No. 84933-6-I
(consolidated with No. 85558-1-I)

COURT OF APPEALS, DIVISION I,
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.

PETITION FOR REVIEW

Corrie Yackulic
WSBA #16063
Corrie Yackulic
Law Firm PLLC
110 Prefontaine Place S., #304
Seattle, WA 98104
(206) 787-1915

Carrie Goldberg
Naomi Leeds
C.A. Goldberg, PLLC
16 Court Street, 33rd Floor
Brooklyn, NY 11241
(646) 666-8908

Philip A. Talmadge
WSBA #6973
Gary W. Manca
WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioners

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A. IDENTITY OF PETITIONERS

Petitioners are the grieving parents and estates of four vulnerable people to whom Amazon.com, Inc. ("Amazon"), with the knowledge it would likely be used for self-harm, sold high purity sodium nitrite ("SN").

B. COURT OF APPEALS DECISION

Division I's November 25, 2024 published opinion is in the Appendix.

This case has been before this Court before. Commissioner Johnston ruled that Division I committed obvious error in granting discretionary review in Cause No. 102631-5 ("Ruling") at 5, but he declined review, predicting: "there is a possibility the case will end up here eventually." Ruling at 10 n.2. *See* Appendix.

Amazon promoted, sold, and delivered high-purity SN, an invariably lethal chemical with no household uses, in its web market place. Amazon *knew for years* that minors and young adults considering self-harm were buying this lethal poison on

Amazon.com and were ingesting it and then dying in a painful and gruesome manner. Nevertheless, Amazon continued promoting and selling SN to vulnerable people with predictable results: excruciating pain followed by death.

On review of trial court decisions denying CR 12(b)(6) dismissal,[1] Division I correctly rejected Amazon's contention that a product defect is an essential predicate to a seller liability claim under the Washington Product Liability Act, RCW 7.72 ("WPLA"). Op. 14 ("There is no defective product predicate anywhere in the text of the WPLA that restricts liability for the negligence of a product seller."). It also correctly ruled that RCW 7.72.040(1)(a) preserves claims against product sellers for common law *negligence*, analyzing specific common law duties arising out of the *Restatement (Second) of Torts*; the *Restatement* plainly animated "negligence" under RCW 7.72.040(1)(a).

[1] Three other Washington trial courts denied CR 12(b)(6) motions by Amazon. A chart of all pending SN suicide cases against Amazon is in the Appendix.

However, the court also misapplied some of those duty principles, as will be noted *infra*.

Division I ultimately reversed the trial court decisions, applying a "suicide rule," an immunity, based on its incorrect belief that a duty may not arise out of promoting/aiding suicide or that suicide is a superseding cause as a matter of law. In doing so, lamenting that its hands were tied by this Court's "archaic" precedents, Division I essentially invited this Court to grant review to address that causation issue. Op. 25, 28.

This case presents significant public policy issues of statewide consequence that this Court should address. In addition to the legal issues that compel this Court's review, prudential factors argue for review. RAP 13.4(b)(4). As noted *supra*, there are at least 9 other cases of a similar nature involving 23 vulnerable people's suicides, awaiting this Court's decision. Those other cases have been stayed by the parties' agreement or court order. The Ninth Circuit has also stayed its decision in *McCarthy v. Amazon.com* (Cause No. 23-35584), pending this

Court's decision. *See* Appendix.

Division I's published opinion on the suicide rule and duty merits this Court's review. RAP 13.4(b)(1), (2), (4).

C. ISSUES PRESENTED FOR REVIEW

1. Does Washington law reject the *Restatement (Second) of Torts* § 281 and instead apply a "suicide rule" that either finds no duty when a defendant facilitates/promotes another's suicide or treats such a suicide as a superseding cause as a matter of law?

2. For purposes of negligent entrustment under the *Restatement* § 390, must a defendant visualize the plaintiff's incapacity in order for a duty to exist?

3. Is a duty owed under the *Restatement* § 388 when a product seller supplies an industrial strength poison for which there is no household use to vulnerable people?

D. STATEMENT OF THE CASE

Division I's opinion addresses the facts and procedure below, op. 2-9, but certain points bear emphasis.

- Amazon is the world's largest retailer and supplied SN on its website at a very low price and with quick delivery to any consumer. CP 213-45;

- Pure SN is an industrial grade poison that looks like salt and has no household uses; its ingestion invariably results

in death. CP 390, 400-01;

- Amazon has never restricted access to SN to adults[2] or commercial buyers, steps that would have prevented the suicides in these cases. CP 213-45;

- Amazon affirmatively escalated the suicidal mindset of the decedents through its acts of promoting and selling them the poison; and most importantly, by home delivering it to their doorsteps. CP 213-45, 379-417;

- Amazon's algorithm for SN on its website routed consumers to a book ("Amazon edition") on how to die by suicide using SN, scales to weigh the poison, and anti-emetics to prevent the consumer from vomiting it up. CP 225-26, 394-95, 413;

- Amazon knew from the suppliers of SN themselves that its ingestion was lethal. CP 392-94;

- Amazon was aware that Sanctioned Suicide, a group that advocates suicide, also promoted SN purchased from Amazon, as a means of suicide. CP 196, 215, 381, 393, 410;

- Amazon knew as early as 2018 from grieving parents that young people were using SN from its store to die by suicide, CP 214-15, 236, 281, 392, but it did not stop selling the poison until 2022, and it has never promised to permanently remove the poison from its website. CP 215;

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[2] *See McCarthy v. Amazon.com*, 679 F. Supp. 3d 1058 (W.D. Wash 2023) (16 year-old Kristin Jonsson was able to set up an Amazon account, contrary to Amazon policy, and to buy SN).

- After 2018, Amazon received a letter from Congress about SN and youth suicides, CP 414-15 (*see* Appendix), was aware that foreign governments had banned or restricted SN sales because of its use for suicides, CP 145, and was aware of a New York *Times* investigation of SN and youth suicides. CP 242, 414 (*see* Appendix);

- Amazon's competitors, eBay and Etsy, removed SN from their websites in 2019 and 2020 respectively, CP 226, 396-97, 402, and Loudwolf, one of Amazon's SN suppliers, stopped selling SN on Amazon's site, when youth suicides by SN ingestion became known. CP 383;

- Far from being resolutely committed to completing suicide, several young victims called parents or 911 after ingesting SN, or otherwise evidenced a desire to stop the process of the poison. CP 239, 382, 407-08;

- Amazon never issued warnings, nor did SN bottles warn, that ingestion of even a small amount of the poison would result in the consumer's agonizing and *irreversible* death of the user in 20 minutes. CP 235, 382-83, 400.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[3]

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[3] CR 12(b)(6) motions are granted *sparingly*, *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984), only when beyond a reasonable doubt the families could not prove any set of facts, including hypothetical facts, that would justify recovery. *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

(1) WPLA Product Seller Liability

This case addresses an issue of first impression for this Court – the proper construction of seller liability under RCW 7.72.040.[4] By its express language,[5] RCW 7.72.040(1)(a) provided for *negligence* claims against sellers. WPI 110.07 (pattern jury instruction on seller negligence); *Huntington v. Smoke City for Less, LLC*, 2023 WL 2031423, *4 (E.D. Wash. 2023) ("[F]or negligence claims arising from RCW 7.72.040(1)(a), courts apply a standard no different than common law negligence." (collecting cases)). As will be noted *infra*, Division I correctly recognized that duty under *Restatement* §

[4] Division I correctly rejected Amazon's arguments, derived from the federal district court's *McCarthy* decision, that a "defect" in a product is a necessary predicate to an RCW 7.72.040(1)(a) claim, the WPLA "preempts" common law negligence claims against sellers, or that common law principles do not animate the term "negligence" in RCW 7.72.040(1)(a).

[5] *Federal Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019) (statute's express language is bedrock principle of statutory construction).

281 was present under RCW 7.72.040(1)(a), but misstated other facets of the common law negligence duty owed by Amazon here.

Division I did not analyze in detail what the Legislature meant when it employed the common law phrase "negligence" in RCW 7.72.040(1)(a).[6] In enacting RCW 7.72.040, the Legislature only relieved sellers of *strict* liability that had been applied to sellers under the *Restatement (Second) of Torts* § 402A in *Seattle-First National Bank v. Tabert*, 86 Wn.2d 145, 154, 542 P.2d 774 (1975). Otherwise, the Legislature *preserved* common law negligence in RCW 7.72.040(1)(a): "If the non-manufacturing product seller was negligent, it will bear the

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[6] Resting on a "common law foundation," *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 761, 389 P.3d 517 (2017), the WPLA preserved the common law to the extent not expressly abrogated by the WPLA. RCW 7.72.020(1). *See* Appendix. This is consistent with this Court's general principle that a statute purporting to abrogate a common law principle requires the Legislature to do so expressly. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008).

burden of liability under the standards governing negligence." *Senate Journal* at 632.[7]

Given this proper context, this Court should grant review to address the so-called suicide rule and the scope of a seller's negligence under RCW 7.72.040(1)(a). RAP 13.4(b)(1), (2), (4).

