No. 1037309

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RUTH SCOTT, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MIKAEL SCOTT, A DECEASED INDIVIDUAL; JEFF MUHLEMAN, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TYLER MUHLEMAN, A DECEASED INDIVIDUAL; AND CINDY CRUZ, INDIVIDUALLY,

Petitioners,

v.

AMAZON.COM, INC., A DELAWARE CORPORATION,

Respondent.

MARY-ELLEN VIGLIS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DEMETRIOS VIGLIS, A DECEASED INDIVIDUAL; JAMES PASSANNANTI, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AVA PASSANNANTI, A DECEASED INDIVIDUAL; AND ANNETTE GALLEGO, INDIVIDUALLY,

Petitioners,

v.

AMAZON.COM, INC., A DELAWARE CORPORATION,

Respondent.

Amazon's Answer to Petition for Review

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INTRODUCTION

Between 2018 and 2022, customers purchased over 11,000 units of high-purity sodium nitrite on Amazon.com. Regrettably, a fraction of those purchases were by individuals planning to commit suicide. Division I unanimously held, on two independent grounds, that Amazon cannot be liable for those suicides under the Washington Product Liability Act ("WPLA"). Pet.App.8. Both grounds must warrant review under RAP 13.4(b) to grant the Petition. And neither does.

First, Division I held that "Washington law does not impose a duty on sellers to protect against intentional misuse of a product." Pet.App.8. That holding was correct. "There is no general duty to refrain from selling or giving goods to persons just because the seller can or should foresee that the recipient might misuse the good." Goldberg & Zipursky, *Intervening Wrongdoing in Tort*, 44 WAKE FOREST L. REV. 1211, 1221 (2009). Indeed, this Court has long rejected the notion that foreseeable "misuse" or "abuse" of a product justifies imposing

liability for selling that product. *Baughn* v. *Honda Motor Co.*, 107 Wn.2d 127, 146-47, 727 P.2d 655 (1986). Allowing recovery under the WPLA for purchasers' intentional misuse of products would create unjustified liability for selling a range of products—such as "[g]uns," "knives," "liquor," tobacco, "BB gun[s]," "mini-trail bikes," "planer[s]," trampolines, and "hatchet[s]"—because retailers know that some purchasers will inevitably "kill," "maim," or otherwise injure themselves (or others) by misusing those products. *Id.* at 140, 141, 147 (citation omitted). The fact that the product here was misused for suicide does not justify creating a new duty. Washington law "provides no general duty to protect others from self-inflicted harm, *i.e.*, suicide." *Webstad* v. *Stortini*, 83 Wn. App. 857, 866, 924 P.2d 940 (1996).

Second, Division I held that Washington's longstanding proximate-cause rule for suicide "directs that suicide under these circumstances breaks the chain of causation." Pet.App.8. That holding was also correct. When the WPLA was enacted, this Court had endorsed

the proximate-cause rule that the "voluntary choice" to commit suicide "supersedes the defendant's liability" in cases like this one where the defendant did not cause the mental state that led to suicide. *Orcutt* v. *Spokane County*, 58 Wn.2d 846, 852, 364 P.2d 1102 (1961) (citation omitted).

Review is not warranted under RAP 13.4(b)(1) or (2). Plaintiffs acknowledge that they are raising a novel liability theory under RCW 7.72.040(1)(a). Pet.7. So no precedents conflict with Division I's application of the WPLA's "negligence" and "proximate cause" elements. Division I followed longstanding precedents—including suicide-specific rules and general products-liability principles—that preclude Plaintiffs' claims. Instead of seeking reconciliation of any actual conflicts among existing precedents, Plaintiffs ask this Court to adopt novel theories of liability based on "development[s]" decades after the WPLA's passage. Pet.11.

Even if this Court were inclined to consider these novel theories, review would be improper under

RAP 13.4(b)(4) because the Petition does not raise "an issue … that should be determined by the Supreme Court." The Petition acknowledges that its novel theories rely on post-WPLA "decisions" that supposedly "develop[ed]" the law. Pet.11-14. This Court has held that later "change[s] in the common law" cannot alter the meaning of "a statute," like the WPLA, "which was enacted with the existing rule of common law in mind." *Jongeward* v. *BNSF Ry. Co.*, 174 Wn.2d 586, 595, 278 P.3d 157 (2012) (citation omitted). The Legislature is the proper forum for Plaintiffs' novel theories.

COUNTERSTATEMENT OF THE ISSUES

1. Can the WPLA's proximate-cause element be construed to make selling products the proximate cause of suicides, where this Court's pre-WPLA precedents hold that tortious conduct cannot proximately cause suicide unless that conduct caused a mental condition resulting in an uncontrollable impulse to commit suicide?

2. Can RCW 7.72.040(1)(a) be construed to impose liability, under a § 388 negligent-failure-to-warn

theory, where the decedents intentionally ingested a chemical knowing it was lethal?

3. Can RCW 7.72.040(1)(a) be construed to impose liability, under a novel negligent-entrustment theory, where the entrustor has no actual knowledge of the entrustee and the plaintiff-entrustee falls outside the categories of "incompetents" recognized under Washington law?

4. Can RCW 7.72.040(1)(a) be construed to impose liability, under a § 281 duty-of-ordinary-care theory, where the product user intentionally ingested a chemical to commit suicide?

COUNTERSTATEMENT OF THE CASE

In 2019, anonymous posters on "Sanctioned-Suicide.com" began recommending mixing high-purity sodium nitrite with water and drinking it as a method for suicide. CP.226 & n.6. The posters recommended Amazon.com as a place to purchase it. *Id.* No webpage on the Amazon.com website—or any other communication

from Amazon—advertised sodium nitrite as a method for suicide. *See* CP.213-49, 379-422.

