No. 100225-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

REBECCA WEST, an individual,

Respondent,

vs.

RIDE THE DUCKS INTERNATIONAL, LLC, a foreign company; RIDE THE DUCKS OF SEATTLE, LLC, a Washington company; ERIC BISHOP and JANE DOE BISHOP, a marital community,

Petitioners

ANSWER TO PETITION FOR REVIEW OF RIDE THE DUCKS INTERNATIONAL, LLC

Darrell L. Cochran, WSBA No. 22851
Michael T. Pfau, WSBA No. 24649
Christopher E. Love, WSBA No. 42832
Kevin M. Hastings, WSBA No. 42316
Counsel for Respondent

PFAU COCHRAN VERTETIS
AMALA, PLLC
909 A St., Suite 700
Tacoma, Washington 98402
(253) 777-0799

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I. IDENTITY OF RESPONDENT

Respondent Rebecca West, an individual who suffered permanent injuries from the catastrophic failure and crash of an amphibious "Duck" vehicle manufactured by Petitioner Ride the Ducks International, LLC ("RTDI"), asks this Court to deny review of Division One of the Court of Appeals' unpublished opinion, *West v. Ride the Ducks Int'l, LLC,* 80257-7-I, 2021 WL 2809609 (Wash. Ct. App. July 6, 2021).

II. RESTATEMENT OF ISSUES

1. Does RTDI fail to demonstrate a conflict under RAP 13.4(b)(1) and (b)(2) between the Court of Appeals' decision in this case and this Court's opinion in *Campbell* and the Court of Appeals' opinion in *Little* regarding the circumstances in which an intervening act may constitute a superseding cause in products liability cases where the Court of Appeals expressly followed *Campbell*'s analysis; assumed *arguendo* that *Little* applied, as did *Campbell*; and just like *Campbell*, limited *Little*'s holding to its distinguishable facts?

III. RESTATEMENT OF THE CASE

A. Substantive Facts

1. RTDI repurposed post-World War II military amphibious "Duck" vehicles for recreational tours

"Duck" amphibious vehicles were created, designed, and utilized during World War II by the United States military for transporting troops and supplies shoreside. Exhibit ("Ex.") 169 at 101410. The Duck's original producer for the military, General Motors, only produced them for three years and abandoned the concept after the war. *Id.* There is no evidence in the record that the World War II-era designers ever contemplated Ducks' regular, decades' long usage on city streets as a recreational passenger tour vehicle.

One Branson, Missouri company decided to monetize this abandoned concept by repurposing Ducks into recreational tour vehicles, eventually becoming RTDI. Report of Proceedings ("RP") 760, 788, 891, 964, 1019, 1021; Clerk's Papers ("CP") 2434-36, 2443-45, 2471, 2519-20, 2627.[1] RTDI charged headfirst into designing, manufacturing, utilizing, and selling replica "fleet" Duck vehicles assembled from surplus and new parts. RP 964-65.

RTDI was continually aiming to expand its business and eventually manufactured a new type of Duck vehicle: "Stretch"

[1] RTDI does not argue any legal distinction between its predecessors and the entity at fault in this lawsuit, their actions, or the knowledge that may be imputed to them. Accordingly, for simplicity Mrs. West refers to the company as RTDI regardless of name or timeframe.

Ducks. CP 2520-21, 2627. RTDI manufactured Stretch Ducks by cutting their hulls in half and stretching the hull and chassis 15 inches. CP 2442, 2520-21. The purpose of the Stretch Duck design was to fit five more paying customers onto each vehicle for tours. Ex. 169 at 101406.

2. Early in their life, Stretch Ducks—and only Stretch Ducks—experienced multiple front axle housing fractures

RTDI began manufacturing Stretch Ducks in 1996, ultimately producing 57. CP 2627. By 2003 and 2004 RTDI's Stretch Ducks began experiencing a specific problem with their front axle housings. The first known problem occurred on July 8, 2003, when a Stretch Duck's right front axle housing fractured at the knuckle ball.[2] RP 994; Ex. 169 at 101411. On two more occasions in 2003 and 2004, RTDI recorded "canting"[3] in the left front wheels of separate Stretch Ducks. RP 996; Ex. 169 at 101412. Inspections discovered that the canted wheels were the result of axle housing fractures along the bottom of the housing. CP 2485; Ex. 169 at 101412.

