No. 1028814

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

HOWMET AEROSPACE, INC., f/k/a ARCONIC, INC., as corporate successor to ALCOA, INC.,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Under the Industrial Insurance Act (IIA), workers' compensation benefits are the exclusive remedy for workplace injuries with one, narrow exception: if the employee was injured because of "the deliberate intention of his or her employer to produce such injury." RCW 51.24.020.

For over a century, this Court has interpreted that exception narrowly as requiring deliberate intent to injure the plaintiff, specifically. In *Birklid v. Boeing Co.*,[1] this Court adopted a two-pronged test for invoking the exception. A plaintiff must establish that their employer (1) actually knew that *the plaintiff* was certain to be injured and (2) willfully disregarded that knowledge. Then, in *Walston v. Boeing Co.*,[2] an asbestos-exposure case, this Court held that the plaintiff's

[1] 127 Wn.2d 853, 904 P.2d 278 (1995).

[2] 181 Wn.2d 391, 334 P.3d 519 (2014).

claim failed *Birklid*'s first prong because "asbestos exposure is not certain to cause mesothelioma or any other disease."[3]

This asbestos-exposure case is indistinguishable from *Walston*. In *Walston*, the plaintiff's medical expert acknowledged that asbestos exposure is medically certain to cause mesothelioma or any other disease. The same is true here. Division One correctly concluded that *Walston* controls, and nothing in Division One's unpublished decision affirming the summary judgment for Alcoa[4] conflicts with *Birklid* or *Walston*.

Wishing to distinguish *Walston*, the Cockrums assert that Alcoa was aware that other workers at its aluminum smelter developed asbestos-related diseases before Jeffrey Cockrum was exposed. They argue that, under *Birklid*, they can rely on such evidence to prove that Alcoa knew that injury was certain to occur—to someone. But, in both *Birklid* and *Walston*, this Court

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[3] *Id.* at 397.

[4] For clarity, Respondent will refer to itself by the historical name of Cockrum's former employer, Alcoa.

held that an employer's certainty that someone will be injured does not suffice under the exception. In fact, the plaintiff in *Walston* relied on evidence of prior occasions of asbestos-caused diseases in other workers, to no avail.

Trying a different tack, the Cockrums overstate the issue as whether *Birklid* and *Walston* "categorically exclude" chronic occupational diseases from the deliberate-intent exception. But this case does not raise that issue because it involves the same disease as *Walston*—mesothelioma—and so *Walston* controls. Besides, as Division One correctly concluded, a disease's being a compensable "injury" under the IIA does not necessarily mean it can be deliberately caused under the exception.

Although they refrain from outright saying so, the Cockrums ultimately disagree with *Walston*. And they hope that a majority of the current members of this Court do, too. They hope that changes in this Court's membership in the decade since *Walston* will yield a different result. But stare decisis and legislative acquiescence weigh strongly against revisiting this

Court's longstanding interpretation of the deliberate-intent exception, reflected in *Walston*. Any reservations this Court's current members may hold about that interpretation would be an improper proper basis for granting review.

Nothing in Division One's decision conflicts with *Birklid* or *Walston*. To the contrary, those precedents compelled the result here. And the Cockrums can claim to raise an issue of substantial public interest only by overstating the issue presented to raise a purely academic question, the answer to which does not favor them in any event. This Court thus should deny review.

But if this Court grants the Cockrum's petition, it should also consider an alternative ground to affirm not reached by Division One—*Birklid*'s willful-disregard prong. Unrebutted evidence establishes that Alcoa actively sought to safeguard its employees, including Cockrum, against asbestos exposure. So summary judgment was appropriate on that ground, as well.

II. RESTATEMENT OF THE ISSUES

A. The Cockrums' Petition

1. No conflict with Birklid or Walston. This case is indistinguishable from *Walston*, where this Court held that asbestos exposure cannot satisfy *Birklid*'s first prong because such exposure is not certain to cause mesothelioma or any other disease. Did Division One correctly conclude *Walston* controls?

