

FILED
SUPREME COURT
STATE OF WASHINGTON
7/19/2024 4:24 PM
BY ERIN L. LENNON
CLERK

No. 103135-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondent.

RESPONDENT PHARMACIA LLC'S RESPONSE
REGARDING PETITIONERS' MOTION FOR
ACCELERATED REVIEW

BRYAN CAVE LEIGHTON PAISNER LLP
Jennifer L. Campbell, WSBA #31703
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Farron Curry, WSBA #40559
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Attorneys for Respondent Pharmacia LLC

Petitioners seek accelerated review pursuant to RAP 18.12 of Division One’s vacatur and remand for retrial in this personal-injury/product-liability case (*Erickson v. Pharmacia LLC*, 548 P.3d 226 (Wash. 2024)).¹ Petitioners have not shown that granting acceleration in a money-judgment case like this is consistent with how this Court traditionally has applied RAP 18.12. Petitioners’ request for acceleration also is inconsistent with their temporal nonchalance before this Court. Further, many of the assertions on which they base their request are demonstrably exaggerated and/or inconsistent with the public representations of their counsel, including to the trial court.

¹ All references to Division One’s opinion are to the slip opinion attached as an appendix to petitioners’ petition for review and take the form “Op.” or “Concurrence/Dissent.”

BACKGROUND

Following a seven-week trial, a King County jury found respondent Pharmacia LLC, liable to petitioners—three Sky Valley Education Center (“SVEC”) school teachers—for \$50M in non-economic compensatory damages and \$135M in punitive damages under the Washington Product Liability Act (“WPLA”). Petitioners’ theory to the jury was that they suffered from brain damage allegedly caused by exposure to chemicals known as “PCBs” that the old Monsanto Company (Pharmacia’s predecessor in interest) had manufactured and sold to manufacturers of fluorescent light ballasts (“FLB”) and caulk sometime between the mid-1960s and 1977,² but that the Monroe School District had failed to remove over the ensuing 40 to 50 years despite EPA warnings to do so. Op. at 1, 6-7.

² The facility where the three teachers taught was constructed between 1967-68, “at a time when PCBs were used extensively in caulking and FLBs.” Op. at 7. Old Monsanto voluntarily stopped producing and selling PCBs in 1977. Op. at 6.

On Pharmacia’s appeal to Division One, a panel unanimously reversed and remanded on two grounds, with one judge dissenting in part on a third.

First, the panel unanimously held that the trial court erroneously severed RCW 7.72.060(1)(a)—enacted as a critical part of the WPLA to impose a statutory presumption of a useful safe life of 12 years for all products claimed to have resulted in injury and extinguishing liability if the plaintiff fails to rebut the presumption—from the rest of the Act. Op. at 18-29. On that erroneous basis, the trial court ruled that Pharmacia could not present its repose defense to the jury—an error that required reversal. *Id.* The panel also unanimously found that the provision survived petitioners’ challenge to it under this State’s privileges and immunities clause, made for the first time after the close of merits briefing, with Judge Dwyer warning that attempting to constitutionally invalidate that “integral part of the act” may compel the invalidation of the

entire WPLA under severability principles. Op. at 20-29; Concurrence/Dissent at 2, 12-15.

Second, the panel majority held that two of the three methodologies employed by one of petitioners' experts to retrospectively estimate the PCB air concentrations at SVEC when petitioners worked there were "novel and not generally accepted in the scientific community." Op. at 54. Accordingly, the panel determined that the expert's methods violated this State's precedents applying *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), and that the trial court erred in admitting the expert's opinions based on those methodologies. Op. at 45-57.

