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.

ANSWER TO PETITION FOR REVIEW

BRYAN CAVE LEIGHTON PAISNER LLP

Jennifer L. Campbell
WSBA No. 31703
Allison K. Krashan
WSBA No. 36977
Farron D. Curry
WSBA No. 40559
CaroLea W. Casas
WSBA No. 54102

Jean-Claude André
Cal. Bar No. 213538
pro hac vice

999 Third Ave., Suite 4400
Seattle, WA 98104
Tel.: (206) 600 6650

Attorneys for Respondent

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I. INTRODUCTION

Petitioners seek review of four holdings from Division One's opinion vacating and remanding for a new trial in this personal-injury/product-liability case. Petitioners argue these holdings conflict with decisions of this Court (or of other courts applying other states' law). Those asserted conflicts are illusory. Division One followed settled Washington law and/or majority practice. Petitioners have not satisfied RAP 13.4(b).

First, with respect to RCW 7.72.060(1)(a)—a "claim-defining" statute of repose—Division One properly applied Section 6 of the Restatement (Second) of Conflict of Laws to conclude that the trial court erred in severing it from the rest of the WPLA, thereby preventing the jury from considering Pharmacia's useful-safe-life defense. That holding by Division One was consistent with not only established Washington law but also the Restatement (Third) of Conflict of Laws. The "most significant

relationship rule" adopted by *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976), which petitioners fault Division One for not applying, is wholly inapplicable in this context.

Second, Division One properly applied the privileges-and-immunities framework recently reinforced by this Court in *Bennett v. United States*, 2 Wn.3d 430, 539 P.3d 361 (2023), to uphold RCW 7.72.060(1)(a)'s constitutionality. *Bennett* concerned the legislature's ability to provide *post hoc* justifications for a statute that this Court had previously declared unconstitutional. Unlike the statute considered in *Bennett*, the Legislature enacted RCW 7.72.060(1)(a) based on an extensive, contemporaneous legislative record as part of the WPLA's comprehensive redefinition and unification of Washington's product-liability law. Neither *Bennett*'s result nor its rationale suggests the WPLA's claim-defining statute of repose is unconstitutional.

Third, Division One neither erred nor created any conflict in excluding under *Frye* two opinions of petitioners' exposure expert. Petitioners' challenges rest on mischaracterizations of Division One's decision and the methodologies at issue and, thus, raise no issue of substantial public interest warranting review.

Fourth, Division One's holding that Missouri punitive damages are unavailable for petitioners' WPLA post-sale failure-to-warn claim was correct. Under Section 171 of the Restatement (Second), Missouri has no "significant interest" in imposing punitive damages for a cause of action that Missouri does not recognize, and under Section 6.12 of the Restatement (Third), "punitive damages may not be awarded" because both Washington and Missouri "disallow" them for post-sale failure-to-warn claims. To the extent petitioners contend Missouri *does* recognize a post-sale failure-to-warn claim, they are wrong.

Because petitioners have not shown that any criteria for continued review under RAP 13.4(b) are satisfied, this Court should deny review.

But if the Court grants review, it should also decide whether Washington courts can award punitive damages for WPLA claims under other states' laws. That question is antecedent to the punitive-damages question petitioners have raised regarding their post-sale failure-to-warn claim (Pet. 18-20), and Division One's resolution of that question conflicts with this Court's longstanding precedent and both the Restatement (Second) and Restatement (Third).

II. RESTATEMENT OF ISSUES

1. Whether Division One correctly held that the WPLA's statute of repose is inseverable from claims plaintiffs chose to bring solely under the WPLA, and that the trial court accordingly erred in precluding the jury from considering Pharmacia's useful-safe-life defense.

2. Whether Division One correctly held that the WPLA's statute of repose is constitutional under *Bennett* and the Washington privileges and immunities clause.

3. Whether Division One correctly held that two of the opinions of petitioners' exposure expert based on indisputably novel methodologies should have been excluded under *Frye*.