2. No issue of substantial public interest. This case involves the same disease as in *Walston*—mesothelioma—and it does not require deciding if the deliberate-intent exception may apply to other chronic occupational diseases. Do the Cockrums thus fail to raise any issue of substantial public interest?

3. Statutory interpretation cemented by stare decisis and legislative acquiescence. For over a century, this Court has narrowly interpreted the deliberate-intent exception to require intent to injure the plaintiff, specifically. And a decade has passed since this Court decided *Walston*, specific to asbestos exposure. Yet the Legislature has never taken issue with this Court's interpretations of the exception. Consistent with stare decisis and legislative acquiescence, should this Court decline to revisit *Walston*?

B. Alcoa's Conditional Cross-Petition

No willful disregard. Alternatively, the Cockrums cannot establish *Birklid*'s second prong—willful disregard—because Alcoa actively sought to safeguard its employees, including Cockrum, against asbestos exposure. If this Court grants the Cockrums' petition, should it also consider this alternative ground to affirm?

III. RESTATEMENT OF THE CASE

A. The Cockrums' medical expert acknowledged that asbestos exposure is not certain to cause disease.

As the Cockrums acknowledge, Division One accurately summarized the facts material to *Birklid*'s first prong—certainty of injury. *See Slip Op.* at 2–3; *see also Br. of Respondent* at 6–8. Certain facts bear emphasis.

The Cockrums' medical expert, Steven E. Haber, M.D., testified that asbestos exposure, at any dose, is not medically certain to cause mesothelioma or any other disease. CP 616–17, 868. "[D]ue to individual susceptibility," he added, "two individuals could work side-by-side and inhale the same dose of asbestos yet only one (or neither) might develop an asbestos-related disease decades later." CP 618. And he testified that he was unaware of any scientific or medical literature suggesting otherwise. CP 617, 868.

B. Alcoa actively sought to safeguard employees from asbestos exposure.

Additional facts bear on *Birklid*'s second prong—willful disregard. Unrebutted evidence establishes that Alcoa actively sought to safeguard against asbestos exposure.

Alcoa began working to prevent or minimize possible asbestos exposure before Cockrum's arrival in 1967. When it opened the Wenatchee Works smelter in 1952, Alcoa created an onsite industrial-hygiene committee. CP 179–80. The committee's charge included being "familiar with maximum concentrations of toxic substances [and] dusts…allowable under applicable state and federal laws" and conducting tests and surveys to ensure compliance with those standards. CP 179.

Starting in the 1950s, Alcoa regularly performed industrial-hygiene surveys to identify and correct safety issues. CP 192–228, 233. The surveys included air sampling and aimed to ensure that any toxic substances or dusts were within state standards and industry guidelines. *See id.*

Between 1963 and 1971, Alcoa voluntarily adopted and complied with standards stricter than then-existing industry and governmental standards for airborne asbestos fibers. CP 177, 227–35, 248–54, 282, 286, 288. Air sampling in the late 1960s found concentrations well below allowed levels. CP 192–228, 233. Alcoa also enforced a mask policy and improved ventilation and dust collection. CP 133, 150–51, 173–77, 195–225.

Alcoa expanded its efforts to reduce the potential asbestos risks after Cockrum's hiring in 1967. In the 1960s and 1970s, it installed even more ventilation and continued enforcing its mask policy. CP 76, 173–77, 210–11, 227–28. The smelter passed an OSHA inspection in 1973; that inspection noted no concerns about asbestos exposure in the pot rooms. CP 290–91. That same year, an OSHA asbestos-compliance questionnaire indicated that no workplace areas exceeded asbestos-exposure limits. CP 293–99.

From 1972 onward, Alcoa replaced asbestos-containing materials, such as the insulation in the pot rooms, with asbestos-free substitutes as they became available. CP 301–89. Alcoa held safety meetings and provided masks, showers, separate lockers for work and non-work clothes, and laundry services. CP 76, 109–10, 124, 137–39.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The deliberate-intent exception in RCW 51.24.020 is a narrow exception to the exclusive remedy of workers' compensation.