(2) Washington Does Not Have a Suicide Immunity Rule

Division I erred in determining that a "suicide immunity" rule applies in Washington. Op. 18-19, 22-28. Whether treated as a duty issue or causation issue, Washington does not immunize any person, including product sellers, who knowingly aids in another's suicide or supplies the instrumentality of a

[7] The WPLA's robust legislative history, including the Senate Select Committee's section-by-section analysis of the WPLA in the *Senate Journal*, S. Journal, 47th Leg., Reg. Sess. 616, 632 (1981) ("*Senate Journal*"), and the contemporaneous article written by the WPLA's prime legislative sponsor, who also chaired that Senate committee. Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. Puget Sd. L. Rev. 1 (1981), *available at* https://digitalcommons.law.seattleu.edu/sulr/vol5/iss1/1/ (last accessed Dec. 24, 2024), supports that interpretation.

victim's death.

Division I recognized that Washington law on causation and suicide is "archaic" and conflicting, op. 25-26, and essentially invited this Court to grant review. Op. 28, 30-31. Division I ignored settled Washington law on superseding cause, as Division II held in another suicide-related case in *Adgar v. Dinsmore*, 26 Wn. App. 2d 866, 530 P.3d 236 (2023), *review denied*, 2 Wn.3d 1014 (2024). Review is merited. RAP 13.4(b)(1), (2), (4).

(a) Duty

Division I adopted the view that persons have no duty "to prevent suicide," based on its erroneous reading of *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940 (1996), *review denied*, 131 Wn.2d 1016 (1997),[8] a split 2-1 decision that predates this

[8] Despite *Webstad*, Washington courts recognize that a defendant has a duty of reasonable care to protect another person from suicide when a special relationship exists. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 644, 645, 244 P.3d 924 (2010) (plurality) (jailer duty to inmate); *Hunt v. King County*, 4 Wn.

Court's decisions on duty under *Restatement* § 281 and the development of Washington superseding cause principles. Commissioner Johnston correctly noted that *Webstad* was *distinguishable*. Ruling at 8-9.

In *Webstad*, the parties had been "romantically involved," and the defendant, a prominent politician, previously employed the decedent. While drunk, the decedent called the defendant and told him that "she was going to take some pills." 83 Wn. App. at 861. On those facts, the estate argued that the parties had a special relationship that triggered the politician's affirmative duty to stop her and to render aid. Plainly, he did not supply the *instrumentality of death* that increased or created the risk of suicide, as was true here, and the *Webstad* majority accordingly concluded: "the law provides no general duty to protect others from self-inflicted harm." *Id.* at 866.

App. 14, 481 P.2d 593, *review denied*, 79 Wn.2d 1001 (1971) (county negligently allowed psychotic patient to escape and commit suicide by jumping out of window).

But unlike the defendant in *Webstad*, Amazon *knowingly* promoted and supplied the instrumentality of death to vulnerable people, delivering SN to their homes. Since *Webstad*, this Court has developed its *Restatement* § 281 jurisprudence and refined its perception of young people's brain development that limits their ability to appreciate risk.[9] Amazon had a duty to refrain from enhancing the foreseeable risk of harm to persons with whom it interacted. *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019) ("[E]very individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others."); *Mancini v. City of Tacoma*,

[9] Young people contemplate dangerous and reckless acts without appreciating or intending the outcomes—even if those outcomes may appear obvious to mature adults. Youth is often characterized by immaturity, impetuosity, and failure to appreciate risks and consequences. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 322, 482 P.3d 276 (2021); *In re Stevens*, 200 Wn.2d 531, 554, 519 P.3d 208 (2022). Neuroscientific studies support the view that the parts of the adolescent brain involved in behavior control mature well into a person's twenties. *Monschke*, 197 Wn.2d at 321; *State v. O'Dell*, 183 Wn.2d 680, 691-92, 358 P.3d 359 (2015).

196 Wn.2d 864, 885-86, 479 P.3d 656 (2021); *Nunley v. Chelan-Douglas Health Dist.*, __ Wn. App. 2d __, 558 P.3d 513, 520 (2024).

Despite *Webstad*'s view that there allegedly is no duty to *prevent* a suicide, there *is* a duty not to promote/aid it; it's a *crime* to promote/aid suicide in Washington under RCW 9A.36.060; a person is guilty of a felony when he/she knowingly causes or aids another person to attempt suicide. *See also*, RCW 70.245.200(3) (Washington's Death with Dignity Act carves out civil liability for negligence as to suicide). Given this clear Washington public policy, the statute supports a related tort duty. RCW 5.40.050.[10] Critically, unreferenced by Division I, the *Webstad* majority focused on the absence of language in RCW 9A.36.060 regarding prevention of suicides, as a basis for its decision. 83 Wn. App. at 866. RCW 9A.36.060 supports a duty not to aid

[10] Logic, common sense, justice, policy, and precedent animate a duty in tort. *Centurion Props. III LLC v. Chicago Title Ins. Co.*, 186 Wn.2d 58, 65, 375 P.3d 651 (2016).

another's suicide.[11]

Division I misread *Webstad* on duty. Its analysis is inconsistent with this Court's *Restatement* § 281 jurisprudence. Review is merited. RAP 13.4(b)(1).

(b) Superseding Cause as a Matter of Law

Division I also believed that this Court's archaic case law arguably required it as an intermediate appellate court to treat suicide as a superseding cause of the young people's deaths here as a matter of law. Op. 23-28. It erred, particularly where it failed to cite this Court's well-established superseding cause precedents. Review is merited. RAP 13.4(b)(1), (2).

Division I erred when it ruled that causation could be decided as a matter of law; causation is generally a fact question,

[11] Not only does Division I fail to address the *Webstad* court's reliance on RCW 9A.36.060's language to discern no duty to *prevent* suicide, Division I observes in a footnote, op. 23 n.16, that the statute is not "strong enough" to support a duty not aid suicides. That was not Division I's decision. *The Legislature* set that policy, and it is for a jury to decide if its breach is negligence. RCW 5.40.050.

unsuited for disposition on a summary judgment motion, let alone a CR 12(b)(6) motion. *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 818 P.2d 1337 (1991); *O'Connell v. MacNeil Wash Sys., Ltd.*, 2 Wn. App. 2d 238, 254-56, 409 P.3d 1107 (2017).

Division I relied on this Court's old cases that evidenced an antiquated understanding of mental illness. *Arsnow v. Red Top Cab Co.*, 159 Wash. 137, 292 P. 436 (1930); *Orcutt* v. *Spokane County*, 58 Wn.2d 846, 364 P.2d 1102 (1961). Op. 24-25. There, the risk of self-harm was not the basis for the duty that the defendant breached. Rather, the decedents suffered accidental physical injuries by negligent drivers in automobile wrecks, and the injured persons died years later by suicide. *Arsnow*, 159 Wash. at 138; *Orcutt*, 58 Wn.2d at 848-49. Thus, the deaths in those cases were indirect and remote in time from the incidents that made the defendants liable, and death by suicide was tangential to the risks of harm that made the defendants negligent.

Arsnow/Orcutt essentially address when the causal chain

is broken by a superseding cause. But those early attempts to apply causation principles to suicides should not result in this Court, decades later, fashioning a general suicide rule that bars all cases involving suicide even when the defendant acted knowingly to supply the instrumentality of the victim's death. Amazon's conduct was not accidental as in *Arsnow/Orcutt*. The harm of SN ingestion by vulnerable people was eminently foreseeable by Amazon when it *knew* SN was being used for suicides by vulnerable people.

Division II's *Adgar* decision, *supra*, is instructive. There, a water district employee left a truck running with keys in the ignition and a troubled man stole it. He then drove the truck into oncoming traffic expressly intending to commit suicide, but instead, he severely injured the plaintiff. Division II held that the district owed the plaintiff "a duty of care to protect him from [the troubled man's] criminal conduct because the [district staffer's] affirmative acts exposed him to a recognizable high degree of risk of harm, which a reasonable person would have taken into

account." 26 Wn. App. 2d at 875. Moreover, analyzing *Arsnow*, *Orcutt*, and *Webstad*, the court rejected the notion that suicide constituted a superseding cause as a matter of law. *Id.* at 885-86. Instead, the court applied this Court's traditional principles on superseding cause. *Id.* at 885.

Ordinary principles of superseding causation apply here, but Division I failed to even cite them. Intervening cause, including the element of foreseeability, is a question of fact. *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975). An intervening act constitutes a superseding cause that breaks the causal chain only if: 1) the intervening act created a *different type of harm* than otherwise would have resulted from the actor's negligence; (2) the intervening act was *extraordinary* or resulted in extraordinary consequences; (3) the intervening act *operated independently* of any situation created by the actor's negligence." *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 812, 733 P.2d 969 (1987) (applying *Restatement (Second) of Torts* § 442). *See also*, *Albertson v. State*, 191 Wn. App. 284, 297, 361 P.3d 808

(2015).