4. Whether Division One correctly held that punitive damages may not be awarded on a WPLA post-sale failure-to-warn claim because Missouri has no "significant interest" in imposing punitive damages for a cause of action it does not recognize.

5. If this Court grants review, whether Division One erred in holding that Missouri law may be applied to award punitive damages for WPLA claims notwithstanding the text of the WPLA, Washington's public policy against punitive damages, and the Restatement (Second) and Restatement (Third) all dictating otherwise.

III. RESTATEMENT OF FACTS

A. Factual Background and Trial Court Proceedings

For decades, "old Monsanto" (Pharmacia LLC's predecessor-in-interest) lawfully manufactured industrial chemicals known as PCBs and sold them to manufacturers of fluorescent light ballasts ("FLBs") and caulk for incorporation into their finished products. Op. 4-6. Petitioners' suggestion that Monsanto hid potential dangers of PCBs from its customers and the public is false: Monsanto commissioned and shared with its customers the results of hundreds of toxicity studies between the 1930s and 1960s and provided warnings regarding repeated direct exposure. Op. 5-6. And after PCBs were discovered in 1966 to persist in the environment, Monsanto began phasing out production and voluntarily ceased all PCB production and sales by 1977. Op. 5-6.

In 2011, the Monroe School District ("MSD") moved the Sky Valley Education Center ("SVEC"), where

petitioners taught, to an old middle school building constructed between 1967-68—"a time when PCBs were used extensively in caulking and FLBs." Op. 7. Despite decades of EPA warnings to school districts (including MSD), regarding the inspection, safe handling, and removal of PCB-containing products—of which MSD was aware—many remained in situ at SVEC. Op. 1, 6-7.

In 2016, MSD commissioned an independent environmental firm to test the air and surfaces at SVEC, which detected no PCB concentrations above regulatory health-protective levels. P1854:6, 236; *see also* Resp. C.A. Br. 14-18. Petitioners and others had their blood tested, which likewise showed PCB blood levels at or below U.S. background levels. RP 1961:1-1968:22; *see also* Resp. C.A. Br. 20.

Nonetheless, petitioners sued Pharmacia, bringing WPLA claims for design defect, construction defect, time-of-sale failure to warn, and post-sale failure to warn. Op. 8.

No treating health-care provider diagnosed petitioners with any PCB-related injury, but petitioners' litigation neuropsychologist diagnosed them with brain damage. Op. 59; *see also* Resp. C.A. Br. 20-23, 124 n.28. And although air, surface, and blood testing showed no exposure to potentially harmful levels of PCBs, petitioners' industrial hygienist attempted to establish that SVEC's airborne PCB levels exceeded what the actual data showed. Op. 45-46; *see also* Resp. C.A. Br. 69-70.

The trial court granted petitioners' motion to apply Missouri law instead of Washington law to the WPLA's statute of repose, effectively excusing petitioners from having to rebut the statute's presumption that any PCBs at SVEC—made by Monsanto over 40 years earlier—were beyond their presumptive 12-year useful safe life. Op. 8.

The trial court also denied Pharmacia's motion to exclude the industrial hygienist's estimates as based on

novel methodologies impermissible under *Frye*. Op. 46 n.23.

And the trial court tendered the punitive-damages question to the jury on all of petitioners' claims, notwithstanding Pharmacia's objections that punitive damages were not recoverable on WPLA claims and that, in any event, Missouri punitive damages cannot be awarded on a post-sale failure-to-warn claim that Missouri does not recognize. Op. 29, 35-36; *see also* Resp. C.A. Br. 185-93.

The jury returned a verdict for $50M in non-economic compensatory damages and $135M in punitive damages to petitioners. Op. 9.

B. Proceedings on Appeal

Division One 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 the statute of repose from the rest of the WPLA, thereby preventing Pharmacia from presenting its useful-safe-life defense to the jury. Op. 18-20. The panel also unanimously rejected petitioners' challenge to the repose statute under Washington's privileges-and-immunities clause, with Judge Dwyer warning that invalidation of that "integral part of the act" might compel invalidation of the entire WPLA under severability principles. Op. 20-29; Concurrence/Dissent 2, 12-15.