[2] RTDI, without any expert testing or investigation, speculatively blamed this axle housing failure on a previous incident involving the Duck. Ex. 169 at 101411. 0

[3] "Canting" means the wheel slanted inward. Ex. 169 at 101412.

RTDI's response to these multiple incidents of Stretch Duck front wheel canting and axle housing failures—all of which occurred within such a short timeframe—was to create what it referred to as a "tab repair."[4] CP 2449, 2454; Ex. 169 at 101412. RTDI's *ad hoc* remedy was aimed at strengthening the bottom of the tapered portion of the axle housing, which it knew was a weak point where stress needed to be alleviated in the vehicles it had remanufactured. CP 2461, 2532. RTDI intended for the tab repair to serve as an advance warning system for axle housing failure. RP 1060. And RTDI knew the axle housing weakness was a design flaw inherent in all Stretch Ducks, evidenced by the fact that it installed the "tab" repair on all Stretch Ducks going forward. CP 2454, 2480.

3. Despite a repeated history of axle housing failures already prompting a design modification entirely motivated by them, RTDI continued selling Stretch Ducks, including Duck No. 6

Despite recognizing that Stretch Ducks inherently were so prone to axle housing failures that they required installing an advance warning system line wide, RTDI continued

[4] The "tab repair" consisted of welding a small piece of section of pipe to the bottom of the knuckle ball bridging the tapered gap between the knuckle ball and axle housing. CP 2453-54, 2480-81, 2485; Ex. 169 at 101412.

manufacturing and selling Stretch Ducks to tour companies around the country, including its co-defendant in this case, Ride the Ducks of Seattle, LLC ("RTDS"). RTDI built Duck No. 6 in 2004 and delivered it to RTDS in 2005. CP 2635. RTDI did not disclose the previous history of wheel canting and axle housing failure on Stretch Ducks, its concerns leading to creation of the tab repair, or the purpose of the tab repair. RP 834, 1072, 1074-075.

As anticipated by RTDI's tab repair, Stretch Ducks continued experiencing wheel canting and axle housing failures. On July 27, 2013, a fourth RTDI Stretch Duck experienced a left front axle housing failure, resulting in the left front wheel falling off during a passenger tour.[5] CP 2559; RP 1036.

On August 10, 2013, RTDI discovered that a ***fifth*** Stretch Duck had a canted left front wheel. RP 999, 1041. RTDI's inspection found that yet another left front axle housing had failed, just like the others. *Id.* In fact, the axle had fractured in the same location as the July 27 axle housing fracture. CP 2504, 2530-531. At this point that RTDI finally acknowledged what long had been obvious: its Stretch Ducks were defective.

[5] Despite the similarity to previous Stretch Duck axle housing failures, RTDI again blamed this failure on extenuating circumstances without any engineering analysis. Ex. 169.

RP 963. As RTDI's Director of Fleet Operations, Frank English, testified, wheels falling off during the normal operation of a Duck is a thing that simply "shouldn't happen." CP 2498.

4. RTDI issued a "service bulletin" to Stretch Duck owners advising that axle housing fractures "may" occur and instructing yet another design modification

After eight hours or less of considering the issue in house, RTDI went again with its first and only idea for a repair: this time dubbing it the collar "fix." CP 2474-475. The collar "fix" consisted of half-pipes on each side of the axle housing's tapered neck. RP 1002, 1042-43, 1054; CP 2473-474, 2476, 2532. The collar was yet another attempt by RTDI to "strengthen[]" this weak part of the axle housing that was known to exist and pose significant safety threats. RP 1043.

