Supreme Court No. 102881-4

No. 851829

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

JEFFREY L. COCKRUM AND DONNA COCKRUM, husband and wife,

Appellants,

v.

HOWMET AEROSPACE, INC.,

Respondent.

PETITION FOR DISCRETIONARY REVIEW BY THE WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONERS

Jeffrey and Donna Cockrum are the plaintiffs in this action and ask the Court to accept review of the decision designated in Part II.

II. COURT OF APPEALS DECISION

Division One filed its opinion on February 12, 2024, affirming the grant of summary judgment to Howmet Aerospace, Inc., f/k/a Alcoa (hereafter "Alcoa") on the ground that chronic asbestos disease can never fall within the "deliberate injury" exception to Washington's Industrial Insurance Act irrespective of the employer's culpability in exposing workers to known carcinogens. The opinion is in the appendix.

III. ISSUES PRESENTED FOR REVIEW

Do this Court's prior holdings in *Birklid v. Boeing Co.* and *Walston v. Boeing Co.* categorically exclude all chronic occupational diseases, including cancer, from the "deliberate injury" exception to employer immunity?

IV. STATEMENT OF THE CASE

This case turns on whether employers can intentionally and repeatedly expose their employees to a known carcinogen and evade civil liability under RCW 51.24.020 simply because it is not medically "certain" that each and every exposed employee will develop cancer. Division One's opinion below outlines the facts and procedure in this case. Op. 2–7. However, several facts bear supplemental emphasis.

As early as the 1950s, Alcoa Wenatchee Works repeatedly exposed its employees to a deadly toxin, asbestos, without ever providing any warnings or requiring the use of proper respiratory protection. CP 650, 653–57, 664–67. At the same time, Alcoa instituted an internal medical monitoring program to observe for the development of illnesses among its employees. CP 668–670. Through this medical monitoring program, Alcoa observed *objective* and certain radiographic evidence that its asbestos-exposed workers were developing compensable diseases. CP 807, 818, 833, 835–850.

Alcoa irrefutably knew that the cause of its employees' chronic illnesses was exposure to asbestos they sustained while working at Alcoa's facilities. CP 721, 725–26, 731–33, 736–37. Alcoa's own industrial hygienists, Thomas Bonney and Lester Cralley, even authored a chapter in the treatise *Industrial Hygiene* Highlights discussing the link between asbestos and mesothelioma, a terminal cancer of the lining of the lungs! CP 722–24, 726, 732–33, 737, 743, 745. Nevertheless, Alcoa engaged in an active campaign of disinformation among its workers combined with the illusion of safety measures. CP 799–801. As one employee explained, "[S]afety has always been predicated on one thing, and that's affordability. Always. That's never changed." CP 802.

When Jeffrey Cockrum first started work at Alcoa in 1967, Alcoa had already observed numerous examples of its employees developing asbestos disease from their workplace exposure to asbestos. Nevertheless, from 1967 through 1969, Alcoa caused Mr. Cockrum to be exposed to near constant asbestos dust while

working in the "pot rooms" of its Wenatchee facility without providing him with any warnings or respiratory protection. CP 616.

In 1987, Mr. Cockrum transferred to Alcoa's laboratory where one of his duties was to test samples of insulation from throughout the plant to see whether or not they contained asbestos. CP 660–63. Although Alcoa workers retrieved these insulation samples while wearing moon suits and air-fed respirators, Alcoa never warned Mr. Cockrum that the samples he tested were dangerous or that he should wear a respirator while working with them. CP 664–67.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Washington Industrial Insurance Act ("IIA") granted Washington employers immunity from civil litigation for workplace injuries in exchange for creating an exclusive remedy for injured workers regardless of fault. RCW 51.04.010. "However, the legislature specified that employers who *deliberately* injure their employees are not immune from suit."

Walston v. Boeing Co., 181 Wn.2d 391, 393, 334 P.3d 519 (2014) (citing RCW 51.24.020) (emphasis in original). This Court has interpreted the "deliberate" injury exception to require that "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). This case turns on whether all diseases—or just some diseases—can satisfy the deliberate injury test under *Birklid* and *Walston*.