Not only did Division I misread *Arsnow/Orcutt/Webstad* to create an immunity, its decision puts Washington outside the mainstream of American law that rejects such an antiquated "suicide rule." Division I's decision tethers Washington to the past. In 1881, the U.S. Supreme Court determined that a defendant could not be liable for an injured person later dying by suicide, reasoning that suicide "was not the natural and probable consequence" of the defendant's negligence in causing a train wreck. *Scheffer v. Railroad Co.*, 105 U.S. (15 Otto) 249, 252, 26 L. Ed. 1070 (1881). Other courts followed suit, ruling "suicide is an unforeseeable consequence of a defendant's negligence, and therefore the efficient or superseding cause of death." Alex B. Long, *Abolishing the Suicide Rule*, 113 Nw. U. L. Rev. 767, 783 & n.121 (2019) ("hereinafter Long) (summarizing and collecting cases). This principle became known as "the suicide rule." *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 440 (7th Cir. 2009) (applying Illinois law).

Now, society's more sophisticated understanding of suicide has broken free of the misconceptions underpinning this old rule. Courts have reformed this archaic rule accordingly in a wave of decisions. Long, *supra*, at 812-820 & nn.310-61 (discussing and collecting cases). Doctrinally, courts have recognized that a suicide's role in causation turns on ordinary principles of foreseeability and superseding causation, not a blanket immunity. *See id.* at 812-13 ("Implicit in these decisions is the recognition that traditional foreseeable scope-of-risk analysis is sufficient to address the vast majority of these cases without relying upon the fiction that suicide is a superseding cause as a matter of law."). For example, in Tennessee, a seller that negligently supplied ammunition to a suicidal person was liable when the suicide was foreseeable. *Rains v. Bend of the River*, 124 S.W.3d 580, 594 (Tenn. App. 2003). In Missouri, that state's high court concluded that a doctor may be liable for suicide following a botched spinal surgery. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 303, 308 (Mo. 2011).

The Missouri court pointed to the insights of "[m]odern psychiatry." *Id.* at 308. The Nevada Supreme Court agreed. *See Bourne v. Valdes*, 559 P.3d 361, 365 (Nev. 2024) ("If the medical provider's conduct is proven to fall below the standard of care, then 'the crucial inquiry is whether the defendant's negligent conduct led to or made it reasonably foreseeable that the deceased would commit suicide.'" (quoting *White v. Lawrence,* 975 S.W.2d 525, 530 (Tenn. 1998)); Long, *supra*, at 812-820 & nn.310-61 (discussing and collecting cases). Division I's opinion places Washington in conflict with these tort law reforms.

This Court has already recognized that suicide does not relieve a defendant of liability for breaching its duty when suicide was one of the risks encompassed by the duty: "The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability." *Gregoire*, 170 Wn.2d at 641 (quotation omitted). A "suicide rule" undermines the suicide-prevention policies that justify a duty in the first place. "Courts

must be willing to look past the boilerplate of the traditional suicide rule and be willing to recognize the special facts that may be present that make suicide the kind of harm that the defendant foreseeably risked through his negligence." Long, *supra*, at 813.

Review is merited. RAP 13.4(b)(1), (2), (4).

(3) The Families Stated Cognizable Negligence Claims

Particularly at this CR 12(b)(6) stage, the families stated "negligence" claims against Amazon under RCW 7.72.040(1)(a). In determining that Amazon had a duty under common law negligence principles, this Court is guided by, not necessarily bound by, *Restatement* principles that assist the Court in analyzing duty. Division I correctly recognized that Amazon owed the families a *Restatement (Second) of Torts* § 281 duty,[12] op. 22, but it erred in limiting that duty's scope, and in finding

[12] "Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts." *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013) (citing § 281 cmts. c, d). This duty requires a defendant to use reasonable care to avoid creating or increasing the risk of harm to another.

no proximate cause as to that duty. Op. 23-28. But it also misstated Amazon's *Restatement* § 390 duty, op. 19-22, and failed to address its *Restatement* § 388 duty.

(a) *Restatement* § 281

Amazon enhanced the risk of harm twice over: First, through promoting, selling, and delivering[13] a lethal chemical to teenagers and young adults contemplating suicide; and, second, by suggesting a suicide "package deal" of other implements and a manual. CP 394-95, 413.

Like Division I, op. 15-17, Amazon will no doubt attempt to pigeon hole this case as one of failure to warn alone. But that's wrong. The families have vigorously argued Amazon's broader negligence in promoting, selling, and delivering SN, given the clear-cut notice to Amazon of its lethality from bans/restrictions in other countries, notice from parents, lawyers, lawmakers, and

[13] Amazon increased the risk of suicide by using its "Prime" offering to expeditiously deliver the poison to the front doorsteps of individuals it knew were likely to be suicidal.

the media, its competitors' removal of the poison from their online stores, and Loudwolf's removal of it from Amazon's own site. At a minimum, Amazon could have limited SN sales to industrial consumers or adults, but Amazon *did nothing for years* despite growing evidence of vulnerable people committing suicide with it.

Amazon also failed to adequately warn customers. The adequacy of warnings is ordinarily a question of fact that should not be resolved on a Rule 12(b)(6) motion. *See, e.g.*, *Ayers*, 117 Wn.2d at 795. Whether a risk is open and obvious is a fact question, too. *Schuck v. Beck*, 19 Wn. App. 2d 465, 485-86, 497 P.3d 395 (2021).

Division I prematurely upheld dismissal of the families' claims regarding Amazon's negligent warnings. A warning must "catch the attention of persons who could be expected to use the product; to apprise them of its dangers and to advise them of the measures to take to avoid those dangers." *Little v. PPG Indus.*, 92 Wn.2d 118, 122, 594 P.2d 911 (1979). Amazon knew *for*

years that it was supplying this industrial-grade poison to vulnerable consumers—suicidal adults and suggestible, immature teenagers—who were dying painfully from it, and the adequacy of its warnings is a jury question. *Ayers*, 117 Wn.2d at 755.

The irreversibly lethal quality of SN, an obscure industrial-grade chemical that looks no more noxious than salt, is neither obvious nor appreciated by vulnerable people. The warning label on Loudwolf's bottle said only that it was an "irritant." Its true danger was downplayed by the label's false statement that it had "hundreds" of household uses. The HiMedia-branded bottle also downplayed the danger, recommending calling "a poison center or doctor/physician" if swallowed, implying, falsely, that any intervention could timely reverse the fate of a person who ingested SN. An appropriate warning, commensurate with the risk and likely customers, including minor children with suicidal ideation, would have included clear, obvious, and unequivocal disclosures about the

poison's irreversible lethality when ingested without a special antidote, and the intense physical suffering and hideous physical manifestations that ingestion causes as organs are deprived of oxygen.

Division I correctly recognized the existence of a *Restatement* § 281 duty here, but erroneously restricted its scope by applying a suicide immunity rule and failing to appreciate that the families' arguments encompassed more than failure to warn. Review is merited.

(b) *Restatement* § 390

Division I erred in its treatment of negligent entrustment under *Restatement* § 390 requiring a defendant to "visualize" incapacity face-to-face.[14] Op. 21.[15] That has *never* been

[14] That "incapacity" involves the person's heedlessness, recklessness, or vulnerability. *Cameron v. Downs,* 32 Wn. App. 875, 878, 650 P.2d 260 (1982).

[15] This "face-to-face" visualization was based in part on Division I's apparent "fact finding" that mentally ill people are able to "mask" their mental illness from others. Op. 21. Division

Washington law. While in *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982), the gun shop sold a gun to a visibly intoxicated man who used it to shoot and kill his wife, visualization was not required by this Court in *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 64 P.3d 1244 (2003), where an agricultural producer entrusted organic wastes to a farmer, expecting that they would be dumped on the farmer's premises. The producer never "saw" the incompetent farmer. Amazon was on notice that vulnerable persons, including minors, were purchasing SN and using it for self-harm.

§ 390 is pertinent here as Commissioner Johnston correctly discerned, noting the facts in this case are more like *Bernethy* than *Webstad*. Ruling at 8-9.

Review is merited. RAP 13.4(b)(1).

(c) *Restatement* § 388

Division I's opinion never addressed a *Restatement* § 388

I cites no authority for its musings on the abilities of the mentally ill.

duty regarding its supplying of a harmful chattel, recognized by this Court. *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 423 P.2d 926 (1967); *Mele v. Turner*, 106 Wn.2d 73, 79, 720 P.2d 787 (1986).

Under § 388, Amazon had a duty to be aware of what it was marketing. *See, e.g.*, *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 806-07, 613 P.2d 780 (1980) (applying § 388 to lease of forklift). The duty extends not only to the person or entity that directly receives the chattel, but anyone in the class that the supplier should expect to use the chattel. *See, e.g.*, *Gall v. McDonald Indus.*, 84 Wn. App. 194, 203-04, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997); *Schuck*, *supra* (a recycling center worker stated a negligence cause of action against a scrap dealer who provided a metal cylinder that contained chlorine gas to the center without any warnings and the cylinder exploded, injuring the worker).

Amazon had a duty to warn vulnerable consumers of the hazards of industrial-grade SN and then again about the dangers

of the Amazon-promoted "kit."[16]

Review is merited on this duty issue. RAP 13.4(b).