Third, and finally, the panel unanimously found that the trial court erred in entering judgment on the jury's punitive damages award under Missouri law. The panel reasoned that, although Washington's courts "will allow punitive damages under the law of another state when that state has an interest in punishing or deterring egregious

conduct that is greater than any interest Washington has in not allowing punitive damages,” this State’s courts will not permit punitive damages for claims that the other state does not recognize in the first place. Op. at 34. Here, because “Missouri lacks a cause of action for post-sale failure to warn” and “the general nature of the verdict form” prevented the panel from determining whether the jury based its punitive damages award on petitioners’ post-sale failure-to-warn cause of action, which was brought solely under the WPLA, the panel held that the jury’s punitive damages award must be vacated. Op. at 35-36.

The panel rejected all of Pharmacia’s other challenges to the trial court’s judgment, except those it deemed unnecessary to its decision.

ARGUMENT

There is no dispute that this Court has the discretion to manage its docket as it sees fit, including by “set[ting] any review proceeding for accelerated disposition.” RAP

18.12. But it is ultimately petitioners' burden to establish both that this Court's review is warranted in the first place and that a departure from the ordinary course of proceeding is appropriate. As will be explained in detail in Pharmacia's forthcoming answer to the petition for review, petitioners have not shown the former. Nor have they shown the latter—particularly in light of their self-contradictory representations elsewhere.

* *

As a threshold matter, petitioners' have not demonstrated that their request for acceleration is consistent with this Court's historical treatment of such requests. The cases petitioners cite (Mot. at 2-3) in which this Court has granted acceleration involved a recall election (*In re Recall of Fortney*, --- Wn.2d ---, 471 P.3d 180 (Wash. 2020)), the resentencing of a criminal defendant who would otherwise be unable to vindicate his liberty interests (*State v. Medina*, 184 Wn.2d 1010, 359

P.3d 792 (2015)), and the sale of municipal bonds for construction of a sports stadium (*King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 949 P.2d 1260 (1997))³—all cases involving time-sensitive issues and either issues of general public interest or constitutionally protected liberty interests. Pharmacia is unaware of this Court granting acceleration in a money-judgment, personal-injury/product-liability case like this.

* * *

Further, petitioners' request for acceleration is inconsistent with their handling of this matter before this Court. Despite petitioners' counsel telling the media and the trial court that they would be seeking expedited review by this Court,⁴ petitioners waited until the last day possible

³ *King County* also was a direct-review case pursuant to RAP 4.2, which this case is not.

⁴ <https://tinyurl.com/5b2byh5c>; May 6, 2024, Hr'g Tr. in *Grant v. Pharmacia LLC*, No. 21-2-14304-7 SEA, at 690:18-19 (Attach. 1).

to file their petition for review. Petitioners then waited five additional days to seek acceleration.

* * * *

Finally, many of the assertions on which petitioners base their request for acceleration are demonstrably exaggerated and/or inconsistent with the public representations of their counsel, including to the trial court. For example, at a general level, petitioners assert that their petition presents “three important, recurring, and unsettled questions of law” and that “[a]ccelerated review will ... giv[e] guidance to trial and appellate judges in numerous related cases currently moving through the court system at all stages of the litigation process.” (Mot. 3.)

But petitioners’ counsel have publicly asserted that they “prevailed on 90% of the issues Monsanto complained about in its appeal,” that “[s]ome of the issues [they] prevailed on are not even issues in subsequent

trials,” and that Division One’s decision already “gives the trial judges guidance on how to try these cases moving forward,”⁵ and have told the trial court that Division One’s decision actually “simplifies [future] trial[s]” (May 3, 2024, Hr’g Tr. in *Grant v. Pharmacia LLC*, No. 21-2-14304-7 SEA (“May 3, 2024, Hr’g Tr.”), at 677:17-678:1 (Attach. 2)). The best way to avoid future disruption would thus appear to be to grant neither review nor acceleration, but instead deny review altogether.

On a more-granular level, counsel for petitioners have likewise exaggerated the importance of the petition’s three issues, and at times have contradicted their present assertions of importance.

