certain its strategies for modifying R.M.'s behavior would fail such that R.M. would continue to injure school staff." 154 Wn. 2d at 20-25, 35.

Vallandigham held that courts cannot consider the "effectiveness of a remedial measure" in determining "willful disregard" because that "is merely another way of evaluating its reasonableness," which is an impermissible negligence standard. *Id* at 35. The Court overruled two prior court of appeals decisions and held that "willful disregard" could not be established merely because "an employer's remedial efforts were ineffective." 154 Wn. 2d at 34-35 (overruling *Stenger v. Stanwood Sch. Dist.*, 95 Wn. App. 802, 977 P.2d 660 (2001) and *Hope v. Larry's Markets*,

108 Wn. App. 185, 29 P.3d 1268 (2001)).[7] Hence, the "willful disregard" standard is only satisfied when the employer makes *no* remedial efforts.[8]

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[7] The Supreme Court overruled *Stenger* and *Hope* because they improperly considered the effectiveness of the employer's attempted remedial measures in evaluating the willful disregard prong of the *Birklid* test:

> In *Stenger*, Division One focused on "whether a jury could conclude that [the district's] efforts to accommodate Jason in the classroom *were inadequate and thus constitute willful disregard under the* Birklid *rule*." *Stenger*, 95 Wn. App. at 813, 977 P.2d 660 (emphasis added). Following *Stenger*, the *Hope* court noted that it could find willful disregard if attempted remedial measures were *ineffective*. *Hope*, 108 Wn. App. at 195, 29 P.3d 1268. The Court of Appeals in this case took issue with the *Stenger* court's reasoning and opined that "[b]y focusing on the efficacy or adequacy of the remedial measures, Stenger impermissibly erodes the requirement of 'deliberate intent.'" *Vallandigham*, 119 Wn. App. [95,] 108, 79 P.3d 18 [(2003)]. Because evaluation of the effectiveness of a remedial measure is merely another way of evaluating its reasonableness, we agree that the *Stenger* and *Hope* language, at least to some extent, adopted a negligence standard.
>
> We note that this court has been abundantly clear that negligence, even gross negligence, cannot satisfy the deliberate intention exception to the IIA. *Birklid*, 127 Wn.2d at 860, 904 P.2d 278. Therefore, we reject any notion that a reasonableness or negligence standard should be applied to determine whether an employer has acted with willful disregard. We disapprove of the holdings in the *Stenger* and *Hope* cases to the extent that they suggest that a finding of willful disregard can be based on the simple fact that an employer's remedial efforts were ineffective. *Stenger*, 95 Wn. App. at 813, 977 P.2d 660; *Hope*, 108 Wn. App. at 195, 29 P.3d 1268.

Vallandigham, 154 Wn. 2d at 34-35 (emphasis in original). By overruling *Stenger* and *Hope*, the Supreme Court held that the willful disregard prong requires the employer to make no remedial efforts to improve conditions; evidence that the employer only took some steps that were ineffective or that additional measures were necessary is insufficient as a matter of law to satisfy this prong.

[8] For example, in *Birklid*, the court held that the employer acted with willful disregard because it not only took no steps to remedy the conditions, but in fact retaliated by harassing the sick employees, by removing labels that provided warnings about the products, and by altering the workplace during government safety tests. *Birklid*, 127 Wn.2d at 856-57. Similarly, in *Baker*, the court held that the employer acted with willful disregard by making "no effort" to improve the working conditions and even threatening one employee that "if your crew doesn't like it, the door's right there." *Id.* at 778-79, 784. Thus, in both cases, it was undisputed that the employer took absolutely no remedial measures to reduce the risk of injury.

Thus, the Washington Supreme Court has already expressly rejected the Kalahars' arguments here that Alcoa acted with "willful disregard" because its efforts to reduce asbestos exposure were ultimately ineffective in preventing Mr. Kalahar's disease. There is no dispute here that Alcoa took multiple remedial measures to reduce the risks of asbestos exposure during Mr. Kalahar's employment between 1963 and 1971 – a fact that Mr. Kalahar himself concedes. Rather, Mr. Kalahar has only alleged that when "looking back" in light of his recent mesothelioma diagnosis, the affirmative steps that Alcoa took "weren't enough" to prevent his disease from developing forty years later and that Alcoa was "negligent" by not further reducing "the risk" of mesothelioma to its employees. CP 144-145, 196-197.

The Kalahars spend much of their brief arguing that Alcoa could (and in retrospect should) have taken additional precautions and that the steps Alcoa did take were ultimately ineffective. But the undisputed evidence remains that Alcoa (i) took numerous affirmative steps to reduce the risk of asbestos exposure to its employees, and (ii) attempted to comply with the then-existing safety guidelines for asbestos exposure throughout the time period that Mr. Kalahar worked there. Because whether "an employer's remedial efforts were ineffective" cannot establish "willful disregard," the Kalahars cannot satisfy this prong of the *Birklid*

test and avoid workers' compensation pre-emption. Thus, Alcoa is entitled to judgment as a matter of law. *Vallandigham*, 154 Wn. 2d at 34-35.

C. The Legislature has already provided the Kalahars with a remedy.

Finally, the Kalahars fail to acknowledge that they have a readily-available remedy in a workers compensation system that requires no proof of fault. RCW 51.04.010. The WIIA was "the product of a grand compromise" that gave employers "immunity from civil suits by workers" in exchange for giving injured workers "a swift, nofault compensation system for injuries on the job." *Birklid*, 127 Wn. 2d at 859. Long ago, the Legislature decided that it was in the best interests of this State to provide an exclusive remedy for workplace injuries in which workers received benefits without regard to the employer's or the worker's fault in exchange for foregoing unlimited potential damages.

The Legislature further decided that the employers would primarily fund the costs of this industrial insurance program. As a result, workers who sustain injuries or develop occupational disease are entitled to substantial benefits, including but not limited to payment of their medical expenses and lost wages, vocational rehabilitation, awards for permanent full or partial disabilities, and even death benefits. RCW 51.36.010; RCW 51.32.050-.095. The injured worker receives full benefits even if the employer was not at fault or the worker was at fault. "The wisdom of that

decision is not a proper subject of [judicial] review." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 242, 588 P.2d 1308 (1978).

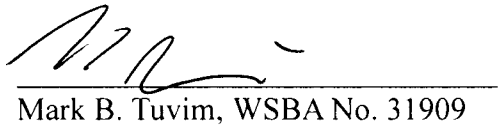
The Court should respect the Legislature's "grand compromise" and binding Supreme Court authority regarding it by dismissing this tort action against Alcoa while leaving the Kalahars free to recover their substantial benefits under the workers compensation system.

V. Conclusion

The outcome of this appeal is controlled by the reasoning and holding in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014), which require that the trial court's decision be affirmed. Alcoa requests that the Court grant this motion and affirm the trial court's judgment.

DATED this 25th day of March, 2015.

GORDON & REES LLP



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this date I caused a copy of the foregoing to be served via e-mail on all counsel of record, addressed as follows:

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