No. 103135-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KERRY L. ERICKSON; MICHELLE M. LEAHY; RICHARD A. LEAHY; and JOYCE E. MARQUARDT,

Plaintiffs/Petitioners,

vs.

PHARMACIA LLC, a Delaware limited liability company, f/k/a Pharmacia Corporation,

Defendant/Respondent.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen St.
Camas, WA 98607
(360) 852-3332

Daniel E. Huntington
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
(509) 455-4201

On behalf of
Washington State Association for Justice Foundation

I. IDENTITY AND INTEREST OF MOVING PARTY

The Washington State Association for Justice Foundation (WSAJ Foundation or Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in whether the Washington Product Liability Act (WPLA) statute of repose violates Wash. Const. Art. I, § 12.

II. INTRODUCTION

This case asks the Court to decide, *inter alia,* whether RCW 7.72.060 comports with the anti-favoritism principles of art. I, § 12. It gives the Court an opportunity to offer important clarification on the factual and evidentiary support necessary to satisfy art. I, § 12's "reasonable grounds" test, including whether unsubstantiated statements from insurers regarding the effect of so-called "long-tail" claims are sufficient to satisfy this heightened level of scrutiny. The Court should grant review.

III. STATEMENT OF THE CASE

The facts are drawn from the Court of Appeals' opinion and the parties' briefs. *See Erickson v. Pharmacia, LLC,* __ Wn. App. 2d__, 548 P.3d 226, 235-38 (2024); Respondents' Corrected Brief at 7-40; Pharmacia's Supp. Br. at 1-8; Pet. for Rev. at 4-7.[1]

The Swann Chemical Company invented polychlorinated biphenyls (PCBs) in the 1920s. PCBs had a variety of applications, including a "heavy" form used in products like caulking and paint, and a "lighter" form used as dielectric fluid in capacitors in products like fluorescent lights. PCBs quickly became an industry standard for electrical companies like General Electric (GE). Monsanto Company, located in St. Louis, Missouri, purchased Swann in 1935.

Evidence of the harmful effects of PCBs began to emerge. Toxicity studies eventually confirmed that exposure to PCBs,

[1] Defendant obtained an extension of time to file its Answer to July 31, 2024, so it will not be available for WSAJ Foundation to review before the July 30, 2024 deadline for filing this amicus curiae memorandum.

whether through inhalation or contact with the skin, causes a variety of significant health problems. In the late 1960s, scientists learned that the heavier forms of PCBs were staying in the environment, intensifying environmental and health concerns. The EPA banned the production of PCBs in 1979, and its production has since been banned in every country.

Monsanto knew early on that exposure to PCBs may cause health problems in animals and humans. Despite this knowledge, Monsanto declined to inform customers or commission additional studies to fully examine the health effects of PCBs. Indeed, there is substantial evidence that it actively tried to conceal information related to PCBs' toxicity.

Monsanto ceased production of PCBs by 1975. However, products containing PCBs continued to be used in the United States and around the world.

Plaintiffs Kerri Erickson, Michelle Leahy and Joyce Marquardt were teachers with the Monroe School District (MSD). Despite MSD's knowledge that PCBs were used in caulking and fluorescent lights in its old Middle School

Buildings, in 2011 MSD moved its K-12 Sky Valley Educational Center (SVEC) into these buildings. Plaintiffs were assigned to work at SVEC and soon began experiencing an array of symptoms, including headaches, fatigue, memory problems, blurred vision and respiratory issues.

Plaintiffs filed suit, asserting claims of negligence and strict product liability against Monsanto and its successor, Pharmacia LLC. The trial court applied the WPLA to liability issues, but applied Missouri law regarding the statute of repose and punitive damages. By the time of trial, Pharmacia was the only defendant. The jury found that Monsanto supplied an unreasonably unsafe product and awarded Plaintiffs $185 million in compensatory and punitive damages.

The Court of Appeals reversed and remanded. It ruled, *inter alia,* that the WPLA statute of repose, and not Missouri law, applies, and that the repose statute does not violate art. I, § 12. Plaintiffs seek review of a number of issues in the opinion, including the constitutionality of RCW 7.72.060.

IV. ISSUE PRESENTED

> Is review warranted to address whether "reasonable grounds" for the WPLA statute of repose can be established based on insurers' unsubstantiated concerns about "long-tail" claims combined with the assumption that insurers' concerns impact insurance premiums?