F. CONCLUSION

This case presents important issues under the WPLA and tort law generally for this Court's review. This Court should decide the nature of a WPLA seller liability negligence claim under RCW 7.72.040(1)(a), and it should decide if a "suicide rule" immunity principle applies in Washington tort law. Moreover, this case is one of many involving the horrendous deaths of vulnerable persons resulting from Amazon's cavalier attitude about selling known poison in its virtual marketplace; those other cases await this Court's resolution here.

For these reasons, this Court should grant review, RAP

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[16] Amazon had a duty not to inflict emotional distress on the decedents' family members. *Hegel v. MacMahon*, 136 Wn.2d 122, 426-27, 960 P.2d 424 (1998); *Gain v. Carroll Mill Co.,* 114 Wn.2d 254, 261, 787 P.2d 553 (1990). Division I dismissed the parents' NIED claims because they were derivative of their children's claims. Op. 27 n.17. Because Division I erred, those NIED claims must be restored on remand.

13.4(b), and affirm the trial court decisions.

This document contains 4,913 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of December 2024.

Respectfully submitted,

/s/ Philip A. Talmadge
Philip A. Talmadge
WSBA #6973
Gary W. Manca
WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Corrie Yackulic
WSBA #16063
Corrie Yackulic
Law Firm PLLC
110 Prefontaine Place S., #304
Seattle, WA 98104
(206) 787-1915

Carrie Goldberg
Naomi Leeds
C.A. Goldberg, PLLC
16 Court Street, 33rd Floor
Brooklyn, NY 11241
(646) 666-8908

Attorneys for Petitioners

APPENDIX

APPENDIX TO
PETITION FOR REVIEW

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CHAPTER 27

[Engrossed Senate Bill No. 3158]

TORT ACTIONS——PRODUCT LIABILITY——CONTRIBUTORY NEGLIGENCE——CONTRIBUTION

AN ACT Relating to tort actions; amending section 2, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.020; creating new sections; adding new sections to Title 7 RCW as a new chapter thereof; adding new sections to chapter 4.22 RCW as a part thereof; and repealing section 1, chapter 138, Laws of 1973 1st ex. sess. and RCW 4.22.010.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. PREAMBLE. Tort reform in this state has for the most part been accomplished in the courts on a case–by–case basis. While this process has resulted in significant progress and the harshness of many common law doctrines has to some extent been ameliorated by decisional law, the legislature has from time to time felt it necessary to intervene to bring about needed reforms such as those contained in the 1973 comparative negligence act.

The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.

Of particular concern is the area of tort law known as product liability law. Sharply 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. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.

It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.

RCW 7.72.010:

For the purposes of this chapter, unless the context clearly indicates to the contrary:

(1) Product seller. "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products. The term "product seller" does not include:

(a) A seller of real property, unless that person is engaged in the mass production and sale of standardized dwellings or is otherwise a product seller;

(b) A provider of professional services who utilizes or sells products within the legally authorized scope of the professional practice of the provider;

(c) A commercial seller of used products who resells a product after use by a consumer or other product user: PROVIDED, That when it is resold, the used product is in essentially the same condition as when it was acquired for resale;

(d) A finance lessor who is not otherwise a product seller. A "finance lessor" is one who acts in a financial capacity, who is not a manufacturer, wholesaler, distributor, or retailer, and who leases a product without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor; and

(e) A licensed pharmacist who dispenses a prescription product manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed prescribing practitioner if the claim against the pharmacist is based upon strict liability in tort or the implied warranty provisions under the uniform commercial code, Title 62A RCW, and if the pharmacist

complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules as provided in RCW 7.72.040. Nothing in this subsection (1)(e) affects a pharmacist's liability under RCW 7.72.040(1).

(2) Manufacturer. "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).

(3) Product. "Product" means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce. Human tissue and organs, including human blood and its components, are excluded from this term.

The "relevant product" under this chapter is that product or its component part or parts, which gave rise to the product liability claim.

(4) Product liability claim. "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling

of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; negligence; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

(5) Claimant. “Claimant” means a person or entity asserting a product liability claim, including a wrongful death action, and, if the claim is asserted through or on behalf of an estate, the term includes claimant's decedent. "Claimant" includes any person or entity that suffers harm. A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller.

(6) Harm. “Harm” includes any damages recognized by the courts of this state: PROVIDED, That the term “harm” does not include direct or consequential economic loss under Title 62A RCW.

RCW 7.72.020:

(1) The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.
(2) Nothing in this chapter shall prevent the recovery of direct or consequential economic loss under Title 62A RCW.

RCW 7.72.040:

(1) Except as provided in subsection (2) of this section, a product seller other than a manufacturer is liable to the claimant only if the claimant's harm was proximately caused by:

(a) The negligence of such product seller; or

(b) Breach of an express warranty made by such product seller; or

(c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

(2) A product seller, other than a manufacturer, shall have the liability of a manufacturer to the claimant if:

(a) No solvent manufacturer who would be liable to the claimant is subject to service of process under the laws of the claimant's domicile or the state of Washington; or

(b) The court determines that it is highly probable that the claimant would be unable to enforce a judgment against any manufacturer; or

(c) The product seller is a controlled subsidiary of a manufacturer, or the manufacturer is a controlled subsidiary of the product seller; or

(d) The product seller provided the plans or specifications for the manufacture or preparation of the product and such plans or specifications were a proximate cause of the defect in the product; or

(e) The product was marketed under a trade name or brand name of the product seller.

(3) Subsection (2) of this section does not apply to a pharmacist who dispenses a prescription product in the form manufactured by a commercial manufacturer pursuant to a prescription issued by a licensed practitioner if the pharmacist complies with recordkeeping requirements pursuant to chapters 18.64, 69.41, and 69.50 RCW, and related administrative rules.

Restatement (Second) of Torts Section 281:

The actor is liable for an invasion of an interest of another, if:
(a) the interest invaded is protected against unintentional invasion, and

(b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
(c) the actor's conduct is a legal cause of the invasion, and
(d) the other has not so conducted himself as to disable himself from bringing an action for such invasion.

Restatement (Second) of Torts Section 388:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Restatement (Second) of Torts Section 390:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

FILED
11/25/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS 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, Respondents, v. AMAZON.COM, INC., a Delaware corporation, Petitioner.	No. 84933-6-I DIVISION ONE PUBLISHED OPINION
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, Respondents, v. AMAZON.COM, INC., a Delaware corporation, Petitioner.	No. 85558-1-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — The families of four individuals who purchased sodium nitrite on Amazon.com and ingested the substance in order to cause their own death by suicide brought suit against the online retailer. The complaints collectively present causes of action against Amazon for (1) products liability and negligence under the Washington product liability act[1] (WPLA), (2) common law negligence, (3) negligent infliction of emotional distress (NIED), and (4) violations of the Washington Consumer Protection Act[2] (CPA). The trial courts denied Amazon's CR 12(b)(6) motions to dismiss and this court granted discretionary review of those orders. As Washington law does not impose a duty on sellers to protect against intentional misuse of a product and binding case law directs that suicide under these circumstances breaks the chain of causation, the claims under the WPLA, for common law negligence, and for NIED all fail as a matter of law. Separately, the two plaintiffs with a cause of action under the CPA are unable to establish a prima facie claim. Accordingly, we reverse and remand for the trial court to enter orders dismissing both complaints.

FACTS[3]

These consolidated cases arose from the deaths of four individuals, Mikael Scott, Tyler Muhleman, Demetrios (DJ) Viglis, and Ava Passannanti (collectively,

[1] Ch. 7.72 RCW.
[2] Ch. 19.86 RCW.
[3] Because this case comes to us after denial of a CR 12(b)(6) motion to dismiss, the facts as set out herein are derived from the allegations in the complaints. Further, they are presumed to be true for purposes of our analysis under this procedural posture. *See Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007).

the purchasers[4]), who each died by suicide after intentionally ingesting sodium nitrite that they had ordered from Amazon.com. Sodium nitrite is a white and yellowish crystalline powder that is the most prevalent drug used to treat cyanide poisoning. Apart from sodium nitrite's legitimate usage in laboratory research and medical treatments, it is also used as a meat preservative and an ingredient in curing salts at a diluted level of approximately 6 percent purity. The brands of sodium nitrite that were purchased in these cases, HiMedia Sodium Nitrite and Loudwolf Sodium Nitrite, are 98 percent and 99.6 percent pure, respectively, and both brands had explicit warnings on their labels that the products were dangerous and toxic.[5] The chemical compound is highly soluble and "most people who use [s]odium [n]itrite for suicide," as occurred here, "consume it orally after mixing it with water."

On December 21, 2020, Mikael Scott purchased HiMedia Sodium Nitrite and a small scale on Amazon.com; both arrived two days later at the house that he lived in with his mother, Ruth, in Guadalupe County, Texas. Mikael, who was 27 years old at the time, had been diagnosed with severe anxiety disorder, schizoaffective disorder, bipolar I disorder, and agoraphobia approximately 10

[4] While we use "the purchasers" to refer to the plaintiff decedents, their estates, and their parents collectively, we will use last names when addressing causes of action specific to particular complaints.

Similarly, as many of the parties share a last name, we may occasionally refer to individuals by their first names for clarity. No disrespect is intended.