Washington was one of the first states to enact a workers' compensation law over a century ago with the IIA's passage in 1911. The IIA reflected a "grand compromise" concerning the rights of employers and injured workers. *Birklid*, 127 Wn.2d at 859. Workers obtained speedy, guaranteed relief for workplace injuries without the expense or uncertainty of litigation; employers obtained immunity from nearly all civil suits for such injuries. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002); *see* RCW 51.04.010.

The workers' compensation remedy is exclusive with one, narrow exception: if the employee was injured because of "the deliberate intention of his or her employer to produce such injury." RCW 51.24.020. An injured worker who proves that their employer deliberately intended to injure them may recover in a tort action against the employer, in addition to obtaining the benefits payable under the act. *Id.*

B. For over a century, this Court has consistently interpreted the deliberate-intent exception narrowly.

The exception's scope is a matter of statutory interpretation under Washington's plain-meaning rule. *See State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 145 Wn.2d 1, 9–12, 43 P.3d 4 (2002). For over a century, this Court has interpreted the exception narrowly, consistent with the statute's plain language requiring the worker to establish that their employer had "deliberate intention…to produce" their injury. RCW 51.24.020.

1. Since 1922, this Court has interpreted the exception to require deliberate intent to injure the plaintiff, specifically.

This Court addressed the deliberate-intent exception four times during the first four decades after the IIA's enactment, starting with two decisions in 1922 and 1923. *See Perry v. Beverage*, 121 Wash. 652, 209 P. 1102, 214 P. 146 (1923) (en banc); *Delthony v. Standard Furniture Co.*, 119 Wash. 298, 205 P. 379 (1922). Those cases' facts provided a useful contrast.

In *Delthony*, a boiler explosion injured the plaintiff. *Delthony*, 119 Wash. at 299. Invoking the exception, the plaintiff asserted that his employer knew the boiler was unsafe. *Id.* at 299–300. But this Court held that the exception applies only where the employer had "determined to injure an employee" and had "specific intent" to do so. *Id.* at 300. Because the evidence showed, at most, negligence, this Court affirmed a dismissal. *Id.*

Conversely, *Perry* involved intentional conduct directed at the plaintiff: his boss smashed his face with a water pitcher.

Perry, 121 Wash. at 655, 659. Affirming a judgment for the plaintiff, this Court held that the trial court properly submitted the deliberate-intent issue to the jury. *Id.* at 659–60.

The next two cases—separated by 40 years—were more like *Delthony* than *Perry*. Both involved employers who knowingly endangered employees generally but lacked intent to injure the plaintiff, specifically. One employer used a bad cable in its logging operation. *Biggs v. Donovan Corkery Logging Co.*, 185 Wash. 284, 285–88, 54 P.2d 235 (1936). The other disabled a safety mechanism on an industrial press. *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 579–84, 457 P.2d 856 (1976). Because neither plaintiff had evidence of his employer's intent to injure him, this Court affirmed dismissals in both cases. *Id.* at 584; *Biggs*, 185 Wash. at 287–88.

2. In *Birklid v. Boeing Co.* (1995), this Court confirmed that the same narrow interpretation applies in toxic-exposure cases.

This Court next addressed the exception's scope nearly two decades later in *Birklid*—a toxic-exposure case that

presented a fact pattern this Court had not previously addressed. After Boeing began using phenol-formaldehyde resin, the plaintiff employees became ill from toxic fumes and complained. *Birklid*, 127 Wn.2d at 856–57. Boeing continued exposing them anyway, triggering their symptoms anew. *Id.* Their case came to this Court on a certified question after a federal district court dismissed on summary judgment.

This Court resolved to refine its test for deliberate intent to better contend with diverse fact patterns. *See id.* at 862–63. It considered and rejected two tests from other states. First was the "substantial certainty" test, which allowed a finding of deliberate intent if the employee's injury was "substantially certain to occur as a consequence of actions the employer intended[.]" *Id.* at 864 (quoting *Beauchamp v. Dow Chem. Co.*, 427 Mich. 1, 398 N.W.2d 882, 891–92 (1986)). Second was the "conscious weighing" test, which allowed a finding of deliberate intent if 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." *Id.* at 865.

