No. 92313-2

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 72635-8-I)

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

Petitioners,

v.

ALCOA, INC.,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

Peggy L. Kalahar is the surviving spouse of John M. Kalahar and is also the Personal Representative of his Estate.

II. COURT OF APPEALS' DECISION

On August 24, 2015, the Court of Appeals, Division I, issued its unpublished decision affirming the trial court's summary judgment dismissal of the Plaintiffs' intentional injury claim against Alcoa, Inc. based on this Court's recent ruling in *Walston v. Boeing Co.*, 181 Wn. 2d 391, 334 P.3d 519 (2014). *Kalahar v. Alcoa, Inc.*, 72635-8-I, 2015 WL 5012588 (Wn. Ct. App. Aug. 24, 2015).

III. ISSUE PRESENTED FOR REVIEW

Should this Court review the Court of Appeals' holding that *Walston v. Boeing* precludes intentional injury claims under RCW 51.24.020 whenever the claimed injury is a latent occupational disease, irrespective of the employer's culpability in exposing the plaintiff to the toxin that caused his disease?

IV. STATEMENT OF THE CASE

John Kalahar was employed at Alcoa's aluminum plant in Wenatchee, Washington from 1963 to 1971. CP 590-91. Throughout this period, Mr. Kalahar was forced to inhale asbestos fibers in the course of his regular job duties. CP 593-94, 611, 624-34, 697-701, 705-07. Mr. Kalahar

was diagnosed with mesothelioma in January of 2014 and died on August 4, 2015, during the pendency of this appeal. There is no dispute that Mr. Kalahar was exposed to asbestos at Alcoa or that this exposure caused his illness and death.

Both the Superior Court and Court of Appeals recognized that Alcoa had actual knowledge that asbestos caused mesothelioma at the time John Kalahar worked at Alcoa's Wenatchee facility. RP 35-36; 2015 WL 5012588 at *1. In granting Alcoa's motion for summary judgment, the Superior Court explicitly found that "at the time he was exposed, that Alcoa knew that more than likely that exposure to asbestos could cause mesothelioma." RP 35. Likewise, in affirming the summary judgment, the Court of Appeals agreed that "Alcoa was aware of the health risks of asbestos exposure and that exposure could result in asbestosis and lung cancer." 2015 WL 5012588 at *1.

More specifically, Alcoa understood the concept of the latency of asbestos-related disease in which symptoms manifest many years after initial exposure. CP 452. The record also suggests that Alcoa knew that "[e]ven intermittent exposures to high concentrations [of asbestos], over long periods of time" were capable of causing disease, but that development of disease varied "according to individual susceptibility." CP 574. Likewise, Plaintiffs presented evidence that Alcoa was aware of the disease

of mesothelioma resulting from "even short and intermittent exposures to asbestos." CP 578-80.

Despite this knowledge, Alcoa affirmatively misrepresented the toxicity of asbestos to Mr. Kalahar and his co-workers. Testifying in this case, Mr. Kalahar described how he and his co-workers complained to Alcoa management regarding the injurious nature of asbestos, but were assured it was safe:

> Q: [W]ere you ever told anything by Alcoa concerning whether or not asbestos was safe to work with and work around?
>
> A: We [] were told that it was safe.
>
> Q: Okay. Tell me about that.
>
> A: There were questions about the materials that we used, and the—the answer was "These are...safe materials."
>
> Q: And who would tell you that, sir?
>
> A: It was a company line and—that came down. Also, you know, other employees said, "Oh, we've asked those questions. It's—they've told us it's safe."

CP 636-37. Mr. Kalahar's co-worker John Cox corroborated this testimony as follows:

> I had the idea in the back of my mind that asbestos might be—since it was a rock, might be as bad as having black lung from working in a coal mine or something. So I asked the foreman that had worked there for many years the first or second day I worked there, Isn't this hazardous to your

> health breathing this? And I was informed that Alcoa had done a study and it had been proven it would not harm you. Don't worry about it.

CP 604.

Plaintiffs filed a Complaint against Alcoa alleging that, by intentionally exposing Mr. Kalahar to asbestos and knowingly misrepresenting its carcinogenic effect, the Defendant fell within the deliberate injury exception to workers' compensation exclusivity set forth in RCW 51.24.020. Alcoa sought summary judgment on the ground that RCW 51.24.020, as applied in *Walston v. Boeing Co.*, 181 Wn. 2d 391, precludes claims for chronic occupational diseases such as mesothelioma for which there is no 100 percent correlation between exposure and disease. The trial court agreed, reasoning as follows.

> So according to *Walston*, the plaintiffs have to, in order to have an exception to the workers' comp remedy, show deliberate intention. And it is a high standard that is met in Washington only when an employer had actual knowledge that injury was certain to occur. Substantial certainty is insufficient. Negligence and gross negligen[ce] are both insufficient...
>
> Mr. Kalahar wasn't diagnosed until 40 years he left Alcoa. And that's when he and everyone else knew that he had this disease. ... [T]his Court is obligated to follow the Supreme Court, whether it thinks it's the right decision or not. I don't see how this Court could find otherwise that Alcoa was not certain that injury was going to occur to Mr. Kalahar back in 1963 to 1971.

RP 35-36. The Court of Appeals adopted the same reasoning, holding that, "Like the expert in *Walston*, the Kalahars' expert admitted that asbestos exposure, at any level, is never certain to cause mesothelioma or any other disease. We are bound by the Supreme Court's decision in *Walston*." 2015 WL 5012588 at *3.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals erred when it interpreted this Court's decision in *Walston v. Boeing Co.*, 181 Wn. 2d 391, as precluding a diseased worker from *ever* bringing an intentional injury claim—no matter how egregious an employer's conduct—where the injury at issue is a latent occupational disease caused by asbestos exposure. 2015 WL 5012588 at *3. If the Court of Appeals' application of *Walston* and *Birklid* is correct, intentionally-inflicted occupational disease may never be the subject of an intentional injury claim under RCW 51.24.020, despite the legislative inclusion of the term "disease" for purposes of application of the "deliberate intent" exception. *See* RCW 51.24.030(3) *and* RCW 51.24.020.

Unless this Court accepts review and clarifies the law, Washington employers who deliberately coerce their employees to sustain toxic exposures will enjoy blanket immunity because of the inescapable reality that *no* disease process is ever 100 percent certain to occur. The perverse incentives of this result do not comport with

Washington's legislative and judicial policy favoring protection of workers from workplace injury and illness. *See Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn. 2d 291, 300, 996 P.2d 582, 586 (2000). This Court should accept review to correct the Court of Appeals' mistake and clarify the law consistent with the policy of Washington State.

A. The Court of Appeals' Holding Writes Occupational Disease Out of the Intentional Injury Exception.

RCW 51.24.020 sets forth the deliberate injury exception to the "grand compromise" of the workers' compensation system created by the Industrial Insurance Act:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted...