[5] The HiMedia brand included warnings about the danger of ingesting the sodium nitrite. The label had a symbol of skull and crossbones along with the words "Danger," "Toxic if swallowed," and "IF SWALLOWED: Immediately call a POISON CENTER or doctor/physician." This brand of sodium nitrite was manufactured by HiMedia Laboratories and sold online by Amazon.

Similarly, the Loudwolf label identifies that product as "a high-purity, reagent grade chemical" and warns that it is "INDUSTRIAL & SCIENTIFIC," "TOX," "HAZARD Oxidizer. Irritant." Loudwolf Sodium Nitrite was supplied by Duda Diesel and sold on Amazon.com starting in June 2017.

years earlier. On the night of December 26, Ruth worked a night shift, and at around midnight, Mikael texted her saying that he was ill and vomiting. When Ruth offered to come home Mikael told her that he was feeling better, so she stayed at work. Ruth returned the following morning and found vomit all over her bedroom. Mikael was laying on his bed in the fetal position and had passed away. Later that night, Ruth looked at Mikael's phone and saw that the internet browser was open to a website titled "Sanctioned Suicide." The complaint Ruth filed specifically asserts that "[t]he thread on Mikael's phone provided instructions from user '@Marktheghost' on how to die from [s]odium [n]itrite."

On May 22, 2021, when Tyler Muhleman was 17 years old, he purchased HiMedia Sodium Nitrite and Tagamet brand acid reducer on Amazon.com. The sodium nitrite arrived at Tyler's parent's house in San Jose, California on May 24. Tyler's parents, Jeff Muhleman and Cindy Cruz, invited him to go out to dinner with them the following night, but he declined and stayed home. When his parents returned home about two hours later, they found Tyler lying unconscious in his bedroom, his body blocking the door. His parents attempted to resuscitate him with cardiopulmonary resuscitation and called 911, but Tyler ultimately died. There was a bottle of HiMedia Sodium Nitrite in Tyler's room next to a glass with a spoon in it that was nearly full of a clear liquid. His death was ruled a suicide by sodium nitrite.

In late March 2020, DJ Viglis[6] ordered Loudwolf Sodium Nitrite from Amazon.com to be delivered to his mom's house in Henrico County, Virginia.

[6] The complaint establishes that DJ's first name is Demetrios, but uses DJ to refer to him throughout. Accordingly, we also use his preferred name.

When the global COVID-19[7] pandemic started that March, 19-year-old DJ "became isolated at home and depressed." After ordering the sodium nitrite, "DJ made up a story to tell his mom[, Mary-Ellen,] so that she wouldn't become suspicious if she happened upon the delivery." DJ told his mom the he had ordered the sodium nitrite and was "planning to learn how to cure meat with it since they were stuck at home." The product arrived at the Viglis' home on or around March 30, 2020. On April 3, DJ, Mary-Ellen, and her partner cooked and ate dinner together. That night, Mary-Ellen "asked DJ if she could sleep in his room so that she'd be there for him if he needed to talk." He declined her offer, but told his mom that he loved her and thanked her for loving him. In the middle of the night, DJ ingested sodium nitrite and Mary-Ellen's partner found him in the bathroom the following morning. DJ was pronounced dead shortly after responding law enforcement officers arrived at the home.

On December 8, 2020, Ava Passannanti, who was 18 years old, logged onto Amazon.com and purchased Loudwolf Sodium Nitrite under the name "Holly." The package from Amazon arrived at Ava's family home in Tucson, Arizona a week later. Ava had deferred enrollment at a university due to the COVID-19 pandemic and she resided with her parents, James Passannanti and Annette Gallego, and younger sister while starting an online college program. In the weeks leading up to her death, Ava "seemed to be doing well and demonstrated a positive outlook on life," and was participating in a therapy program for her mild depression. On February 23, 2021, Ava and her mom spent the day together at home. The

[7] 2019 novel coronavirus infectious disease.

following morning, Annette woke Ava up and made sure she took her medicine[8] and ate before leaving the house. When Ava drove away, instead of going to therapy, she stopped at a grocery store and purchased cups, spoons, water, mouthwash, toothpaste, a glass measuring cup, and Skittles candy. She then drove about fifteen minutes away and parked her car. Ava ingested sodium nitrite, and after doing so, called a 911 dispatcher, explained what she had done, and provided her location. Ava was crying while asking for help, and about five minutes into the call, she became unresponsive. While law enforcement arrived on the scene shortly thereafter to transport her to the hospital, Ava did not survive. Her cause of death was listed as sodium nitrite toxicity.

Scott & Muhleman Complaint

On February 3, 2022, Ruth Scott, individually, and as personal representative of the estate of Mikael Scott, filed a complaint against Amazon based on the death of her son who took his own life by ingesting HiMedia Sodium Nitrite that he purchased from Amazon.com. There were two causes of action in the complaint, "Count I: Products Liability," which included claims under the Washington Products Liability Act[9] (WPLA), and "Count II: Negligent Infliction of Emotional Distress." On March 22, Amazon moved to dismiss the complaint under CR 12(b)(6), primarily arguing that the claims were barred by Washington law as "there is no liability for another's decision to commit suicide unless the defendant

[8] The complaint does not describe the medication, so it is unclear if it was part of her treatment plan for depression or prescribed for some other unrelated medical condition.

[9] Ch. 7.72 RCW.

caused a mental state that rendered the suicide involuntary" or "had a special relationship giving rise to the duty to prevent the decedent's suicide."

On May 3, Scott sought leave from the court to amend the complaint to add (1) one claim of negligence against Amazon, (2) other plaintiffs and (3) further factual allegations in support of the new plaintiffs and claim. Amazon opposed the motion to amend the complaint, but following a hearing on May 20, the trial court granted leave to amend and continued the hearing on Amazon's motion to dismiss to June 17.

On May 20, Scott filed the first amended complaint, which added plaintiffs Jeff Muhleman, individually and as personal representative of the estate of Tyler Muhleman, and Cindy Cruz, individually. The amended complaint provided causes of action numbered as, "Count I: Products Liability," "Count II: Negligence," "Count III: Negligent Infliction of Emotional Distress." On June 3, Amazon moved to dismiss the Scott and Muhleman amended complaint. It again contended that "Washington law precludes any cause of action against Amazon based on [the purchasers'] unilateral decisions to take their own lives." Additionally, Amazon asserted the WPLA "statutorily bars [p]laintiffs from applying their novel theories of liability to a product seller like Amazon."

The court heard argument from the parties on June 17 and reserved ruling on the motion to dismiss. Over six months later, on December 30, 2022, the trial court entered an order that denied Amazon's CR 12(b)(6) motion to dismiss.

Shortly thereafter, Amazon filed a motion for RAP 2.3(b)(4) certification on two controlling questions: whether Washington state recognizes a duty for

manufacturers and sellers to refrain from lawfully selling a non-defective product to an individual who intentionally misuses the product to commit suicide, and whether the WPLA supports claims for failure to warn or consumer expectation tests when the user disregards the warning. Following a hearing on the motion, the court denied Amazon's motion for certification of the questions.

Viglis & Passannanti Complaint

On March 30, 2023, Mary-Ellen Viglis, individually, and as personal representative of the estate of Demetrios Viglis, James Passannanti, individually, and as personal representative of the estate of Ava Passannanti, and Annette Gallego, individually, filed a complaint against Amazon. Both DJ and Ava had purchased Loudwolf Sodium Nitrite on Amazon.com for use in suicide and ingested it for that purpose. Viglis and Passannanti alleged that Amazon was "liable for promoting and aiding in DJ's and Ava's suicides." The causes of action in their complaint are, "Count I: Products Liability," which includes claims of negligence under the WPLA directed at Amazon as a product seller, "Count II: Negligence," under common law theories, and "Count III: Violation of the Consumer Protection Act."[10]

On May 3, Amazon filed a CR 12(b)(6) motion to dismiss the complaint. According to Amazon, the Viglis and Passannanti complaint "fails to state a claim for relief under Washington law because of [the] well-established rules against imposing civil liability on third parties for another's suicide." Amazon argued that "binding precedent precludes the [c]omplaint from establishing the essential duty

[10] Ch. 19.86 RCW.

and proximate cause elements of [p]laintiffs' tort claims." It also contended both the WPLA and CPA claims failed as a matter of law. On June 16, following a hearing on the motion to dismiss, the trial court denied Amazon's motion and explained that "summary judgment will be an appropriate place to deal with the case as discovery's proceeded."

In both cases, Amazon filed notices in this court seeking discretionary review of the orders denying its CR 12(b)(6) motions to dismiss the complaints. A commissioner of this court granted discretionary review and consolidated the cases under No. 84933-6-I.[11]

ANALYSIS

"A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo." *Cutler v. Phillips Petrol. Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). "Dismissal is proper only when we can determine, beyond a reasonable doubt, that there are no facts that would justify recovery." *Birnbaum v. Pierce County*, 167 Wn. App. 728, 732, 274 P.3d 1070 (2012). "The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims." *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Courts should grant CR 12(b)(6) motions "'sparingly and with care' and 'only in the

[11] Scott and Muhleman filed a petition to modify the commissioner's ruling, but a panel of judges denied the motion under RAP 17.7.