This Court unanimously rejected those tests as incompatible with "the narrow interpretation Washington courts have historically given to RCW 51.24.020, and…the appropriate deference four generations of Washington judges have shown to the legislative intent embodied in RCW 51.04.010." *Id.* It instead adopted a test consistent with its earlier decisions requiring that the plaintiff establish that the employer had specific intent to injure them. Under *Birklid*'s two-pronged test, a plaintiff must establish that their employer "[1] had actual knowledge that an injury was certain to occur and [2] willfully disregarded that knowledge." *Id.*

Applying this test to *Birklid*'s facts, this Court concluded that the plaintiffs raised a fact issue about Boeing's alleged deliberate intent to injure them. *Id.* at 863, 865–66. It reasoned that Boeing arguably "knew in advance" that injury was certain to occur when it re-exposed the plaintiffs to the chemical that

previously injured them. *Id.* at 863. And Boeing arguably willfully disregarded that knowledge by re-exposing the plaintiffs to that chemical despite that knowledge. *Id.*

Since *Birklid*, this Court has adhered to its narrow interpretation of the exception and confirmed that *Birklid*'s first prong is met "in only very limited circumstances." *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 32, 109 P.3d 805 (2005) (holding that the employer's knowledge that a student had injured staff nearly 100 times was not knowledge of certainty of future injury to anyone, let alone the plaintiff).

3. In *Walston v. Boeing Co*. (2014), this Court held that the exception did not apply to the same disease involved here—mesothelioma.

A decade ago, this Court applied *Birklid* in the precise context presented here—asbestos-related disease and, specifically, mesothelioma. It held that the plaintiff's claim failed *Birklid*'s first prong because "asbestos exposure is not

certain to cause mesothelioma or any other disease." *Walston*, 181 Wn.2d at 397.

In *Walston*, the evidence was that, by 1985, Boeing was aware of the dangers of asbestos and that safety regulations mandated protective gear. *Walston*, 181 Wn.2d at 395. Yet it forced Walston and his colleagues to work without protection while abatement professionals disturbed asbestos insulation above, creating visible dust and debris. *Id.* at 394. Despite requests to relocate, a supervisor suggested only to avoid working directly beneath the repairs. *Id.* Twenty-five years later, Walston was diagnosed with mesothelioma, and his estate later sued Boeing. *Id.* at 394–95.

This Court held that Boeing was entitled to summary judgment. It observed that *Birklid*'s "high standard" is met "only when an employer had actual knowledge that an injury was certain to occur." *Id.* at 396. It held as a matter of law that this standard was not met. *Id.* at 397. It observed that Walston's experts had acknowledged that "asbestos exposure is not certain

to cause mesothelioma or any other disease." *Id.* So it concluded that Walston failed to raise "an issue of material fact as to whether Boeing had *actual knowledge* that injury was *certain to occur*." *Id*. (emphasis by this Court).

C. Division One correctly concluded that *Walston* controls, and nothing in its decision conflicts with *Birklid* or *Walston*.

This case is indistinguishable from *Walston*. The Cockrums submitted no evidence distinct from that in *Walston*. And the science is unchanged: like the plaintiff's experts in *Walston*, the Cockrums' medical expert acknowledged that asbestos exposure is not certain to cause mesothelioma or any other disease. CP 616–18. Division One thus correctly concluded that *Walston* controls. *See Slip Op*. at 5–7.

Seeking review, the Cockrums assert that Division One's decision conflicts with *Birklid* and *Walston*. But they misread both decisions.

The Cockrums contend that this Court in *Birklid* allowed the plaintiffs to use other workers' prior injuries as evidence that

Boeing had actual knowledge that continuing to use phenyl-formaldehyde resin was certain to injure the plaintiffs. They label this approach "constructive certainty." But nothing in *Birklid* supports such an approach. Indeed, *Birklid* precludes it.