V. ARGUMENT IN SUPPORT OF REVIEW

A. Under Art. I, § 12's "Reasonable Grounds" Test, Legislation That Grants Special Benefits To Favored Groups At The Expense Of Others' Fundamental Rights Of State Citizenship Must Be Justified *In Fact.*

Art. I, § 12, guarantees equal treatment under the law:

> SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Art. I, § 12 has sometimes been interpreted as providing similar protection to the federal equal protection clause. *See Grant County Fire Prot. Dist. v. City of Moses Lake*, 145 Wn.2d 702, 725-31, 42 P.3d 394 (2002) (*Grant County I), vacated in part*, *Grant County Fire Prot. Dist. v. City of Moses Lake*, 150 Wn.2d 791, 805-11, 83 P.3d 419 (2004) (*Grant County II)*. In

Grant County, this Court recognized that art. I, § 12 has a separate concern – preventing special benefits for "any citizen, class of citizens or corporation." When legislation favors select parties and implicates fundamental rights, art. I, § 12 offers independent protection. *See Grant County I,* 145 Wn.2d at 731-33. A two-part test is used to determine whether class legislation violates art. I, § 12's anti-favoritism principle: 1) Does it grant a privilege or immunity that implicates a fundamental right? 2) If so, are there "reasonable grounds" for the legislative distinction? *Schroeder v. Weighall,* 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014). Applying reasonable grounds, courts "will not hypothesize facts to justify a legislative distinction," and instead must *scrutinize* the distinction "to determine whether it *in fact* serves the legislature's stated goal." *Id.* at 574.

B. Despite No Demonstrated Link Between Long-Tail Claims And Insurance Premiums, The Appellate Court Held That Reasonable Grounds Exist For The Repose Statute Based On Insurers' Stated Concerns About Long-Tail Claims And The Assumption That Insurers' Concerns Are Reflected In Premiums.

The right to recover in tort for product liability claims is governed by the WPLA. *See* ch. 7.72 RCW. The WPLA includes

a statute of repose, generally limiting liability for injuries arising during the "useful safe life" of a product. RCW 7.72.060(1). The burden of proving that the useful safe life has passed is on the product seller, *see id.*, but this burden shifts after 12 years, establishing a presumption that the useful safe life has expired if an injury occurs more than 12 years after the product's delivery. *See* RCW 7.72.060(2). The repose statute also includes exceptions, rendering the statute inapplicable where the seller warrants the product, the seller misrepresents facts about the product, or the plaintiff's injuries commenced during the product's useful safe life. *See* RCW 7.72.060(1)(b)(i)-(iii).

Here, Plaintiffs argue that the statute implicates art. I, § 12's reasonable grounds test because it extends the immunity of limited liability to insurers, product manufacturers and sellers, and implicates plaintiffs' common law-based right to bring a product liability claim. They further contend that the proffered justification for the statute – reducing escalating insurance premiums and the harms that arise therefrom – cannot satisfy the reasonable grounds standard because the Legislature did not

provide support for the conclusion that the repose statute would actually affect insurance premiums. They cite the analogous case of *Bennett v. United States,* 2 Wn.3d 430, 539 P.3d 361 (2023), which struck down the medical negligence statute of repose under art. I, § 12 because, like here, there was insufficient evidence that the Legislature's stated purpose of reducing insurance premiums would be advanced by the repose statute. *See* 2 Wn.3d at 447-52.

The Court of Appeals rejected Plaintiffs' argument. *See Erickson*, 548 P.3d at 246. Citing the WPLA preamble, the Court noted that a primary purpose of the Legislature in enacting the chapter was to address "[s]harply rising premiums for product liability insurance." *Id.* at 244 (citing Laws of 1981, ch. 27, § 1) (brackets added). To research the problem and propose solutions, the Legislature created the Washington State Senate Select Committee on Tort and Product Liability Reform (Committee or Select Committee). *See id.* at 244. The Committee's Report (Final Report) concluded that older products cause an

exceedingly small percentage of incidents or injuries.[2] *See id.* at 244 ("over 97 percent of product-related incidents occurred within six years of purchase and 83.5 percent of bodily injuries occurred within 10 years of manufacturing" (citing Final Report at 19)). As such, data did not support the conclusion that older products contribute to insurance premiums, nor that a limitation on claims arising out of injuries from such products would reduce insurance premiums.

The absence of data notwithstanding, the Committee cited product insurers' *concerns* about litigation costs related to long-tail claims, along with insurers' assertion that "the potential 'long tail' of exposure is the primary factor influencing rate-setting." *Id.* at 245 (citing Final Report at 19). The Committee credited insurers' concerns, concluding that "an insurer's perception of potential claims, *whether substantiated or not,* very likely is reflected in rates." *Id.* (citing Final Report at 19).

---

[2] The Committee's Final Report is available at https://perma.cc/R3XP-CRC8.