Scott and Muhleman then sought discretionary review by our state Supreme Court under RAP 13.3(a) and 13.5 and argued that this court committed "obvious error." Despite several assertions in the order of the Supreme Court commissioner that the Court of Appeals likely committed obvious error, one of the express bases for granting direct review under RAP 13.5(b)(1), he denied their motion for discretionary review.

unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 767, 102 P.3d 173 (2004) (quoting *Cutler*, 124 Wn.2d at 755).

I. Washington Product Liability Act

Enacted in 1981, the WPLA was "designed to address a liability insurance crisis which could threaten the availability of socially beneficial products and services." *Wash. Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 850, 774 P.2d 1199, 779 P.2d 697 (1989). The statute "preempts any claim or action that previously would have been based on any 'substantive legal theory except fraud, intentionally caused harm or a claim or action brought under the [CPA]." *Bylsma v. Burger King Corp.*, 176 Wn.2d 555, 559, 293 P.3d 1168 (2013) (quoting RCW 7.72.010(4)). The "WPLA creates a single cause of action for product-related harms that supplants previously existing common law remedies." *Graybar Elec.*, 112 Wn.2d at 860. A product liability claim is broadly defined to encapsulate the following:

> [A]ny claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any claim or action previously based on: Strict liability in tort; *negligence*; breach of express or implied warranty; breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or other claim or action previously based on any other substantive legal theory except fraud, intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW.

RCW 7.72.010(4) (emphasis added).

As our Supreme Court has explained, the "WPLA is the exclusive remedy for product liability claims." *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 409, 282 P.3d 1069 (2012). Because common law remedies for product-related harms are preempted by the WPLA, a product liability claim "cannot be maintained on a common law negligence theory." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 323, 858 P.2d 1054 (1993). "Insofar as a negligence claim is product-based, the negligence theory is subsumed under the WPLA product liability claim." *Macias*, 175 Wn.2d at 409. Consequently, the purchasers' causes of action based on common law negligence theories are expressly preempted by the WPLA.

"The substantive liabilities of product manufacturers and sellers towards individuals or entities asserting product liability claims are specifically delineated in the statute." *Graybar Elec.*, 112 Wn.2d at 850. Manufacturers are subject to liability if the plaintiff can show their harm was proximately caused by negligence "in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided." RCW 7.72.030(1). Manufacturers may be strictly liable if the plaintiffs can show their harm was proximately caused by a product that is "not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW." RCW 7.72.030(2). Here, none of the purchasers allege that Amazon was the manufacturer of the sodium nitrite.

Rather, each suit asserts Amazon as a "product seller," and liable as such, under RCW 7.72.010(1).[12]

Under the WPLA, a product seller is subject to liability only if the plaintiff's harm was *proximately caused* by one of the following:

> (a) The negligence of such product seller; or (b) Breach of an express warranty made by such product seller; or (c) The intentional misrepresentation of facts about the product by such product seller or the intentional concealment of information about the product by such product seller.

RCW 7.72.040(1). Relying on RCW 7.72.040(1)(a) and (c), the purchasers allege that Amazon was negligent as a product seller and that it intentionally concealed information about the sodium nitrite on its website.

A. Intentional Concealment and Misrepresentation Claim

Scott and Muhleman contend that Amazon "intentionally concealed warnings and other information on the bottle on its website" and "intentionally removed and concealed negative product reviews that warned consumers of the products use for death by suicide." Similar claims are made in the Viglis and Passannanti complaint. Amazon points to the plain language of the statute and asserts that the purchasers fail to state a claim upon which relief can be granted because they do not allege any "intentional misrepresentation *of facts about the*

[12] However, Scott and Muhleman also allege that Amazon is liable as a manufacturer pursuant to RCW 7.72.030(1)(b) and (c). While RCW 7.72.040(2) provides five specific circumstances in which a product seller may be held liable as a manufacturer, the purchasers do not identify or argue any of them in either their complaint or briefing before this court. As noted, the plaintiffs identify the manufacturers of the sodium nitrite in their complaints and only allege the fact that Amazon is the product seller. Thus, we treat Amazon as a product seller subject to liability under the WPLA on the bases provided in RCW 7.72.040(1).

product" or "the intentional concealment *of information about the product*." RCW 7.72.040(1)(c) (emphasis added). Amazon is correct.

In response, the purchasers reference allegations in the complaint such as, "Amazon's concealment that it does in fact provide independent accounts to minors," "Amazon concealing from vendors that the product was being purchased by children and vulnerable adults," and "Amazon misrepresenting that it is advisable and recommended that people who purchase sodium nitrite should also purchase anti-vomit medication, a suicide manual[13] with instructions on death via sodium nitrite, and a personal scale." These allegations, while jarring, simply do not fall within the scope of RCW 7.72.040(1)(c).

Again, for a seller to be liable under this provision of the WPLA, the statute requires an intentional misrepresentation or concealment "of facts about *the product*" or "information about *the product*." *Id.* (emphasis added). Assuming the truth of these allegations as we must within the framework of CR 12(b)(6), the facts of Amazon providing accounts to minors, recommending other purchases along with sodium nitrite, or failing to disclose that vulnerable adults and children had purchased sodium nitrite, are not sufficient to state a claim under the plain language of RCW 7.72.040(1)(c). More critically, even if the purchasers could show intentional misrepresentation or concealment by Amazon about sodium nitrite, such a claim would still fail because proximate cause does not exist as a matter of law under these circumstances.

[13] There is no allegation in either suit that any of the purchasers in these cases also bought a "suicide manual" on Amazon.com.

B. Seller Negligence Claim

Amazon contends that liability is precluded on the basis of seller negligence because the WPLA requires a defective product in order for liability for negligence to attach to a seller under RCW 7.72.040(1)(a). As the "sodium nitrite was obviously not defective," Amazon avers the purchasers cannot state a viable claim under this theory.

"We review questions of statutory interpretation de novo." *Money Mailer, LLC v. Brewer*, 194 Wn.2d 111, 116, 449 P.3d 258 (2019). Our "fundamental objective is to ascertain and carry out the [l]egislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). "We look first to the text of a statute to determine its meaning." *Dep't of Transp. v. City of Seattle*, 192 Wn. App. 824, 837, 368 P.3d 251 (2016). "If the plain language is subject to only one interpretation, our inquiry is at an end." *Id*.

There is no defective product predicate anywhere in the text of the WPLA that restricts liability for the negligence of a product seller. RCW 7.72.040(1)(a) simply provides that a seller other than a manufacturer is liable to the claimant based on the "negligence of such product seller." When interpreting a statute, we "must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.,* 150 Wn.2d 674, 682, 80 P.3d 598 (2003). While Amazon looks beyond the plain language of the statute into pre-WPLA case law and legislative history for support of this unwritten rule, we need not continue the inquiry as the plain language of the WPLA is only subject to one interpretation

here. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Because the WPLA expressly provides that product sellers may be liable for negligence and the legislature did not include any defective product requirement in the text of the statute, Amazon's contention here is unavailing.

Amazon primarily relies on *McCarthy v. Amazon.com, Inc.*, where a federal district court addressed nearly identical claims as those raised here and held that a seller cannot be liable for negligence under the WPLA "unless the product at issue was defective." 679 F. Supp. 3d 1058, 1069 (W.D. Wash. 2023). Not only is the district court's decision not binding on this court, it is also unpersuasive on this specific issue as the holding was based in part on McCarthy's "failure to dispute the issue" that WPLA negligence claims are limited to those involving defective products. *Id.* Here, the purchasers do contest Amazon's proposed rule and their opposition is sound.[14]

Though we disagree with the *McCarthy* court's interpretation of the WPLA on that point, the district court rejected the WPLA negligence claim against Amazon on multiple grounds and others are applicable here. Regarding McCarthy's negligence claim against Amazon for failure to warn, the district court

[14] Amazon also relies on *Knott v. Liberty Jewelry & Loan, Inc.* in support of its assertion that a product seller cannot be liable for negligence under the WPLA unless the product is defective. 50 Wn. App. 267, 748 P.2d 661 (1988). Knott brought various claims under the WPLA and common law theories seeking to hold the "manufacturers, assemblers, distributors and sellers of Saturday Night Specials" liable because the decedent was intentionally shot by someone who had purchased that make of firearm. *Id.* at 271-72.