For starters, the plaintiffs in *Birklid* did not rely on other workers' prior injuries to allege knowledge of certain injury; they relied on their own prior injuries. *See Birklid*, 127 Wn.2d at 856–58. They alleged that Boeing "knew specific workers, including Appellants [the plaintiffs], were getting sick working with the phenolic resins." *Birklid v. Boeing Co.*, No. 62530-1, *Br. for Appellants*, 1995 WL 17223700, at *9 (June 27, 1995).

Not only that, but *Birklid* ruled out using some workers' getting sick to establish the certainty of similarly situated workers' getting sick in the future. To permit such a theory, this Court would have needed to adopt the conscious-weighing test, under which the employer's knowledge that "someone, not necessarily the plaintiff specifically, would be injured," is sufficient. *Birklid*, 127 Wn.2d at 865. But this Court rejected

that test. *Id.* The Cockrums' "constructive certainty" theory is conscious weighing by another name. It thus contradicts *Birklid*.

Constructive certainty also contradicts *Walston*, where this Court observed that it "already rejected" an injury-to-someone approach in *Birklid*. *See Walston*, 181 Wn.2d at 397. But that does not stop the Cockrums from claiming otherwise. Viewing *Walston* through the lens of their distorted reading of *Birklid*, the Cockrums maintain that Walston failed to satisfy *Birklid* and survive summary judgment because he could not point to "prior occasions of asbestos-caused illnesses among Boeing's personnel prior to or contemporaneous with the incident with the maintenance workers." *Petition* at 11–12. But that was not the basis for *Walston*'s holding.

The problem for Walston was not a lack of evidence of prior occasions of asbestos-caused diseases in other workers. He submitted such evidence. *See Walston*, 181 Wn.2d at 409 (Wiggins, J., dissenting) (noting that "[o]ne of Walston's coworkers had already died of mesothelioma from inhaling

asbestos fibers in the hammer shop"); *Walston v. Boeing Co.*, 173 Wn. App. 271, 276, 294 P.3d 759 (2013) (describing multiple prior workers' compensation claims for asbestos-related injuries).[5] Instead, Walston's problem was that this evidence was irrelevant under *Birklid*'s first prong—so much so that the *Walston* majority omitted any mention of it.

This Court made crystal clear the irrelevance of other workers' injuries. It stated the issue as whether Walston had "raised a question of material fact as to whether Boeing had actual knowledge that *he* was certain to be injured by the asbestos exposure[.]" *Walston*, 181 Wn.2d at 395 (emphasis added). The answer was "no," this Court held, because "asbestos exposure is not certain to cause mesothelioma or any other disease." *Id.*

[5] The Court of Appeals and Justice Wiggins mentioned this evidence only to show Boeing's general knowledge of the hazards of asbestos. *See Walston*, 181 Wn.2d at 409 (Wiggins, J., dissenting); *Walston*, 173 Wn. App. at 276. Justice Wiggins dissented based on the notion that asbestos exposure caused "immediate and certain scarring in Walston's lungs," which he argued established "continuous[]" injury under *Birklid*. *Walston*, 181 Wn.2d at 403–04 (Wiggins, J., dissenting).

at 397. That holding rules out reliance on other workers' prior illnesses because such evidence does not tend to show that the plaintiff was certain to contract an asbestos-related disease from their own asbestos exposure.

Division One's decision is fully consistent with *Birklid* and *Walston*. Division One addressed the Cockrums' evidence that Alcoa observed certain employees contract asbestos-related diseases between 1953 and 1982. And it correctly concluded that this evidence cannot support a finding of certainty that Cockrum would be injured. *Slip Op.* at 7. That evidence instead "amounts at most to knowledge of the hazardousness of asbestos that was present in *Walston*, and was insufficient." *Id.* Review under RAP 13.4(b)(1) is unwarranted.

D. Although an issue beyond the scope of this case (because *Walston* controls in asbestos-exposure cases such as this), nothing in the IIA requires that chronic occupational diseases may be deliberately caused.