Second, the panel majority held that two of the three methodologies employed by the industrial hygienist to retrospectively estimate the PCB air concentrations at SVEC were "novel and not generally accepted in the scientific community," and that admitting his opinions based on those methods violated *Frye*. Op. 45-57.

Finally, the panel unanimously held that the trial court erred in entering judgment on the jury's punitive-

damages award under Missouri law because "Missouri lacks a cause of action for post-sale failure to warn," and "the general nature of the verdict form" obscured whether and to what extent the jury based its punitive award on that cause of action. Op. 35-36.

Before reaching this holding, however, the panel determined that choice-of-law for punitive damages could be analyzed separately from liability. Op. 31. Without addressing the WPLA's directive on damages or addressing the fact that much of the relevant conduct did not take place in Missouri, the panel stated that "the contacts were evenly split," that Missouri purportedly "has the greater interest," and that punitive damages could therefore be awarded on WPLA claims that Missouri would recognize. Op. 34-35.

IV. ARGUMENT IN OPPOSITION TO REVIEW

A. Division One's Choice-of-Law Analysis on the Statute of Repose Was Correct and Consistent with This State's Precedent and Majority Practice.

The WPLA's integrated statute of repose is a substantive component of any WPLA claim. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994); 54 C.J.S. Limitations of Actions § 28 ("[A] statute of repose is not merely a limitation of a plaintiff's remedy but defines the right involved."). Consequently, a WPLA claim and its statute of repose are not separate "issues" for choice-of-law purposes under *Johnson*, 87 Wn.2d at 580. *See* 2 L. of Toxic Torts § 12:12 (2023) (courts holding statutes of repose are "substantive" have "applied repose statutes from states *whose law applies to the tort*" (emphasis added)).

This Court held decades ago in *Rice* that, "[i]f the [WPLA] does apply, RCW 7.72.060(1)(a) provides for repose for product sellers if the harm was caused after the

product's useful safe life has expired." 124 Wn.2d at 212. Division One thus correctly held that "when there is no dispute as to which substantive product liability law applies, [no] other state's statute of repose could supplant the claim-defining statute of repose in [the] WPLA." Op. 16. No Washington law is to the contrary, and both the Restatement (Second) and Restatement (Third) confirm this result.

> Restatement (Second) § 6, cmt. b provides:
>
> > The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect.

Petitioners argue that Pharmacia is "subject to liability to a claimant for harm *under this chapter*" in the exact circumstances where the legislature determined "a product seller *shall not* be subject to liability." RCW 7.72.060(1) (emphases added). That cannot be right: under this view, the statute clearly would not have "the range of application

intended by the [Washington] legislature." Op. 16 (quoting Restatement (Second) § 6 cmt. b).

Section 6 was the primary basis for Division One's repose holding (*see* Op. 16 n.10), and it accords with the only other on-point Washington precedent. *See In re Marriage of Abel*, 76 Wn. App. 536, 539-40, 886 P.2d 1139 (1995) (applying Section 6 to statutory language that "The child support schedule *shall* be applied." (emphasis in original)). Petitioners *chose* the WPLA to govern their claims; they must take the WPLA *as a whole*. *See Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 855-56, 774 P.2d 1199 (1989) ("The WPLA would accomplish little if it were a measure plaintiffs could choose or refuse to abide at their pleasure.").

The American Law Institute's recently adopted Restatement (Third) of Conflict of Laws, "Chapter 6,

Torts,"[1] confirms Division One's holding that in product-liability cases, the law governing liability includes the statute of repose. Contrary to petitioners' argument, Section 6.11 of the Restatement (Third) does not "recogniz[e] repose as a separate issue for issue-by-issue analysis." Pet. 18. It says exactly the opposite: "A statute of repose relates to liability, and choice of law with respect to such statutes is performed under this Section [on product-liability claims]." Restatement (Third) § 6.11 cmt. h.