First, counsel for petitioners have repeatedly downplayed the significance of Division One’s holding that RCW 7.72.060(1)(a) cannot be severed from the WPLA, explaining that “the impacts would be limited to—at most—

⁵ <https://tinyurl.com/4e7k35et>.

narrow retrials on a certain company defense”—*i.e.*, the WPLA’s statutory repose defense.⁶ Moreover, Division One’s repose holdings will not affect all SVEC cases the same way that they affect this case because, as counsel for petitioners recently told the trial court—and as Pharmacia agrees—“this court and other courts recently have been allowing that issue to go to the jury anyway.” May 3, 2024, Hrg. Tr. at 677:22-25 (Attach. 2).

Second, with respect to the two PCB-estimation methodologies employed by petitioners’ expert that Division One found violative of *Frye*, petitioners gloss over in their motion to accelerate, but rightfully acknowledge in their petition (as they did before the Court of Appeals), that this expert (industrial hygienist, Kevin Coghlan) deployed three independent methodologies to calculate “three independent estimates” (Pet. 20; *see also* Pet’rs C.A. Br. at 101) and that Division One upheld the admissibility of the

⁶ <https://tinyurl.com/5b2byh5c>.

third (*see* Op. at 58-59).⁷ Counsel for plaintiffs has elsewhere publicly stressed that the testimony “that the Court of Appeals deemed inadmissible account[s] for roughly six minutes of five hours of the expert’s testimony.”⁸

Third, with respect to Division One’s specific punitive-damages holding in this case, petitioners omit that the precise issue resolved against them—that, under the verdict form submitted to the jury, its award of punitive damages under Missouri law may have been impermissibly based on a Washington post-sale failure-to-warn cause of action—has arisen in only two of the SVEC cases tried after this one and is unlikely to occur again:

⁷ To be clear, Pharmacia does not concede that Coghlan’s third methodology is *sufficient evidence* of petitioners’ potential exposure levels at SVEC. Division One’s holding concerning Coghlan’s third methodology focused exclusively on its admissibility under Rule 702, not under *Frye* and not on whether petitioners could meet their causation burden. Op. 58-59.

⁸ <https://tinyurl.com/5b2byh5c>.

Clinger v. Pharmacia LLC, King Cnty. No. 18-2-54572-2-SEA, *appeal docketed* Dec. 18, 2023 (Div. I No. 86188-3), and *Bard v. Pharmacia LLC*, King Cnty. No. 21-2-14305-5-SEA, *appeal docketed* May 6, 2024 (Div. I No. 86669-9).

CONCLUSION

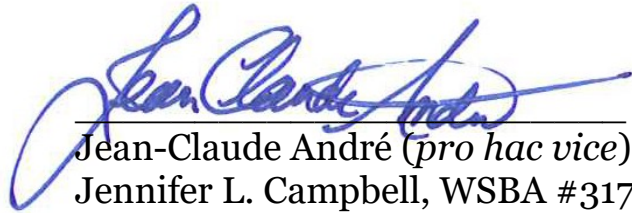
Despite the foregoing, respondent Pharmacia LLC ultimately takes no position on, and defers to the Court on the proper resolution of, petitioners' motion for acceleration.

Respondent Pharmacia LLC certifies that this response is in 14-point Georgia font and contains 1,517 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

July 19, 2024

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER
LLP

A handwritten signature in blue ink, appearing to read "Jean-Claude André", is written over a horizontal line.

Jean-Claude André (*pro hac vice*)

Jennifer L. Campbell, WSBA #31703

Allison K. Krashan, WSBA #36977

Farron Curry, WSBA #40559

CaroLea W. Casas, WSBA #54102

ATTACHMENT 1

**MAY 6, 2024 Hearing on
Motion for Reconsideration in
Grant v. Pharmacia LLC, No.
21-2-14304-7 SEA**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

DONYA C. GRANT, ET AL.,

Plaintiff(s),

v.

PHARMACIA LLC, ET AL.,

Defendant(s).

King County Cause No.
21-2-14304-7

VERBATIM REPORT OF PROCEEDINGS

Had in the above entitled cause before the HONORABLE
JAMES ROGERS, Superior Court Judge for the State of
Washington, County of King, on May 6, 2024.