On October 1, 2013, RTDI issued a "service bulletin" to inform Stretch Duck owners like RTDS of the axle housing failure defect and the proposed collar "fix." RP 1044; Ex. 20000. The service bulletin stated that its "reason for release" was "[t]o avoid axle fractures" and to provide notice that "fracturing ***may*** occur" in the axle housing. Ex. 20000 at 1 (emphasis added). Nevertheless, the service bulletin was deceptively incomplete and failed to notify Stretch Duck

owners that axle housing fracturing ***actually had occurred*** on multiple, specific occasions, including without warning while on tour. Ex. 20000. It also categorized the "[u]rgency" level of the collar fix "[a]s soon as practical and prior to operating 2014," again, without putting forth the known dangers of axle housing failures during operations of tours. *Id.* at 1. Rather than take the opportunity to underscore the real danger the axle posed, RTDI issued the "service bulletin" with the same urgency level as another RTDI service bulletin issued that ***same day*** recommending painting or wrapping stair release handles in red tape for better visibility. RP 2136-137. In contrast, RTDI had categorized the urgency level of other service bulletins recommending physical modifications to Ducks, such as a "prop engaged yolk weld," as "immediate." RP 2135.

In a similarly deceptive fashion, RTDI's service bulletin failed to disclose that axle housing failures had occurred without any prior observed canting, even though the bulletin recommended "daily visual inspections" for wheel canting until the collar fix was performed. Ex. 20000. Further confusing the issue, the bulletin stated that "visual detection of a failing axle housing is not possible" "[d]ue to the axle knuckle boots covering the connection in question."[6] *Id.*

[6] The "boot" was a rubber boot covering the axle housings to create a watertight seal. RP 1463.

Finally, RTDI's service bulletin ***did not*** instruct Stretch Duck owners to remove Stretch Ducks from service until they implemented the collar "fix." Rather, they instructed owners to remove Stretch Ducks from service only when they visually observed wheel canting. *Id.*

RTDI had reason to be gravely concerned about Stretch Duck axles continuing to fail, understood the importance of the Stretch Duck axles being fixed, and yet took no steps to ensure that local Duck tour outfits complied with the service bulletin. In fact, RTDI's president, Chris Herschend, was so concerned that local Duck tour outfitters would not perform the service bulletin that he directed his team to "confirm that Seattle is doing this as required."[7] Ex. 179; RP 959. He acknowledged that he bore "the responsibility for following up to confirm" that local Duck tour outfitters completed the service bulletin repairs. RP 975. Despite his acknowledgement of "responsibility" and RTDI's concern that the "fix" might not be implemented, neither Mr. Herschend nor anyone at RTDI followed-up to confirm that RTDS had implemented the "fix"

[7] In response, Mr. English claimed that he had confirmed with Ryan Johnson, RTDS's Director of Operations, that RTDS would perform the collar fix. Ex. 179. Mr. Johnson did not recall ever telling Mr. English RTDS would perform the collar fix. RP 1430-431.

before accepting money to transport tourists on the vehicles. RP 975.

5. Duck No. 6's axle housing fractures on the Aurora Bridge during a September 24 tour, ejecting Mrs. West from the Duck during the ensuing collision

On September 24, 2015, while crossing the Aurora Bridge, Duck No. 6 experienced a catastrophic left front axle fracture while in operation, causing the wheel to fall off. RP 917, 962-63, 971-72. Immediately after, the Duck began gently veering to the right, then made a "very hard, uncommanded left turn." RP 924-25; Ex. 641. At that moment, the Duck collided with a charter bus in the opposite lane of traffic. RP 925; Ex. 641.

The fracture occurred on the bottom of the tapered portion of the axle housing—the same location where previous axle fractures had prompted RTDI to begin installing the tab repair in 2004. CP 2509. It was also the exact same location and type of facture as the July 13, 2013 fracture. CP 2507-508.