In tandem, RCW 51.24.030(3) defines "injury" for purposes of Chapter 51.24 as including "any physical or mental condition, *disease*, ailment or loss, including death, for which compensation and benefits are paid or payable under this title." (emphasis supplied).

The Industrial Insurance Act did not always cover "disease." Originally, RCW 51.08.100 defined "injury" narrowly and exclusively as "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." *Henson v. Dep't of Labor & Indus.*, 15 Wn. 2d 384, 390, 130 P.2d 885, 888 (1942). *See also Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wn. 2d 467, 472, 745 P.2d 1295, 1298 (1987) (at the time of the IIA's enactment in 1911 there was "no coverage for disability resulting from occupational disease"). Starting in 1937, the Legislature expanded the universe of compensable "injuries" and eventually added "occupational disease," defined in RCW 51.08.140, as a basis for compensation. *Dennis*, 109 Wn. 2d at 472-74 (discussing history of occupational disease coverage in Washington).

The Legislature has generally maintained the distinction between "injury" of an abrupt onset—defined as a sudden and traumatic event—and "occupational disease," which generally occurs as the result of a long-term injurious process to the worker's body. *Compare* RCW 51.08.140 (defining "occupational disease" as "disease or infection as arises naturally and proximately out of employment") *with Lehtinen v. Weyerhaeuser Co.*, 63 Wn. 2d 456, 458, 387 P.2d 760, 762 (1963) ("injury" "must be the product of a sudden and tangible happening...of some notoriety, fixed as to time and susceptible of investigation"). A notable exception to this framework is Chapter 51.24 RCW, the statute codifying the deliberate intent exception, where the Legislature brought together sudden and traumatic events and gradually occurring occupational diseases when it defined "injury" for

purposes of applying the "deliberate intent" exception. RCW 51.24.030 defines "injury" for purposes of RCW 51.24.020 as including *both* sudden injuries *and* "diseases," which develop over time.

In interpreting statutes, this Court must give meaning to *all* the words chosen by the Legislature and avoid strained or absurd results. *See Lowy v. Peace Health*, 174 Wn. 2d 769, 779, 280 P.3d 1078 (2012); *State Dep't of Transp. v. James River Ins. Co.*, 176 Wn. 2d 390, 397-98, 292 P.3d 118 (2013) (rejecting interpretation of statute that did not account for or explain all the words chosen by the Legislature); *American Cont'l Ins. Co. v. Steen*, 151 Wn. 2d 512, 521, 91 P.3d 864 (2004) (holding that all the words in a statute "have meaning," and "are not superfluous"). Because "injury" is defined as "disease" for purposes of application of the deliberate intent exception, and because "disease" is the compensable injury at issue in this case, RCW 51.24.020 must be read as follows:

> If [disease] results to a worker from the deliberate intention of his or her employer to produce such [disease], the worker or beneficiary of the worker shall have cause of action against the employer as if this title had not been enacted...

In finding that the Kalahars had failed to satisfy the intentional injury exception, the Court of Appeals relied upon the fact that the Kalahars' experts, like the plaintiff's experts in *Walston*, "admitted that asbestos exposure, at any level, is never certain to cause mesothelioma

or any other disease." 2015 WL 5012588 at *3. The fact that not everyone who is coerced to inhale asbestos dust develops disease is equally true for any toxic insult that triggers an injurious process leading to a chronic disease. That was the case with the chemical exposures in *Birklid v. Boeing Co.*, 127 Wn. 2d 853, 904 P.2d 278 (1995) and in *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501 (1996). It is equally true in poisoning and irradiation cases. The Court of Appeals seized upon this inescapable reality at oral argument in asking Alcoa's counsel whether there was *any* occupational disease that was medically certain to occur:

> Q: [I]s there any occupational disease that [] a medical practitioner would testify that anyone was certain to suffer from, to [] have manifest itself?
>
> A: I don't know the answer to that.
>
> ***
>
> Q: So insofar as you know though, mesothelioma and any other similar disease that comes about over a long period of time and may or may not be related to a particular exposure -- or I guess -- no. They usually know that it is related to an exposure, but that may or may not occur even to someone who has been exposed. You are arguing for a rule that that is outside of *Birklid* because of a lack of certainty?
>
> A: Yes.

Appendix E, Transcript of Recorded Hearing (App. E) at 12-13.

If the Court of Appeals' interpretation of *Walston* is allowed to stand, an employee suffering from asbestos-related disease could *never* bring an intentional injury claim, no matter how egregious the employer's conduct. Employers who hire itinerant day laborers to strip asbestos from pipes and boilers without informing them of the hazards are subject to criminal prosecution under the Clean Air Act.[1] Nevertheless, under the Court of Appeals' application of *Walston*, the same conduct that would send an employer to federal prison is shielded from civil liability under Washington law.

The Court of Appeals perceived the incongruity in Alcoa's proposed post-*Walston* certainty threshold when posing the following hypothetical to its counsel:

> Q: Fifteen employees working down below. Employer on the walkway blindfolded takes a gun and fires fifteen shots, kills three, wounds two, ten are missed. No certainty of injury?
>
> A: Under *Birklid* there is no certainty of injury.

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[1] *See, e.g., See, e.g., United States v. Rubenstein*, 403 F.3d 93 (2nd Cir. 2005) (upholding conviction of employer who hired day workers to remove asbestos pipe insulation with knife and scissors and failed to tell the workers that they were removing asbestos). *United States v. Starnes*, 583 F.3d 196 (3rd Cir. 2009) (affirming 33-month prison sentences for employers who failed to provide their workers with any personal protective devices during asbestos abatement project and instructed workers to engage in asbestos work practices that created visible asbestos dust); *United States v. Hunter*, 193 F.R.D. 62 (N.D.N.Y. 2000) (defendant employed and supervised workers while they removed asbestos pipe insulation from a building, never told them their work involved asbestos and never provided them with respirators or other protection).

App. E at 15-16. The law of Washington does not countenance immunity under the circumstances of this hypothetical simply because each shot was not destined for a fatal impact and thus not "certain" to kill a specific individual. The gun fired into a crowd of people may or may not kill the first target, but it may be lethal to someone. That kind of "uncertainty" does not exempt employers under the workers' compensation law, including where the metaphorical bullet is an industrial toxin.

The fact that no disease is ever certain to occur is not a principled reason to remove disease from the Legislature's definition of "injury" codified in RCW 51.24.030(3). Mrs. Kalahar is entitled to have a jury consider the evidence—including the undisputed evidence of Alcoa's knowledge of the carcinogenic effect and other human health hazards of asbestos—to decide whether the "deliberate intent" exception applies. The Court of Appeals' erroneous interpretation of *Walston* removes occupational disease from the purview of RCW 51.24.020 in a manner that is inconsistent with *Birklid* and its progeny, and the Court should accept review to correct this error of law.