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On Behalf of the Plaintiff(s)

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SUSAN K. WERSTAK

JENNIFER L. CAMPBELL

A. ELIZABETH STERNHELL-BLACKWELL

Attorney(s) at Law

On Behalf of the Defendant(s)

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Motion for Reconsideration

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* * * * *

1 MAY 6, 2024

2 9:00 AM

3 * * * * *

09:00:31 4 THE COURT: All right. Good morning.

09:00:37 5 MR. FRIEDMAN: Good morning, Your Honor.

09:00:38 6 THE COURT: This is Grant v. Pharmacia,
09:00:42 7 21-2-14304-7.

09:00:45 8 And as the counsel know, I heard a motion to
09:00:49 9 continue on Friday, which I denied; and then on
09:00:52 10 Sunday, I received an email from Mr. Friedman, who is
09:00:56 11 appearing here with Ms. Sastre on behalf of the
09:00:58 12 respective parties, and that -- in that email,
09:01:02 13 Mr. Friedman joined the motion to continue and asked
09:01:06 14 that I reconsider the motion to continue.

09:01:13 15 So why don't I have the -- Mr. Friedman, why don't
09:01:16 16 I have you -- if you have anything else you want to
09:01:19 17 add. And then, Ms. Sastre, if you have anything, and
09:01:21 18 then we'll go from there.

09:01:24 19 MR. FRIEDMAN: Thank you, Your Honor.

09:01:25 20 I could talk for many hours on this subject or just
09:01:28 21 a couple of minutes, and essentially I think the
09:01:34 22 Court's entitled to an explanation. I mean, our main
09:01:38 23 goal in these cases has always been to resolve them as
09:01:41 24 quickly and efficiently as possible. Over the years,
09:01:46 25 that has seemed to be directing us to try as many

09:01:50 1 trials as we can as quickly as we can in the hopes
09:01:53 2 that maybe that would lead to settlement or something
09:01:57 3 else, or at least we get the cases processed.

09:02:02 4 When Your Honor announced last Friday an intention
09:02:07 5 to at least propose, if not order, some sort of
09:02:12 6 consolidation or method of expediting the cases, that
09:02:17 7 frankly got us thinking along those lines ourselves.
09:02:22 8 And so there are kind of two variable -- there are a
09:02:26 9 lot of variables that are influencing our decision,
09:02:29 10 but kind of the two main variables are -- well, three
09:02:33 11 I guess. One, we would like to -- to be able to
09:02:37 12 consider the Court's proposal and also maybe make some
09:02:42 13 proposals of our own in that regard. Each of these
09:02:47 14 trials costs us between five hundred thousand and a
09:02:53 15 million and a half dollars, so just in the most
09:02:56 16 simplistic way, if we can do one trial instead of two,
09:03:00 17 it probably saves us roughly a million dollars.

09:03:04 18 In addition, we're going to petition the Court of
09:03:08 19 -- or the Supreme Court for expedited review, and so
09:03:17 20 we don't know of course whether that'll be granted or
09:03:20 21 not; but with the prospect of appellate finality on
09:03:24 22 most of the major substantive issues, if we could
09:03:29 23 obtain that let's say by the end of the year, that
09:03:35 24 would also influence kind of how we would want to talk
09:03:39 25 about moving forward.

1 STATE OF WASHINGTON)
) ss. Reporter's Certificate
2 COUNTY OF KING)

3 I, Miranda L. Seitz, Registered Professional
4 Reporter, Certified Court Reporter, in and for the State of
5 Washington;

6 Do hereby certify;

7 That to the best of my ability, the
8 foregoing is a true and correct transcription of my
9 shorthand notes as taken on the date and at the time and
10 place as shown on page one hereto;

11 That I am not related to any of the parties
12 to this litigation and have no interest in the outcome of
13 said litigation;

14 Dated this 6th day of May, 2024.

15
16
17
18 *Miranda L. Seitz*

19 _____
20 Miranda L. Seitz
21 Certified Court Reporter
22 License No. 20114055
23
24
25

ATTACHMENT 2

**MAY 3, 2024 Status Conference
in *Grant v. Pharmacia LLC*, No.
21-2-14304-7 SEA**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

DONYA C. GRANT, ET AL.,

Plaintiff(s),

v.

