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No. 85535-8

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

LEO MACIAS and PATRICIA MACIAS,

Petitioners,

v.

SABERHAGEN HOLDINGS, *et al.*,

Respondents.

FILED
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STATE OF WASHINGTON
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IN SUPPORT OF RESPONDENTS**

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INTRODUCTION AND SUMMARY OF ARGUMENT

A primary goal of tort law is to “provide incentives for increasing product safety and better informing consumers, workers, and other end-users so that they may avoid potential hazards.” Victor E. Schwartz and Christopher E. Appel, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 Mo. L. Rev. 1 (2008). The duty to warn of a product’s potential hazards generally falls upon the product’s manufacturer and those in the stream of commerce who have both the knowledge of potential hazards and the ability to effectively communicate those hazards to those who are likely to come into contact with them. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 354 (2008), *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 380 (2008).

The specific question here is whether a manufacturer of a safety device has a duty above and beyond the duties of manufacturers of other types of products to warn the eventual user of the dangers presented by the use or maintenance of another product if it is foreseeable that the two products will be used in tandem. As argued below, public policy favors limiting the imposition of duties on those who have the knowledge and ability to issue effective warnings to end-users. That policy, however, cannot justify a “safety device exception” that would impose liability costs on safety-device

manufacturers who have neither caused harm nor are in a position to prevent the harm. Protective equipment ranging from safety glasses to bullet resistant vests and radiation suits, provide “an immeasurable value to, not only the user of the protective equipment, but to society as a whole. They prevent injuries and reduce the need for individuals to rely on the tort or workers’ compensation systems if harmed.” Victor E. Schwartz, *et al.*, *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 Am. J. Trial Advoc. 13, 14 (2009).

Government regulation and existing tort law create incentives for employers to provide safety equipment to prevent workplace injuries. The manufacturer of a non-hazardous piece of protective equipment should not be on the hook for an injury it did not create, particularly where other manufacturers and the employer are already legally bound to provide warnings. Allowing negligence liability to attach here would expand the duty of care too far, with potentially dangerous consequences to Washington’s economy.

ARGUMENT

I

PUBLIC POLICY FAVORING PREVENTION OF INJURY AND MANUFACTURE OF SAFETY DEVICES WEIGHS AGAINST AN EXPANSION OF THE DUTY TO WARN

While it is entirely consistent with Washington tort doctrines that manufacturers have a duty to warn about maintenance procedures regarding their own products, manufacturers have no duty to warn about dangers of products manufactured by other companies that, when disturbed in general maintenance procedures, result in potential hazards. *Simonetta*, 165 Wn.2d at 354; *Braaten*, 165 Wn.2d at 389-90. Petitioners argue that this Court should adopt a “safety device” exception to the general rule absolving manufacturers of the duty to warn of other manufacturers’ products. Public policy would never countenance such a result, however, because it places the onus on the defendant who has no control to prevent the harm from occurring and is likely to create perverse incentives of over-warning and ineffective warning. Courts that generously impose liability on manufacturers for failure to warn provide “an incentive to sellers to overwarn about product risks, which undermines the effectiveness of product warnings to the ultimate detriment of consumers.” Mark Geistfeld, *Inadequate Product Warnings and Causation*, 30 U. Mich. J.L. Ref. 309, 310 (1997). This incentive is

heightened because “companies are penalized for underwarning but not for overwarning.” W. Kip Viscusi, *Individual Rationality, Hazard Warnings, and the Foundations of Tort Law*, 48 Rutgers L. Rev. 625, 666 (1996).

The law of torts is about line drawing. Courts have long understood that the line of potential liability must be drawn somewhere. *See, e.g., Hunsley v. Giard*, 87 Wn.2d 424 (1976) (“Essentially we are balancing the interest of the injured party to compensation against the view that a negligent act should have some end to its legal consequences.”); *Kloepfel v. Bokor*, 149 Wn.2d 192, 199 (2003) (quoting same).

In drawing that line, courts rely on the concepts of duty, foreseeability, and proximate cause. The duty to use care to avoid injury to others arises from the foreseeability of the risk created. Thus, courts often have found that defendants have no duty to take burdensome precautions against potential harms that are not reasonably foreseeable, or are simply too unlikely. As this Court explained in *Rose v. Nevitt*, 56 Wn.2d 882, 885 (1960), “if the conduct of the actor does not involve an unreasonable risk of harm to the person injured, he owes no duty to that person and, therefore, there is no actionable negligence.” For example,

[i]f a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his car, negligence

cannot be predicated on the mere fact that he started his machine, injuring the child.