B. This Case Meets the Criteria for Accepting Review.

This case meets the criteria of RAP 13.4(b)(l), (2) and (4), any one of which compels granting review. Foremost, defining the scope of the intentional injury exception to the exclusivity of workers' compensation is a matter of "substantial public interest" touching directly upon issues of worker safety in Washington State. The Court of Appeals' interpretation of *Walston* is inconsistent with this Court's oft-expressed commitment to aggressively protecting the interests of workers so that the blood of the workman is no longer a cost of industrial production in this state. *Birklid*, 127 Wn. 2d at 874 (*quoting Stertz v. Indus. Ins. Comm'n of Washington,* 91 Wn. 588, 158 P. 256 (1916)). *See also Drikwitz*, 140 Wn. 2d at 300.

If the Court of Appeals' analysis is permitted to stand, employers will enjoy immunity when they deliberately subject their workers to toxic exposures in the hope that resultant terminal illnesses will be sufficiently attenuated to allow the employers to act in their short-term economic interest without the threat of long-term repercussions. Review is therefore necessitated under "Washington's long and proud history of being a pioneer in the protection of employee rights" and "concern for the health and welfare of Washington's workforce," which has found expression in "[n]umerous statutory priovisions" and judicial opinions

safeguarding workers from the disparate bargaining power of their employers. *Drikwitz*, 140 Wn. 2d at 300.

This Court has justifiably interpreted the "deliberate intent" exception narrowly, yet at the same time, it has affirmed that employers who engage in "egregious conduct should not burden and compromise the industrial insurance risk pool." *Birklid*, 127 Wn. 2d at 859. In *Birklid,* Boeing urged that it should remain within the protective cloak of the workers' compensation laws when it deliberately injured its workers "so long as that conduct was reasonably calculated to advance an essential business purpose." *Id.* at 862. This Court readily recognized the imprudence of such a proposed standard and rejected it.

Yet, under the Court of Appeals' analysis in this case, *Birklid* and *Walston* would be applied to limit the universe of cognizable intentional injuries to toxic exposures that cause immediate and visible, but often trivial injuries, while employers enjoy the right to pursue their "business purpose" when deliberately causing workers to suffer latent occupational disease that they know will kill some, but not all, of exposed employees. Such a perverse calculus is neither consistent with the public policy nor the law of this state. *Birklid*, 127 Wn. 2d at 874. Protecting workers from the exploitative conduct of

employers inclined to act in their short-term economic interest, where the cost of such conduct will be borne exclusively by workers suffering latent disease, implicates a substantial public interest necessitating this Court's review. RAP 13.4(b)(4).

If the Court of Appeals' decision stands, Washington employers can decide it is in their economic self-interest to deliberately force employees to sustain a toxic exposure simply because no disease, including cancer, is ever absolutely certain to occur in all exposed individuals. At oral argument, the Court of Appeals foreshadowed this untenable result, to which its application of *Walston* ineluctably leads:

> Q: [I]f Alcoa were to say, to get together in the boardroom and say, You know, there's all this stuff that we're supposed to do to protect our employees. We know what it is. We're supposed to make them wear masks. There's supposed to [be] hoods. There's supposed to be meters. There's supposed to be all kinds of protection. But they're expensive, and so we're not going to do it. You know, we may get a fine, but we'll take that risk... Because the fact of the matter is, even though it's possible and even likely that some of these people may develop mesothelioma, it's not certain. So we will never have to pay them. Don't you think that's a bit of a stretch? Don't you think the Court would have a hard time not fitting that under the rule of *Birklid*, even though it isn't entirely certain that these employees will experience that particular injury?...
>
> A: Well, it looks like deliberate conduct, but that's an intentional tort standard as opposed to deliberate intent to injure standard. And what we have here is the --
>
> Q: Can you answer my question.

A: My answer is --

Q: -- that you would win that case?

A: I believe we win the case under this statute.

App. E at 11-12.

Furthermore, the Court should grant review here because the Court of Appeals' decision in this case conflicts with Division II's holding in *Baker v. Shatz,* 80 Wn. App. 775. In *Baker,* employees of General Plastics were forced to work with toxic chemicals that caused breathing difficulties. *Id.* at 778-79. Despite their repeated protests, supervisors ordered them to continue to work and said the chemicals were not causing the workers' problems. *Id.* at 779. The Court of Appeals held that the deliberate intent exception could go to the jury, even where the employer insisted that it did not intend harm to any of its employees. *Id.* at 784.

Finally, the Court of Appeals' decision below is in conflict with the decision of this Court in *Birklid,* necessitating review pursuant to RAP 13.4(b)(1), and highlighting the inconcsistency in the law enunciated by this Court in *Birklid* and *Walston* respectively. While the Court of Appeals claimed simply to implement the holding of this Court in *Walston,* the Court of Appeals misapplied the *Birklid* rule for toxic exposure cases.

This Court in *Birklid* held that where an employer 1) knows of the health risk of forcing its employees into a toxic exposure; 2) is aware that its employees had suffered injuries from such toxic exposures; and 3) proceeded to force employees into such toxic exposures without altering workplace conditions, the case should be heard by a jury. 127 Wn. 2d at 865-66. Under Washington law, this Court should similarly hold that an employer is not immune from suit when it deliberately forces an employee to inhale asbestos dust for several years, with full knowledge—gleaned in whole or in part from the employer's observation of injuries occurring among its workforce or of contemporaneous symptoms of injurious toxic exposure—that such exposure is capable of causing disease and death among exposed workers. Because the Court of Appeals' decision below conflicts with decisions of this Court and also with other decisions of the Courts of Appeals, review is merited under RAP 13.4 (b)(1)-(2).

C. The Evidence Presented by *Kalahar* Parallels the Evidence Presented in *Birklid.*

Disposition of this appeal is controlled by this Court's opinion in *Birklid v. Boeing Co.*, 127 Wn. 2d 853. This Court has never overruled or modified its holding in *Birklid*, despite at least three opportunities to do so. *See Folsom v. Burger King,* 135 Wn. 2d 658, 661, 667, 958 P.2d 301 (1998);

Vallandingham v. Clover Park School District 154 Wn. 2d 16, 109 P.3d 805 (2005); *Walston v. Boeing Co.*, 181 Wn. 2d 391. Consequently, to the extent the factual record in *Birklid* is analogous to the case at bar, the Court of Appeals' erred in affirming the trial court's grant of summary judgment.

The factual circumstances under which John Kalahar sustained his injurious asbestos exposure at Alcoa are analogous to the facts in *Birklid. Birklid* arose from Boeing's use of phenol formaldehyde resin at its Auburn fabrication facility between 1987 and 1988. 127 Wn. 2d at 856. During pre-production testing, a Boeing supervisor wrote to Boeing administrators reporting that obnoxious odors were present and that some "employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach." *Id.* He stated that "[w]e anticipate this problem to increase as temperatures rise and production increases." *Id.* However, the record in *Birklid* was devoid of evidence that Boeing knew that exposure to phenolic resins was "certain" to cause specific injuries other than dizziness, burning eyes and upset stomach, let alone that any specific employee would sustain injury. Similarly, in this case, Alcoa knew that exposed workers were suffering immediate and observable symptoms in connection with asbestos exposure, even if they were not suffering a compensable injury.