Petitioners call Division One's holding "novel" and "unprecedented." Not so. It reached "the same result[] as a majority of reported decisions." Restatement (Third)

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[1] *Available at* https://www.ali.org/projects/show/conflict-laws.

Petitioners suggest a "tentative draft" is not authoritative (Pet. 17), but once "approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute's position on the subject and may be cited in opinions or briefs," Restatement (Third) of Conflict of Laws Intro. Note TD No. 4 (2023).

§ 6.11, Reporters' Notes; *accord id.* § 6.01 cmt. a ("These rules capture majority practice."). Nonetheless, petitioners criticize Division One for not citing supposedly "on-point" non-Washington cases. Pet. 16-17. Those cases cannot demonstrate a conflict under *Washington* law.

Marchesani v. Pellerin-Milnor Corp. (*see* Pet. 16) held a substantive claim was severable from its statute of repose only due to a Louisiana statute that specifically overrides a *non-forum state's* repose period. 269 F.3d 481, 493 (5th Cir. 2001). In *Gantes v. Kason Corp.* (*see* Pet. 16), the "conflict" was between New Jersey's statute of *limitations* and Georgia's statute of *repose*, 145 N.J. 478, 484, 679 A.2d 106 (1996), which *Rice* long ago held does not rise to the level of a conflict in Washington, 124 Wn.2d at 210-11. Petitioners' other cases do not even address whether a substantive claim can be separated from its

statute of repose,[2] and the two unpublished federal district court orders invoked have never been cited by another court.[3] None of these cases plausibly undermines the ALI, the national weight of authority, or both Washington and Missouri precedent holding that application of one state's law to the substantive claim ordains the same state's statute of repose. *Rice*, 124 Wn.2d at 212; *Grosshart v. KCP&L Co.*, 623 S.W.3d 160, 167-73 (Mo. Ct. App. 2021) (treating Kansas statute of repose as substantive and applying it to bar claim based on alleged exposure to heavy metals in Kansas under a choice-of-law analysis).

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[2] *See Mahne v. Ford Motor Co.*, 900 F.2d 83, 89 (6th Cir. 1990) (not analyzing the question); *Mitchell v. LoneStar Ammunition, Inc.*, 913 F.2d 242, 250 (5th Cir. 1990) (same); *Sico N. Am., Inc. v. Willis*, 2009 WL 3365856, at *2-6 (Tex. App. Sept. 10, 2009) (same).

[3] *Ehrenfelt v. Janssen Pharms., Inc.*, 2016 WL 7335922 (W.D. Tenn. June 23, 2016); *Bruce v. Haworth, Inc.*, 2014 WL 834184 (W.D. Mich. Mar. 4, 2014).

B. Division One Correctly Found the WPLA's Statute of Repose Constitutional Under the *Bennett* Framework.

As Division One correctly recognized (Op. 20-29), the analysis in *Bennett*, 2 Wn.3d 430, cannot be blindly mapped on to this case. Petitioners ignore the dispositive differences between the WPLA's statute of repose and the medical-malpractice statute of repose invalidated in *Bennett*. But this Court should not.

First, petitioners falsely contend that the "nexus" between the legislature's stated purposes in adopting the WPLA and its integrated statute of repose rested on "hypothesized facts." Pet. 8-10. But the WPLA's stated "purpose" was "to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault;" "to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion;" and to protect product sellers "from the substantially increasing product

liability insurance costs and unwarranted exposure to product liability litigation." Laws of 1981, ch. 27 § 1, Preamble.