B. Procedural History

Mrs. West filed a personal injury lawsuit against RTDI and RTDS. CP 1-9. At trial, in addition to the above evidence, RTDI president Herschend made the following series of admissions:

- All 57 Stretch Ducks had a defect;
- The defect was that the axle housing fractures at the connection point between the knuckle ball and the housing due to excessive fatigue;
- This defect in Duck No. 6 caused the September 24, 2015 collision;
- RTDI knew of these front axle housing fractures since 2003;
- RTDI failed to comply with its mandatory duty under the National Traffic and Motor Vehicle Safety Act to report the housing defect to NHTSA;
- RTDI failed to comply with its duty under the Act to issue a formal recall for Stretch Ducks that described the potential safety consequences of the axle housing defect;
- RTDI failed to comply with its duty under the Act to reimburse Stretch Duck owners for parts and labor in repairing the axle housing defect; and
- RTDI failed to comply with its duty under the Act to ensure axle housing defect repairs were completed

RP 960-964, 983, 993-996, 1009-011, 1069.

The jury returned a verdict finding RTDI liable on Mrs. West's design defect, construction defect, and failure to warn

product liability claims; finding RTDS liable on Mrs. West's common carrier negligence claim; finding RTDI 60 percent at fault and RTDS 40 percent; and awarding Mrs. West $4 million in general damages. CP 2373-376.

C. The Court of Appeals' Decision

On review, the Court of Appeals affirmed the trial court's denial of RTDI's motion for judgment as a matter of law on Mrs. West's design defect, manufacturing defect, and failure to warn at the time of sale product liability claims. *West*, 2021 WL 2809609, at *1, *7. It held that sufficient evidence existed to allow the jury to conclude that Duck No. 6 was defective at the time RTDI remanufactured it in 2004 and sold it in 2005—a holding unchallenged by RTDI. *Id.* at *7-10.

The Court of Appeals affirmed the trial court's denial of RTDI's proposed superseding cause instruction. *Id.* at *11. It held that the evidence at trial was insufficient to instruct the jury that RTDS's failure to implement the collar "fix" was a superseding cause of the collision. *Id.* at *11-15.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

RAP 13.4(b) limits review of decisions by the Court of Appeals to a narrow set of circumstances. RTDI contends that review is warranted under RAP 13.4(b)(1) and (b)(2) because the Court of Appeals' decision regarding the inapplicability of

the superseding cause doctrine to this case's facts conflicts with previous decisions of this Court and the Court of Appeals. Specifically, RTDI argues that the Court of Appeals' holding conflicts with *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 814, 733 P.2d 969 (1987) and *Little v. PPG Industries, Inc.*, 19 Wn. App. 812, 579 P.2d 940, *aff'd as modified*, 92 Wn.2d 118, 594 P.2d 911 (1979). No such conflict exists, however, where the Court of Appeals extensively discussed and applied *Campbell*'s and *Little*'s principles—and followed *Campbell* to the letter in limiting *Little* to its distinguishable facts.

RTDI first contends that the Court of Appeals' decision conflicts with *Campbell* and *Little* through applying "certain factors identified in *Restatement (Second) of Torts* § 442 (1965)" for determining whether an intervening act was unforeseeable. Petition for Review ("PFR") at 2, 17-18. The touchstone of whether an intervening act constitutes a superseding cause is whether it is unforeseeable. *Campbell*, 107 Wn.2d at 814. As the Court of Appeals correctly recognized, this Court has adopted certain factors from *Restatement* § 442 as "the relevant considerations" for this determination in product liability cases:

> the relevant considerations for determining whether an intervening act constitutes a superseding cause are "whether (1) the intervening act created a *different type of harm* than otherwise

> would have resulted from the actor's negligence; (2) the intervening act was *extraordinary* or resulted in extraordinary consequences; [and] (3) the intervening act *operated independently* of any situation created by the actor's negligence."

West, 2021 WL 2809609, at *12 (emphasis added) (quoting *Campbell*, 107 Wn.2d at 812-13) (citing RESTATEMENT (SECOND) OF TORTS § 442 (1965)). This Court ***itself*** held that these factors are "the relevant considerations" for determining whether an intervening act constitutes a superseding cause. 107 Wn.2d at 812. Thus, there was not (and there could not be) any conflict between the Court of Appeals' decision to utilize the relevant legal framework identified by *Campbell* in analyzing superseding cause.