In *Birklid*, the building where the phenol formaldehyde resin was used housed between 100 and 200 Boeing employees. CP 841. However, only 20 workers sought treatment at Boeing's in-house clinic for their symptoms, *Birklid* 127 Wn. 2d at 857, n. 2, and only 17 Boeing workers joined in the suit. Indeed, only half of the people who worked with phenolic resins developed any symptoms at all. CP 845-46. Furthermore, even among affected workers, there was wide divergence in the nature and severity of their symptoms. Some plaintiffs suffered from skin problems, headaches, shortness of breath, asthma and depression. The most common chronic illness alleged by the plaintiffs was chemical sensitivity syndrome. One plaintiff claimed she suffered from depression, mood swings, memory loss, paranoia, suicidal ideation, chemical sensitization syndrome, and brain damage as a result of her exposure to the resin. CP 875-80. Another plaintiff only suffered a rash on his hands. CP 883.

Notwithstanding the fact that less than half of the exposed employees developed symptoms and that the nature and severity of symptoms varied widely, this Court held that Boeing's actual knowledge that *some* workers would become sick was sufficient to satisfy the deliberate injury exception under RCW 51.24.020. The Court explained:

> Boeing ... knew in advance its *workers* would become ill from the phenol-formaldehyde fumes, yet put the new resin into production. After beginning to use the resin, Boeing then observed its *workers* becoming ill from the exposure. In 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.

127 Wn. 2d at 863 (emphasis supplied). In *Birklid*, this Court did not require knowledge that a *specific* employee would sustain a *specific* injury; rather it was sufficient that Boeing observed its "workers" sustaining injuries from the toxic chemicals.

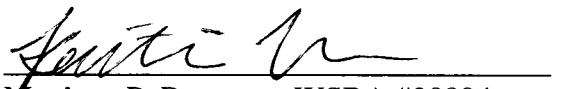
The Court of Appeals' holding that the Kalahars could not establish an intentional injury claim, despite Alcoa's knowledge that coercing employees to sustain asbestos exposure could cause disease and cancer, conflicts with the holding of *Birklid*. Likewise, Alcoa's undisputed actual knowledge that asbestos was carcinogenic, that exposure to asbestos was capable of causing latent disease including asbestosis and mesothelioma, and that its workers being exposed to asbestos were suffering injuries related to their exposure, satisfies *Birklid*'s framework for establishing a triable issue on the question of intentional injury.

VI. CONCLUSION

For the foregoing reasons, this Court should grant review of the unpublished opinion of the Court of Appeals, and hold that the Court of Appeals erroneously applied well-developed principles allowing a direct action in toxic exposure cases where the injury at issue is an occupational disease.

DATED this 24th day of September, 2015.

BERGMAN DRAPER LADENBURG



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN M. KALAHAR and PEGGY L. KALAHAR, husband and wife, Appellants, v. ALCOA, INC., Respondents CERTAINTEED CORPORATION; HANSON PERMANENTE CEMENT, INC., f/k/a KAISER CEMENT CORPORATION; KAISER GYPSUM COMPANY,INC.; PFIZER INC.; RILEY POWER, INC., f/k/a RILEY STOKER CORP., f/k/a BABCOCK BORSIG POWER, INC., f/k/a D.B. RILEY, INC.; SABERHAGEN HOLDINGS, INC.; and UNION CARBIDE CORPORATION, Defendants.	)	No. 72635-8-I DIVISION ONE UNPUBLISHED OPINION FILED: August 24, 2015

APPELWICK, J. — The Kalahars appeal the summary judgment dismissal of their personal injury action against Alcoa. Kalahar and his wife sued Alcoa claiming that Kalahar's mesothelioma was caused by asbestos exposure during his employment at an Alcoa plant. Because RCW 51.04.010 provides employers immunity from civil suits by workers for injuries on the job, the Kalahars brought suit under the intentional injury exception outlined in RCW 51.24.020. The trial court dismissed the Kalahars' action

reasoning that Alcoa did not have actual knowledge that injury was certain to occur as required by the intentional injury exception. We affirm.

FACTS

John Kalahar worked various jobs at the Alcoa "Wenatchee Works" plant in Wenatchee, Washington from March 1963 to September 1963 and from March 1964 to April 1971. Wenatchee Works was an aluminum smelter where raw alumina ore was converted into molten aluminum. At the plant, alumina ore was placed into large pots and high levels of electricity were used to separate the aluminum molecules from the alumina ore.

Kalahar first worked as a trainee in "potrooms" at the plant. A separate team of "potliners" would periodically "dig out" spent pots and reline them while Kalahar was nearby. There was asbestos in the materials used to line the pots where the molten aluminum was created. Kalahar also worked near the machine shop around machinists who would cut Marinite boards creating dust with asbestos particles. Kalahar's position in the machine shop as a sheet metal apprentice required him to cut asbestos-containing cloth himself. As a result of working around the dust from the Marinite in the machine shop, Kalahar would often sneeze and blow his nose. When he worked as a sheet metal apprentice he would get an itchy sensation in his face. At the time Kalahar worked at the plant, Alcoa was aware of the health risks of asbestos exposure and that exposure could result in asbestosis and lung cancer.

In January 2014, Kalahar was diagnosed with mesothelioma, a cancer primarily associated with asbestos exposure. Kalahar and his wife filed a complaint against Alcoa for personal injuries. On September 25, 2014, Alcoa filed a motion for summary

judgment. It asserted that the Kalahars' claims against it are barred by the exclusive remedy of the Washington Industrial Insurance Act (WIIA)—RCW 51.04.010. Alcoa asserted that the Kalahars' claims were barred unless they could demonstrate Kalahar's mesothelioma was caused by the deliberate intention of Alcoa to produce such injury—a narrow exception to RCW 51.04.010 outlined in RCW 51.24.020. It argued that under Washington case law, the Kalahars had to provide evidence that (1) Alcoa had actual knowledge Kalahar was certain to develop mesothelioma and (2) that it willfully disregarded that knowledge. In arguing that the Kalahars could not provide evidence satisfying the deliberate intention exception, Alcoa relied heavily on the Kalahars' expert's deposition testimony that asbestos exposure is never certain to cause mesothelioma or any injury.

The trial court agreed with Alcoa and concluded that under the Washington Supreme Court's recent decision in Walston v. Boeing Co., 181 Wn.2d 391, 334 P.3d 519 (2014), the Kalahars failed to satisfy the deliberate intention exception. Consequently, it granted Alcoa's motion for summary judgment. The Kalahars appeal.