Unlike the medical-malpractice statute of repose at issue in *Bennett*, enacted in an attempt to circumvent this Court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998), the WPLA and its statute of repose were enacted simultaneously as part of a comprehensive codification of the law of product liability, and after a Washington Senate Select Committee on Tort & Product Liability Reform ("WPLA Committee") had exhaustively studied whether "a product liability insurance problem existed." WPLA Committee Final Report at 4 (Jan. 1981), *incorporated into* Senate Journal, 47th Legislature (1981), at 617 ("Final Report"). The WPLA Committee found that: "[s]harply rising premiums for product liability insurance have increased the cost of consumer and industrial goods;" these "increases in

premiums have resulted in disincentives to industrial innovation and the development of new products" (Laws of 1981, ch. 27 § 1, Preamble); and the WPLA would slow or decrease rising premiums (*see* Final Report at 42). This differs dramatically from the stand-alone statute of repose considered in *Bennett*, where the legislature "did not assert that the statute of repose would, in fact, decrease the cost of medical malpractice insurance." 2 Wn.3d at 449.

Petitioners contend that the WPLA's statute of repose does not "address what insurers claimed was their real concern: the need for 'certainty'" because it does not include a hard cutoff date, and includes exceptions for breach of warranty, fraud, and latent injuries. Pet. 8-9, 11. But Division One correctly recognized that the medical-malpractice statute of repose at issue in *Bennett* was simply about extinguishing claims, 2 Wn.3d at 446, whereas the WPLA's statute of repose substantially furthered the legislative purpose by curtailing claims arising from

products that had exceeded their useful safe life. Thus, the "certainty" that the WPLA's statute of repose brought is different from the illusory "certainty" analyzed in *Bennett*.

Before the WPLA, Washington's common law of product liability "ha[d] not been clearly articulated," resulting in "the creation of a wide variety of legal formulae, unpredictability for consumers, and instability in the insurance market." Final Report 17 (internal quotation marks omitted). These were not "postulate[d] problem[s]" (Pet. 10), but clear and present ones. And an absolute cutoff date was not the only remedy to increase certainty.

Rather, the real certainty provided by the WPLA was a specific set of definitions and rules instead of unpredictable "formulae." The WPLA statute of repose is directly responsive to the stakeholders' and *this State's* desire for greater certainty while "professing less concern regarding the actual time period selected." Final Report 19.

And as a substantive component of any WPLA claim, it brought greater certainty to every product-liability lawsuit than existed previously under the common law.

For this reason, petitioners' complaint that the statute covers an insufficient number of claims (Pet. 9) is likewise not well taken: The legislature's goal was not merely to extinguish claims, but to establish a *stable framework* for litigating them as well. *Cf. O'Hartigan v. Dep't of Pers.*, 118 Wn.2d 111, 124, 821 P.2d 44 (1991) ("It is no requirement … that all evils of the same genus be eradicated or none at all." (citation omitted)).

Petitioners' arguments ignore the context of the WPLA's statute of repose, and Division One's decision does not conflict with *Bennett*.[4]

[4] In the event the Court reviews Division One's decision on the constitutionality of RCW 7.72.060(1)(a), Pharmacia reserves the right to argue that the inability to sever that provision leaves the rest of the WPLA a nullity, as suggested by Judge Dwyer in his separate opinion.

C. Division One Correctly Found that Two Opinions from Petitioners' Expert Based on Novel Methodologies Should Have Been Excluded.

Division One correctly recognized that two methodologies from petitioners' industrial hygienist/ exposure expert, Kevin Coghlan, were novel and therefore fail *Frye*. The decision does not conflict with any of this Court's precedents; accords with Division One's decision in *Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Insurance Co.,* 176 Wn. App. 168, 313 P.3d 408 (2013), *review denied*, 179 Wn.2d 1019 (2014), and Division Two's decision in *Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn. App. 407, 413-14, 241 P.3d 808 (2010), *review denied*, 171 Wn.2d 1009 (2011); and does not present a frequently recurring issue given the idiosyncratic nature of the evidence excluded.

As a threshold matter, petitioners fundamentally mischaracterize Division One's decision, claiming it focused on whether Coghlan's final "estimates"—that is,

the *results* of his methodologies—are generally accepted. *E.g.*, Pet. 20. But the proper question for Division One was whether "the *methodolog[ies]* used" were generally accepted. Op. 53 (citing *Lake Chelan*, 176 Wn. App. at 175). Division One properly focused exclusively on Coghlan's methodologies and correctly held that neither was.