The Court of Appeals considered the Select Committee's conclusions sufficient to satisfy reasonable grounds. It distinguished *Bennett* on the grounds that there, no "specific link" was identified between older claims and insurance premiums, whereas here, the Select Committee's findings "illustrate a specific link" between insurance industry concerns and insurance premiums. This "specific link" was the Committee's assumption that "an insurer's perception of potential claims, whether substantiated or not, very likely is reflected in rates." *See id.* at 245 (citing Final Report at 19). The court quoted excerpts from the relevant passage of the Report, but the full quote demonstrates that the "specific link" identified by the appellate court was simply the Committee's assumption that insurers' concerns impact insurance premiums, an assumption that was belied by the data:

> Of greatest concern to product insurers is the length of time a product seller is subject to liability for harm resulting from a product defect, and they contend that the potential "long tail" of exposure is the primary factor influencing rate-setting. As a result, insurers have argued for certainty in the length of time of exposure, professing less concern regarding the actual time period selected. *The ISO Closed Claim Survey showed that over 97% of*

> *product-related incidents occurred within six years of the date the product was purchased. In the capital goods area, 83.5% of all bodily injuries occurred within ten years of the date of manufacture. However, an insurer's perception of potential claims, whether substantiated or not, very likely is reflected in rates.*

Final Report at 19. The appellate court accepted the Committee's assumption that insurers' concerns about open-ended liability, *whether founded or not,* "likely" lead to increased insurance rates. *See Erickson*, 548 P.3d at 245.

C. The Court Should Grant Review To Address Whether Art. I, § 12's Reasonable Grounds Standard Can Be Satisfied By Insurers' Unsubstantiated Concerns Regarding Potential Long-Tail Claims And The Assumption That Insurers' Concerns Impact Insurance Premiums.

Pharmacia concedes that the reasonable grounds test applies here. *See* Pharmacia Supp. Br. at 11. In evaluating whether reasonable grounds exist, courts may not "hypothesize facts," but rather must "scrutinize the legislative distinction to determine whether it *in fact* serves the legislature's stated goal." *Schroeder,* 179 Wn.2d at 574.

As discussed in § V.B, the opinion below disregards available data and holds that the "reasonable grounds" test is

satisfied based on insurers' unsubstantiated concerns about long-tail claims, combined with the Select Committee's assumptions that insurers' concerns "likely" influence premiums. *See Erickson*, 548 P.3d at 245 (citing Final Report at 19). This Court should accept review because the Court of Appeals' opinion is in tension with this Court's decisional law and threatens the anti-favoritism principles underlying art. I, § 12.

First, the Court of Appeals' opinion is inconsistent with this Court's caselaw, including *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998).[3] In *DeYoung*, a pre-*Grant County* case, the same medical negligence statute of repose that was struck down in *Bennett* was examined under the more deferential "rational basis" standard. This Court considered the Legislature's stated justification for the repose statute – that it was necessary to arrest rising insurance premiums. Like the WPLA repose statute, the proffered basis to believe that a repose statute would affect premiums was insurers' statements:

[3] WSAJ Foundation agrees with, and will not repeat, Erickson's argument that the Court of Appeals' opinion conflicts with *Bennett v. United States, supra*. *See* Pet. for Rev. at 8-11.

> The eight-year statute of repose was enacted in 1976 in response to a perceived insurance crisis said to result from the discovery rule and from increased medical malpractice claims, which allegedly created problems in calculating and reserving for exposure on long-tail claims.… *Insurers asserted that because of this "long tail effect" and other reasons, much higher medical malpractice liability insurance premiums were required to cover present and future claims against health care practitioners*.…By enacting an eight-year statute of repose, the Legislature intended to protect insurance companies while "hopefully not result[ing] in too many individuals not getting compensated."

136 Wn.2d at 147 (emphasis added; internal citations omitted).

This Court accepted the Legislature's conclusion that increased premiums were causing an insurance crisis. *See id.* at 148. However, the Court *did not* accept the Legislature's implicit assumption that insurers' concerns impact premiums or that the perceived insurance crisis would be mitigated by a repose statute. Rather, it scrutinized the available data to determine whether the insurers' perceptions were founded. *See id.* (concluding that "materials before the Legislature … showed that an eight-year repose provision could not rationally be thought to have any chance of actuarially stabilizing the insurance industry even if an insurance crisis did exist and even if every state adopted an eight-

year statute of repose"). Thus, applying a more deferential standard, this Court rejected the assumption that insurers' perception of a link between long-tail claims and insurance premiums could justify the infringement of plaintiffs' rights effectuated by a repose statute. If insurers' assertions of a link between long-tail claims and insurance premiums are insufficient to satisfy rational basis review, they are surely insufficient to satisfy the heightened reasonable grounds standard.