DISCUSSION

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 WIIA was the product of a "grand compromise" in 1911. Birklid v. Boeing Co., 127 Wn.2d 853, 859, 904 P.2d 278 (1995). Injured workers were given a swift, no-fault compensation system for injuries on the job and employers were given immunity from civil suits by workers. Id. But, employers who deliberately injured their employees would not enjoy the immunity from suit under RCW 51.24.020's deliberate intention exception. Id.

RCW 51.24.020 states:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

In 1995, in Birklid, the Washington Supreme Court examined earlier intentional injury exception cases. 127 Wn.2d at 862. It noted that previous courts interpreted RCW 51.24.020 as providing an exception for only cases of assault and battery by the employer against the employee. Id. It concluded that the statutory words "deliberate intention . . . to produce such injury" must mean more than assault and battery. Id. at 862-63. Consequently, it set out to define "deliberate intention" in RCW 51.24.020. See id. at 865.

The Birklid court held that "deliberate intention" means (1) the employer had actual knowledge that an injury was certain to occur and (2) willfully disregarded that knowledge. Id. at 865; see also Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 27-28, 109 P.3d 805 (2005). Before adopting that narrow test, the Birklid court considered and rejected broader tests from other jurisdictions. See id. at 864-65. The Washington Supreme Court recently applied the standard outlined in Birklid in Walston. 181 Wn.2d at 396-97.

Walston was exposed to asbestos while working at Boeing and was later diagnosed with mesothelioma. Id. at 393. Walston was exposed to asbestos throughout his career with Boeing (from 1956 to 1995), but only one 1985 incident of asbestos exposure was at issue. Id. at 394. In 1985, maintenance workers began repairing pipe insulation in the ceiling above the hammer shop where Walston worked. Id. The maintenance workers wore protective clothing and ventilators, but the hammer shop employees below did not. Id. The repairs caused visible dust and debris, and the employees requested that they work in a different location during the pipe repair. Id. Their supervisor told them to go back to work in the hammer shop, but told them to avoid working directly under the overhead repairs. Id.

Walston was diagnosed with mesothelioma in 2010 and passed away in 2013. Id. Walston's estate sued Boeing claiming that Walston's disease was caused by the asbestos exposure during his employment. Id. at 395. One of the experts testifying on behalf of the decedent stated that asbestos exposure is not certain to cause mesothelioma or any other disease. Id. at 394.

Boeing did not dispute that it was aware in 1985 that asbestos was hazardous or that the 1985 incident happened as described. Id. at 395. Instead, it argued that it did not have actual knowledge that Walston was certain to be injured and therefore it was immune from suit under the WIIA. Id. Boeing moved for summary judgment. Id.

The Walston court reasoned that as the expert acknowledged, asbestos exposure is not certain to cause mesothelioma or any other disease. Id. at 397. It continued that even though asbestos exposure does cause a risk of disease that is insufficient to meet the standard in Birklid. Id. It thus concluded that Walston's estate did not raise an issue

of material fact as to whether Boeing had actual knowledge that injury was certain to occur.[1] Id.

Here, the trial court granted Alcoa summary judgment based on the Washington Supreme Court's holding in Walston. The Kalahars argue that summary judgment was improper, because Walston is distinguishable. They argue that in Walston there was no evidence that Walston or any workers in his vicinity suffered immediate visible symptoms from asbestos exposure. They claim that unlike in Walston, the Kalahars offered evidence that Alcoa employees had visible symptoms and complained of those symptoms.

The Kalahars attempt to distinguish Walston based on their evidence of Kalahar's contemporaneous physical symptoms claiming that none existed in Walston. But, the Walston court ultimately reached its conclusion by reasoning that asbestos exposure is not certain to cause mesothelioma or any other disease—not because Walston failed to provide evidence of physical injury—contemporaneous or delayed. 181 Wn.2d at 397 ("[Asbestos exposure] does cause a risk of disease, but as we have previously held, that is insufficient to meet the Birklid standard."). Like the expert in Walston, the Kalahars' expert admitted that asbestos exposure, at any level, is never certain to cause mesothelioma or any other disease. We are bound by the Supreme Court's decision in Walston. Therefore, we conclude that the Kalahars have not raised a genuine issue of

[1] The Kalahars argue that the effect of the Walston court's application of the first prong of the Birklid test removes occupational diseases from the intentional injury exception to the WIIA altogether. They contend this is so, because no employee could ever prove that his or her employer knew with certainty that the employee would suffer an injury in the form of disease several years later. We can respond only that both Walston and Birklid are Washington Supreme Court decisions, and the legislature has not taken issue with either decision.

material fact as to whether Alcoa had actual knowledge that the injury—mesothelioma—was certain to occur.

We affirm.

WE CONCUR:

APPENDIX B

Beginning of Chapter << 51.24.020 >> **51.24.030**

RCW 51.24.020

Action against employer for intentional injury.

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

[1984 c 218 § 2; 1977 ex.s. c 350 § 31; 1973 1st ex.s. c 154 § 94; 1961 c 23 § **51.24.020**. Prior: 1957 c 70 § 24; prior: 1927 c 310 § 5, part; 1919 c 131 § 5, part; 1911 c 74 § 6, part; RRS § 7680, part.]

Notes:

Severability -- 1973 1st ex.s. c 154: See note following RCW **2.12.030**.

APPENDIX C

51.24.020 << 51.24.030 >> **51.24.035**

RCW 51.24.030

Action against third person — Election by injured person or beneficiary — Underinsured motorist insurance coverage.

(1) If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) 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.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

[1995 c 199 § 2; 1987 c 212 § 1701; 1986 c 58 § 1; 1984 c 218 § 3; 1977 ex.s. c 85 § 1.]

Notes:

Severability -- 1995 c 199: See note following RCW **51.12.120**.

APPENDIX D

51.08.110 << 51.08.140 >> **51.08.142**

RCW 51.08.140

"Occupational disease."

"Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title.

[1961 c 23 § **51.08.140**. Prior: 1959 c 308 § 4; 1957 c 70 § 16; prior: 1951 c 236 § 1; 1941 c 235 § 1, part; 1939 c 135 § 1, part; 1937 c 212 § 1, part; Rem. Supp. 1941 § 7679-1, part.]

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellants,

vs.

No. 72635-8-1

ALCOA, INC.,

DIVISION ONE

Respondent,

CERTAINTEED CORPORATION; HANSON PERMANENTE CEMENT, INC., f/k/a KAISER CEMENT CORPORATION; KAISER GYPSUM COMPANY, INC.; PFIZER INC.; RILEY POWER, INC., f/k/a RILEY STOKER CORP., f/k/a BABCOCK BORSIG POWER, INC., f/k/a D.B. RILEY, INC., SABERHAGEN HOLDINGS, INC.; and UNION CARBIDE CORPORATION,

Defendants.