Coghlan's carpet back-calculation approach failed *Frye* because his "*methodology* of using data from the Guo Study to determine historical PCB levels in the air" does not "enjoy the same general acceptance as the *theory* of source-sink dynamics" on which Coghlan's methodology was purportedly based. Op. 53.

And Coghlan's remediation-factor approach failed *Frye* because it is a "novel *method* that is not generally accepted by the scientific community." Op. 57 (emphasis

added).[5] Coghlan's methodologies were not merely "application[s]" of or "deduction[s] drawn from generally accepted theories." Pet. 21-22, 25 (cleaned up). Rather, Coghlan's excluded approaches *were* entirely new and untested methodologies.

Coghlan confirmed that his back-calculation approach was "unprecedented" "in the literature" and "the EPA has never done that" either. RP 1941:9-20. And with respect to his remediation-factor approach, neither Coghlan nor petitioners have ever identified any evidence that this methodology has been employed *by any other person*. *See* Pet. 20-26; Pet'rs' Am. C.A. Br. 105-07.

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[5] Petitioners relatedly argue that Division One too finely parsed Coghlan's opinions. Pet. 20-21 (arguing Division One required "general acceptance of each discrete and ever more specific part'" (citation omitted)). But Coghlan's opinions are—as petitioners admitted below—based on "three *independent* … methods." Pet'rs' Am. C.A. Br. 101 (emphasis added). It was thus proper for Division One to analyze each method independently.

Coghlan created these unvalidated methodologies for this case.

In resisting these conclusions, petitioners argue *Lake Chelan* is "nothing like this case" and Division One should not have relied on it partly because the expert there "admitted he didn't know of anything done to verify" his methodology. Pet. 24 (cleaned up). But petitioners omit that Coghlan, like the *Lake Chelan* expert, admitted nothing had been done to verify his back-calculation methodology by anyone, including himself. CP 15598-601; RP 1945:1-16. Coghlan even described the test one would need to perform to validate his methodology, and conceded he did not do it. CP 15600-01.

Division Two's decision in *Moore* confirms Division One was correct and refutes any suggestion of a conflict. 158 Wn. App. at 413-14. Division Two affirmed the exclusion of an engineering expert's theory that an already-accepted methodology of blood spatter could be used with

molten metal splatter too. The court held the testimony failed *Frye* because this "expert" was "probably the first engineer to attempt this method … which implies that there are no other sources that could provide the indicia of general acceptance" that the plaintiffs were required to present. *Id*. at 422. As in *Moore*, Coghlan admitted he is the first person to attempt his methodology. There is no authority to the contrary; nor do petitioners cite any.

Based on Coghlan's admissions and the other evidence in the record, Division One correctly applied *Frye* in concluding (1) that his novel back-calculation methodology lacked general acceptance (*see* Op. 54) and (2) "there is no evidence of other studies using similar methodology to develop a 'remediation factor' from other school samples" (Op. 57 n.29).

Moreover, the lack of general acceptance of Coghlan's methodologies was confirmed, as Division One properly found, by the express disclaimers of the scientists

and authors of the studies on whom Coghlan purported to rely. Op. 51, 55.

D. Division One's Holding that Punitive Damages Are Unavailable for Petitioners' Post-Sale Failure-to-Warn Claim Brought Under Washington Law Was Correct and Consistent with Majority Practice.

Under the Restatement (Second), Missouri cannot have a more "significant interest" than Washington on the issue of punitive damages with respect to underlying conduct that is not unlawful in Missouri. *See* Restatement (Second) § 171 cmt. d.

The Restatement (Third) yields the same result. Indeed, in a products liability case—a "Topic 2" tort "listed" in Section 6.11—the law of liability, repose, *and* punitive damages are determined by the same decision-tree. Restatement (Third) § 6.11(a).

Section 6.12 then provides that:

> [P]unitive damages may not be awarded if they are disallowed under the law of two of the following three states: (1) the defendant's domicile; (2) the place of conduct; [and] (3) the place of injury.