Id. at 886 (citations omitted); *Romero v. West Valley School Dist.*, 123 Wn. App. 385, 392 (2004) (same). But in each case, public policy considerations—not the single factor of foreseeability—are paramount. According to this Court, “[t]he most common vehicle for circumscribing the boundaries of liability has been the court’s definition of duty.” *Hunsley*, 87 Wn.2d at 434.

Here, this issue is whether or not the defendants had a duty to warn. “[M]any factors interplay” in finding this duty, including history, morals, and justice, convenience of administration of the rule, and the policy as to “where the loss should fall.” *Hunsley*, 87 Wn.2d at 434; *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wn.2d 233, 243 (2001) (“The existence of a duty is a question of law and depends on mixed considerations of ‘logic, common sense, justice, policy, and precedent.’” (citations omitted)).

The public policies are drawn from the two main functions of tort law: compensation (*De Nike v. Mowery*, 69 Wn.2d 357, 358 (1966)), and deterrence (*Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419 (2007)). The deterrence function is particularly important in the context of expanding duty specifically to target manufacturers of safety equipment. When considering cases in the industrial workplace, the common law has

developed several exceptions to tort liability that reflects societal value in enhanced safety over traditional tort recovery. *See Respirators to the Rescue*, 33 Am. J. Trial Advoc. at 26. For example, employees benefit when businesses engage in self-critical analysis of problems that arise in the workplace, because the analysis is often the first step in resolving the problem, resulting in a safer, more productive workplace. For this reason, many courts refuse to allow plaintiffs to rely on these analyses as a basis for proving that a business failed in its duty to provide a safe workplace.

A contrary holding, punishing self-critical analysis, creates a perverse incentive to allow potential problems to fester, lest frank discussion of potential solutions cost more than risking a potential injury. *See Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 907 (8th Cir. 1979) (“privilege against disclosing self-evaluative reports”); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 667 (4th Cir. 1977) (“qualified privilege for self-evaluative documents”), *cert. denied*, 435 U.S. 995 (1978).

Similarly, this Court adopted the rule that plaintiffs cannot leverage tort liability from a business’ subsequent remedial measures after an accident has occurred. Like the self-critical analysis privilege, the public policy served by this exception to tort liability is the overriding public desire to improve

workplace safety. See *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 141 (2002).¹

Another reason that courts choose to promote public safety over tort liability is because, in many cases, tort liability is not the only—or even the best—method of determining how to create the safest possible workplace. Tort law does not exist in a vacuum; it coexists with criminal law and an exhaustive array of both state and federal administrative mandates. In the specific case of respirators, extensive federal regulations govern both the manufacture of the devices *and* the way respirators are to be used in the workplace.²

“[R]espirators are intended to be the last, not first, line of defense against hazardous contaminants in the workplace.” *Respirators to the Rescue*, 33 Am. J. Trial Advoc. at 27 (citing NIOSH Safety & Health Topic, *Respirators*).³ The first line of defense is “accepted engineering control

¹ The voluntary rescue doctrine presents a similar doctrinal theme—the public policy of promoting safety overrides the individual plaintiff’s ability to pursue damages in tort. See *Folsom v. Burger King*, 135 Wn.2d 658, 674 (1998).

² The Occupational Safety & Health Act of 1970, 29 U.S.C. § 654(a), requires employers to provide their employees with a workplace free of recognized hazards and to comply with occupational safety and health standards promulgated under the Act.

³ Available at <http://www.cdc.gov/niosh/topics/respirators> (last visited June 6, 2011).

measures,” that is, managing the work environment to reduce exposure. 29 C.F.R. § 1910.134(a)(1). When respirators are needed to supplement the environmental controls, federal law requires employers to “develop . . . a written respiratory protection program with required worksite-specific procedures,” 29 C.F.R. § 1910.134(c), including medical evaluations for employees and teaching employees the proper use of respirators, procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators, and employee training in the hazards to which they are exposed. *Id.* In the context of this case, federal regulations place the onus of teaching tool clerks how to properly clean and repair respirators squarely on the employer. There is no suggestion in the decisions or briefs below that the respirator manufacturers failed to provide adequate instructions to the *employer* for these purposes.