Sodium nitrite is a chemical with many "legitimate uses in laboratories" and "medical facilities," as well as "food preservation." CP.230. The most common consumer use is as "a meat preservative." *Id.* FDA regulations recognize that sodium nitrite can be sold "for household use," both in high-purity form as an "additive" and as part of "a mixture containing the additive." 21 C.F.R. 172.170(b)(2)-(3). Customers buying the pure "additive" typically use it to make dry "curing salts," CP.230, or to make a solution for "wet curing" large meats like ham or elk.

Sodium nitrite is also used by hobbyists. The "Pro-Cure" brand of sodium nitrite, which is at issue in two lawsuits cited in Plaintiffs' Appendix, Pet.App.59 (*Jenks*; *Quiroz*), is specifically marketed to fishers for making "custom" bait. Supp.App.10. It is found under the "Fishing" and "Baits & Attractants" categories on Amazon.com. Supp.App.10. And the label says it is "for

curing salmon eggs" to use as bait—usually for salmon or steelhead.

Supp.App.10

The two brands of sodium nitrite at issue in this appeal are HiMedia and Loudwolf. Pet.App.9. Both contain warnings alerting users that consuming sodium nitrite is dangerous. *Id.*

The HiMedia label has a skull-and-crossbones symbol, a bolded "Danger" heading, and the warnings "Toxic if swallowed" and "IF SWALLOWED: Immediately call a POISON CENTER or doctor/physician."

CP.40.

The Loudwolf label similarly warns that the product is "TOX[IC]" and a "HAZARD." CP.390-92. The label also says: "This is a high-purity, reagent grade chemical. It is suitable for most experimental and analytical applications, as well as many technical and household purposes." CP.391.

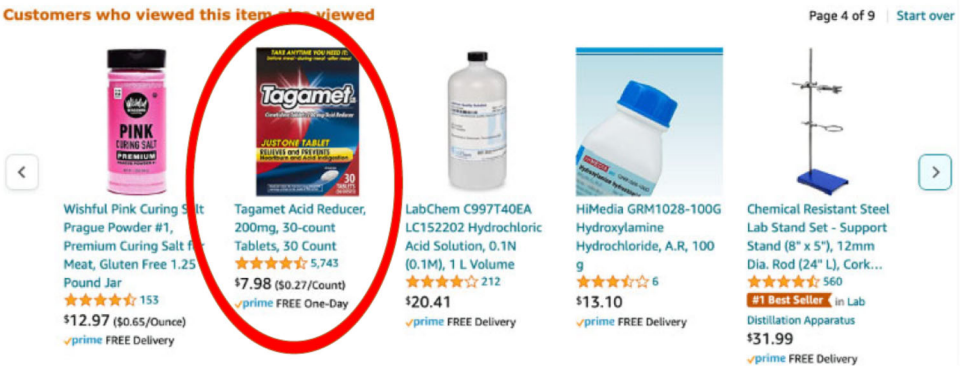
CP.390.

CP.391.

CP.392.

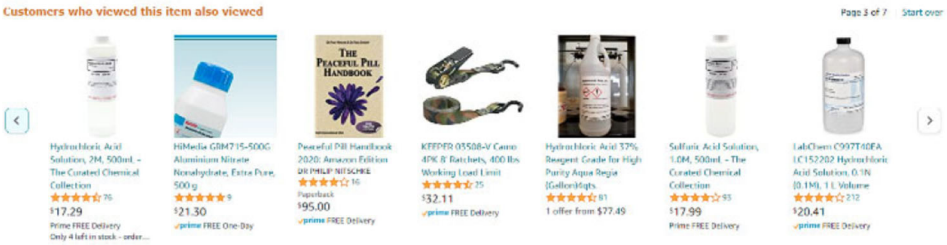
The anonymous posters on Sanctioned-Suicide.com recommended various products to use in conjunction with sodium nitrite. CP.231. Amazon itself never "suggest[ed] a suicide 'package deal' of other implements and a manual." *Contra* Pet.22. Rather, the algorithm in the "Customers who viewed this item also viewed" widget sometimes showed those "implements" interspersed among items that had no relation to suicide. CP.224-25.

For example, the *Scott* complaint alleges that the "Tagamet Acid Reducer" could be found—only after clicking through to "Page 4 of 9" of the widget—among curing salts and laboratory supplies:



CP.224.

Similarly, the "Peaceful Pill Handbook" appears—only after clicking through to "Page 3 of 7" of the widget—among various laboratory chemicals:



CP.225.

The complaints do not allege that *any* of the decedents bought the "Peaceful Pill Handbook." *See* CP.214, 224-25, 393-95. Nor did any decedent buy all the "implements" that the Petition characterizes as a suicide "kit." Pet.22, 27-28.

The four decedents are: 27-year-old Mikael Scott, 19-year-old DJ Viglis, 18-year-old Ava Passananti, and 17-year-old Tyler Muhleman. CP.232, 238, 382. At the time of their purchases, no federal or state law restricted the sale of sodium nitrite to particular purchasers. Pet.App.40. Each was living with their parents at the time, and the complaints detail their history (unknown

to Amazon) of mental-health issues. *See* CP.232, 403, 405. They learned about sodium nitrite as a method for committing suicide from websites and other sources unaffiliated with Amazon. *Cf.* CP.226, 230-32, 402. They then bought sodium nitrite on Amazon.com, waited until they were alone, mixed it with water, and intentionally ingested it to commit suicide. *E.g.*, CP.216, 233-34, 239, 382, 403-404, 407. Each of the decedents' families interacted with them shortly before their suicides, and none saw any indication that they were about to commit suicide. CP.233, 239, 403-07.

ARGUMENT

A. Division I's application of RCW 7.72.040(1)'s "proximate cause" element does not warrant review.

Plaintiffs urge review of Division I's holding that Amazon did not proximately cause the decedents' suicides. Pet.14-21. But they overlook the fact that whether Amazon "proximately caused" the decedents' "harm" for purposes of RCW 7.72.040(1) is a matter of statutory interpretation. Plaintiffs' theory requires this Court to

effectively amend the WPLA by rejecting "the traditional suicide rule" established by pre-WPLA common law. Pet.21. There is no principled basis for doing so, as it would usurp the legislative function.