The Court of Appeals decision in this case misinterpreted this Court's holding in *Walston* as requiring that 100 percent of asbestos-exposed workers must develop disease to satisfy *Birklid's* certainty requirement. The clear consequence from the court's analysis is that some diseases can be deliberately caused but some cannot be under any circumstances irrespective of the employer's culpability. Thus, employers who intentionally require their workers to expose themselves to known carcinogens such as asbestos or plutonium can never be subject to the deliberate injury exception because it is never medically certain

that each and every exposed employee will develop mesothelioma or leukemia. Such a holding shifts the analysis from the conduct and intent of the employer—the intended focus of RCW 51.24.020—to whether the employee suffered the *right kind* of disease.

While medical certainty of disease remains one way to demonstrate certain injury, it is by no means the only way. In *Birklid*, for example, the plaintiffs demonstrated certain injury through evidence of continuing illnesses among *some* exposed workers at Boeing's plant and this Court never suggested that the toxin at issue was medically certain to cause disease in *all* exposed workers. *The undisputed medical evidence in this case is that no chronic occupational disease, including cancer, is ever medically certain to manifest in all exposed workers*. CP 618. If the Court of Appeals opinion is correct and medical certainty of disease is a requisite component to the deliberate injury test, it would mean employers can be subject to liability under RCW 51.24.020 for deliberately causing their employers to suffer

dermatitis, rashes, nausea, headaches, and dizziness—the illnesses at issue in *Birklid*—but never cancer. Such a holding would contravene the Court's robust rejection in *Birklid* of the doctrine "that the blood of the workman was a cost of production." 127 Wn.2d at 874 (quoting with disapproval *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916))

Here, the Cockrums presented unrefuted evidence that Alcoa's asbestos-exposed employees were sustaining objective, observable, continuing and compensable asbestos-related diseases occurring as far back as 1953. The Court of Appeals rejected the Cockrums' evidence of continuing illnesses, indicating that it amounted only to "knowledge of the hazardousness of asbestos." Op. 7. Yet as in *Birklid*, this evidence should preclude the grant of summary judgment because, unlike in *Walston*, it shows not just a *risk* of disease among exposed workers but the objective and ongoing manifestation of diseases. The first disease may be due to

negligence or even gross negligence, but what of subsequent and ongoing diseases occurring over the next 40 years? The decision by the Court of Appeals thus conflicts with both *Birklid* and *Walston* and raises a critical question of public importance: whether the Legislature and this Court intended to exclude all chronic occupational diseases, including all forms of cancer, from the "deliberate injury" exception of the IIA under RCW 51.24.020. RAP 13.4(b)(1), (4).

A. Division One's Opinion Conflicts with both *Walston* and *Birklid*.

This Court first articulated the test for the deliberate injury exception in *Birklid*, a case arising out of Boeing's use of phenol-formaldehyde resin at its fabrication facility between 1987 and 1988. 127 Wn.2d at 856. During preproduction testing, Boeing's general supervisor wrote that obnoxious odors were present and that "employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach." *Id*. Boeing dismissed the complaints of its employees and commenced

production in early 1987. *Id.* As expected, workers again suffered an array of symptoms including dermatitis, rashes, nausea, headaches, tearing, dizziness, and faintness. *Id.* Yet not all exposed workers developed symptoms, and the range of symptoms were not identical. *Id.* at 858.

The Court reviewed the jurisprudence arising from the deliberate injury exception, noting that courts had previously applied the exception only to cases of assault and battery. *Id.* at 862 ("Our courts have effectively read the statutory exception to the IIA's exclusive remedy policy nearly out of existence."). However, as the Court observed, the language of the statute was not so limited but encompassed the deliberate intent to produce a wide range of injuries. *Id.* at 862-63. Indeed, the statutory definition of "injury" expressly included "*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) (emphasis added).

The Court explained that "[i]n all the other Washington cases, while the employer may have been aware that it was exposing workers to unsafe conditions, its workers were not being injured until the accident leading to litigation occurred." *Id.* at 863. Yet in *Birklid*, the evidence of continuing illness among workers effectively put the employer on notice that subsequent exposures would lead to subsequent injuries—a form of constructive certainty rather than medical certainty. *See id.* at 863 ("There was no accident here."); *Walston*, 181 Wn.2d at 398 (noting that "this was how the employees raised an issue of material fact in *Birklid* and other cases involving exposure to toxic chemicals"). Consequently, the Court held that the employees' subsequent illnesses went "beyond gross negligence of the employer and involve willful disregard of actual knowledge by the employer of continuing injuries to employees." *Birklid*, at 127 Wn.2d at 863.