Indeed, the Court of Appeals' superseding cause analysis mirrors that of *Campbell*. There, ITE Imperial, the manufacturer of "auxiliary brushing" through which electricity was conducted at a public utility substation, provided no warning that, due to an unusual design feature, the brushing would remain energize even when normal shutdown procedures were followed. 107 Wn.2d at 809-10. Campbell, a public utility employee (PUD) tasked with cleaning the auxiliary brushing, followed normal shutdown procedures to "de-energize" the substation. *Id.* at 809-10. The brushing remained energized and severely injured Campbell when he attempted to

clean it. *Id.* at 810.

On review, this Court concluded that any negligence by the PUD in failing to discover and warn of the brushing's defective, dangerous condition legally could not constitute a superseding cause. *Id.* at 817. Applying "the relevant considerations" under *Restatement* § 442 as well as *Restatement* § 449, it held:

> [T]he intervening negligence of the PUD did not result in a different kind of harm than otherwise would have resulted from ITE Imperial's failure to warn. The harm caused by the PUD's negligence—electrical shock and burns—is identical to the harm brought about by ITE Imperial's failure to warn. Secondly, the intervening negligence of the PUD did not operate independently of the situation created by ITE Imperial's failure to warn. To use this court's language in *Herberg,* the PUD's negligence was "activated" by ITE Imperial's failure to affix a warning to its product.
>
> In fact, this case falls directly within the coverage of § 449 of Restatement (Second) of Torts. Under § 449, even criminal conduct of a third party does not constitute a superseding cause "[i]f the likelihood that a third person may act in a particular manner is ... one of the hazards which makes the actor negligent". In this case, the likelihood that the PUD would not properly shut down the auxiliary bushing is the very hazard which makes ITE Imperial's switchgear

> unreasonably unsafe if unaccompanied by an adequate warning. Accordingly, under § 449 the PUD's negligence does not constitute a superseding cause.

107 Wn.2d at 815 (quoting RESTATEMENT (SECOND) OF TORTS § 449 (1965)).

Likewise, the Court of Appeals utilized the ***exact same*** *Restatement* § 442 and § 449 analysis in its decision:

> Here, as in *Campbell*, RTDS's alleged intervening negligence did not result in a different kind of harm to West than otherwise would have resulted from RTDI's conduct. Rather, the harm brought about by RTDS's intervening failure to implement the collar modification is *exactly the same harm* the risk of which was increased by RTDI's conduct in allegedly designing or manufacturing a defective product and failing to warn of its danger: A catastrophic collision resulting from an axle housing fracture. Additionally, RTDS's conduct did not operate independently of the situation created by RTDI's conduct. Rather, as in *Campbell*, RTDS's alleged negligence was "activated" by RTDI's antecedent conduct in that the only reason RTDS was allegedly negligent was because RTDI's product was allegedly defective.
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>
> Furthermore, with regard to West's failure-to-warn claim, this case also falls within the coverage of § 449 of the *Restatement*, on which the *Campbell* court also relied . . . .

> Here, as was the case in *Campbell*, the likelihood that RTDS would not implement the collar modification (or take some other action in response to the service bulletin) is one of the hazards that made RTDI's service bulletin allegedly inadequate. *See id.* ("In this case, the likelihood that the PUD would not properly shut down the ... bushing is the very hazard which makes ITE Imperial's switchgear unreasonably safe if unaccompanied by an adequate warning. Accordingly, under § 449 the PUD's negligence does not constitute a superseding cause."). For the foregoing reasons, we conclude as a matter of law that RTDI was not entitled to a superseding cause instruction and, thus, the trial court did not err by refusing to give one.

West, 2021 WL 2809609 at *13. The Court of Appeals' decision was in lockstep adherence to *Campbell*, not conflict.