In addition to contravening this Court's precedent, crediting insurers' assertions as a basis to grant them the immunity of a statute of repose runs afoul of art. I, § 12's anti-favoritism principle. Separate and independent protection under art. I, § 12 is based on the view that the Legislature cannot extend special benefits to powerful, well-funded entities at the expense of others' fundamental rights of state citizenship. *See Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 202-03, 396 P.2d 537 (1964). The purpose of art. I, § 12's enhanced protection is to ensure that powerful entities do not enjoy unwarranted benefits that impact others in the exercise of fundamental rights. If this

heightened standard can be satisfied by assumptions based on assertions of those entities themselves, art. I, § 12 is stripped of its intended purpose. The Court should grant review.

VI. CONCLUSION

This Court should grant Review.

This document contains 2,460 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 30th day of July 2024.

/s/ Valerie McOmie
VALERIE D. MCOMIE
WSBA No. 33240
4549 NW Aspen Street
Camas, WA 98607
Telephone: (360) 852-3332
valeriemcomie@gmail.com

/s/ Daniel E. Huntington
DANIEL E HUNTINGTON
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
Telephone: (509) 455-4201
danhuntington@richter-wimberley.com

On behalf of WSAJ Foundation

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July 2024, I caused the foregoing Amicus Curiae Memorandum to be served via the Washington State Appellate Courts Portal to the parties' counsel as follows:

Attorneys for Plaintiffs:

Richard H. Friedman
rfriendman@friedmanrubin.com
Sean J. Gamble
sgamble@friedmanrubin.com
James A. Hertz
jhertz@friedmanrubin.com
Henry G. Jones
hjones@friedmanrubin.com
Ronald J. Park
rpark@friedmanrubin.com
Friedman Rubin PLLP
1109 First Avenue, Suite 501
Seattle, WA 98101
(206) 501-4446

Deepak Gupta*
deepak@guptawessler.com
Robert D. Friedman*
robert@guptawessler.com
Gupta Wessler LLP
2001 K Street, NW
Suite 850 North
Washington, DC 20006
(202) 888-1741
deepak@guptawessler.com

*Admitted Pro Hac Vice

Attorneys for Defendant:

Allison K. Krashan
allison.krashan@bclplaw.com
CaroLea W. Casas
carolea.casas@bclplaw.com
Bryan Cave Leighton Paisner LLP
701 5th Avenue
Suite 3860
Seattle, WA 98104-7047

Jean-Claude Andre
jcandre@bclplaw.com
Bryan Cave Leighton Paisner LLP,
120 Broadway, Suite 300
Santa Monica, CA 90401

A. Elizabeth Sternehll-Blackwell
liz.blackwell@bclplaw.com
Bryant Cave Leighton Paisner, LLP
211 N. Broadway, Suite 3600
St. Louis, MO, 63102

Kenneth Lee Marshall
klmarshall@bclplaw.com
Bryan Cave Leighton Paisner LLP
Three Embarcadero Center
Seventh Floor
San Francisco, CA 94111

Logan M. Rutherford
logan.rutherford@bclplaw.com
Bryan Cave Leighton Paisner LLP
1200 Main Street, Suite 3800
Kansas City, MO 64105

Attorneys for Amicus Curiae Symeon C. Symeonides, Peter Nicolas, Brooke D. Coleman:

Blythe Chandler
bchandler@terrellmarshall.com
Elizabeth Anne Adams
eadams@terrellmarshall.com
Terrell Marshall Law Group PLLC
936 N. 34th St., Ste 300
Seattle, WA 98103

/s/ Daniel E. Huntington
DANIEL E HUNTINGTON
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
Telephone: (509) 455-4201
danhuntington@richter-wimberley.com

July 30, 2024 - 4:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,135-1
Appellate Court Case Title:	Kerry L. Erickson, et al. v. Pharmacia LLC.

The following documents have been uploaded:

- 1031351_Letters_Memos_20240730165359SC801860_3786.pdf
  This File Contains:
  Letters/Memos - Other
  The Original File Name was Final Erickson ACM.pdf

A copy of the uploaded files will be sent to:

- DanHuntington@richter-wimberley.com
- allison.krashan@bclplaw.com
- carolea.casas@bclplaw.com
- deepak@guptawessler.com
- dwatkins@friedmanrubin.com
- farron.curry@bclplaw.com
- feve.retonio@bclplaw.com
- greg@guptawessler.com
- hjones@friedmanrubin.com
- jcandre@bclplaw.com
- jenn.campbell@bclplaw.com
- jhertz@friedmanrubin.com
- jon@guptawessler.com
- jvick@friedmanrubin.com
- mblackledge@friedmanrubin.com
- rfriedman@friedmanrubin.com
- robert@guptawessler.com
- rpark@friedmanrubin.com
- sgamble@friedmanrubin.com
- tadegregorio@bclplaw.com

Comments:

Sender Name: Valerie McOmie - Email: valeriemcomie@gmail.com
Address:
4549 NW ASPEN ST
CAMAS, WA, 98607-8302
Phone: 360-852-3332

Note: The Filing Id is 20240730165359SC801860