TRANSCRIPT OF RECORDED HEARING

JULY 22, 2015

Reported By: Shirley Koch, RPR
Washington CCR No. 3096
California CSR No. 10849
Hawaii CSR No. 467

JULY 22, 2015

* * *

MR. TUVIM: Would the Court mind if I came to the side here so I can see?

THE COURT: Not at all.

MR. TUVIM: Thank you.

THE COURT: Counsel may have smaller copies for you to look at as well, if that would help.

Do you?

MR. BERGMAN: Yes, I do.

THE COURT: Or you could use the overhead and put them up, and then everybody will see them.

MR. BERGMAN: I'll be happy to share my copies with my colleague.

THE COURT: Whatever works, Counsel.

MR. BERGMAN: Thank you. May it please the Court -- which apparently does not include that.

(Sotto voce discussion.)

MR. BERGMAN: May it please the Court, I'm Matthew Bergman. I represent the Kalahar family, and Kaitlin Cherf has been very involved in the case as well.

With the Court's permission, I'd like to reserve three minutes for rebuttal.

THE COURT: Proceed.

MR. BERGMAN: Your Honor, it has been 75 years since the state legislature explicitly included occupational disease within the intentional injury exception to workers' compensation immunity and 20 years since the Supreme Court in Birklid liberalized the standard to establish an intentional injury claim under Washington law.

Nevertheless, under the rule of law propounded by Alcoa in this case and followed by the trial court, the legislative intent to include occupational disease has been written out of the statute. And the evidentiary standard that is put forward is -- is one that under the facts of Birklid, the holding of Birklid, could never have emerged.

In the 20 years since Birklid has been decided, our Supreme Court has had three opportunities to revisit the holding, and at no time did our Supreme Court question the holding of Birklid, try to change the holding of Birklid, or suggest that the -- or that a different holding should have resulted under those set of facts.

Rather, in Folsom versus Burger -- Burger King, in Vallandigham and most recently in Walston, our Supreme Court has distinguished the facts of those case -- cases from the facts of -- of -- of Birklid.

And so, your Honors, we would submit that to the extent that we have come forward with evidence creating an issue of fact as to whether or not the Kalahar facts are analogous to those set forth in Birklid, that summary judgment should have been denied, and the case should go forward to a jury.

THE COURT: I thought Birklid had a factor that there was certainty of the injury.

MR. BERGMAN: In --

THE COURT: Your expert, as I recall, testified there is no certainty that everyone exposed will develop mesothelioma.

MR. BERGMAN: Of course. And -- and -- and in -- in -- in Birklid, there was no certainty that the individuals exposed to the resin would develop memory loss, would develop depression, would develop suicidal ideation. If you see here, your Honor, in this chart, the immediate visible symptoms --

THE COURT: But certainty of injury.

MR. BERGMAN: And in this case, we also have certainty of injury because the evidence in this case is undisputed, that both -- Mr. Kalahar sustained immediate symptoms as a result of his asbestos exposure, and other Alcoa employees who were doing the exact same work that Mr. Kalahar was doing with Marinite were developing

respiratory -- sinus problems, difficulty breathing, skin irritations, and sneezing and -- and -- and other respiratory distress.

And consequently, your Honor, the -- there was nothing in Birklid that suggests that the immediate symptoms are identical or need to be identical to the symptoms that give rise to the cause of action because in Birklid, as the Court can see, asthma, pneumonia, depression, memory loss, mood swings, all of these causes of action, all of these injuries giving rise to the cause of action in Birklid, were separate and distinct from the rashes, respiratory distress, and -- and wheezing that the individuals intentionally exposed to in Birklid sustained.

The issue in -- in -- in Birklid as distinguished -- as -- as made clear in Walston is that is there something immediate that occurs that places the employer on notice that an injury is being sustained. That was not present in Walston. However callous Boeing's conduct might have been, there was nothing that occurred at the time of the exposure that was injurious.

In this case there was. Mr. Kalahar sustained immediate symptoms, as did his coworkers. And consequently, your Honor, it's a question of fact whether the symptoms that the workers at Alcoa

submitted -- experienced were sufficiently analogous to give rise to a -- an intent, a deliberate intent, or knowledge that injury was certain to occur. That's what the holding was.

And so there is no way that the holding in Birklid can be sustained if the -- if -- if the ruling is that the injury claimed in the lawsuit is identical to the injury sustained on the shop floor because that's not what occurred in that case. What occurred in that case is that there were some symptoms --

THE COURT: But --

MR. BERGMAN: Yes.

THE COURT: -- the test does use the word "certainty of harm."

MR. BERGMAN: The test does use the word "certainty of harm," but the facts of Birklid did not have certainty. Not every -- there were a hundred people exposed in Shop 731 in the -- in the Birklid shop. Not all of those people developed illness. Only half of them had any symptoms whatsoever. And the nature of the illness that they -- that they sustained was a whole panoply of things from very minor illnesses to extensive ones.

Additionally, unlike in Walston, in this case, your Honor, you had repeated -- as in Birklid, you had

repeated injurious -- injurious exposures, not one incident. And you also had an identified cohort. In Walston -- in Walston, the Court, the Supreme Court, was concerned that generalized knowledge by the employer that asbestos was hazardous was not sufficient to trigger a Birklid duty.

Nonetheless, in this case, people doing the exact type of work. You had an identifiable cohort. People working with Marinite and -- and actual readings of -- of fiber counts that were orders of magnitude higher than the then-applicable standards. You had abs-- absolute --

(Simultaneous speakers.)

THE COURT: -- substantial risk -- distinguish this from your previous.

MR. BERGMAN: The -- the -- distinguish --

(Simultaneous speakers.)

MR. BERGMAN: Yeah. The -- the distinguishing factor is here you had immediate injury. You had immediate symptoms going on. That was not the case in Walston. You had -- you had something going on right at the time, and that was the distinguishing factor.

In -- in Birklid, the Court said the -- the -- the central factor distinguishing this case from every other case is that the workers were becoming ill at the

time of exposures. The workers, not the specific plaintiffs, mind you, but the actual workers.

You had the same thing here. The -- the -- the record is clear that as early as 1964, individuals sawing Marinite, which is exact product that Mr. Kalahar worked around, were sustaining serious injuries. Now, was it mesothelioma? No, it wasn't.

But the only way to -- but -- but to establish -- to -- to accept the conclusion that Boeing had -- that -- that Alcoa had to know that Mr. Kalahar would establish [sic] mesothelioma explicitly writes out every occupational disease from the statute. And that's something that a court does not do absent a clear intent to do so.

And let me just be a little bit more clear. There is no occupational disease where there is a certain one-on-one correlation between exposure and disease. And, therefore, the question becomes: Why is the term "disease" in -- in RCW 51.24.020? And if the Supreme Court intended to write that out of the statute, it needed to do so explicitly.

And with the Court's permission, I'll reserve the rest of my time for rebuttal.

MR. TUVIM: I -- I have my --

MR. BERGMAN: Let's see if you can do it more

gracefully than I did.