1. Division I correctly applied this Court's pre-WPLA precedents on suicide.

Plaintiffs mischaracterize Division I's decision. It did not "fashion[] a general suicide rule that bars all cases involving suicide." Pet.16. Rather, it faithfully applied this Court's pre-WPLA precedents on proximate cause for decedents' voluntary self-inflicted harm. As Division I correctly held, those precedents establish that "liability does not attach to a death by suicide unless either there was a special relationship, … or the decedent's *decision* to commit suicide was proximately caused by the defendant's negligence such that the suicide was not truly a voluntary act." Pet.App.30 (emphasis added; citing *Arsnow* v. *Red Top Cab Co.*, 159 Wash. 137, 138-39, 292 P. 436 (1930)).

The WPLA's proximate-cause element is defined by pre-WPLA common law. When passing the WPLA in 1981, "the Legislature intended" its "undefined terms to mean what they did at common law." *McKenna* v. *Harrison Mem'l Hosp.*, 92 Wn. App. 119, 122, 960 P.2d 486 (1998). The WPLA does not define the term "proximately caused." *See* RCW 7.72.010. Because proximate cause is a legal term, its "plain and ordinary meaning" is determined by "what it was understood to mean at common law." *Schwartz* v. *King County*, 200 Wn.2d 231, 239-40, 516 P.3d 360 (2022) (cleaned up).

When the WPLA was enacted, this Court had already adopted the "salutary and … necessary rule" limiting proximate cause for voluntary self-harm. *Arsnow*, 159 Wash. at 161. This Court had reaffirmed "the rule" in *Orcutt*, limiting liability for voluntary self-harm to cases where the "negligent wrong" itself "caused a mental condition which resulted in an uncontrollable impulse to commit suicide" or put the decedent in a "delirium or frenzy." 58 Wn.2d at 850, 852, 853 (cleaned up).

The overwhelming majority of states followed this "general rule" in 1981 (and still do today). *See Krieg* v. *Massey*, 781 P.2d 277, 278-79 (Mont. 1989) (collecting authorities). The Legislature has also adopted it comparable contexts, for instance precluding monetary liability for voluntary suicides in workers compensation and insurance. *See* RCW 51.32.020, RCW 48.23.260(1)(b). So the Legislature has embraced the principle that, where an individual "deliberately injures or kills himself or herself," the decedent's own "fault breaks the causal chain." *Dep't of Lab. & Indus.* v. *Shirley*, 171 Wn. App. 870, 886, 288 P.3d 390 (2012).

Plaintiffs do not identify any pre-WPLA precedents questioning *Arsnow* and *Orcutt*—much less holding that suicide can be proximately caused by the negligent sale of a product. *See* Pet.15-16. Instead, Plaintiffs claim that those decisions are fact-bound "early attempts to apply causation principles" in cases involving "automobile wrecks." *Id.* But "the rule" adopted in *Arsnow* applies generally to claims that a suicide was

"caused by the defendant's negligent act or omission." 159 Wash. at 149 (cleaned up). The First Restatement—adopted in *Orcutt*—makes clear that the proximate-cause rule is not fact-bound. Pet.15. The Restatement articulates a general "rule" for when an "actor's negligent conduct" proximately causes self-harm. 58 Wn.2d at 850-51 (quoting Restatement (First) of Torts § 455 (1934)).

Plaintiffs try to characterize Washington's rule as inconsistent with the Second Restatement. *See* Pet.14. But the First Restatement's proximate-cause rule applied in *Orcutt* was carried forward in "Restatement (Second) of Torts § 455 (1965)." *Baxter* v. *Safeway Stores, Inc.*, 13 Wn. App. 229, 232, 534 P.2d 585 (1975). And the Second Restatement repeatedly cites *Arsnow* as embodying its rule. *See* Restatement (Second) of Torts § 455, reporter's notes (1965).

Division I was therefore correct to hold that the WPLA's proximate-cause element incorporates Washington's common-law rule.

2. Post-WPLA precedents analyzing third-party superseding acts are irrelevant.

Plaintiffs fault Division I for not citing various post-WPLA "superseding cause precedents." Pet.14. But those precedents apply the Restatement's test for analyzing the "intervening act" "of a third person." *Campbell* v. *ITE Imperial Corp.*, 107 Wn.2d 807, 812, 733 P.2d 969 (1987) (cleaned up). This appeal—and the suicide causation rule it implicates—concerns the decedents' "own act[s]." *Orcutt*, 58 Wn.2d at 850 (citation omitted).

Contrary to Plaintiffs' assertion, Division II's decision in *Adgar* v. *Dinsmore* did not "reject[] the notion that suicide constituted a superseding cause." Pet.17 (citing 26 Wn. App. 2d 866, 885-86, 530 P.3d 236 (2023)). Division I cited *Adgar* approvingly. *See* Pet.App.29. And *Adgar* confirms that "*Arsnow*, *Orcutt*, and *Webstad*" remain good law and are applicable in "a wrongful death suit … alleging that the defendant's negligent acts were the proximate cause of the decedent's suicide." 26 Wn. App. 2d at 883. *Adgar* simply held that *Arsnow* and its progeny are "inapposite" in a "case concern[ing] whether

a *third party's* intervening acts rose to the level of a superseding cause." *Id.* (emphasis added). So *Adgar* actually shows that Plaintiffs' post-WPLA superseding-cause precedents are "inapposite" given that these cases are "wrongful death suit[s] … alleging that [Amazon's] negligent acts were the proximate cause of the decedent[s'] suicide[s]." *Id.*

3. Washington's proximate-cause rule remains the majority view and should not be reconsidered.

Plaintiffs wrongly claim that Washington's longstanding rule is "outside the mainstream of American law." Pet.18. The law review article they cite confirms that Washington follows the basic "rule" that "has been adopted in nearly every jurisdiction" and "remains the norm in negligence cases." Long, *Abolishing the Suicide Rule*, 113 NW. U. L. REV. 767, 772, 784 & n.123 (2019) (citing *Arsnow*).