Knott alleged that the handguns were defective by nature of their "unreasonably unsafe design" and were distributed and sold negligently, but this court rejected all of Knott's proffered bases of liability and affirmed the dismissal of his claims. *Id.* at 272. The court explained that "'[g]uns may kill; knives may maim; liquor may cause alcoholism; but the mere fact of injury does not entitle the [person injured] to recover . . . there must be something wrong with the product.'" *Id.* at 276 (some alterations in original) (quoting *Baughn v. Honda Motor Co.,* 107 Wn.2d 127, 147, 727 P.2d 655 (1986)). This court held that there must be "a showing that the injury-causing product was defective before liability can be imposed." *Id.*

cited numerous Washington cases supporting the conclusion that there is no duty to warn if the danger is obvious or known. *Id.* at 1070; *see also Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 438, 739 P.2d 1177 (1987) (noting no duty to warn of obvious danger under both negligence and strict liability theories); *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 835, 906 P.2d 336 (1995) (observing danger of injury from trampoline use obvious and manufacturer or seller need not warn of obvious danger); *Mele v. Turner*, 106 Wn.2d 73, 78, 720 P.2d 787 (1986) (holding owner not required to warn user of danger of putting hands under running lawnmower when danger was obvious and known). The federal district court then provided multiple examples of Washington courts "consistently hold[ing] that a warning label need not warn of 'every possible injury.'" *McCarthy*, 679 F. Supp. 3d at 1070 (quoting *Weslo,* 79 Wn. App. at 840); *see also Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 141-42, 727 P.2d 655 (1986).

The *McCarthy* court concluded that the warnings on the sodium nitrite were sufficient as the "label identified the product's general dangers and uses, and the dangers of ingesting [s]odium [n]itrite were both known and obvious." 679 F. Supp. 3d at 1070. As the decedents in that case had "deliberately sought out [s]odium [n]itrite for its fatal properties, intentionally mixed large doses of it with water, and swallowed it to commit suicide," the court stated that they "necessarily knew the dangers of bodily injury and death associated with ingesting [s]odium [n]itrite." *Id.* at 1070-71 ("[U]nder Washington law, suicide is 'a voluntary willful choice' by a person who 'knows the purpose and the physical effect of the suicidal act.'" (quoting *Webstad v. Stortini*, 83 Wn. App. 857, 866, 924 P.2d 940 (1996))).

Additionally, the *McCarthy* court held the plaintiffs' negligent seller claim failed under the WPLA because, "even if Amazon owed a duty to provide additional warnings as to the dangers of ingesting sodium nitrite, its failure to do so was not the proximate cause" of the deaths at issue. *Id*. at 1071-72.

Although the WPLA does not bar claims against Amazon for negligence on the basis that the sodium nitrite it sold was not defective, the purchasers' claims premised upon seller negligence theories fail as a matter of law nonetheless. To establish a cause of action for negligence they must show, "(1) the existence of a duty owed to the complaining party; (2) a breach thereof; (3) a resulting injury; and (4) a proximate cause between the claimed breach and resulting injury." *Hansen v. Wash. Nat. Gas Co.,* 95 Wn.2d 773, 776, 632 P.2d 504 (1981). Here, the purchasers can neither show that Amazon owed them the specific duty they allege nor establish that Amazon proximately caused their deaths by suicide. Even assuming the truth of the allegations in their complaints or considering hypothetical facts, because these elements cannot be satisfied as a matter of law, the trial court erred when it denied Amazon's CR 12(b)(6) motions to dismiss.

1. Duty as Seller

"The most common vehicle for circumscribing the boundaries of liability has been the court's definition of duty." *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). The "determination of whether an actionable duty was owed to the plaintiff represents a question of law to be decided by the court." *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). Whether a duty exists "'depends on mixed considerations of logic, common sense, justice, policy, and

precedent.'" *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 763, 344 P.3d 661 (2015) (internal quotation marks omitted) (quoting *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 P.3d 283 (2005)). "In general, courts will find a duty where reasonable persons would recognize it and agree that it exists." *Tallariti v. Kildare*, 63 Wn. App. 453, 456, 820 P.2d 952 (1991).

In the negligence claims in each of the complaints, the purchasers allege that Amazon owed duties to (1) "exercise reasonable care," (2) "not assist or aid in a suicide attempt," and (3) "not supply a substance for the use of another whom it knew or had reason to know to be likely to use it in a manner involving unreasonable risk of physical harm to [themselves]."

In *Webstad*, Division Two of this court plainly held that "the law provides no general duty to protect others from self-inflicted harm, i.e., suicide." 83 Wn. App. at 866. "Suicide is 'a voluntary willful choice determined by a moderately intelligent mental power, which knows the purpose and the physical effect of the suicidal act.'" *Id*. (internal quotation marks omitted) (quoting *Hepner v. Dep't of Lab. & Indus.*, 141 Wash. 55, 59, 250 P. 461 (1926)). As such, "the person committing suicide is in effect both the victim and the actor." *Id*. "In fact," the court explained, "no duty exists to avoid acts or omissions that lead another person to commit suicide unless those acts or omissions directly or indirectly deprive that person of the command of [their] faculties or the control of [their] conduct." *Id*.

The purchasers attempt to distinguish *Webstad* on the basis that, there, the "negligence theories rested on very different grounds from the families' negligence claims here." Despite the clear language of *Webstad* that "no duty exists to avoid

acts or omissions that lead another person to commit suicide," *id.*, absent circumstances not present here, the purchasers claim in briefing that "*Webstad* does not foreclose Amazon having a duty arising from affirmatively supplying a killer chemical to young and vulnerable people." They attempt to cultivate this duty through various sources.

The purchasers first aver that Amazon had a "duty as a supplier of chattel" under *Restatement (Second) of Torts* § 390 (Am. L. Inst. 1965), which provides:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of [their] youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to [themselves] and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 933, 653 P.2d 280 (1982). Relying on *Bernethy*, in which the Supreme Court adopted § 390, the purchasers contend that "Amazon owed these vulnerable people a duty not to supply them with sodium nitrite—a harmful chattel—that Amazon knew was being used for self-harm."

In *Bernethy*, the plaintiffs filed a wrongful death action against the owners of a gun shop and alleged that they negligently sold a firearm to a visibly intoxicated individual, Robert, who used the gun to kill his wife, Phoebe. *Id.* at 930-31. Robert had been drinking heavily for the previous 24 hours and was obviously intoxicated when he left Phoebe and friends at a bar and walked to the gun store to purchase a rifle. *Id.* at 931. Robert recalled "wetting his pants before entering the store, falling and staggering as he walked into the store and having to rest his arms on the counter to support himself." *Id.* The owner of the store, Walt Failor, was

working as the salesperson. *Id.* After Robert inspected a rifle and agreed to purchase it, Failor laid the weapon on the counter next to Robert, along with ammunition. *Id.* When Failor turned away to complete the required firearm transaction record, Robert picked up the rifle and ammunition and walked out of the store. *Id.* Robert walked one-half block back to the tavern and shot Phoebe. *Id.* at 931, 935. He was arrested immediately and his blood alcohol level was ultimately determined to have been .23 percent at the time of the incident. *Id.* at 932.

In its consideration of the existence of the seller's duty, the *Bernethy* court looked at the criminal statute prohibiting the sale of pistols to incompetent people, RCW 9.41.080, and noted that it "reflects a strong public policy in our state that certain people should not be provided with dangerous weapons." *Id.* at 932-33. Adopting the *Restatement (Second) of Torts* § 390, the court explained that the basis for "imposing this general duty is that one should not furnish a dangerous instrumentality such as a gun to an incompetent." *Id.* at 933. Further, the *Bernethy* court noted it had already recognized an analogous cause of action for negligent entrustment of a vehicle to an intoxicated individual and stated it is common sense that "'one cannot let or loan to another, knowing that other to be reckless and incompetent, and in such a condition that he would be reckless and incompetent, an instrumentality which may be a very dangerous one in charge of such a person.'" *Id.* at 934 (quoting *Mitchell v. Churches*, 119 Wash. 547, 552-53, 206 P. 6 (1922)). As the *Bernethy* court emphasized, the owner of the gun shop "placed a gun and ammunition in the hands of a visibly intoxicated person." *Id.* at 935.

Here, patently distinct from the circumstances in *Bernethy*, there was no face-to-face transaction between Amazon and the purchasers of sodium nitrite that might have alerted the online retailer to the fact that any one of them may be "an incompetent." And more critically, regarding *Restatement (Second) of Torts* § 390, our Supreme Court has explained that the kinds of "incompetency" that fall within this rule are provided in the illustrations and include the following:

> [G]iving a loaded gun to a feeble minded child of 10; permitting a 10-year-old child, who has never driven an automobile before, to drive one; permitting one's chauffeur, who is in the habit of driving at excessive speeds, to drive the car on an errand of his own; lending one's car to a friend to drive to a dance, knowing that the friend habitually becomes intoxicated at dances; and renting an automobile to a person who says that he plans to drive it from Boston to New York in 3 hours to win a bet.

