NO. 94732-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET RUBLEE, Individually and as Personal Representative of the Estate of VERNON D. RUBLEE,

Plaintiff-Petitioner,

v.

PFIZER INC.,

Defendant-Respondent,

DEFENDANT-RESPONDENT PFIZER INC.'S ANSWER TO PLAINTIFF-APPELLANT MARGARET RUBLEE'S PETITION FOR REVIEW

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INTRODUCTION

The petition arises out of an attempt to use an obscure and largely obsolete aspect of product liability law—the "apparent manufacturer" doctrine derived from Section 400 of the Restatement (Second) of Torts—to evade the terms of an asbestos injury trust. Like every other court to consider this strategy, a unanimous panel of the Court of Appeals rejected it, ruling that Plaintiff's claim fails under any possible test for apparent manufacturer liability. This ruling was correct and does not raise any issue warranting the Court's review.

Plaintiff-Appellant Margaret Rublee alleges that her deceased husband contracted mesothelioma from exposure to asbestos-containing products manufactured by Quigley Company, Inc. when it was a subsidiary of Defendant-Respondent Pfizer, Inc. Normally, plaintiffs alleging such injury would sue the manufacturer based on strict liability, and the manufacturer's parent based on its ownership, management, or control of the manufacturer. However, after litigating and settling thousands of such claims, Quigley was forced to declare bankruptcy and to set up an asbestos injury trust in order to ensure equitable treatment for all remaining claimants. Although Quigley and Pfizer contributed nearly $1 billion to this trust, Plaintiff seeks to avoid the trust's restrictions by

bringing a claim outside the trust under the apparent manufacturer doctrine.

Division One of the Court of Appeals unanimously held that Plaintiff had failed to raise a genuine issue under the apparent manufacturer doctrine. This doctrine was formulated in the early 20th century prior to the development of strict liability, when sellers were subject to less stringent liability requirements than manufacturers. The doctrine estops sellers that act as if they manufactured a product and concealed the identity of the true manufacturer from relying on more lenient seller standards. Undisputed evidence in this case, however, showed that Quigley products were sold by Quigley as Quigley products and that, to the extent Pfizer was associated with them, it was only as Quigley's corporate parent. Accordingly, Division One ruled that Plaintiff had failed to raise a genuine issue under any possible test for apparent manufacturer liability.

Plaintiff does not—and cannot—show that this ruling, which is consistent with both Washington law and every other court to consider similar attempts to repurpose the apparent manufacturer doctrine, warrants discretionary review.[1] Plaintiff asserts that the Court of Appeals' decision

[1] *See Turner v. Lockheed Shipbuilding Co.*, No. C13-1747 TSZ, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013) (dismissing apparent

raises a frequently recurring issue of substantial public interest. In fact, until the recent attempts of her counsel to evade the Quigley bankruptcy channeling injunction, the apparent manufacturer doctrine had not even been mentioned in a Washington decision for more than four decades, and Plaintiff offers no reason why a plaintiff would invoke the doctrine outside the unusual circumstances of a case such as this. Plaintiff also asserts that the Court of Appeals' ruling conflicts with the decisions of this Court concerning the learned intermediary defense and focusing on the understanding of the end user, rather than the purchaser. But the Court of Appeals did not apply the apparent manufacturer doctrine exclusively from the perspective of purchasers, as Plaintiff claims. It also analyzed Plaintiff's claim from the perspective of end users, as Plaintiff urges, and concluded that her claims failed as a matter of law under that test as well.