Plaintiffs' proposal to eliminate Washington's longstanding proximate-cause rule would unleash a wave of suicide-related litigation. Doing so would extend

potential liability beyond custodial institutions (jails and hospitals) to "landlord[s], employer[s]," and even "the friend, counselor, or other confidant who fails to … prevent the decedent from committing suicide." *Id.* at 800-01. This Court does not adopt novel tort theories that implicate so many "complex questions of public policy" and which "require[] consideration of factual matters extrinsic to the case before the court." *Niece* v. *Elmview Grp. Home*, 131 Wn.2d 39, 58, 929 P.2d 420 (1997). "The Legislature" should make any such changes because it can "learn the full extent of the competing societal interests" and tailor solutions balancing those "interests." *Id.* (cleaned up).

4. Only the Legislature can alter the WPLA's proximate-cause element.

Even if this Court were persuaded to reconsider Washington's longstanding proximate-cause rule, it cannot do so here. The WPLA was enacted by the Legislature. And while this Court may change "the rules of common law," it is "not the prerogative of the courts to

amend the acts of the legislature." *Spokane Methodist Homes, Inc.* v. *Dep't of Lab. & Indus.*, 81 Wn.2d 283, 286-88, 501 P.2d 589 (1972).

As explained above, the WPLA's proximate-cause element is defined by the common law when it was passed. *Supra* at 13. Statutes that were "enacted with the existing rule of common law in mind" are not "automatically amended to conform to" a subsequent change to the common law. *Spokane Methodist*, 81 Wn.2d at 287. Changing such statutes requires legislation. Thus, in *Jongeward*, this Court interpreted the common-law term "trespass" in RCW 64.12.030, in light of the common-law understanding of trespass "[w]hen the … statute was enacted" rather than the "modern view of trespass." 174 Wn.2d at 596. This Court stressed that "[a] subsequent change in the common law does not impact our statutory analysis." *Id.* at 595.

So even if Plaintiffs were correct that the common law of proximate cause has changed in recent years, their implicit concession that their claims would be

barred under the "antiquated" rule of *Arsnow* and *Orcutt* is dispositive. Pet.15. This Court must interpret the WPLA by applying "the historical view" of proximate cause—as it existed in 1981—and not "the modern view." *Jongeward*, 174 Wn.2d at 596.

Division I's proximate-cause holding does not raise an issue "that should be determined by the Supreme Court." RAP 13.4(b)(4). Only the Legislature can amend the WPLA's proximate-cause element.

B. Division I's interpretation of RCW 7.72.040(1)(a)'s "negligence" element does not warrant review.

Division I correctly concluded that Plaintiffs have no viable claim under RCW 7.72.040(1)(a) because there is no "duty on sellers to protect against intentional misuse of a product" under the facts alleged. Pet.App.8. No decision—in Washington or elsewhere—supports Plaintiffs' novel and expansive negligence theories. "There is no general duty to refrain from selling … goods" simply because it foreseeable that purchasers "might misuse the good." Goldberg & Zipursky, 44 WAKE FOREST L.

REV. at 1221. And Plaintiffs' novel failure-to-warn and negligent-entrustment theories usurp the legislative function by going far beyond "the historical view" of seller negligence when the WPLA was adopted. *Jongeward*, 174 Wn.2d at 596.

1. RCW 7.72.040(1)(A) cannot support a failure-to-warn claim where the purchasers intentionally ingested a chemical knowing it was lethal.

Plaintiffs claim that Division I failed to address their section 388 failure-to-warn theory. Pet.26-28. Not true. The court noted the "numerous Washington cases supporting the conclusion that there is no duty to warn if the danger is obvious or known" and deemed those precedents "applicable here." Pet.App.21-22. Plaintiffs ignore the precedents that Division I cited. *See* Pet.26-28.

Division I's failure-to-warn holding is correct. When the WPLA was adopted (and today), it was "well recognized" that "a warning need not be given at all in instances where a danger is obvious or known."

Haysom v. *Coleman Lantern Co.*, 89 Wn.2d 474, 479, 573 P.2d 785 (1978). And here, the decedents "necessarily knew" that ingesting sodium nitrite was dangerous because they "deliberately sought out sodium nitrite for its fatal properties." Pet.App.22 (cleaned up). Plaintiffs' arguments contravene longstanding precedent.

First, Plaintiffs point out that "[t]he adequacy of warnings" and the "obvious[ness]" of dangers are "ordinarily … question[s] of fact." Pet.23. But "ordinarily" does not mean always. Washington courts have repeatedly held—"as a matter of law"—that "warnings" were "sufficient" and that "hazards" were so "obvious" as to obviate any duty to warn. *Simonetta* v. *Viad Corp.*, 165 Wn.2d 341, 350-51, 197 P.3d 127 (2008) (collecting cases). The precedents holding that an obvious danger forecloses any duty to warn involve far more benign activities with far younger consumers, including:

- a 16-year-old performing somersaults on a trampoline in *Anderson* v. *Weslo, Inc.*, 79 Wn. App. 829, 832-33, 840, 906 P.2d 336 (1995);

- two 8-year-olds riding a mini-trail bike on public roads without helmets in *Baughn*, 107 Wn.2d at 130-31, 139-41;

- and an infant using "a baby walker" that "allow[ed] the baby some mobility" in *Thongchoom* v. *Graco Childs. Prods., Inc.*, 117 Wn. App. 299, 305, 71 P.3d 214 (2003).

Plaintiffs offer no explanation for how their cases create a factual question when those cases did not.

Second, Plaintiffs assert that the bottles' warnings were inadequate because they did not alert users to the "irreversible lethality" of ingesting sodium nitrite and the resulting "intense physical suffering." Pet.24-25. But the WPLA does not require warnings to "inform [users] of every possible injury" so long as they "warn[] of the general risk of injury." *Anderson*, 79 Wn. App. at 840. Plaintiffs cannot claim a warning is inadequate because it lacks "more vivid detail" regarding the risk of "death or serious injury." *Baughn*, 107 Wn.2d at 144.