The Court never suggested that phenol-formaldehyde resin was a substance that was medically certain to cause illness

in every exposed worker at every dose. Instead, examining the specific facts of *Birklid* under the newly articulated "deliberate injury" test, this Court made clear that evidence of continuing injuries satisfies the requirement of certain injury. The Court therefore concluded that "the evidence the Plaintiffs produced in response to Boeing's motion for summary judgment was sufficient, under Washington law, to justify a trier of fact finding that there was a deliberate intention on the part of Boeing to injure the Plaintiffs." *Id.* at 865–66.

Almost twenty years later, this Court examined the deliberate injury exception in the context of a Boeing employee exposed to asbestos when maintenance workers in "moon suits" removed insulation from overhead piping. *Walston*, 181 Wn.2d at 391. The employee suffered no immediate effects or visible symptoms from this exposure, but 25 years later was diagnosed with mesothelioma. *Id.* at 394. Although Walston's exposures were egregious, the Court did not note any prior occasions of asbestos-caused illnesses among Boeing's personnel prior to or

contemporaneous with the incident with the maintenance workers. *Id.* at 398. Thus, there appeared to be no evidence of continuing injuries as in *Birklid*.

Walston alleged a deliberate injury under two alternative and novel theories: 1) asbestos exposures presents a significant *risk* of disease; and 2) asbestos inhalation cases undetectable and asymptomatic cellular injury. *Id.* at 397–98. The Court rejected the first theory, holding that the mere "risk" of developing asbestos disease in the future was not sufficient. *Id.* at 397 (noting that "[e]ven substantial certainty" is insufficient). After all, the notion of risk incorporates principles of negligence, whereas a deliberate injury requires intentionality. *See Birklid*, 127 Wn.2d at 863 ("There was no accident here."). As to the Plaintiff's alternate theory, the Court held that asymptomatic invisible, non-compensable cellular-level injuries were not compensable injuries. *Walston*, 181 Wn.2d at 398. In reaching these conclusions, the Court explicitly reaffirmed and relied

upon the analysis and holding of *Birklid* and did not purport to modify or limit its prior holding in any way. *Id.* at 397.

In analyzing Walston's evidence on summary judgment, the Court expressly considered two *alternative* methods of satisfying *Birklid's* certainty prong. The first method, medical certainty, was found to be absent because Walston's medical expert "conceded that asbestos exposure is not certain to cause mesothelioma or any other disease." *Id.* at 394, 397. But the Court also considered the second method of *constructive* certainty under *Birklid*, demonstrated by evidence of continuing illnesses among employees:

> 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. 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. *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.*

Id. at 398 (emphasis supplied, internal citations omitted). In so holding, this Court expressly recognized *and reaffirmed* the point in *Birklid* that there exists more than one way to demonstrate certainty of injury. Boeing's actual knowledge of continuing illnesses to its workers, combined with a willful disregard of those continuing illnesses, demonstrated the intentionality necessary for a finding that the subsequent illnesses were something more than a recurring accident. *Birklid*, 127 Wn.2d at 863.

In this case, Division One recognized that "Walston had no evidence (as the *Birklid* plaintiff did) that Boeing had actual knowledge of injury because it did not observe immediate and visible injury due to asbestos exposure." Op. 5 (citing *Walston*, 181 Wn.2d at 398). Yet Division One then misconstrued *Walston* as requiring medical certainty of disease such that exposure causes illness in all people and at all doses. Op. 6 ("The

court held that because 'asbestos exposure is not certain to cause mesothelioma or any other disease' and because it causes only 'a *risk* of disease,' Walston did not meet the *Birklid* standard.").

The Court of Appeals' interpretation of *Walston* directly conflicts with *Birklid*—upon which *Walston* expressly relied—where plaintiffs proved certainty of injury in the exact same way as the Cockrums: through evidence of prior and continuing illnesses among employees, actually known to the employer yet willfully disregarded. 127 Wn.2d at 863. Indeed, if "medical certainty" were a necessary element of the test and not merely one of several ways to prove certainty—the *Birklid* court could not have reached its result based on the facts of that case.