Moreover, in applying these tests, the Court of Appeals did not even mention the learned intermediary defense, a rule from pharmaceutical products liability law that applies only to unavoidably unsafe products, and none of the decisions of this Court cited by Plaintiff

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manufacturer claim against Pfizer under Washington law); *Sprague v. Pfizer, Inc.*, No. 14-5084 RJB, 2015 WL 144330, at *3-5 (W.D. Wash. Jan. 12, 2015) (same), *appeal filed*, Jan 5, 2015 (9th Cir.); *Stein v. Pfizer*, 137 A.3d 279 (Md. Ct. Spec. App. 2016) (dismissing apparent manufacturer claim against Pfizer under Maryland law); *cert. denied*, 146 A.3d 476 (Md. Sept. 29, 2016).

consider the apparent manufacturer doctrine. Nor does Plaintiff explain why application of the apparent manufacturer doctrine, which is based on an estoppel rationale, would turn on the understanding of parties with no involvement in the sale of a product. Thus, Plaintiff has failed to demonstrate any conflict or, indeed, even an inconsistency warranting discretionary review.

In short, there is no justification for reviewing the Court of Appeals' unanimous rejection of Plaintiff's attempt to evade an asbestos injury trust using a moribund and obsolete doctrine. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Background

Quigley, which was founded in 1916, manufactured and sold heat-resistant, or "refractory," products to shipyards, steel plants, and other major industrial operations for high-temperature applications such as lining industrial furnaces and turbines. Pet. App. 3; CP 915, 950. In particular, from the mid-1930s until the early 1970s, Quigley manufactured and sold Insulag and Panelag, cement-like powders designed to be mixed with water and applied to the surface of areas exposed to extreme heat, both of which contained asbestos. Pet. App. 3; CP 1793, 1796.

In 1968—six years before Quigley discontinued Insulag and Panelag and replaced them with asbestos-free products—Pfizer acquired Quigley, which became a wholly-owned Pfizer subsidiary. Pet. App. 3. After the acquisition, Quigley continued to operate as a separate corporation, and to manufacture Insulag and Panelag in a plant that it continued to own using raw materials that it continued to buy. *Id.* Even more pertinently, Quigley also "continued to handle sales and distribution of these products by maintaining its own sales employees and receiving and filling customers' orders," and "Quigley sales employees continued to communicate with purchasers and distributors on Quigley stationery and sign letters on behalf of Quigley," using stationary expressly identifying Quigley as a subsidiary of Pfizer. *Id.* Moreover, "[p]urchasers and distributors continued to send orders and letters to 'Quigley Company, Inc.'" *Id.*

In addition, the labels on Insulag and Panelag bags identified Quigley as the manufacturer and stated that it was a Pfizer subsidiary. Pet. App. 3-4; CP 204, 228, 567, 1821, 1824. Quigley also continued to distribute safety and promotional materials that identified Insulag and Panelag as Quigley products. Pet. App. 4.

B. The Asbestos Injury Trust And The Channeling Injunction

Like other manufacturers of products containing asbestos, Quigley has been sued by many individuals claiming injury from exposure to asbestos. Pet. App. 4. In fact, by September of 2004, more than 160,000 plaintiffs had filed asbestos-related suits against Quigley. *Id.* Although Pfizer owned Quigley for only six years out of the many decades that the company sold Insulag and Panelag, over two-thirds of these suits also named Pfizer. Lacking the resources to fully compensate all these claimants, Quigley was forced to file for bankruptcy. *Id.* In August 2013, the United States District Court for the Southern District of New York approved a reorganization plan creating an asbestos injury trust under Section 524(g) of the Bankruptcy Code to compensate asbestos claimants, which includes approximately $965 million funded by Pfizer. *Id*; CP 49-50.

To protect the asbestos claimants trust and ensure an equitable distribution of relief to all claimants, the district court also issued a channeling injunction. Pet. App. 4. This injunction requires parties claiming injury from exposure to asbestos in Quigley products to seek relief solely from the trust, and enjoins them from suing Quigley for asbestos-related injuries. *Id.* The injunction also bars asbestos-related

injury claims against Pfizer that are based on Pfizer's prior ownership, management, or control of Quigley, such as claims asserting a "'piercing the corporate veil' theory" or "successor liability theory." *Id*. This channeling injunction, however, does not bar claimants from bringing claims against Pfizer under the apparent manufacturer doctrine because such claims are not necessarily based on Pfizer's ownership or control of Quigley. *Id.*; *In re Quigley*, 676 F.3d 45, 59-62 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2849 (2013).