At bottom, Plaintiffs' failure-to-warn claim fails because Washington law requires only that users be "able to understand [the] potential dangers" of a product

"and the ways to avoid them." *Id.* at 140. Here, the decedents unquestionably knew that they could avoid the lethal danger of ingesting sodium nitrite by not intentionally drinking it. Pet.App.22.

2. RCW 7.72.040(1)(a) cannot be construed to include Plaintiffs' novel negligent-entrustment theory.

Plaintiffs contend that they can bring a negligent-entrustment claim under the WPLA simply because "Amazon was on notice that vulnerable persons" were buying sodium nitrite "for self-harm." Pet.26. Division I identified two "significant factual distinction[s]" under Washington law that foreclose Plaintiffs' novel theory. Pet.App.27. First, "there was no face-to-face transaction between Amazon and the purchasers of sodium nitrate that might have alerted" Amazon to their alleged incompetence. *Id.* Second, the decedents' various mental-health issues are not "the kinds of 'incompetency' that fall within" the negligent-entrustment doctrine. *Id.* Plaintiffs' attempt to refute the first distinction is meritless, and they completely ignore the second.

No knowledge of appearance or conduct. Plaintiffs "do not engage with" the fact that their theory would hold retailers liable for purchasers' misuse of products where retailers have no knowledge about the purchasers that indicates they "may be 'an incompetent.'" *Id.* Plaintiffs simply claim that knowledge is not required. Pet.25-26. "But as with liability for overservice, liability for negligent entrustment revolves around appearance." *Weber* v. *Budget Truck Rental, LLC*, 162 Wn. App. 5, 11, 254 P.3d 196 (2011). The doctrine requires that the entrustee's "*appearance or conduct*" indicate incompetence "at the time of entrustment," or that the entrustor otherwise have actual "knowledge" of the entrustee's "incompetence" from past "specific instances." *Id.* at 11 n.12 (cleaned up). Hence, this Court's first decision recognizing a negligent-entrustment claim grounded liability on the entrustor "knowing that at the time [the entrustee] was drinking" and knowing from past experience that the entrustee "was in the habit of

getting drunk." *Mitchell* v. *Churches*, 119 Wash. 547, 552, 206 P. 6 (1922).

Instead of engaging with that well-established limiting principle, Plaintiffs attack a strawman. They claim that "visualization [i]s not required" because, in *Hickle* v. *Whitney Farms, Inc.*, "[t]he producer never 'saw' the incompetent farmer" to whom it "entrusted organic wastes." Pet.26 (citing 18 Wn.3d 911, 64 P.3d 1244 (2003)). But the producer *did* see the farmer when "contract[ing] with" him over "many years." *Hickle*, 148 Wn.2d at 914-15. More importantly, *Hickle* stressed the defendant's knowledge of prior incidents involving the farmer. The producer continued sending waste to the farmer despite *knowing for years* that the farmer was illegally dumping "smoldering wastes." *Id.* at 917-18. So the defendant, based on personal observation, knew of "specific instances" indicating "recklessness" or "incompetence." *Weber*, 162 Wn. App. at 11 n.12.

Removing the well-established actual knowledge requirement would make Washington a national outlier.

Courts have repeatedly refused to impose liability where retailers lacked "actual notice" that the particular customer "was legally incompetent." *Buczkowski* v. *McKay*, 490 N.W.2d 330, 336-37 & n.16 (Mich. 1992). Plaintiffs' novel theory would "effectively require[] independent investigation to establish each buyer's fitness to use each product, leaving negligent commercial transactions open to unlimited expansion tantamount to imposing a fiduciary duty on the retailer." *Id.* at 336 n.16. That is not the law. *See Weber*, 162 Wn. App. at 11 & n.12.

No established category of incompetency. Plaintiffs' novel theory also creates a new, undefined category of legal incompetents: "vulnerable persons." Pet.26-28. Plaintiffs do not cite any pre-or-post WPLA precedent recognizing such a category of "incompetents" for purposes of negligent entrustment.

Nor could they. This Court has held that an "obvious physical or mental impairment" is required to establish the kind of "incompetency" that makes the entrustor liable for the entrustee's self-injury. *Mele* v. *Turner*, 106

Wn.2d 73, 77-78, 720 P.2d 787 (1986). As the Restatement explains, holding suppliers "liable for harm sustained by the incompetent" requires that the entrustee belong to a "class which is *legally recognized* as so incompetent as to prevent them from being responsible for their actions." Restatement (Second) of Torts § 390, cmt. c (1965) (emphasis added). The only categories that the Restatement recognizes are "child[ren] of tender years" (under 14) and the "obviously … intoxicated." *Id.* cmt. c. & illust. 7. Hence, as Division I stressed, this Court's decision in *Bernethy* v. *Walt Failor's, Inc.*—the only case applying negligent-entrustment to a commercial sale—turned on the defendant entrusting a gun to "a visibly intoxicated person." Pet.App.26 (citing 97 Wn.2d 929, 935, 653 P.2d 280 (1982)).

Recognizing "vulnerable persons" as a new category of "incompetents" would invite a slew of negligent-entrustment claims. Retailers would face potentially crushing liability for selling non-defective products to people whose mental-health issues make them more

likely to misuse those products for self-harm. Under Plaintiffs' approach, nearly every retailer sells a potential "instrumentality" enabling self-harm—pharmacies enable bulimia by selling laxatives, liquor stores enable alcoholism by selling spirits, hardware stores enable inhalant abuse by selling spray paint, and gas stations enable gambling addiction by selling lottery tickets.