MR. TUVIM: I'll admit I do not have a copy for Mr. Bergman, but it's all I had. I have the statute and the test for Birklid. Okay.

May it please the Court, my name is Mark Tuvim, and I am representing respondent Alcoa this morning.

As I was preparing for this, I noted Judge Dwyer's Law Review article which took exception with bringing -- bringing exhibits. So I almost didn't. But I said, Well, it's only the two statutes which leads me to believe --

JUDGE DWYER: We've seen --

MR. TUVIM: -- it could be an exception.

JUDGE DWYER: We've seen nothing here this morning that would be inconsistent with the views expressed. It's nice to know that you're now the third person that's ever read that. So yeah.

MR. TUVIM: Well, I did see it this week, and it was -- I thought it was well done.

I think your Honor has -- has hit on what is really the crux of the issue here on two things. One, what is the meaning of "such injury." And what the statute says, what 51.24.020 says, is "such injury." And I believe such injury must be the injury that is indeed the injury upon which the lawsuit which this

statute permits is brought. And that injury here is mesothelioma.

THE COURT: Is that consistent with what happened in Birklid?

MR. TUVIM: Birklid is interesting, and I believe it is. And here's why. Birklid was actually an advisory opinion by the Washington Supreme Court to certified questions by the Ninth Circuit. The Court in Birklid had no power to either affirm or deny a grant of summary judgment.

The Ninth Circuit said, What's the law in Washington? Here's the law in Washington. So now the Ninth Circuit would then say, Okay. Now we'll apply that rule to the facts before us. Quite honestly, I don't know what the Court did to all of these -- to all of these symptoms. And I don't know if Mr. Bergman does.

But what I think Birklid does is it sets forth the rule. And the rule of certainty actually predates Birklid. It goes back to Biggs in 1936. It goes back to Delthony in 1922. The first time the Supreme Court looked at this statute and said deliberate intention to produce such injury.

THE COURT: Well, let me ask you a hypothetical question. Let's suppose that the -- the relevant time

period of exposure is today, and today there's a great deal of knowledge about the dangers of exposing people to asbestos in the workplace. But it still remains true apparently, according to expert witnesses, that it's somewhat random, that a person heavily exposed to asbestos may or may not develop mesothelioma.

Do you think that if Alcoa were to say, to get together in the boardroom and say, You know, there's all this stuff that we're supposed to do to protect our employees. We know what it is. We're supposed to make them wear masks. There's supposed to hoods. There's supposed to be meters. There's supposed to be all kinds of protection. But they're expensive, and so we're not going to do it. You know, we may get a fine, but we'll take that risk.

MR. TUVIM: Okay.

THE COURT: Because the fact of the matter is, even though it's possible and even likely that some of these people may develop mesothelioma, it's not certain. So we can -- we will never have to pay them.

Don't you think that's a bit of a stretch? Don't you think the Court would have a hard time not fitting that under the rule of Birklid, even though it isn't entirely certain that these employees will experience that particular injury?

MR. TUVIM: Actually, under the rule --
THE COURT: That particular injury.
MR. TUVIM: Well, it looks like deliberate conduct, but that's an intentional tort standard as opposed to deliberate intent to injure standard. And what we have here is the --
THE COURT: Can you answer my question.
MR. TUVIM: My answer is --
(Simultaneous speakers.)
THE COURT: -- that you would win that case?
MR. TUVIM: I believe we win the case under this statute. I will say though that, as you said, more knowledge today than there was in the 1960s. But even in the 1960s, getting to the second Birklid prong, Alcoa took significant steps which are outlined in our brief and in the papers below to address, to -- to minimize, to -- to lessen the risks of exposure.
So once they get past the actual knowledge that an injury was certain to occur -- and I don't think they get here either then or today because, as Dr. Churg said, the highest cohort he knows is 18 percent. Even among insulators it was about 10 percent. This gets to the question of okay, is certainty certainty? What is the level of certainty required?
THE COURT: Well, is there any occupational

disease that a -- that a medical practitioner would testify that anyone was certain to suffer from, to -- to have manifest itself?

MR. TUVIM: I don't know the answer to that.

THE COURT: I mean, that's way above what medical practitioners typically would testify to or not.

MR. TUVIM: I don't know the answer to that. I don't know if a doctor could say that. But it then becomes how -- how attenuated does the ultimate diagnosis have to be from original symptoms. It's -- does a landscaper or lifeguard sent out in the sun who gets sunburned who 40 years later develops skin cancer, is that the same thing? What -- what appellants are looking for, what Mr. Rigner (phonetic) is looking for here today, is really an asbestos-specific exception to this. And I don't think he can do that.

THE COURT: Well, if mesothelioma were only caused by asbestos exposure, does that change the dynamic there?

MR. TUVIM: I don't think it does because it's still not certain to occur by -- merely by exposure because what we're looking at is, Okay. Something happens. The employer does something here. There's symptoms here. We can fix it. But if something doesn't happen until, let's say, decades later, and there's no

evidence here that -- that whatever, the runny nose and the skin rash, was actually due to asbestos.

The -- there are many different kinds of dust at the Alcoa facility. There is alumina. There is chlorine. There's -- there's -- there are several other types of dusts and toxins. There's no evidence in this record that those symptoms were, in fact, due to asbestos.

In fact, Mr. Kalahar never reported his symptoms. He never filed a claim. He never filed a lawsuit. According to Mr. Kalahar's deposition testimony, he never brought his symptoms to Alcoa's attention.

THE COURT: Are you --

MR. TUVIM: Perhaps others did.

THE COURT: Are you arguing for a rule, as counsel contends that you are, that would effectively eliminate an occupational disease from the Birklid analysis?

MR. TUVIM: No, I'm not. I'm just saying that there may -- this occupational disease doesn't fit with the framework of Birklid. There may be one. I'm not a medical doctor. I don't know it.

THE COURT: So insofar as you know though, mesothelioma and any other similar disease that comes

about over a long period of time and may or may not be related to a particular exposure -- or I guess -- no. They usually know that it is related to an exposure, but that may or may not occur even to someone who has been exposed. You are arguing for a rule that that is outside of Birklid because of a lack of certainty?

MR. TUVIM: Yes.

THE COURT: So I mean that -- that --

MR. TUVIM: Because everyone --

(Simultaneous speakers.)

THE COURT: -- on a practical level, if not a theoretical level, rules out occupational disease.

MR. TUVIM: Because if there is an occupational disease that everyone who -- who is exposed to a toxin or everyone who is assigned to a particular job or -- excuse me -- or has a particular risk, then gets that disease, I believe that would, in fact, satisfy Birklid.

But mesothelioma is not that disease. Many people, the vast, vast majority of people who are exposed, don't get mesothelioma. And -- and Birklid requires certainty. One in ten is not even a substantial certainty as far as -- as far as the cohort.