PHARMACIA LLC, ET AL.,

Defendant(s).

King County Cause No.
21-2-14304-7

VERBATIM REPORT OF PROCEEDINGS

Had in the above entitled cause before the HONORABLE
JAMES ROGERS, Superior Court Judge for the State of
Washington, County of King, on May 3, 2024.

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On Behalf of the Plaintiff(s)

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SUSAN K. WERSTAK

JENNIFER L. CAMPBELL

A. ELIZABETH STERNHELL-BLACKWELL

Attorney(s) at Law

On Behalf of the Defendant(s)

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Status Conference

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MAY 3, 2024

1:30 PM

* * * * *

THE COURT: Good afternoon.

MR. FRIEDMAN: Good afternoon, Your Honor.

MS. SASTRE: Hello, Your Honor.

THE COURT: This is Donya Grant v.

Pharmacia, 21-2-14304-7, and I think you all asked for
a status conference.

MS. SASTRE: Imagine that.

THE COURT: And I have a motion.

MR. FRIEDMAN: I don't think it was us that
asked for the status conference, Your Honor.

THE COURT: Okay.

MS. SASTRE: We asked, Your Honor.

THE COURT: All right.

MS. SASTRE: We're happy to -- happy to
start, if you'd like.

THE COURT: Sure. Yeah.

MS. SASTRE: Okay. Very good.

Are you able to hear me okay, Your Honor? I'm in a
--

MR. FRIEDMAN: Excuse me. I'm having
trouble. If you wouldn't mind, Ms. Sastre, just for a
minute? Let me see if I can get this fixed.

13:42:35 1 saying that somehow they're representative of levels
13:42:39 2 in Sky Valley does not pass any test when it comes to
13:42:43 3 sufficiency. So that would be our position. And,
13:42:46 4 again --

13:42:47 5 THE COURT: Okay.

13:42:47 6 MS. SASTRE: -- it comes to also -- the
13:42:49 7 difference here, Your Honor, also the second part --
13:42:51 8 answer to your question, is that that would also --
13:42:56 9 Your Honor, if you had made that ruling on the eve of
13:42:59 10 trial, it would put us in the position to then go back
13:43:02 11 and look at all of the specific cause experts to the
13:43:06 12 extent that they relied upon that stricken and
13:43:08 13 excluded methodology, and we would likely be asking
13:43:10 14 for time and we would ask the Court to address those
13:43:13 15 issues because it infects every single one of their
13:43:16 16 opinions and it impacts and touches every single
13:43:18 17 plaintiff in this case.

13:43:21 18 THE COURT: Mr. Friedman, are you the one
13:43:22 19 arguing on behalf of the plaintiffs?

13:43:25 20 MR. FRIEDMAN: I am, Your Honor.

13:43:26 21 THE COURT: All right.

13:43:28 22 MR. FRIEDMAN: Your Honor, I want to start
13:43:29 23 with what I think is a mischaracterization by
13:43:32 24 Ms. Sastre about the other experts' opinions. They
13:43:36 25 are not relying on Mr. Coghlan's methodology. They've

13:45:26 1 It was also I think what was used in the Heit trial.
13:45:29 2 And putting my cursor here, it's only these three
13:45:35 3 calculations that come out of his opinions. And the
13:45:39 4 rest of this, and I'll just talk in terms of the pilot
13:45:43 5 study, but -- actually, I'll just remind the Court,
13:45:46 6 all of our experts have said even the EPA level is not
13:45:53 7 protective, and you've heard the testimony, there is
13:45:56 8 actually no safe level that's been found. So
13:45:59 9 basically -- it's not like Dr. Dahlgren came in and
13:46:03 10 said yes, I trust the back carpet sample methodology
13:46:08 11 or any of the experts -- many of them said I don't
13:46:10 12 even know what he's doing or how he's doing it. What
13:46:14 13 they say is if these are the estimates, then our
13:46:18 14 opinion is X. So if we go -- this is basically -- if
13:46:22 15 we go forward with the trial, this is what Mr. Coghlan
13:46:27 16 will testify to, just as he has in other trials.