No duty to inquire. Plaintiffs' novel theory would effectively create a duty for all retailers—not just Amazon—to inquire into purchasers' potential incompetency. With thousands of purchasers buying sodium nitrite on Amazon.com, the only way Amazon could possibly identify who might be considering suicide would be affirmatively investigating each potential purchaser prior to the sale. *Cf.* Pet.App.27. There is "no authority" in Washington establishing "a duty to inquire" or "investigate the background of" customers for "a negligent entrustment claim," and for very good reason. *Kelly* v. *Rickey*, 166 Wn. App. 1010, 2012 WL 255855, at *6 (2012) (unpublished).

The affirmative duty that Plaintiffs' theory requires has no limiting factors. It would create expansive and unpredictable liability; invade the privacy of everyday consumers; and unnecessarily increase the cost of household goods. As Division I pointed out, purchasers' ability to hide their "mental illness" and "mask their suicidal intentions" would make the duty impossible to meet, especially in online retail with no "in-person transactions." Pet.App.27.[1]

3. RCW 7.72.040(1)(a) cannot support Plaintiffs' novel ordinary-care theory.

Division I correctly concluded that the § 281 duty of ordinary care does not "impose a duty on sellers to protect against intentional misuse of a product." Pet.App.8. Plaintiffs do not cite a single decision anywhere imposing such a duty. *See* Pet.10-14, 21-25.

[1] Plaintiffs wrongly characterize this as an improper "fact finding." Pet.25-26 n.15. The complaints' factual allegations establish that the decedents hid the seriousness of their mental-health issues—and their intention to commit suicide—from the family members living with them. *Supra* at 10-11.

Instead, Plaintiffs advance a novel theory of duty—based exclusively on post-WPLA decisions—that would make retailers liable for every "foreseeable risk of harm" from selling a product. Pet.12. Allowing such novel theories, forty years after the WPLA's passage, would undermine its primary goals of "delimiting the substantive liabilities of manufacturers and product sellers" and reducing "uncertainty in tort litigation." *Wash. Water Power Co.* v. *Graybar Elec. Co.*, 112 Wn.2d 847, 851, 863, 774 P.2d 1199 (1989).

For starters, § 281 cannot support liability here given that Plaintiffs have no viable claim under § 388 or § 390. *See supra* at 20-30. The Restatement says that sections 388 and 390—not § 281—provide the "rule[s] … determining the liability of one who supplies a chattel for another to use." Restatement (Second) § 390, cmt. a. This Court should not misuse section 281's general rule to impose a duty when the product-specific rules in sections 388 and 390 would not. Doing so would violate this Court's longstanding precedent rejecting the notion that

foreseeable "abuse" or "misuse" of a non-defective product justifies imposing liability for selling that product. *Baughn*, 107 Wn.2d at 146-47.

Plaintiffs spend multiple pages distinguishing *Webstad* factually. Pet.10-14. But Division I relied on *Webstad* not for its factual similarities, but for the general principle that suicide is "a voluntary" act of "self-inflicted harm," which takes it outside of the ordinary duty care. Pet.App.24-25 (cleaned up). This Court's precedents buttress that reasoning, explaining that a defendant's "duty extends to self-inflicted harm" only where "a special relationship with [the plaintiff] creat[es] an affirmative duty to provide for [the plaintiff's] health, welfare, and safety." *Gregoire* v. *City of Oak Harbor*, 170 Wn.2d 628, 639, 244 P.3d 924 (2010) (plurality op.). And Plaintiffs do not challenge Division I's holding that there is no such special-relationship duty under the WPLA. Pet.App.27-28 n.15.

Plaintiffs' framing of their theory as a duty to "not supply the *instrumentality of death*" actually undercuts

their claim. Pet.11. What Plaintiffs seek—forty years after the WPLA's passage—is a novel exception to the longstanding rule that there is no duty to protect purchasers against "known or obvious" "danger[s]" from misusing a product. *Haysom*, 89 Wn.2d at 481. This Court cannot break from "the historical view" of negligence when construing RCW 7.72.040(1)(a). *Jongeward*, 174 Wn.2d at 596.

Additionally, Plaintiffs offer no principled limitation for their novel duty. Many common methods of suicide involve consumer goods, including: self-poisoning with over-the-counter drugs (*e.g.*, acetaminophen) or additives (*e.g.*, antifreeze), hanging with rope, and asphyxiation with helium. Plaintiffs' theory would require retailers to ensure that they are not selling these "instrumentalit[ies] of death to vulnerable people." Pet.12. That would mean a "jury is, in effect, allowed to legislate in each particular case whether … a well-made product" "should not be sold" because of potential "misuse." *Baughn*, 107 Wn.2d at 135, 146. In Washington, "the

Legislature … is the appropriate body" to impose such restrictions. *Id.* at 130.

Plaintiffs also criticize (Pet.14 n.11) Division I's conclusion that RCW 9A.36.060 does not "support a corresponding duty in tort law" here. Pet.App.29 n.16. The statute criminalizes "*knowingly* caus[ing] or aid[ing] another person to attempt suicide." RCW 9A.36.060 (emphasis added). No Washington court has held that a criminal statute with a heightened *mens rea* provides the "standard of conduct for purposes of a tort action." Restatement (Second) of Torts § 286, cmt. d (1965). The heightened *mens rea* indicates that no civil liability is intended, as "actual knowledge" is more demanding than the "duty of ordinary care" for negligence actions. *Carlsen* v. *Wackenhut Corp.*, 73 Wn. App. 247, 257, 868 P.2d 882 (1994).

Finally, Plaintiffs assert that Amazon had a duty to refrain from "suggesting a suicide 'package deal' of other implements and a manual." Pet.22. The actual allegations establish that Amazon made no such

suggestion, and no decedent purchased this supposed "package." *See supra* at 9-10.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Certificate of Compliance: I certify this brief contains 5,000 words in compliance with Rules of Appellate Procedure 13.4 and 18.17(c)(10).

RESPECTFULLY SUBMITTED this 23rd day of January, 2025.

PERKINS COIE LLP

By: */s/Gregory F. Miller*

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Attorneys for Amazon.com Inc.

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on January 23, 2025, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 23rd day of January, 2025.