In arguing that their petition involves an issue of substantial public interest under RAP 13.4(b)(4), the Cockrums overstate the issue presented. They argue that this Court in

Walston cannot have meant to rule out applying the deliberate-intent exception to asbestos-related diseases because, by the same logic, it would "categorically exclude all chronic occupational diseases." *Petition* at 1.

Whether the exception can apply to diseases besides mesothelioma is beyond the scope of this case. *Walston* resolved the issue for the disease at issue here—mesothelioma. Barring a change in the science of disease causation—and none has occurred—*Walston* controls. This Court ordinarily will not decide "purely academic" questions. *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968). And doing so can yield only nonbinding dictum. *See Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003).

Given *Walston*'s clear holding about the same disease involved here, it seems evident that the Cockrums do not actually believe that this case presents the broad issue they identify. Instead, they overstate the issue purely as a rhetorical device

meant to cast doubt on *Walston*'s rationale. But that is not an appropriate basis to grant review.

Even if this Court were to consider *Walston*'s potential implications for other diseases, the Cockrums' argument would fail because they misread the IIA. Just because a particular disease is an "injury" for purposes of workers' compensation eligibility (*see* RCW 51.24.030(3); RCW 51.32.180) does not mean it can necessarily be deliberately caused. As Division One correctly concluded, "the IIA's covering an ailment does not imply a particular amenability to its being deliberately caused, or proven to be deliberately caused." *Slip Op.* at 7.

Nor does the deliberate-intent exception categorically exclude injuries from exposure to toxic substances. The Cockrums' medical expert acknowledged that exposure to certain toxic substances causes "immediate recognizable injury in everyone exposed." CP 617–18. *Birklid*'s first prong could be satisfied if an employer deliberately exposed its workers to such a substance. But asbestos is not such a substance.

E. Consistent with stare decisis and legislative acquiescence, this Court should decline to revisit *Walston*.

Given that *Walston* controls, the Cockrums' petition effectively asks this Court to revisit that decision and curtail or overrule it. But that would violate two complementary doctrines that command respect for precedent—stare decisis and legislative acquiescence. So review would not be prudent.

Stare decisis—adherence to past decisions—is essential to stability in our jurisprudential system. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

Although not absolute, only narrow grounds exist to overcome stare decisis. This Court has identified just two,

neither of which applies here. *See State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016).

First, a decision may be overruled on "a clear showing that an established rule is incorrect and harmful." *Id.* (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Under this test, the question is not whether this Court would make the same decision if it were writing on a clean slate, but whether the prior decision is "so problematic that it must be rejected, despite the many benefits of adhering to precedent[.]" *Id.* (declining to revisit a longstanding interpretation of ER 801(d)(1)).

Second, a decision may be overruled if intervening authority has eliminated its "legal underpinnings." *Id.*

The Cockrums have never argued that *Walston* is incorrect and harmful. And for good reason. Any such argument would be meritless because this Court based *Walston* on the IIA's plain language and a century's worth of precedent narrowly interpreting that language. Nor have the Cockrums argued that

Walston's legal underpinnings have been eliminated. And no support exists for such an argument. After all, the science of disease causation for mesothelioma has not changed since *Walston*.

Instead, it appears that the Cockrums hope that changes in this Court's membership since *Walston* will work in their favor.[6] And that is the core problem with their petition: accepting review would invite precisely the instability and erosion of trust that stare decisis seeks to prevent. This Court remains the same

[6] This is not the first bid by the Cockrums' lawyers—who also represented the plaintiff in *Walston*—to have this Court revisit *Walston*. *See Atchinson v. Howmet Aerospace, Inc.*, No. 20-35250, 2021 WL 5232530 (9th Cir. 2021) (affirming summary judgment for Alcoa and refusing to certify to this Court whether the deliberate-intent exception exempts all chronic occupational diseases).

institution even as its composition changes; a change in its membership alone cannot justify a change in the law.[7]

But that is not all. The Cockrums' bid for review is weaker still because this case turns on statutory interpretation, and stare decisis has "special force" in such matters. *State v. Blake*, 197 Wn.2d 170, 190–91, 481 P.3d 521 (2021) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)). That is because the Legislature is "free to correct any judicial error; and the remedy may be promptly invoked." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting) (subsequent history omitted).