The Cockrums' testifying medical expert, Dr. Steven E. Haber, explained the difference between acute responses to certain toxins and chronic (or "latent") occupational diseases such as malignant mesothelioma. CP 617–18 (¶¶ 9, 10). Dr. Haber stated that latent diseases "do not result in immediate apparent injury upon exposure but instead do not manifest until

sufficient time has lapsed." CP 617 (¶ 9). This, he explained, is true for all human cancers and that malignant mesothelioma requires at least 10 years to manifest, with some studies showing a latency period of 45–50 years or longer. CP 617–18 (¶¶ 11, 13).

In contrast, Dr. Haber described certain harmful chemicals that, at the right dose, are "certain to cause immediate recognizable injury in everyone exposed." CP 617–18 (¶ 10). "Ammonia and chlorine gases are classic examples of acute occupational hazards medically certain to cause immediate recognizable injury at a sufficient dose." *Id.*

Dr. Haber agreed that asbestos-caused diseases are "never medically certain to occur in humans" but observed that the same is true for all carcinogens. CP 618 (¶ 11). By way of example, "[a]lthough tobacco is well established as a potent lung carcinogen, only a minority of smokers will ever develop lung cancer." *Id.* Indeed, Dr. Haber was "not aware of any carcinogen for which exposure at a particular dose is medically certain to

cause cancer in everyone." CP 618 (¶ 13). Under Division One's interpretation of *Walston* and the undisputed medical record in this case, acute occupational diseases can satisfy the deliberate injury test but chronic occupational diseases cannot under any circumstances. Thus, under the Court of Appeals' holding, employers who require workers to smoke two packs of cigarettes per day as a condition of employment can never be subject to suit under RCW 51.24.020 because only a minority of their employees will ever develop lung cancer. This is not the result the Court intended in *Walston*.

To be sure, asbestos does not cause "immediate and visible" illnesses such as the dermatitis, rashes, nausea, dizziness, and faintness at issue manifested in *Birklid*. However, the purpose of "immediate and visible" symptomology in the context of the deliberate injury exception is to put the employer on notice that workers' exposure to industrial toxins is causing objective, compensable and contemporaneous disease, not just the risk of disease in the future. *See, e.g.*, *Hope v. Larry's*

Markets, 108 Wn. App. 185, 189, 29 P.3d 1268 (2001) (manager was "aware that [the chemical] could cause severe skin irritation"); *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996) ("Most importantly, the employees stated, and management admitted, that employees complained *repeatedly* … that the chemicals in the plant *were causing* health problems." (emphasis supplied)). The only difference between the record in this case and that in *Birklid* is that the employer in *Birklid* observed workers becoming dizzy and nauseous, whereas here Alcoa observed ongoing, medically diagnosed injuries through radiographic imaging and pulmonary testing.

Contrary to the Court of Appeals holding, workers suffering from chronic occupational diseases are entitled to *enhanced* protection under the IIA precisely because workers do not immediately realize they are being injured. The first instance of illness may be deemed negligence or even gross negligence, but once chronic occupational diseases manifest—here, in the form of pleural thickening, pleural plaques, and asbestosis—and

the employer knows the cause, it is thus on notice that subsequent exposures are certain to cause subsequent diseases because it has already occurred.

If, as here, the employer continues to expose workers to the exact same toxin, does the IIA and this Court truly deem those subsequent illnesses to be mere "accidents"? *See Birklid*, 127 Wn.2d at 863 ("There was no accident here."). The Court of Appeals concluded that the Cockrums' evidence of continuing illnesses to workers "amounts at most to knowledge of the hazardousness of asbestos that was present in Walston, and was insufficient." Op. 7. On this point, the Court of Appeals erred; the Cockrums' evidence demonstrates not just a *risk* of disease but the actual, ongoing manifestation of disease among identically situated Alcoa's workers. Like the plaintiffs' illnesses in *Birklid*, Mr. Cockrum's mesothelioma "was no accident" because Alcoa had observed its workers getting sick from asbestos for years. 127 Wn.2d at 863. This Court in *Walston* could not have intended to exclude chronic occupational

diseases from the deliberate injury exception as a matter of law, yet that is precisely the unavoidable consequence of Division One's interpretation.