Seeking to exploit the channeling injunction's narrow exception, Plaintiff's counsel has brought several apparent manufacturer claims against Pfizer relating to exposure to Insulag and Panelag. Pet. App. 5. The first two cases were dismissed by federal district courts in Washington on the ground that the plaintiffs could not establish two essential elements of an apparent manufacturer claim—namely, that Pfizer sold the Quigley products and "held itself out" as the manufacturer of the Quigley products—because, it was clear from the record that Quigley manufactured Insulag and Panelag and, to the extent Pfizer was referenced at all, it was correctly identified as Quigley's corporate parent. *See Turner v. Lockheed Shipbuilding Co.*, No. C13-1747 TSZ, 2013 WL 7144096, at *1-3 (W.D. Wash. Dec. 13, 2013) (applying Washington law); *Sprague v.*

Pfizer, Inc., No. 14-5084 RJB, 2015 WL 144330, at *3-5 (W.D. Wash. Jan. 12, 2015) (same), *appeal filed*, Jan 5, 2015 (9th Cir.).

C. The Proceedings Below

In September 2014, Vernon Rublee and his wife Margaret Rublee sued Pfizer and several other defendants alleging that Mr. Rublee suffered from mesothelioma caused by exposure to asbestos products while working as a machinist at the Puget Sound Naval Shipyard ("PSNS") from 1965 to 2005. Pet. App. 4; CP 1-4. The Rublees brought negligence and strict liability claims against most of the defendants, but they sued Pfizer under the apparent manufacturer doctrine. *Id*. When Mr. Rublee died in March 2014, the action against Pfizer was converted to a wrongful death action on behalf of Mr. Rublee's estate and his surviving spouse. Pet. App. 4 n.8.

At the close of discovery, Pfizer moved for summary judgment. The trial court granted Pfizer's motion, ruling that Plaintiff had failed to raise a genuine issue whether Pfizer was an apparent manufacturer of Quigley products because "Quigley was clearly and accurately identified as a/the real manufacturer," and "a reasonable purchaser would not have been induced to believe that" Pfizer manufactured Insulag or Panelag. CP 2929.

On appeal, a three-judge panel of Division One comprised of Judges Leach, Cox and Becker unanimously affirmed. Assuming that this Court would apply § 400 of the Restatement (Second) of Torts and recognize the apparent manufacturer doctrine, the panel held that Plaintiff had failed to raise a genuine issue concerning Pfizer's liability under any of the three tests for apparent manufacturer liability previously recognized by other courts. Pet. App. 8-20.

First, the panel held that there was no genuine issue under the "objective reliance" test utilized by a majority of the courts addressing the apparent manufacturer doctrine. Pet. App. 8-15. This test requires plaintiffs to demonstrate that a "'reasonable purchaser, in the position of the actual purchaser,'" would have thought that the defendant manufactured the product in question. Pet. App. 8-9 (quoting *Stein v. Pfizer*, 137 A.3d 279, 294 (Md. Ct. Spec. App. 2016); *cert. denied*, 146 A.3d 476 (Md. Sept. 29, 2016)). After carefully evaluating all the evidence proffered by Plaintiff—including Mr. Rublee's testimony and that of his co-workers—the panel concluded that "while the evidence shows that Pfizer and Quigley had a corporate relationship, no reasonable industrial purchaser could infer from [the evidence] that Pfizer actually manufactured [Insulag and Panelag]." Pet. App. 13; *see also id*. at 12 (noting that Plaintiff had overstated the prominence of the Pfizer logo and

no reasonable reader would infer from the logo that Pfizer manufactured the Quigley products).

Second, the panel found that Plaintiff's claim would fail under the "actual reliance" test, which asks whether the plaintiff actually and reasonably relied on the defendant's trademark, reputation, or assurances of quality. Pet. App. 16. The panel, however, found that Plaintiff failed to present any evidence that "actual purchasers relied on Pfizer's apparent role when they purchased the products." Pet. App. 17. Indeed, even looking at reliance from the perspective of the user rather than the purchaser—which is the perspective advocated by Plaintiff here and below—the panel found no genuine issue because "no worker testimony shows that a worker relied on Pfizer's name in deciding to use or work near the products." *Id.*; *see also* Pet. App. 13 ("none of the workers stated that they took any action based on seeing Pfizer's name on the products").