RTDI further attempts to manufacture "conflict" with *Campbell* and *Little* through mischaracterizing the Court of Appeals' application of the *Restatement* § 442 factors as establishing an erroneous "bright-line test for determining whether an intervening force may be deemed a superseding cause of harm," to the complete exclusion of the so-called *Little* superseding cause "rule"[8] claimed by RTDI. PFR at 18.

[8] As a threshold matter, RTDI mischaracterizes *Little* as establishing a bright line "rule" that a product purchaser's intervening negligence constitutes a superseding cause cutting off a product manufacturer's liability for failure to provide adequate product warnings in all cases where the purchaser had

"actual, specific knowledge that the defendant's product was unreasonably dangerous and failed to fulfill a duty to warn or protect the plaintiff." PFR at 14. But *Little* itself recognized this as a "general principle[]" appropriately applicable to the highly specific facts of the case before it, including the fact that the product purchaser was a "large industrial concern with its own safety programs . . . and the manufacturer may have no effective means of communicating its warnings to the ultimate user," not a bright-line rule relieving manufacturers of liability in every case where the defendant had "actual, specific" notice of a product's dangerous nature. 19 Wn. App. at 824. To the contrary, *Little* recognized multiple scenarios where such "actual, specific" notice would not relieve manufacturers of liability:

> This must, however, be qualified by the holdings in a few cases, that there are some products which are so highly dangerous, and so utterly unsuited for their intended use, that the responsibility cannot be shifted; and that even such discovery and deliberate failure to disclose will not relieve the seller. There are also decisions holding that where there is appreciable likelihood that the buyer will pass on the product without warning, and that any notice to him will not reach the ultimate user, there is liability for placing the product in his hands for marketing, even with such notice.

Id. Consistent with *Little*'s multiple caveats, *Campbell* expressly held that a general superseding cause rule shifting liability from manufacturers to product purchasers' notice of a product's dangerous nature "would be anomalous" given the nondelegable nature of a manufacturer's duty to provide adequate product warnings under Washington law. C*ampbell*, 107 Wn.2d at 814. In sum, Washington has ***never*** adopted the bright-line superseding cause "rule" asserted by RTDI.

But the Court of Appeals' decision did no such thing. Rather, it observed that *Campbell* characterized the general principle applied in *Little* as "'"[w]here the buyer is notified of the danger, or discovers it for himself, and delivers the product without warning, it usually has been held that the responsibility is shifted to him, and that his negligence supersedes the liability of the seller.'" *Compare West*, 2021 WL 2809609 at *15 (internal quotations omitted) (quoting *Campbell*, 107 Wn.2d at 817), *with Little*, 19 Wn. App. at 824 (quoting WILLIAM L. PROSSER, TORTS § 102, at 667-68 (4th ed. 1971)) (stating the same).

In continued lockstep with *Campbell*, the Court of Appeals *verbatim* reiterated this Court's observation that applying this principle to generally relieve manufacturers of liability for failure to warn of product defects "'would be

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RTDI also suggests, without citation to any authority, that the non-existent *Little* bright line "rule" should apply to the exclusion of all other superseding cause considerations in cases where the alleged superseding cause is a common carrier's breach of its protective duties to passengers. PFR at 16, 19. This Court does not consider arguments unsupported by citation to authority. RAP 10.3(a)(6); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372, P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

anomalous'" under Washington law. *West*, 2021 WL 2809609 at *14 (internal quotations omitted) (quoting *Campbell*, 107 Wn.2d at 814). And it correctly observed that *Campbell* stopped short of formally adopting that principle, instead holding that *Little* was distinguishable on its facts even assuming *arguendo* the adoption of that principle: "'[a]ssuming this court *were* to adopt this principle, it does not apply to this case.'" *West*, 2021 WL 2809609 at *15 (emphasis in original) (quoting *Campbell*, 107 Wn.2d at 817).[9]

[9] In arguing that this Court did, in fact, adopt the so-called *Little* "rule," RTDI relies on *Campbell*'s inclusion of "actual, specific" knowledge of a product's unreasonably unsafe nature in its generalized synopsis of its holding:

> [A]n employer's failure to warn or protect an employee from a product which is unreasonably unsafe, unless accompanied by a warning, does not constitute a superseding cause, unless (1) the employer's intervening negligence created a different type of harm; or (2) the employer's intervening negligence operated independently of the danger created by the manufacturer; or (3) the employer had actual, specific knowledge that the product was unreasonably unsafe and failed to warn or protect.