For these reasons, the Court of Appeals opinion directly conflicts with both *Birklid* and *Walston*. RAP 13.4(b)(1). This Court should grant review to clarify (1) that it did not intend to exclude as a matter of law entire categories of diseases, including chronic occupational diseases and all forms of cancer, from RCW 51.24.020; and (2) that in the absence of medical certainty of disease, an employee may satisfy the deliberate injury test by showing "willful disregard of actual knowledge by the employer of continuing injuries to employees." *Birklid*, 127 Wn.2d at 863.

B. Division One's Opinion Involves an Issue of Substantial Public Interest.

The IIA's statutory definition of "injury" expressly includes "*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) (emphasis

added). "The primary goal of statutory construction is to carry out legislative intent." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). If Division One's interpretation of *Walston* were correct, this definition would be limited to *acute* diseases, not chronic diseases—a limitation never once uttered in *Walston* and found nowhere in the text of the statute. *See Wolf v. State*, 2 Wn.3d 93, 534 P.3d 822, 831 (2023) ("Where the legislature omits language from a statute, this court will not read language into it.").

Instead, the Legislature made clear that "[e]very worker who suffers from disability from an occupational disease in the course of employment … *shall* receive the same compensation … as would be paid and provided for a worker injured or killed in employment under this title." RCW 51.32.180 (emphasis added). This Court has interpreted RCW 51.32.180 to mean that workers suffering from occupational disease must be "accorded equal treatment with workers suffering a traumatic injury during the course of employment." *Dennis v. Dep't of Labor & Indus.*

of State of Wash., 109 Wn.2d 467, 471, 745 P.2d 1295 (1987) (citing RCW 51.32.180). Yet no worker suffering from a chronic occupational disease can be accorded equal treatment if there exists *no means* whereby the worker may prove that his disease was deliberately caused.

Division One sought to brush aside the logical implications from the plain language of these statutes, writing that "the IIA's covering of an ailment does not imply a particular amenability to its being deliberately caused, or proven to be deliberately caused." Op. 7. Yet under Washington law as interpreted by the Court of Appeals, an employer may deliberately and repeatedly subject its employees to a deadly carcinogen, and when those employees begin to develop—and *continue* to develop—diseases as a result of such exposures, those diseases are deemed accidental and fall outside the deliberate injury exception, even if those diseases continue to arise over the course of decades. This interpretation of RCW 51.24.020 and *Walston* cannot be correct.

Ultimately, the Court of Appeals analysis raises more questions than it answers. Why is it that an employer can deliberately cause dermatitis, rashes, nausea, headaches, and dizziness from exposure to one toxin but cannot deliberately cause cancer from exposure to another? *Birklid*, 127 Wn.2d at 856. How does the appellate court's interpretation of *Walston* not abrogate *sub silentio* the analysis and holding of *Birklid*, which made no reference to phenol-formaldehyde resin being medically certain to cause any of the illnesses suffered by the plaintiffs? Which diseases can be deliberately caused, and which diseases are deemed to be nothing more than a series of repeated accidents? Where is there any indication that the Legislature intended to exclude chronic occupational diseases from the deliberate injury exception, and if so, on what basis?

Division One's misreading of *Walston* has created an issue of substantial public interest that should be determined by the Washington Supreme Court. RAP 13.4(b)(4). The unavoidable consequence of Division One's opinion is that employers can

deliberately cause cancer among their workforce with complete impunity. Washington employees deserve to know which diseases are categorically excluded under the deliberate injury test and on what basis. But if the Court of Appeals erred and this Court did not intend to exclude entire categories of diseases from the deliberate injury exception, this Court should accept review to clarify the scope of its holding in *Walston* and reaffirm that there exists more than one way to prove certainty of injury. Medical certainty is sufficient, but not necessary, and constructive certainty through continuing illnesses among workers will also satisfy the deliberate injury test.