THE COURT: 15 employees working down below. Employer on the walkway blindfolded takes a gun and fires 15 shots, kills three, wounds two, ten are missed.

No certainty of injury?

MR. TUVIM: Under Birklid there is no certainty of injury. Now, there may be -- that may be an action that's outside the parameters of employment. I mean, I -- I don't think that firing a gun into a crowd is within the managerial discretion of that employee. But -- and there may be a claim against the employer for even hiring that employee, but not as an exception to workers' compensation preclusion.

So it's not only the -- the certainty of injury, the -- I only have a couple of seconds here. And as I said, the steps are outlined that Alcoa took to defeat the second prong here.

And one last point is that the Kalahars do have a remedy under workers' comp.

THE COURT: Counsel --

MR. TUVIM: Just don't have this one.

THE COURT: -- we're going to spend a little more time on it. Is taking steps enough? The -- the test as written here seems to be virtually strict liability if you know it's certain the injury will occur and you're on notice. And I guess knowing injury will occur is the notice.

So at that point, isn't any exposure to the agent willful disregard so that merely taking steps is

not enough?

MR. TUVIM: Under Vallandigham, any step is -- satisfies that test. No test of adequacy, no test of reasonableness should be applied to the step. Vallandigham was very clear on that because then you start -- as soon as you start assessing adequacy or reasonableness of the test, then you're -- you're invading the province of negligence and the Court. And that is --

THE COURT: It isn't --

(Simultaneous speakers.)

MR. TUVIM: -- deliberate regard.

THE COURT: It isn't really a matter of negligence once you know that injury is certain. Now you're into the vein of intentional injury, so if you don't prevent it.

MR. TUVIM: Well, it's -- part of the issue here I believe is going back to the state of the art as -- as Judge Becker was asking. Back in the 1960s, Alcoa was aware of the risks of asbestos-related diseases and conditions. Alcoa took many steps at -- at this plant.

They had an industrial hygiene committee which addressed issues that were brought up. They were air-monitoring. They put in a specific ventilation system over the -- over the saw that was used to cut the

Marinite board and then tested the air of the operator, and it was below the then-applicable state standard. It was below even the -- the lower standard that Alcoa itself adopted.

THE COURT: So is it certain that injury will occur with exposure above a certain level?

MR. TUVIM: There are insulators who basically lived and worked in clouds of asbestos for decades who have not gotten sick. Dr. Churg says there is no level of exposure at which injury is certain.

THE COURT: All right. Thank you, Counsel.

MR. TUVIM: Thank you.

MR. BERGMAN: Your Honor, Alcoa has articulated a legal standard in which an employer can send the employees out to rake leaves in a minefield and it's never sure whether there's going to be an explosion, or if there is, which employer -- employee is going to sustain the injury. That is not and has never been the standard in Birklid.

I'd like to address the issue of the measures that Alcoa supposedly undertook because that is quintessentially an issue of fact. Issues -- and -- and the evidence induced in the case is directly contrary to that. All of these reports that were supposedly taken were confidential and were never shared with the

employees.

And the undisputed evidence in this case is that despite the vast knowledge that Alcoa knew that exposures were being sustained far in excess of the then-applicable standards, Alcoa affirmatively lied to John Kalahar and said, It's safe. And Mr. Cox testified they said, We've tested it, and it's safe. It doesn't hurt you. That is exactly what occurred in Birklid.

THE COURT: But that just goes to whether he's exposed to it, doesn't it?

MR. BERGMAN: No, your Honor. I think it goes to their -- whether or not this case falls under Birklid. In Birklid, the -- Boeing scraped off the warning labels on the products. In Birklid the -- Boeing intimidated workers who were complaining about exposure.

THE COURT: They knew.

MR. BERGMAN: They knew.

THE COURT: And their knowledge --

MR. BERGMAN: As they did here because as do the documents with Mr. Bonne (phonetic) in the -- in the -- in the cutting of Marinite established that workers were getting injured. They weren't getting the exact injury, the mesothelioma. But they never could. There is no industrial disease that has a one-to-one

correlation. There isn't and there never can be.

And -- and therefore, the argument that they're suggesting is that this Court should subvert or overturn the express language of the state legislature. And I respectfully submit that that's not what this Court is here to do.

THE COURT: Well, if that's what the language in Birklid did, that horse has left the barn. And you don't get an opportunity to talk to the Supreme Court about its consequences.

But I'm also curious about the steps taken by Alcoa. If injury is certain at any level of exposure, isn't then any level of exposure willful disregard of the injury? So isn't it a strict liability in that sense? Or does the certainty of injury have a factual component which is at a certain level of exposure?

MR. BERGMAN: The -- the certainty of injury, your Honor, is an analysis that I believe focuses on the mindset of the employer. This Court's decision in Shellenbarger I think is instructive because in Shellenbarger, this Court found that Birklid was not met because there were -- there were monitoring that occurred that -- that established that the employer genuinely believed that the exposures were safe.

There weren't -- in Shellenbarger, no one was

having any symptoms, and all of the measures that the employer undertook fell within -- well below the then-applicable standards. And this Court I think correctly ruled that that does not establish Birklid.

So, your Honor, I think the focus for the Court's inquiry is less of a esoteric idea of certainty and what is certainty in terms and -- and more focus, I think as the Court directed us in Walston, is to what the employer knew and what the employer saw.

And in Walston, the Supreme Court specifically said that one way, one way to establish, and it that used word "constructive knowledge." I think that's important.

THE COURT: But it says actual knowledge, not should have known.

MR. BERGMAN: I -- I agree. It is not -- and -- and I think that is -- that is where the crux is. It's not a should have known. It's not looking back 50 years later and saying what they should have known. It's what did they know at the time.

And we would submit the evidence of immediate and visible injury by Alcoa employees is specific evidence of mesothelioma, and I think the Court needs to take cognizance of the affirmative misrepresentations, lies and intimidations to employees establishes a jury

question as to whether or not Birklid was satisfied.

THE COURT: Thank you, Counsel. That will conclude our hearing.

I, the undersigned, a Certified Shorthand Reporter of the State of Washington, do hereby certify:

That the foregoing transcript comprises a true and correct account of the audio recorded material and was transcribed into typewriting under my direction and supervision, except in the instances where the transcript indicates "Inaudible" or "Simultaneous speakers." And I certify that said transcript is a full, true and correct transcript of the audio recorded material.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: September 13, 2015.

_____

SHIRLEY KOCH
CCR No. 3096
Expiration Date: December 31, 2015
Firm No. Dallas: 69
1-88-656-DEPO

CERTIFICATE OF SERVICE

I certify that on September 24, 2015, I caused to be served a true and correct copy of the foregoing document upon:

Mark B. Tuvim
Kevin J. Craig
GORDON & REES, LLP
701 Fifth Avenue, Suite 2100
Seattle, WA 98104
(Via Electronic Mail and Messenger)

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

BERGMAN DRAPER LADENBURG

Shane A. Ishii Huffer