Because the configuration and use of respirators varies widely, depending on the types of airborne particulates to be filtered, federal regulations offer a vast array of specifications for different types of respirators. One common theme among the regulations, though, is a need to balance effective filtration with the ease of “breathability” that is necessary if workers are to be convinced to wear the devices. *Respirators to the*

Rescue, 33 Am. J. Trial Advoc. at 30, 40.⁴ The best respirator in the world will not prevent injury if it is so uncomfortable, or causes such claustrophobia, that employees refuse to use it. Again, it is the employer who must ensure that the correct respirators are chosen given the nature of the workplace hazards, and that the employees are properly trained to wear them.

Taken in combination, the general rule of disallowing a duty to warn of products manufactured by others, plus the public policy favoring devices that promote prevention of injury over imposition of tort liability, plus the existing regulatory framework related to workplace safety in general and respirators in particular all lead to the result that no “safety device” exception should undermine the rules announced in *Simonetta* and *Braaten*.

II

EXPANDING THE DUTY TO WARN IN THIS CASE WOULD RESULT IN OVER-DETERRENCE AND UNACCEPTABLY HIGH ECONOMIC COSTS

Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. “At some point,”

⁴ See also *Respirators to the Rescue*, 33 Am. J. Trial Advoc. at 68 (“[T]hree federal agencies test and certify the respirators, allow no deviation from the certified design and labeling without prior approval, and require that employers provide their workers with specific respirators to protect them in the workplace.”).

therefore, “it is generally agreed that the defendant’s act cannot fairly be singled out from the multitude of other events that combine to cause loss.” Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982). Thus, there is a point at which imposing liability has negative consequences—where there is a serious risk of discouraging worthwhile conduct. As Justice Breyer explained, courts must take care to strike an effective balance, because “[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would ‘over-deter’ by leading potential defendants to spend more to prevent the activity that causes the economic harm . . . than the cost of the harm itself.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring).

The “safety device” exception promoted by the Petitioners would cause disproportionate economic impacts. As the Eighth Circuit explained in a case involving a component part of a medical device used in the jaw:

(“[T]he cost to a manufacturer of an inherently safe raw material to insure against all conceivable misuse of his product would be prohibitively expensive.”). As another panel of this Court has determined in a previous TMJ case, “it would be unreasonable and impractical to place the burden of testing and developing all devices that incorporate Teflon as a component on Du Pont.” *Rynders [v. E.I. Du Pont de Nemours & Co.]*, 21 F.3d 835,] 842 [(8th Cir. 1994)].

Suppliers of versatile materials like chains, valves, sand, gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components. *Kealoha* [v. *E.I. Du Pont de Nemours & Co.*, 844 F. Supp. 590,] 594 [(D. Haw. 1994), *aff'd*, 82 F.3d 894, 901 (9th Cir. 1996)] (“[T]here would be no end to potential liability if every manufacturer of nuts, bolts and screws could be held liable when their hardware was used in a defective product.”).

In re Temporomandibular Joint (TMJ) Implants Products, 97 F.3d 1050, 1057 (8th Cir. 1996) (citation omitted). Modern industrial society is full of potential hazards, and imposing severe costs on parties with only tenuous connections to the harm runs the risk of stifling important economic activity. See James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required To Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 Sw. U. L. Rev. 595, 616 (2008) (If a court holds that a seller of a safe product is strictly liable for injuries caused entirely by other, more dangerous, products, the users and consumers of the safe product “end up compensating (and thereby subsidizing) the users and consumers of the dangerous products, thereby generally discouraging use and consumption of relatively safe products and encouraging use and consumption of relatively dangerous ones.”).

Over-deterrence is a serious concern. Economically speaking, if a business faces too high a potential tort liability, it will invest too many

resources in avoiding that liability, rather than into productive enterprises. See Mike D. Murphy, *Note, Market Share Liability New York Style: Negligence in the Air? Hymowitz v. Eli Lilly and Co.*, 55 Mo. L. Rev. 1047, 1067 (1990) (“The consequences of over-deterrence include disincentives for safety to unsafe manufacturers, and a reluctance by ‘leading edge’ companies to introduce new products for fear of potential liability.”). This diverts businesses away from satisfying the needs of consumers, and wastes the energy of entrepreneurs that ought to be focused on producing goods and services at low prices.