Campbell, 107 Wn.2d at 817. But RTDI completely fails to engage with the portion of *Campbell* relied on by the Court of Appeals in which this Court expressly stated that it only ***assumed*** the adoption of *Little*'s principle for purposes of distinguishing *Little* on its facts. Nor does RTDI seek review on the basis that clarifying *Campbell*'s holding, to any extent it

Finally, like *Campbell* before it, the Court of Appeals nonetheless considered *Little*'s "principles" *arguendo* and distinguished *Little* on its facts. *Compare Campbell*, 107 Wn.2d at 816 (holding *Little* was distinguishable because "(1) ITE Imperial had an effective means of communicating its warning to PUD employees; and (2) the PUD did not have actual, specific knowledge that the [brushing] was unsafe"), *with West*, 2021 WL 2809609 at *14 (holding *Little* was distinguishable because "nothing in the service bulletin directed that Stretch Ducks be taken out of service or used a certain way until the collar modification was performed; rather, it recommended only that Stretch Ducks be taken out of service if wheel canting was observed."). Thus, RTDI fails to demonstrate any conflict with *Campbell* or *Little* where the Court of Appeals' decision, at every step, applied and followed *Campbell* in determining superseding cause in a product liability case, including assuming *arguendo* *Little*'s applicability and distinguishing it on its facts.

After dispensing with RTDI's mischaracterizations of that decision and Washington law, all that remains is RTDI's mere disagreement with the Court of Appeals' characterization

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is unclear, is an issue of substantial public interest warranting review under RAP 13.4(b)(4).

of the facts of this case as materially distinct from *Little*. Even assuming *arguendo* that the Court of Appeals erred in assessing the evidentiary record, mere error correction of a factual dispute does not warrant review under RAP 13.4(b)(1) or (b)(2). And even if it did, the Court of Appeals committed no error in distinguishing *Little* on its facts. As it correctly observed, in *Little* an industrial cleaning solvent manufacturer affixed warnings to its product that breathing its vapor "'may be harmful'" and specifically instructing its use in ventilated areas and that prolonged or repeated breathing should be avoided. *West*, 2021 WL 2809609 at *15 (quoting and citing *Little*, 19 Wn. App. at 814). Additionally, the internal company memorandums of the solvent purchaser, Bethlehem Steel, discussed two previous incidents involving four employees who had lost consciousness by overexposure to the solvent's vapors, and reiterated the requirement for adequate ventilation when using the solvent. *West*, 2021 WL 2809609 at *14-15. Despite the manufacturer's warning about the chemical's potential hazards and specific instructions on its safe use; Bethlehem Steel's own knowledge of actual harm to its employees through contrary use; and the employer's own reiteration of the ventilation requirements, Bethlehem Steel assigned Robert Little, its employee, to clean up an oil spill in a poorly ventilated cellar. 19 Wn. App. at 814, 825. Mr. Little lost

consciousness and died. *Id.* at 814.