13:46:30 17 So I don't think it's accurate to say anything has
13:46:35 18 dramatically changed out of the hundreds of decisions
13:46:38 19 you and the other judges have made and out of the
13:46:41 20 scores of appellate issues that were raised. We're
13:46:46 21 kind of left with these two aspects of Coghlan's
13:46:50 22 back-calculation, and the statute of repose issue of
13:46:56 23 course, the Court -- this court and other courts
13:47:00 24 recently have been allowing that issue to go to the
13:47:03 25 jury anyway. So nothing else has changed. All we

13:47:06 1 have is -- really, this simplifies the trial. You now
13:47:11 2 know that most of the decisions you made about lay
13:47:13 3 witnesses and so on have been endorsed.

13:47:18 4 And now I'm trying to figure out how to stop the
13:47:22 5 share screen, screen share.

13:47:31 6 MR. ROWLEY: Should be right at the top,
13:47:32 7 Rick. Right at the top and the center.

13:47:34 8 MR. FRIEDMAN: Top and the center. I
13:47:35 9 apologize for this, Your Honor.

13:47:37 10 THE COURT: That's all right. View options.
13:47:41 11 I'll stop it. There we go. I stopped it for you.

13:47:44 12 MR. FRIEDMAN: Yeah, you could just -- thank
13:47:44 13 you.

13:47:45 14 THE COURT: You're welcome.

13:47:46 15 MR. FRIEDMAN: So if we look at the rest of
13:47:48 16 the issues, Your Honor, and you can go through -- I
13:47:51 17 don't need to take your time now. If you go through
13:47:53 18 the written briefing here, Monsanto lists four
13:47:59 19 reasons. There is the statute of repose. This is on
13:48:02 20 page four of its brief.

13:48:04 21 THE COURT: You don't need to discuss that.

13:48:06 22 MR. FRIEDMAN: Yeah, exactly. We've talked
13:48:09 23 about Mr. Coghlan. We've talked about the other
13:48:12 24 experts relying on him. And, again, they don't rely
13:48:16 25 on his methodology. They rely upon his estimates.

1 STATE OF WASHINGTON)
) ss. Reporter's Certificate
2 COUNTY OF KING)

3 I, Miranda L. Seitz, Registered Professional
4 Reporter, Certified Court Reporter, in and for the State of
5 Washington;

6 Do hereby certify;

7 That to the best of my ability, the
8 foregoing is a true and correct transcription of my
9 shorthand notes as taken on the date and at the time and
10 place as shown on page one hereto;

11 That I am not related to any of the parties
12 to this litigation and have no interest in the outcome of
13 said litigation;

14 Dated this 3rd day of May, 2024.
15
16
17

18 *Miranda L. Seitz*
19

20 Miranda L. Seitz
21 Certified Court Reporter
22 License No. 20114055
23
24
25

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 19th day of July, 2024, I arranged for service of the foregoing **RESPONDENT PHARMACIA LLC'S RESPONSE REGARDING PETITIONERS' MOTION FOR ACCELERATED REVIEW** via the electronic service per the Stipulated E-Service Agreement to the parties to this action as follows:

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Feve R. Retonio, Legal Secretary

BRYAN CAVE LEIGHTON PAISNER LLP

July 19, 2024 - 4:24 PM

Transmittal Information

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Appellate Court Case Title: Kerry L. Erickson, et al. v. Pharmacia LLC.

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