Third, the panel found no genuine issue under the "enterprise liability" test applied by a handful of courts. Pet. App. 17-20. Under this test, a plaintiff must establish that, in addition to placing its trademark on the product, the defendant "participate[d] substantially in the design, manufacture, or distribution of the defective product." Pet. App. 17 (internal quotation marks omitted). Because Plaintiff "presented no evidence" that Pfizer participated in the design, manufacture or

distribution of Insulag and Panelag, the panel ruled that there was no genuine issue under this test either. Pet. App. 19-20.

Finally, the panel considered and rejected Plaintiff's argument that Pfizer was liable under the apparent manufacturer doctrine because its trademark was affixed to some Quigley materials. Pet. App. 20-22. This theory, the panel observed, only applies to a licensor who sells or distributes the product. Pet. App. 20-21 (citing Restatement (Third) of Torts: Prods. Liab. § 14 cmt. d). Pfizer, however, did not sell or distribute the Quigley products. To the contrary, the panel found, "the record shows that Quigley was clearly identified to purchasers as the manufacturer of Insulag and Panelag." Pet. App. 21.

Concluding that "Rublee's evidence does not create a genuine issue of material fact as to any theory of apparent manufacturer liability," the panel unanimously affirmed the grant of summary judgment. Pet. App. 22-23.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether review should be denied where the Petition neither raises an issue of substantial public importance nor demonstrates that the Court of Appeals' decision conflicts with a decision of this Court.

ARGUMENT

The Court of Appeals unanimously rejected Plaintiff's attempt to use an archaic and largely moribund doctrine to evade the channeling injunction in the Quigley bankruptcy. Nothing in that decision, which correctly applied the apparent manufacturer doctrine consistent with other decisions considering similar claims against Pfizer, warrants discretionary review.

I. THE PETITION DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE WARRANTING DISCRETIONARY REVIEW BY THE COURT

Plaintiff asserts that the Court of Appeals' decision warrants review by this Court because it raises a frequently recurring question about the apparent manufacturer doctrine on which the lower courts are in need of guidance. Pet. 8-13 (invoking RAP 13(b)(4)). That is demonstrably false. The decision below addresses an obscure doctrine that no Washington decision has previously addressed in a context that arises only because Plaintiff is attempting to evade a channeling injunction designed to ensure fair compensation to all asbestos victims.

Although Plaintiff asserts that this case raises a question about the apparent manufacturer doctrine that "frequently arises and will reoccur with regularity," Pet. 8, the indisputable fact is that, prior to the decision below, no appellate decision in this State had ever applied the apparent

manufacturer doctrine. *See* Pet. App. 7. Indeed, the doctrine has not even been mentioned by a Washington appellate court since 1975, when a Court of Appeals' decision merely acknowledged the doctrine's existence. *See Martin v. Schoonover*, 13 Wn. App. 48, 54, 533 P.2d 438 (1975). Far from suggesting otherwise, Plaintiff acknowledges that the Court of Appeals heard its appeal because it raised "questions of first impression in Washington." Pet. 6; *see also* Pet. 12 (noting the Ninth Circuit's ruling that "the scope and requirements of § 400 under Washington [law] was an issue of first impression"). Thus, Plaintiff's assertion that this case raises a frequently recurring question is baseless.

Washington decisions rarely address the apparent manufacturer doctrine because the doctrine is "quaintly obsolete." *Stein*, 137 A.3d 279, 290 n.15. The apparent manufacturer doctrine developed in the early twentieth century when sellers were subject to more lenient liability standards than manufacturers. *See Hebel v. Sherman Equip.*, 442 N.E.2d 199, 201-03 (Ill. 1982). However, after the strict liability doctrine developed and imposed liability without fault on all sellers, *see, e.g.*, *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 148-54, 542 P.2d 774 (1975), the apparent manufacturer doctrine was rendered of "little practical significance" and fell into disuse. Restatement (Third) of Torts: Prods. Liab. § 14 cmts. a & b (1998).