Restatement (Third) § 6.12. This "limit on the availability of punitive damages" applies here, and ensures that choice-of-law principles "do[] not lead to an award … that is unsupported by adequate state interests." *Id.* § 6.12 cmt.

Division One's holding that Missouri punitive damages are unavailable for petitioners' WPLA post-sale failure-to-warn claim was correct under either Restatement. Missouri has no "significant interest" in imposing punitive damages for a cause of action that Missouri does not recognize. *See* Restatement (Second) § 171. And because punitive damages are "disallowed" for post-sale failure to warn in both Missouri and Washington, they "may not be awarded" on that claim. Restatement (Third) § 6.12.

Petitioners fail to identify any conflict between Division One's decision and previous decisions of this Court or the Court of Appeals. Moreover, Division One's reasoning on this point aligns with the ALI's position and

majority practice. Op. 36; Restatement (Third) § 6.12 cmt. ("This Section … is consistent with majority practice.").

To the extent petitioners attack Division One's premise, contending Missouri *does* recognize a post-sale failure-to-warn claim, a Washington appellate court's potential misinterpretation of Missouri law is no basis for this Court's review. But petitioners are mistaken in any event.

None of the cases cited by petitioners (*see* Pet. 18-20) supports their argument. *Lopez v. Three Rivers Electric Cooperative, Inc.*, 26 S.W.3d 151, 157 (Mo. 2000), was not a product-liability case. The unique, and irrelevant, category of medical products renders inapposite the decisions in *Johnston v. Upjohn Co.*, 442 S.W.2d 93 (Mo. Ct. App. 1969), and *Stanger v. Smith & Nephew, Inc.*, 401 F. Supp. 2d 974, 982-83 (E.D. Mo. 2005) (post-sale duty arose *only* because artificial tibia was a medical product).

None of these cases suggests that the manufacturer of an industrial chemical sold to another manufacturer has a post-sale duty to warn users of the completed end-product, and the relevant Missouri authorities confirm such a duty does not exist. *Nesselrode v. Exec. Beechcraft, Inc.*, 707 S.W.2d 371, 382 (Mo. 1986) ("The *determinative issue* in a products liability failure to warn case is whether the information *accompanying the product* effectively communicates to the consumer or user the dangers that inhere in the product during normal use." (emphasis added)); *accord Moore v. Ford Motor Co.*, 332 S.W.3d 749, 764 (Mo. 2011) (failure-to-warn claims require proof that "the product did not contain an adequate warning of the alleged defect" at the time of sale).

E. If The Court Grants Review, It Should Decide Whether Punitive Damages Can Be Awarded on WPLA Claims Under Another State's Law.

Petitioners selected the WPLA as the sole basis for their claims, knowing of this Court's settled precedent

"disapprov[ing] punitive damages as contrary to public policy" absent express statutory authorization. *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574-75, 919 P.2d 589 (1996). Although the WPLA does not authorize punitive damages, Division One nevertheless allowed them under *Missouri* law, reasoning that the choice-of-law analysis for punitive damages should proceed separately from liability. Op. 30-31. This decision cannot be reconciled with *Dailey* and legions of other cases establishing Washington's public policy prohibiting punitive damages. It was also flawed on its own terms for at least three reasons.

First, Division One ignored the WPLA's "statutory directive" on damages. Restatement (Second) § 6(1); *accord* Restatement (Third) § 5.02(b). In enacting the WPLA, the Washington legislature intentionally rejected punitive-damages awards by not adopting the punitive-damages provisions of the Model Uniform Product Liability Act and expressly limiting the "harm" covered by

the statute to "damages *recognized by the courts of this state*." RCW 7.72.010(6) (emphasis added); *compare* 44 Fed. Reg. 62,714, 62,717, 62,748 (Oct. 31, 1979) (§§ 102(f), 120(a)).