On review, the Court of Appeals held that the chemical manufacturer was entitled to a jury instruction asking the jury to determine whether Bethlehem Steel's intervening conduct was a superseding cause. *Id.* at 825. It reasoned that Bethlehem Steel's actual notice of harm to its employees through contrary use of the solvent, "when added to the product label warnings," gave rise to a reasonable expectation that Bethlehem Steel would heed the manufacturer's warnings. *Id.*

Accordingly, the Court of Appeals' decision in this case correctly distinguished *Little* on its facts. It correctly concluded that, unlike the specific instructions on proper use given by the chemical manufacturer in *Little*, RTDI never instructed RTDS not to use Stretch Ducks until performing the collar "fix." Rather, it only instructed RTDS to take Ducks out of service if wheel canting was observed. Additionally, unlike Bethlehem Steel, RTDS had no knowledge that the Stretch Duck defect ***actually had*** resulted in fracturing, failure, and loss of control of Ducks during their operation without prior observed wheel canting—all material facts RTDI omitted in its generalized "notice" to RTDS about the collar "fix." Thus, the Court of Appeals neither erred nor conflicted with *Little* in concluding that RTDS's failure to implement the collar "fix" was "extraordinary" or otherwise unforeseeable under the specific

facts of this case.[10]

V. CONCLUSION

For the foregoing reasons, Mrs. West respectfully asks this court to deny RTDI's petition for review.

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[10] RTDI also argues that the Court of Appeals' decision conflicts with *Little* by distinguishing *Little* on additional grounds, such as the fact that *Little* only involved failure to warn product liability claims. PFR at 19-20. But *Little* distinguished ***itself*** from cases, such as this one, involving defective design and manufacture claims in addition to failure to warn claims: "This is because in the failure-to-warn case, the defect which makes the product 'unreasonably dangerous' . . . is in the absence of adequate warnings concerning the product's use, rather than any physical defect in the product itself." 19 Wn. App. at 822.

RESPECTFULLY SUBMITTED this 18th day of October 2021.

The undersigned certifies that the number of words contained in this document is 4,926.

PFAU COCHRAN VERTETIS AMALA, PLLC

By: /s/ Christopher E. Love
Christopher E. Love, WSBA No. 42832

PFAU COCHRAN VERTETIS AMALA, PLLC
909 A St., Suite 700
Tacoma, Washington 98402
(253) 777-0799

CERTIFICATE OF SERVICE

I, Sarah Awes, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on October 18, 2021, I delivered via the Court's Appellate Portal a true and correct copy of the above document, directed to:

Scott C. Wakefield
Dan R. Kirkpatrick
Angela Y. Hunt
Justin M. Monro
Fallon Mckinley & Wakefield, Pllc
1111 Third Ave. Ste. 2400
Seattle, WA 98101

Patricia K. Buchanan
Duncan K. Fobes
Patterson Buchanan Fobes & Leitch, INC., P.S.
2112 Third Ave., Suite 500
Seattle, WA 98121

Michael B. King
Jason W. Anderson
Linda B. Clapham
Carney Badley & Spellman
701 5th Ave #3600
Seattle, WA 98104

Marilee C. Erickson
Reed McClure
1215 Fourth Ave, Ste. 1700
Seattle, WA 98161

DATED this 18th day of October 2021.

/s/ Sarah Awes
Sarah Awes

PCVA LAW

October 18, 2021 - 2:28 PM

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- adecaracena@rmlaw.com
- aengelhard@pcvalaw.com
- anderson@carneylaw.com
- chris@pcvalaw.com
- clapham@carneylaw.com
- djg@pattersonbuchanan.com
- dkirkpatrick@wakefieldkirkpatrick.com
- ebour@wakefieldkirkpatrick.com
- esolbrig@wakefieldkirkpatrick.com
- jrf@pattersonbuchanan.com
- jsteward@williamskastner.com
- kevin@pcvalaw.com
- king@carneylaw.com
- klo@pattersonbuchanan.com
- merickson@rmlaw.com
- michael@pcvalaw.com
- pkb@pattersonbuchanan.com
- rmorris@fallonmckinley.com
- sandy@fmwlegal.com
- swakefield@wakefieldkirkpatrick.com
- thermsen@williamskastner.com

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Sender Name: Sarah Awes - Email: sawes@pcvalaw.com
Filing on Behalf of: Darrell L. Cochran - Email: darrell@pcvalaw.com (Alternate Email: sawes@pcvalaw.com)

Address:
911 Pacific Ave
Suite 200
Tacoma, WA, 98402
Phone: (253) 617-1642

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