The threat of such enormous [damages] awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O’Connor and Stevens, JJ., concurring and dissenting) (citations omitted). Limitations on tort liability, therefore, serve an important economic purpose. As Professors Cass Sunstein, Daniel Kahneman, and David Schkade explain:

If [damages] awards are unpredictable . . . resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive

caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

Cass R. Sunstein, *et al.*, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 (1998).

Tort liability typically is a one-way ratchet—it expands but rarely retracts. If the Court were to find liability in this case, it is difficult to imagine where such liability would stop. *See In re New York City Asbestos Litigation*, 840 N.E.2d 115, 122 (N.Y. 2005) (refusing to find liability in case where wife was injured by laundering husband’s asbestos-covered clothing because “the ‘specter of limitless liability’ is banished only when the ‘class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship’” and there was no relationship between the employer and the wife). In this case, the manufacturers of products containing asbestos had a duty to warn about exposure; the manufacturers of respirators had a duty to provide adequate instruction about the use and maintenance of the respirators to the purchasers of the respirators (the employer); and the employer had both common law and regulatory duties to provide training in the safe use and maintenance of the respirators to the workers. There is no public policy that can be furthered by the expansion of liability to respirator manufacturers to warn individual employees of asbestos hazards created by other products.

III

ASBESTOS LITIGATION IMPOSES SERIOUS ECONOMIC HARMS ON THE NATION

Asbestos exposure has become one of the primary targets for abusive and exploitative mass tort litigation. Such litigation harms citizens of Washington by deterring economic investment and job creation, and curbing the availability of goods and services on the market—thus increasing the cost of living. Worse, asbestos litigation has created serious injustices in the tort system, by changing the rules and extending liability beyond the traditional limits of tort law. It is important to consider the ramifications of the expansion of liability sought by the Petitioners in this case in the context and history of asbestos litigation as a whole.

Asbestos litigation is widely recognized as the epicenter of a massive breakdown in American tort law. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997). According to a 2005 report by the RAND Institute, \$54 billion has already been spent on litigation over asbestos-related injuries, more than half of which has gone to “transaction costs,” such as attorneys’ fees. Stephen J. Carroll, *et al.*, RAND Institute for Civil Justice, *Asbestos Litigation* 81 (2005).⁵ After 30 years, this litigation

⁵ Available at <http://www.rand.org/pubs/monographs/MG162/index.html> (last visited June 9, 2011)

has spread well beyond the asbestos-related manufacturing and installation industries . . . to touch almost every form of economic activity that takes place in the United States. [The study] found that 75 out of a total of 83 different industries . . . included at least one firm that had been named as an asbestos litigation defendant.

Id. Because virtually all manufacturers of products containing asbestos are bankrupt, the plaintiffs' bar has sought out other defendants with peripheral connections to the asbestos industry. Steven B. Hantler, *et al.*, *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (These "peripheral defendants" have only an attenuated connection to asbestos, but are now named in asbestos litigation because of their "deep pockets"; "the net has spread . . . to companies far removed from the scene of any putative wrongdoing."). Respirator manufacturers are specifically identified as in the class of these "peripheral defendants." *Respirators to the Rescue*, 33 Am. J. Trial Advoc. at 48. But

the absence of blameworthy solvent defendants does not justify the imposition of expanded theories of liability to those parties who could not prevent the harm. From both compensation and deterrence perspectives, the issue is not whether asbestos victims should receive compensation from some entity, but rather which entity can fairly be called upon to shoulder the financial burden.

Paul J. Riehle, *et al.*, *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33, 61 (2009).

There is little to be gained by finding liability against defendants that have such attenuated connections to a plaintiff's injury. As the RAND Institute for Civil Justice points out, "[i]f business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure." Carroll, *et al.*, *Asbestos Litigation*, at 129.⁶ The tort system is supposed to create an incentive mechanism that allows businesses to predict, on the basis of anticipated costs and benefits, what sort of risks and practices are legitimate in their pursuit of customer satisfaction. See Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Cal. L. Rev. 677, 678 (1985) (describing cost-benefit analysis expectations and limitations). When a damages verdict is irrationally large or is not based on some clear principle of fault, businesses will disregard the confusing signals that tort liability sends them, and will simply consider the cost of tort liability as a general cost of doing business. "When [tort] awards are arbitrary, it becomes impossible to discern any relevant incentives from the pattern of damage awards, leaving businesses only to guess at what business practices will not instigate damage claims." C. Boyden Gray, *Damage Control*, Wall St. J., Dec. 11, 2002, at A18.