Second, Division One departed from the choice-of-law principles of not only longstanding Washington case law but also the Restatement (Third), which is clear that "[t]he law governing the availability of punitive damages is the law selected under the rules" governing liability in product-liability cases. Restatement (Third) § 6.12. This language clarifies and strengthens Restatement (Second) § 171, which would yield the same outcome on these facts.

Third, to the extent an independent "most significant relationship" analysis was appropriate, Washington is "where the injury occurred," Restatement (Second) § 146, "where the product was delivered," "the plaintiff's domicile," and "the place of injury," Restatement (Third) § 6.11(a)(1). Division One assumed that the "contacts

[were] evenly split" between Washington and Missouri. Op. 34. But most of "the conduct that caused the injury" (*id.*) for which petitioners seek redress did not occur in Missouri. Old Monsanto manufactured PCBs in Alabama or Illinois, and Pharmacia has not been headquartered in Missouri for decades. *See* CP 17071. The former domicile of one defendant's predecessor-in-interest does not outweigh this case's strong connections to Washington.

At a minimum, Division One's result cannot be correct because it is contrary to the express policies of *both* Missouri and Washington. Missouri allows punitive damages only subject to strict procedural protections not applied here, including a bifurcated trial and mandatory setoff against prior punitive-damages awards involving similar conduct. *See* Mo. Rev. Stat. §§ 510.263.1, .4; *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 230 (Mo. Ct. App. 1988); *see also* Mo. Rev. Stat. § 510.261.7 (expressly barring punitive-damages awards in any court applying Missouri

law that does not use required procedures in cases filed after August 28, 2020). In effect, Division One applied the punitive-damages law of *no state*.

V. CONCLUSION

The Court should deny review. If this Court grants review, it should also clarify that Missouri punitive-damages law cannot be applied to petitioners' WPLA claims.

I certify that this brief is in 14-point Georgia font and contains 4899 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 31st day of July, 2024.

BRYAN CAVE LEIGHTON PAISNER LLP

Jennifer L. Campbell
WSBA No. 31703
Allison K. Krashan
WSBA No. 36977
Farron Curry
WSBA No. 40559
CaroLea W. Casas
WSBA No. 54102

By: */s/ Jean-Claude André*
Jean-Claude André
Cal. Bar No. 213538
pro hac vice

Attorneys for Respondent

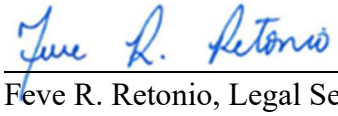
CERTIFICATE OF SERVICE

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 31st day of July, 2024, I arranged for service of the foregoing **ANSWER TO PETITION FOR REVIEW** via the electronic service per the Stipulated E-Service Agreement to the parties to this action as follows:

Attorneys for Plaintiffs-Respondents	
Sean J. Gamble, WSBA #41733	sgamble@friedmanrubin.com
James A. Hertz, WSBA #35222	jhertz@friedmanrubin.com
Henry G. Jones, WSBA #45684	hjones@friedmanrubin.com
Ronald J. Park, WSBA #54372	rpark@friedmanrubin.com
Richard Friedman, WSBA #30626	rfriedman@friedmanrubin.com
	mblackledge@friedmanrubin.com jvick@friedmanrubin.com kduhamel@friedmanrubin.com
Gregory A. Beck, *admitted pro hac vice*	greg@guptawessler.com

Robert Friedman, *admitted pro hac vice* robert@guptawessler.com
Deepak Gupta, *admitted pro hac vice* deepak@guptawessler.com
Jonathan E. Taylor, *admitted pro hac vice* jon@guptawessler.com



Feve R. Retonio, Legal Secretary

BRYAN CAVE LEIGHTON PAISNER LLP

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- rpark@friedmanrubin.com
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- tadegregorio@bclplaw.com
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Sender Name: Feve Retonio - Email: feve.retonio@bclplaw.com
Filing on Behalf of: Jennifer Lynn Campbell - Email: jenn.campbell@bclplaw.com (Alternate Email: feve.retonio@bclplaw.com)

Address:
999 Third Avenue
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