June Starr
June Starr

No. 1037309

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RUTH SCOTT, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MIKAEL SCOTT, A DECEASED INDIVIDUAL; JEFF MUHLEMAN, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TYLER MUHLEMAN, A DECEASED INDIVIDUAL; AND CINDY CRUZ, INDIVIDUALLY,

Petitioners,

v.

AMAZON.COM, INC., A DELAWARE CORPORATION,

Respondent.

MARY-ELLEN VIGLIS, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DEMETRIOS VIGLIS, A DECEASED INDIVIDUAL; JAMES PASSANNANTI, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AVA PASSANNANTI, A DECEASED INDIVIDUAL; AND ANNETTE GALLEGO, INDIVIDUALLY,

Petitioners,

v.

AMAZON.COM, INC., A DELAWARE CORPORATION,

Respondent.

Amazon's Supplemental Appendix

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APP.

THE HONORABLE JOSEPHINE WIGGS
Hearing Date: July 26, 2024
Hearing Time: 9:00 a.m.
With Oral Argument

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ADAM JENKS and MANDY JENKS, individually, and as personal representatives of the ESTATE OF GAGE JENKS, a deceased individual; THOMAS HOERMANN and MARYANN HOERMANN, individually, and as personal representatives of the ESTATE OF PARKER ROSE, a deceased individual; DONALD SPADEL, and CHRYSTINA SPADEL, individually, and as personal representatives of the ESTATE OF DONALD SPADEL, JR., a deceased individual,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware Corporation; and AMAZON.COM SERVICES, LLC, a Delaware Limited Liability Company,

Defendants.

No. 24-2-06395-1 SEA

DECLARATION OF GREGORY F. MILLER IN SUPPORT OF AMAZON'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Perkins Coie LLP
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I, Gregory F. Miller, declare as follows:

1. I am the attorney of record for Defendants Amazon.com, Inc. and Amazon.com Services LLC in this matter. I have personal knowledge of the facts set forth herein.

2. Amazon's Motion to Dismiss shows, at Figure 1, pictures taken by an employee of my office of a bottle of HiMedia Sodium Nitrite that my firm bought on Amazon.com as an exemplar.

a. The exemplar that my firm purchased and that is shown in Figure 1 in the Motion to Dismiss is the same product that Gage Jenks and Donald Spadel, Jr. purchased. I know they are the same because both products have the same Amazon Standard Identification Number (ASIN). An ASIN is the 10-digit alphanumeric identifier for each product offered for sale on Amazon.com.

b. Amazon's business records indicate that the ASIN for the HiMedia Sodium Nitrite purchased with accounts associated with Gage Jenks and Donald Spadel, Jr. is B00DYO6FXA. The ASIN for the exemplar product that my firm purchased is also B00DYO6FXA.

c. The website listing and the physical label of the exemplar product describe the product as "HiMedia GRM417-500G Sodium Nitrite." That matches the listing alleged in Paragraph 7 of the Complaint.

d. The pictures also match the photograph of the HiMedia bottle that Plaintiffs' counsel provided in the First Amended Complaint that they filed in *Scott* v. *Amazon.com, Inc.*, No. 22-2-01739-2 SEA (Jun. 3, 2022), Dkt. #31 at 9.

3. Attached as **Exhibit A** is a true and correct copy of a portion of the product detail page for the HiMedia GRM417-500G Sodium Nitrite. The copy of the product detail page was saved by an employee at my law firm at the time my firm received a letter from Ms.

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Carrie Goldberg announcing her firm's intent to bring a claim against Amazon on behalf of the estate of another decedent who purchased HiMedia GRM417-500G Sodium Nitrite.

a. The website listing describes the product as "HiMedia GRM417-500G Sodium Nitrite." That matches the listing alleged in Paragraph 7 of the Complaint.

4. Amazon's Motion to Dismiss shows, at Figure 2, a screenshot taken by an employee of my office of a bottle of Pro-Cure Sodium Nitrite as displayed on the Amazon.com product detail page at the time my firm received a letter from Ms. Carrie Goldberg announcing her firm's intent to bring a claim against Amazon on behalf of the Estate of Parker Rose.

a. The product detail page describes the product as "Pro-Cure Sodium Nitrite, 2 Pounds, White." That is consistent with Paragraph 7 of the Complaint's allegation that the product is branded as "Pro-Cure Sodium Nitrite."

b. The product detail page lists the ASIN for the product as "B00C92HZKO." That is the same ASIN listed in Amazon's business records for purchases of "Pro-Cure Sodium Nitrite, 2 Pound Jar" for accounts associated with Parker Rose and Donald S. Spadel Jr. And those business records are consistent with Paragraph 7 of the Complaint's allegation that the product was described as "Pro-Cure Sodium Nitrite, 2 Pound Jar."

5. Attached as **Exhibit B** is a true and correct copy of a portion of the Amazon.com product detail page for the Pro-Cure Sodium Nitrite at issue in this case.

a. The product detail page was saved by an employee of my office at the time my firm received a letter from Ms. Carrie Goldberg announcing her firm's intent to bring a claim against Amazon on behalf of the Estate of Parker Rose.

b. The product detail page lists the ASIN for the product as "B00C92HZKO." That is the same ASIN listed in Amazon's business records for purchases

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of "Pro-Cure Sodium Nitrite, 2 Pound Jar" for accounts associated with Parker Rose and Donald S. Spadel Jr. And those business records are consistent with Paragraph 7 of the Complaint's allegation that the product was described as "Pro-Cure Sodium Nitrite, 2 Pound Jar."

6. Attached as **Exhibit C** is a true and correct copy of Commissioner Koh's Ruling Granting Discretionary Review in *Scott* v. *Amazon.com, Inc.*, No. 84933-6-I (Wash. Ct. App. Aug. 17, 2023).

7. Attached as **Exhibit D** is a true and correct copy of Division I's order denying the plaintiffs' Motion to Modify the Ruling Granting Discretionary Review in *Scott* v. *Amazon.com, Inc.*, No. 84933-6-I (Wash. Ct. App. Aug. 17, 2023).