VI. CONCLUSION

Jeffrey Cockrum's mesothelioma was no accident. His exposures to asbestos occurred years after Alcoa observed continuing asbestos-related illnesses among its workforce yet did nothing to warn or protect Mr. Cockrum. Division One's opinion on the "deliberate injury" exception to the IIA is contrary to the plain definition of "injury" under RCW 51.24.030, the

admonition to treat diseased workers the same as those suffering physical injury under RCW 51.32.180, and this Court's opinions in both *Birklid* and *Walston*. If Division One's analysis is correct, it would implicitly rewrite these two statutes, render *Birklid* a dead letter, and exclude entire categories of diseases under the deliberate injury test. This cannot have been the intent of the majority in *Walston*. For these reasons, the Court should grant review.

The undersigned certifies that this document contains 3,982 words in accordance with RAP 18.17.

RESPECTFULLY SUBMITTED this 13th day of March 2024.

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APPENDIX

1. **Court of Appeals decision**
2. **Order Granting Summary Judgment**

Appendix 1

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY L. COCKRUM and DONNA COCKRUM, husband and wife, Appellants, v. C.H. MURPHY/CLARK-ULLMAN, INC.; NORTH COAST ELECTRIC COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; PFIZER, INC.; P-G INDUSTRIES, INC., as successor-in-interest to PRYOR GIGGEY CO., INC.; THERMO FISHER SCIENTIFIC, INC.; and UNION CARBIDE CORPORATION, Defendants, HOWMET AEROSPACE, INC., f/k/a ARCONIC INC., as a corporate successor to ALCOA, INC., Respondent.	No. 85182-9-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Jeffrey and Donna Cockrum appeal the summary judgment dismissal of their personal injury action against Howmet Aerospace, Inc.[1] The Cockrums sued Howmet claiming that Jeffrey Cockrum's mesothelioma was caused by asbestos exposure during his employment at an Alcoa plant. RCW 51.04.010 provides employers immunity from civil suits by workers for workplace

[1] Howmet Aerospace, Inc., was formerly known as Arconic, Inc., which was formerly known as Alcoa, Inc. We will refer to "Howmet" as the respondent and "Alcoa" as Cockrum's employer.

injuries, but the Cockrums rely on the deliberate injury exception of RCW 51.24.020. The trial court dismissed the Cockrums' action, concluding there was no genuine issue of material fact as to whether Howmet had actual knowledge that injury was certain to occur. We affirm.

I

Cockrum worked for Alcoa, Inc. at Alcoa Wenatchee Works between 1966 and 1999. Wenatchee Works was an aluminum smelter where raw alumina ore was converted into molten aluminum. Cockrum first worked in the "potrooms" at the plant. His job duties included sampling the pots and "potlining," which entailed lining empty pots with insulation before ore would be added and melted down. In 1969, Cockrum transitioned to working in Alcoa's laboratories. In the quantometer lab, Cockrum was tasked with analyzing "the metal that came out of the pots as a raw material, and then when it went into the furnaces, to make sure that the metal was on-grade for customer specifications." Later, while working in the environmental lab, he tested samples for asbestos from the insulation material and from the material brought up from the ingot plant. To test the samples, Cockrum would take "a piece of the sample, put it into a beaker" and "add[] acid to it. When it changed colors, it gave me result of whether asbestos was present or not." He would then "put it back into the bag, zip[] it up, and call[] them to tell them to come take it away."

In March 2022, Cockrum was diagnosed with mesothelioma, a lung disease caused by asbestos exposure. Cockrum and his wife filed a complaint against Howmet for personal injuries. Howmet moved for summary judgment, asserting

the Cockrums' claims against it were barred by RCW 51.04.010 of the Washington Industrial Insurance Act (IIA),Title 51 RCW. In arguing that the Cockrums could not provide evidence satisfying the deliberate intention exception, Howmet relied on the Cockrums' expert's deposition testimony that asbestos exposure is never certain to cause mesothelioma or any other disease.

The trial court concluded that under Walston v. Boeing Co., 181 Wn.2d 391, 395, 334 P.3d 519 (2014), the Cockrums failed to satisfy the deliberate intention exception. The trial court granted Howmet's motion for summary judgment. The Cockrums appeal.

II

This court reviews summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). When considering the evidence, the court draws reasonable inferences in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

The IIA established a system for workplace related injuries that gave employers immunity from civil suits in return for giving injured workers "a swift, no-fault compensation system for injuries on the job." Birklid v. Boeing Co., 127 Wn.2d 853, 859, 904 P.2d 278 (1995). The IIA does not exempt employers from claims by an employee for injuries resulting "from the deliberate intention of his or her employer to produce such injury." RCW 51.24.020.