The only reason Plaintiff invoked the apparent manufacturer doctrine in this case was to evade the channeling injunction in the Quigley bankruptcy. Plaintiff could have sued Quigley for her alleged injuries based on strict liability, and she likewise could have sued Pfizer because it is Quigley's parent. If, however, Plaintiff had done so, she would have been limited to the same share of the asbestos injury trust set up in Quigley's bankruptcy as other claimants. In a creative attempt to circumvent those limitations and avoid the channeling injunction, Plaintiff based her claims against Pfizer on the apparent manufacturer doctrine.

Plaintiff does not—and cannot—explain why this Court should use its limited resources to review the Court of Appeals' unanimous rejection of this attempt to evade a federal injunction. Indeed, noticeably absent from Plaintiff's petition is any mention of the channeling injunction, much less an acknowledgement of the reason for her invocation of an archaic and largely obsolete doctrine never before recognized in this State. That is not surprising. The fact that Plaintiff would like to circumvent the channeling injunction by reviving the obscure and largely obsolete doctrine does not create "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

Plaintiff asserts (at 6-7, 11) that in the last four years "four courts have issued rulings holding that this Court would adopt § 400 and

speculating as to the contours of such a ruling." Pet. 11. As Plaintiff identifies only two federal district court decisions, *Turner v. Lockheed Shipbuilding Co*., 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013), and *Sprague v. Pfizer, Inc*., 2015 WL 144330 (W.D. Wash. Jan. 12, 2015), she appears to be including the trial and appellate court decisions in this case in her count. Moreover, she fails to acknowledge that the two federal cases that she cites, which both granted summary judgment dismissing identical apparent manufacturer claims, were both brought by her counsel, both allege exposure to Quigley products, and both seek to evade the Quigley channeling injunction using the apparent manufacturer doctrine. *Sprague*, 2015 WL 144330, at *1; *Turner*, 2013 WL 7144096, at *1. Thus, far from showing any frequently recurring issue of general public interest, the cases cited by Plaintiff merely show that her counsel has chosen to advance the theory asserted here in different courts. Such forum shopping does not create the substantial public interest needed to justify discretionary review.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT

Plaintiff also asserts that the Court of Appeals' decision conflicts with decisions of this Court because it expands the learned intermediary

defense beyond the limits imposed by this Court. Pet. 13-17 (invoking RAP 13.4(b)(1)). This assertion is meritless as well.

There is no conflict between the Court of Appeals' decision and this Court's product liability decisions. The Court of Appeals' decision did not mention, let alone apply, the learned intermediary defense, which is unsurprising as the defense deals with unavoidably unsafe products. *See Terhune v. A.H. Robins Co*., 90 Wn.2d 9, 13, 577 P.2d 975 (1978). Nor did the decision mention the sophisticated purchaser doctrine, and none of the decisions cited by Plaintiff mentioned the apparent manufacturer doctrine, *see Lamon v. McDonnell Douglas Corp*., 91 Wn.2d 345, 588 P.2d 1346 (1979); *Terhune*, 90 Wn.2d 9, 577 P.2d 975; *Teagle v. Fischer & Porter Co*., 89 Wn.2d 149, 570 P.2d 438 (1977); *Bernal v. Am. Honda Motors Co*., 87 Wn.2d 406, 553 P.2d 107 (1976). Plaintiff notes that these decisions focused on the "ultimate user" in determining whether a product is unreasonably dangerous,[2] Pet. 14, but fails to explain why the apparent

[2] Amicus Washington State Labor Council, AFL-CIO's ("WSLC") makes the same argument, and attempts to bolster it by quoting the legislative history of the Washington Product Liability Act ("WPLA"), which it contends shows a legislative intent to retain the common law test for determining if a product is unreasonably dangerous. WSLC Br. at 5-6. But the test for determining whether a product is unreasonably dangerous has nothing to do with whether a seller holds itself out as an apparent manufacturer. Moreover, this case is not governed by the WPLA; it is governed by common law, as Plaintiff admits. *See* Pet. at 11 n.3

manufacturer doctrine—which is an estoppel-based doctrine—should focus on the individuals who used a product rather than the parties who purchased it based on representations that the seller was also the manufacturer. *See Hebel*, 442 N.E.2d at 201. Thus, far from showing any square conflict warranting review, Plaintiff has not even demonstrated any inconsistency.