⁶ Available at <http://www.rand.org/pubs/monographs/MG162/index.html> (last visited June 9, 2011).

Of course, some of these cases are justified on the merits. There is no doubt that industrial exposure to dangerous chemicals is properly the subject of tort law. The problem is that damage awards have become so vast, and courts have become so willing to bend the rules of tort law in favor of plaintiffs and against “deep pockets” defendants, that asbestos litigation has created an entire industry within the legal profession. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 233 (2006) (identifying two “fundamental phenomena” that combine to create the asbestos litigation crisis: “claimant elasticity,” defined as “the essentially inexhaustible supply of claimants,” and “defendant elasticity,” defined as “the correspondingly unbounded source of defendants,” which stem from “the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as ‘solvent bystanders’” (footnotes and citations omitted)).

This industry is economically wasteful, in that it puts resources into unproductive litigation, drives businesses that do produce social benefits into bankruptcy, and over-deters legitimate enterprises. “Beyond sacrificing basic fairness and justice to the litigants, the financial impact provides a strong disincentive for respirator manufacturers to continue producing these

safety devices for sale in the United States.” *Respirators to the Rescue*, 33 Am. J. Trial Advoc. at 50-51 (“[I]f the evolution of mass tort litigation in asbestos and silica provides any guide, mounting liabilities may force respirator manufacturers to shut down.”).

These predictions, though dire, are not “Chicken Little” fantasy. James Stengel identified 32 bankruptcies related to asbestos litigation just from 2000-2005. *Id.* at 265 (listing each bankrupt company and the year it filed for bankruptcy). Moreover, the financial windfalls produced by verdicts in these cases often fail to effect any reparation or justice. “Plaintiffs’ attorneys collect an estimated \$30 billion annually in legal fees—money that could otherwise help prevent or compensate injuries [I]n mass tort litigation involving asbestos, two-thirds of insurance expenditures have gone to lawyers and experts.” Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke L.J. 447, 464 (2004).

The turbulent waters of asbestos litigation have seeped into virtually every type of economic activity in our country. Defense attorneys are striving to protect their clients from the perils attendant to the most enduring mass tort litigation recorded in the annals of American jurisprudence—a marathon that has yet to reach full stride.

Kenneth R. Meyer, et al., *Emerging Trends in Asbestos Premises Liability Claims*, 72 Def. Couns. J. 241, 241 (2005).

Changing the rules of tort liability, or easing the burden on plaintiffs to prove causation and foreseeability so as to allow plaintiffs to recover, is to transform the system from one of justice to one which redistributes wealth on the basis of a jury's subjective feelings of compassion. It is unjust for the courts to treat litigants differently, or to presume their guilt, simply on the basis of their relative wealth or to find defendants liable where their connection to the plaintiff's injury is weak.

CONCLUSION

Pennsylvania Supreme Court Justice Flaherty eloquently described the need for balancing the social benefits and burdens which result from an expansion of tort liability:

As it is with everything, a balance must be struck—certain limits drawn. We are, in the end, dealing with money, and that money must come from somewhere—from someone: the public pays for the very most part by increased insurance premiums, taxation, prices paid for consumer goods, medical services, and in loss of jobs when the manufacturing industry is too adversely affected. A sound and viable tort system—generally what we now have—is a valuable incident of our free society, but we must protect it from excess lest it becomes unworkable and alas, we find it replaced with something far less desirable.

Mazzagatti v. Everingham by Everingham, 516 A.2d 672, 680 (Pa. 1986)
(Flaherty, J., concurring). The expansion of duty sought by the Petitioners in

this case would lead Washington tort law to excess, rendering an attenuated defendant liable to a distant plaintiff.

The decision below should be *affirmed*.

DATED: June 20, 2011.

Respectfully submitted,

DEBORAH J. LA FETRA
BRIAN T. HODGES

By



BRIAN T. HODGES, (WSBA No. 31976)

Attorneys for Amicus Curiae Pacific Legal Foundation

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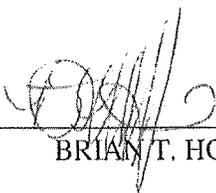
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Dear Clerk:

Attached for filing in *Macias v. Saberhagen Holdings*, No. 85535-8, are copies of amicus applicant Pacific Legal Foundation's (1) *Motion of Pacific Legal Foundation to File Brief Amicus Curiae in Support of Respondents* and (2) *Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondents* with attached declarations of service.

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Thank you,

Brian T. Hodges

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