Birklid held "deliberate intention" means (1) "the employer had actual knowledge that an injury was certain to occur" and (2) the employer "willfully disregarded that knowledge." 127 Wn.2d at 864. "Neither gross negligence" nor "an act that has a substantial certainty of producing injury [are] sufficient to show deliberate intention." Id. at 860. Birklid rejected standards under which a claim would be permitted if the employer knew injury was " 'substantially certain' " to occur, id. at 864-65 (quoting Beauchamp v. Dow Chem. Co., 427 Mich. 1, 21-22, 398 N.W.2d 882 (1986)), or which focused on "whether the employer had an opportunity consciously to weigh the consequences of its act and knew that someone, not necessarily the plaintiff specifically, would be injured." Birklid, 127 Wn.2d at 865 (citing Lusk v. Monaco Motor Homes, Inc., 97 Or. App. 182, 775 P.2d 891 (1989)).

Birklid arose out of Boeing's use of phenol-formaldehyde resin at a fabrication facility in 1987. Id. at 856. A general supervisor wrote that the resin caused " 'dizziness, dryness in nose and throat, burning eyes, and upset stomach' " in employees and the general supervisor " 'anticipate[d] this problem to increase as temperatures rise and production increases.' " Id. Boeing declined to improve ventilation. Id. When full production began, "workers experienced dermatitis, rashes, nausea, headaches, and dizziness." Id. Boeing's general manager said "he knew these complaints were reactions to working with the phenolic material." Id. Birklid concluded that Boeing knew in advance its workers would become ill, yet put the chemicals into production anyway. Id. at 863. The

facts were sufficient for a jury to find that Boeing had actual knowledge that injury was certain to occur. See id. at 865-66.

Walston applied Birklid in an asbestos case. Walston, 181 Wn.2d at 393. Walston sued Boeing, claiming that his mesothelioma was caused by his exposure to asbestos while employed by the company. Id. at 394-95. Although Walston alleged he was exposed to asbestos throughout his career at Boeing, he pointed to a specific exposure in 1985. Id. at 394. That year, maintenance workers rewrapped overhead pipes to contain flaking asbestos insulations. Id. Walston and other employees continued to work below. Id. The repairs created visible dust and debris. Id. Walston's request to work in a different location during the pipe repair was denied, but a supervisor recommended he avoid working directly underneath the overhead repairs. Id. He was diagnosed with mesothelioma in 2010. Id. Walston alleged Boeing deliberately intended to cause his injuries when it exposed him to asbestos during this repair work. Id. at 395. One of Walston's experts "conceded that asbestos exposure is not certain to cause mesothelioma or any other disease." Id. at 394. Boeing did not dispute that it was aware that asbestos was a hazardous material in 1985. Id. Instead, it argued it did not have actual knowledge that Walston was certain to be injured. Id.

The Supreme Court agreed, holding in that context "[a]n act that has substantial certainty of producing injury is insufficient to meet" the " 'deliberate intention' standard." Id. at 396-97. The court noted Walston had no evidence (as the Birklid plaintiff did) that Boeing had actual knowledge of injury because it did not observe immediate and visible injury due to asbestos exposure. Walston, 181

Wn.2d at 398. The court held that because "asbestos exposure is not certain to cause mesothelioma or any other disease" and because it causes only "a *risk* of disease," Walston did not meet the Birklid standard. Id. at 397. At the same time, the court explained that establishing observed immediate and visible injury was not necessarily the only way to show deliberate intention:

> 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 [v. Boeing Co.], 173 [Wn.] App [271,] 284, 294 P.3d 759 [2013]. 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.

Id. at 398.