Indeed, the Court of Appeals' decision did not even adopt a test for applying the apparent manufacturer doctrine. Instead, it held that Plaintiff had failed to state a claim under any of the tests for apparent manufacturer liability adopted in prior decisions or under an additional theory posited by Plaintiff. Pet. App. 8-22. Plaintiff criticizes the Court of Appeals' ruling on one test (but not the other) and on the theory that she posited. Pet. 15-16. She does not suggest, however, that these rulings conflict with any decision of this Court or otherwise offer any reason why these alleged errors warrant review by this Court.

Notably, every court to consider attempts to use the apparent manufacturer doctrine to evade the Quigley channeling injunction has held that the claims fails as a matter of law, including two federal courts applying Washington law. *See Turner*, 2013 WL 7144096 at *3 (holding

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(acknowledging that common law applies). Thus, the legislative intent behind the WPLA does not inform any issue raised by Plaintiff's Petition.

apparent manufacturer doctrine inapplicable because "the evidence presented by Plaintiffs demonstrates a relationship between Pfizer and Quigley, but does not suggest that Pfizer manufactured Insulag"); *Sprague*, 2015 WL 144330, at *3-5 (holding apparent manufacturer doctrine inapplicable because marketing materials "would not give rise to a conclusion that Pfizer manufactured the product"). Likewise, the Maryland Court of Special Appeals considering nearly identical facts held that the doctrine does not apply to Pfizer as a matter of law. *Stein*, 137 A.3d at 294 ("[N]o matter which of the three tests we employ, we reach the same result: Pfizer cannot be deemed an 'apparent manufacturer' of Insulag, under the facts of this case.").

Finally, and most fundamentally, even if this case presented a question worthy of review, it would be a bad vehicle for considering it because Plaintiff's claim fails even under the approach she urges. Plaintiff contends that the apparent manufacturer doctrine should be analyzed from the end user's point of view. Pet. 14. The Court of Appeals, however, analyzed Plaintiff's claim from that perspective and concluded that her claims failed as a matter of law:

> The record also contains deposition testimony from several workers who said that they noticed the Pfizer name on bags of refractory materials at PSNS. But this testimony has little relevance to a reasonable purchaser's understanding of the products' manufacturer because

> Rublee has not shown that any of the workers had any role in any purchasing decision. ***And even if this court applied the objective reliance test from a reasonable user's viewpoint, none of the workers stated that they took any action based on seeing Pfizer s name on the products***.

Pet. App 13 (emphasis added; footnote omitted). In fact, given that the advertising, packaging, and labeling for Insulag and Panelag clearly identified Quigley as the manufacturer of the products, Pet. App. 12-13, based on the record in this case there can be no viable apparent manufacturer claim against Pfizer from any vantage point.

CONCLUSION

The petition for review should be denied.

DATED: September 22, 2017

Respectfully submitted,

s/ Sheila L. Birnbaum

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CERTIFICATE OF SERVICE

I, Cynthia Daniel, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101.

2) By the end of the business day on September 22, 2017, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **DEFENDANT-RESPONDENT PFIZER INC.'S ANSWER TO PLAINTIFF-APPELLANT MARGARET RUBLEE'S PETITION FOR REVIEW**
- **CERTIFICATE OF SERVICE**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 22nd day of September, 2017.

/s/ Cynthia Daniel
Cynthia Daniel, Legal Assistant

BETTS, PATTERSON & MINES, P.S.

September 22, 2017 - 12:21 PM

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