[7] *See Payne*, 501 U.S. at 844 (Marshall, J., dissenting) ("Neither the law nor the facts supporting [precedent] underwent any change…[o]nly the personnel of this Court did"); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government.").

Under legislative acquiescence, where statutory language remains unchanged after a court decision, this Court "will not overrule clear precedent interpreting the same statutory language." *Blake*, 197 Wn.2d at 190. Instead, this Court takes the Legislature's "failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *Koenig*, 167 Wn.2d at 348.

Indeed, once this Court has interpreted a statute, that interpretation becomes, in effect, part of the statute. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 84, 896 P.2d 682 (1995). Thus, even where this Court was concerned that it may have previously misinterpreted a statute (because the U.S. Supreme Court had subsequently interpreted identical language in a federal statute differently), this Court adhered to its precedent and concluded that, because of the passage of time, only the Legislature could change this Court's interpretation. *Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980).

Legislative acquiescence applies specifically to this Court's interpretation of the deliberate-intent exception. Indeed, this Court previously invoked legislative acquiescence to codify that interpretation nearly 50 years ago. *Foster*, 86 Wn.2d at 582–83. Rejecting an invitation to revisit precedent, this Court reasoned that its interpretation had "been in effect for more than 50 years and legislative approval is presumed." *Id.* at 583.

Now, in 2024, this Court's narrow interpretation of the exception has been in effect for over a century. More, this Court handed down *Walston*—specific to asbestos exposure and mesothelioma—a decade ago. And the Legislature has acquiesced in that holding, too. The Legislature is aware of mesothelioma as a disease within the IIA's scope. In 2019, it amended the IIA to identify mesothelioma as one of the types of cancers that, in firefighters, is presumed to be an occupational disease. LAWS OF 2019, ch. 133, § 1. Yet in none of the 18 legislative sessions since *Walston* has the Legislature formally

considered, let alone abrogated, this Court's interpretation of the deliberate-intent exception as applied in *Walston*.

Given the Legislature's acquiescence in that interpretation, this Court should deem it part of the statute, such that only the Legislature may change it. *See Buchanan*, 94 Wn.2d at 511. Review is thus unwarranted.

V. ARGUMENT FOR CONDITIONAL CROSS-REVIEW

Neither court below reached *Birklid*'s second prong—willful disregard—because the first prong is a prerequisite. Absent a showing that Alcoa knew that asbestos exposure was certain to injure Cockrum, there could be no willful disregard of such knowledge. *See Vallandigham*, 154 Wn.2d at 34. But even if the Cockrums could somehow establish the first prong, affirmance would still be warranted because they cannot establish the second.

Birklid's second prong is satisfied only where the employer made *no* effort to reduce or mitigate the risk of harm. *See Birklid*, 127 Wn.2d at 857, 865–66 (holding that summary

judgment was inappropriate where the employer did nothing to mitigate exposure to toxic fumes). A jury cannot find willful disregard given unrebutted evidence that the employer exercised some care—however slight—concerning the risk alleged to have caused the injury. *See Vallandigham*, 154 Wn.2d at 34–35.

Such unrebutted evidence exists here, showing Alcoa's efforts to safeguard against asbestos exposure. *See* § III.B, *supra*. So, as a matter of law, even if the Cockrums could somehow establish *Birklid*'s first prong, they cannot establish the second—willful disregard. If this Court grants the Cockrums' petition, then it should also consider this alternative ground to affirm.

VI. CONCLUSION

Review is unwarranted because Division One correctly concluded that *Walston* controls and because this case does not present the broad question the Cockrums pose as a device to supposedly cast doubt on *Walston*. Besides, even if this case presented that question, the answer would not favor the

Cockrums. But if this Court grants the Cockrums' petition, then it should also consider the willful-disregard issue as an alternative ground to affirm.

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Respectfully submitted: May 28, 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that I am an employee at Carney Badley Spellman, PS, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal to the following:

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DATED: May 28, 2024

/s/ Patti Saiden
Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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