Citing this paragraph, the Cockrums argue their evidence is distinguishable from that presented in Walston, and equivalent to that in Birklid, because their evidence shows Alcoa knew of "continuing illnesses among employees" currently manifesting at the time of Cockrum's asbestos exposure. The Cockrums' evidence is that between 1953 and 1982, Alcoa observed its employees contract asbestosis and mesothelioma due to asbestos exposure. In 1953, Dr. Woodrow Murphy examined an x-ray of an Alcoa employee and found "thickened pleura between the right upper and middle lobes . . . and some fibrosis [in] each upper lung." In 1972, a former Alcoa employee filled out a worker's compensation claim for asbestosis, and related his injury to his work in the ingot plant at Alcoa. In 1979, Alcoa received a letter from Dr. Theodore Fuller discussing the diagnosis of an Alcoa employee

who had been employed for the past 15 years. Dr. Fuller stated, "In view of his history of exposure to asbestos, I think the odds are that this uni-lateral asymptomatic pleural density is an early mesothelioma." In 1982, Dr. Fuller again sent a letter to Alcoa to diagnose another Alcoa employee. After learning the patient was exposed to asbestos dust from his job at Alcoa, Dr. Fuller wrote, "[T]here is no question but what these calcified pleural plaques represent a pleural asbestosis."

This evidence does not show that Alcoa had actual knowledge that Cockrum was certain to be injured, but amounts at most to knowledge of the hazardousness of asbestos that was present in Walston, and was insufficient. The Cockrums argue this must be a faulty interpretation of the IIA, reasoning that their expert testified that asbestos and carcinogens are never "certain" to cause disease, yet such diseases, when related to the workplace, are included in the definition of injury in RCW 51.24.030(3), and are subject to the same treatment as injuries are under RCW 51.32.180. But the IIA's covering an ailment does not imply a particular amenability to its being deliberately caused, or proven to be deliberately caused. The Cockrums' evidence fails to rise above the evidence in Walston, so summary judgment was appropriate.

III

Quoting Andrus v. Department of Transportation, 128 Wn. App 895, 900-01, 117 P.3d 1152 (2005), Howmet argues RAP 18.9(a) sanctions are appropriate because the Cockrums' argument is " 'precluded by well-established and binding precedent that [the appellant] does not distinguish.' " (Alteration in original.)

RAP 18.9(a) authorizes the appellate court to impose sanctions when a party brings a frivolous appeal. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). All doubts as to whether an appeal is frivolous are resolved in favor of the appellant. Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). With doubts resolved in their favor, the Cockrums' arguments are not frivolous. We deny Howmet's request for sanctions.

Affirmed.

Birk, J.

WE CONCUR:

Coburn, J.

Hazelrigg, ACJ

Appendix 2

HONORABLE DAVID WHEDBEE
HEARING DATE: MARCH 24, 2023 at 11:00 a.m.
WITH ORAL ARGUMENT

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN THE COUNTY OF KING

JEFFREY L. COCKRUM and DONNA COCKRUM, husband and wife,

Plaintiffs,

vs.

C.H. MURPHY/CLARK-ULLMAN, INC., et al.,

Defendants.

NO. 22-2-12092-4 KNT

ORDER GRANTING DEFENDANT HOWMET AEROSPACE, INC.'S MOTION FOR SUMMARY JUDGMENT

This matter came on regularly before the Court for hearing upon Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment. The Court has considered the arguments of counsel on March 24, 2023 and reviewed the records and files herein, including:

1. Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment;

2. Declaration of Kevin J. Craig in Support Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment and exhibits thereto;

3. Plaintiffs' Response to Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment;

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4. Amended Plaintiffs' Response to Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment;

5. Declaration of Steven E. Haber, M.D.;

6. Declaration of Justin Olson in Support of Plaintiffs' Response to Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment

7. Reply in Support of Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment;

8. Supplemental Declaration of Kevin J. Craig in Support of Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Howmet Aerospace, Inc.'s Motion for Summary Judgment is GRANTED. Defendant Howmet Aerospace, Inc. is DISMISSED with prejudice from this case.

DATED this 28th day of March, 2023.

HONORABLE DAVID WHEDBEE

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CERTIFICATE OF SERVICE

I certify that on March 13, 2024, I caused to be served a true and correct copy of the foregoing document upon the below-listed attorneys of record by the following method:

☒ Via Appellate Portal, to the following:

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Dated at Seattle, Washington this 13th day of March 2024.

BERGMAN OSLUND UDO LITTLE

*_/s/ Stephanie Simmons_*
Stephanie Simmons

BERGMAN OSLUND UDO LITTLE

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