8. Attached as **Exhibit E** is a true and correct copy of Commissioner Johnston's Corrected Ruling Denying Review in *Scott* v. *Amazon.com, Inc.,* No. 102631-5 (Wash. Feb. 12, 2024).

9. Attached as **Exhibit F** is a true and correct copy of Judge McDonald's order granting in part and denying in part Amazon's Motion to Dismiss in *Janus* v. *Amazon.com, Inc.*, No. 23-2-14460-1 SEA (Jan. 25, 2024), Dkt. #27.

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 17th day of May, 2024, in Seattle, Washington.

s/ Gregory F. Miller

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CERTIFICATE OF SERVICE

On May 17, 2024, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Corrie J. Yackulic CORRIE YACKULIC LAW FIRM, PLLC 110 Prefontaine Place South, Suite 304 Seattle, WA 98101 corrie@cjylaw.com **Attorneys for Plaintiffs**	☐ ☐ ☐ ☑ ☑	Via hand delivery Via U.S. Mail, 1st Class, Postage Prepaid Via Overnight Delivery Via Email Via Eservice
Carrie Goldberg Naomi Leeds C.A. GOLDBERG, PLLC 16 Court Street, 33rd Floor Brooklyn, NY 11241 carrie@cagoldberglaw.com naomi@cagoldberglaw.com **Attorneys for Plaintiffs**	☐ ☐ ☐ ☑ ☑	Via hand delivery Via U.S. Mail, 1st Class, Postage Prepaid Via Overnight Delivery Via Email Via Eservice

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

EXECUTED at Seattle, Washington, on May 17, 2024.

June Starr

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EXHIBIT A

Consider these available items

HiMedia GRM4594-500G Sodium Acetate Trihydrate, A.R, 500 g
31
$15.27

HiMedia GRM1420-500G Sodium Thiosulphate Anhydrous, A.R, 500 g
20
$17.68

HiMedia GRM751-500G Sodium Oxalate, A.R, 500 g
2
$21.70

Click image to open expanded view

HiMedia GRM417-500G Sodium Nitrite, A.R, 500 g

Brand: HiMedia

74 ratings

Currently unavailable.

We don't know when or if this item will be back in stock.

- Country Of Origin: India
- Model Number: GRM417-500G
- Item Package Dimension: 0.15" L x 0.15" W x 0.35" H
- Item Package Weight: 1.34922904344 lb

Specifications for this item

Brand Name	HiMedia
Ean	8902729559604
Item Weight	1.37 pounds
Model Number	GRM417-500G
Number of Items	1
Part Number	GRM417-500G
Specification	

See more

See more product details

Report incorrect product information.

Currently unavailable.
We don't know when or if this item will be back in stock.
Deliver to Perkins - Seattle 98101

Add to List

Share

Products related to this item

Sodium Nitrate ⊘ Non-GMO ♥ Gluten-Free ☮ Vegan ✡ OU Kosher Certified - 400g/14oz
20
$26.99 ($26.99/Count)

Sodium Nitrate ⊘ Non-GMO ♥ Gluten-Free ☮ Vegan ✡ OU Kosher Certified - 50g/2oz
104
$9.99 ($5.68/Ounce)

HiMedia MV1142-500G Medium No. 39 Antibiotic HiVeg Assay, 500 g
$147.59

Generic Silver Nitrate High Purity 50 Grams
$95.00

HiMedia MV009-500G Fluid Thioglycollate HiVeg Medium, 500 g
$64.13

Brands related to this category on Amazon

Special offers and product promotions

- **Amazon Business** : Discover discounts and FREE shipping on work supplies. **Register a free business account**

Product Description

Sodium nitrite, A.R. (500G).

Product details

Package Dimensions : 7.52 x 3.5 x 3.5 inches; 1.37 Pounds

Item model number : GRM417-500G

Date First Available : February 19, 2016

Manufacturer : HiMedia Laboratories

ASIN : B00DYO6FXA

Best Sellers Rank: #162,293 in Industrial & Scientific (See Top 100 in Industrial & Scientific)
#189 in Analytical Reagents

Customer Reviews:
74 ratings

Important information

Directions

Laboratory Use Only

Related products with free delivery on eligible orders

Customer Questions & Answers

See questions and answers

EXHIBIT B

Roll over image to zoom in

Pro-Cure Sodium Nitrite, 2 Pounds, White

Visit the Pro-Cure Store

4.1 out of 5 stars 40 | Search this page

Available with a Free Business Account

- A must have for custom curing
- deep natural reddish color into non dyed, salted eggs.
- a must in prawn and shrimp cures.

Report an issue with this product or seller

Available with a Free Business Account

Create a Business Account

Already a business customer? Sign in

WARNING: California's Proposition 65

Product Description

A great anti growth ingredient to add to your egg cure. Also sets a deep natural reddish color into non dyed, salted eggs. Sodium Nitrite is a must in prawn and shrimp cures.

Product information

Technical Details

Item Package Dimensions L x W x H	5.88 x 3.88 x 3.8 inches
Package Weight	0.98 Kilograms
Item Weight	2 Pounds
Brand Name	Pro-Cure
Model Name	Sodium Nitrite
Color	Multi
Material	other
Suggested Users	unisex-adult
Manufacturer	Pro-Cure
Part Number	PC-NIT
Size	2 lb.
Sport Type	Fishing

Additional Information

ASIN	B00C92HZK0
Customer Reviews	4.1 out of 5 stars 40
Date First Available	April 4, 2013

Feedback

Would you like to tell us about a lower price?

Inspiration from this brand

Pro-Cure
Visit the Store on Amazon
+ Follow


Check out these beauties caught with Pro-Cure Bait Scents!


Getting bait ready to process!! Anchovy season!!

Super Gel Butt Juice does it again!


Wow! Look at this monster @hecatecovelodge caught with th…

What a great group! Thanks for taking @procurebaitscents along…

GREGORY

January 23, 2025 - 2:36 PM

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