Mele, 106 Wn.2d at 77. The circumstances in the cases now before this court are vastly distinct from any of those provided in § 390. Frankly, even if these sodium nitrite purchases had been in-person transactions, the reality of mental illness or an acute mental health crisis is that many who suffer are able to mask their suicidal intentions even from loved ones who know them intimately, so there can be no inference that an online seller would have been able to detect or understand any possible risk of the purchaser's misuse of the product for self-harm. The purchasers do not engage with this significant factual distinction between their cases and the illustrations of § 390 applicability set out in case law.[15]

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[15] Though the purchasers did not allege this theory in their complaints, they now contend on appeal that they had a special relationship with Amazon that gave rise to a protective duty under the *Restatement (Second) of Torts* § 315, which provides the following:

> There is no duty so to control the conduct of a third person as to prevent [them] from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

The purchasers also contend Amazon had a duty to exercise reasonable care under *Restatement (Second) of Torts* § 281. This is true. As our Supreme Court has explained, "Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts." *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013) (citing RESTATEMENT (SECOND) OF TORTS § 281 cmts. c, d). However, the existence of Amazon's duty of reasonable care to the purchasers here does not render the company responsible for their self-harm. Once a legal duty is established, the "scope of that duty is determined by analyzing the foreseeability of the harm to the plaintiff" and it can be decided as a matter of law "where reasonable minds cannot differ." *Lee v. Willis Enters., Inc.,* 194 Wn. App. 394, 401-02, 377 P.3d 244 (2016). While Amazon had a duty to exercise reasonable care to avoid the foreseeable consequences of its acts, the scope of that duty plainly does not extend to "protect[ing] others from self-inflicted harm" or

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(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 200, 943 P.2d 286 (1997). The purchasers cite to *Nivens*, wherein the court held "a special relationship exists between a business and an invitee *because the invitee enters the business premises* for the economic benefit of the business." *Id*. at 202 (emphasis added). *Nivens* explained that "the business has a duty to take reasonable steps to prevent harm to its invitees *from the acts of third parties on the premises*, if such acts involve imminent criminal conduct or reasonably foreseeable criminal behavior." *Id*. at 207 (emphasis added). Here, again, none of the purchasers entered any physical premises owned by Amazon, and thus, there was no special relationship giving rise to a duty pursuant to § 315 that may have otherwise required Amazon to protect the decedents from the actions of others while they were on Amazon's property.

Amazon responds in briefing that application of the special relationship and duty from *Nivens* here would require this court to extend the duty of shop owners to protecting invitees from dangers that are not on the premises and from harms that may occur days after an invitee has left the property. We reject this exceedingly broad proffered extension of the law.

The purchasers also attempt to establish duty via special relationship by relying on *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 244 P.3d 924 (2010), which focuses on the relationship between a "jailer" and inmates based on the custodial role and control exercised. The purchasers cannot demonstrate that Amazon had any control over them while they visited its website, much less so much authority as to create an "affirmative duty to provide" for their "health, welfare, and safety," such that this body of case law would control here. *Id*. at 639.

to "avoid[ing] acts or omissions that lead another person to commit suicide unless those acts or omissions directly or indirectly deprive that person of the command of [their] faculties or the control of [their] conduct." *Webstad*, 83 Wn. App. at 866. Even if we were to disagree with *Webstad* and extend the duty of sellers so as to encompass the purchasers' causes of action here, on the basis that Amazon was obligated to protect them from self-harm and not "facilitate" their suicides, the purchasers' claims still fall short. Regardless of how the purchasers frame the proffered duty and attempt to broaden its scope in order to encapsulate the tragic harm here, there can be no proximate cause of the deaths of these individuals. This is true because our Supreme Court's binding precedent from long-established and controlling case law forecloses proximate cause by deeming the act of suicide a superseding cause.[16]

2. Proximate Cause

The purchasers cannot show that Amazon's actions or omissions proximately caused these devastating suicides under the circumstances presented.

"Proximate cause is an essential element of an actionable negligence claim." *Adgar v. Dinsmore*, 26 Wn. App. 2d 866, 880, 530 P.3d 236 (2023), *review denied,* 2 Wn.3d 1014 (2024). It has two components: "cause in fact and legal

[16] The purchasers also attempt to establish a "duty of care when a product seller directly supplies the means of death by suicide" and rely on RCW 9A.36.060(1), which provides that a person is "guilty of promoting a suicide attempt when [they] knowingly cause[] or aid[] another person to attempt suicide." Even if this criminal statute was strong enough to support a corresponding duty in tort law for liability against Amazon in this case, which it is not, the purchasers' claims independently fail because they cannot establish proximate cause.

causation." *Baughn*, 107 Wn.2d at 142. "Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). "Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend." *Id*. at 779. Legal causation requires courts to determine "whether liability *should* attach as a matter of law given the existence of cause in fact." *Id*. Our Supreme Court determined nearly a century ago that liability does not attach to a death by suicide unless either there was a special relationship, which cannot be established here, 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.

The latter scenario was addressed in *Arsnow v. Red Top Cab Co.*, wherein the decedent was seriously injured by the defendant's taxicab, and shortly after the accident, committed suicide. 159 Wash. 137, 138-39, 292 P. 436 (1930). The surviving spouse brought a wrongful death action against the cab company based on the suicide but the *Arsnow* court held that, as a matter of law, the death "cannot be held to have been the proximate result of the injuries which he suffered at the time of the collision with defendant's taxicab." *Id*. at 162. *Arsnow* established the rule of proximate cause in such cases as follows:

> [L]iability *may* exist on the part of a person, situated as is defendant here, where the death of the person injured results from [their] own act committed in delirium or frenzy and without consciousness or appreciation on [their] part of the fact that such act will in all reasonable probability result in [their] death, or when the act causing the death is the result of an uncontrollable impulse resulting from a mental condition caused by the injuries.

Id. at 156 (emphasis added). The court went on to recognize that "[t]he rule that one who negligently injures another is not liable to one in plaintiff's situation, under the circumstances now before us, may seem harsh, but, if the law were otherwise, a logical extension of the rule would lead to many difficulties." *Id.* at 160.

After carefully considering out-of-state authority provided by both Arsnow and the taxi company, the court held that

> [t]he doctrine of proximate cause is well established in our system of jurisprudence, and is a salutary and, indeed, a necessary rule. It seems to us clear that the defendant herein can only be held liable to plaintiff by an extension of the rule applicable to such cases, and we do not feel that the law as it now stands should be so extended.

Id. at 161. Just over 30 years later, our Supreme Court plainly declared that "[t]he rule stated in the *Arsnow* case was and still is correct." *Orcutt v. Spokane County*, 58 Wn.2d 846, 850, 364 P.2d 1102 (1961). *Arsnow* remains undisturbed, and accordingly, this intermediate appellate court is bound to follow the controlling case law of our Supreme Court. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.,* 158 Wn.2d 566, 578, 146 P.3d 423 (2006); *State v. Gore,* 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Expressly adopting the archaic language of the *Restatement of the Law of Torts*, § 455 (Am. L. Inst. 1934) in describing various mental health conditions, the court in *Orcutt* articulated the rule as follows:

> "If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to [themselves] while delirious or insane, if [their] delirium or insanity
>
> (a) prevents [them] from realizing the nature of [their] act and the certainty or risk of harm involved therein, or

> (b) makes it impossible for [them] to resist an impulse caused by [their] insanity which deprives [them] of [their] capacity to govern [their] conduct in accordance with reason."

58 Wn.2d at 850-51. As our Supreme Court explained, "'[W]hen [a person's] insanity prevents [them] from realizing the nature of [their] act o*r controlling* [*their*] *conduct*, [their] suicide is to be regarded either as a direct result and no intervening force at all, or as a normal incident of the risk, for which the defendant will be liable.'" *Id. at* 851 (quoting WILLIAM L. PROSSER, TORTS § 49 (2d ed. 1955)). However, the *Orcutt* court also held that "if the suicide is during a lucid interval, when [they are] in full command of [their] faculties but [their] life has become unendurable to [them], it is agreed that [their] voluntary choice is an abnormal thing, which supersedes the defendant's liability.'" *Id.* at 852 (quoting PROSSER, TORTS § 49).

Here, there is no allegation that Amazon injured any of the purchasers in a manner that "caused a mental condition which resulted in an uncontrollable impulse to commit suicide." *Id*. at 852-53. For Amazon to be liable for these catastrophic deaths under the causes of action presented here, the purchasers must be able to show proximate cause. Even at the CR 12(b)(6) stage, the complaint presents no facts, nor are there hypothetical facts that we can identify, to satisfy the binding standard that "injuries inflicted by the defendant caused the decedent[s] to enter into a state of delirium or frenzy or to become subjected to an insane and uncontrollable impulse to commit suicide, resulting in death at [their] own hand[s]." *Id*. at 853. Because the allegations in the complaints, which we accept as true for purposes of CR 12(b)(6), establish only that the purchasers each

initiated contact with Amazon with the intent to seek out sodium nitrite in order to take their own lives and then knowingly ingested the chemical for that purpose, these facts can only show that they were in command of their faculties and made voluntary choices to commit suicide. Accordingly, their actions supersede any potential liability for Amazon under this legal theory. *Id.* at 852.[17]

While the parties offer competing case law in support of their respective positions on duty and superseding cause, neither identifies the source of the apparent disparity. The purchasers are correct that the duty of Amazon is rooted in the *Restatement*, but Amazon is also correct that the concept of suicide as a superseding cause set out in *Arsnow* controls. The dissonance comes from the fact that the rule articulated in *Arsnow* was adopted from the *Restatement (First) of Torts* § 455, which was published in 1934. *Orcutt*, 58 Wn.2d at 850-51. Amazon has a duty to purchasers under *Restatement (Second) of Torts* § 281, which has been adopted and relied on by our Supreme Court in multiple cases. *See Washburn*, 178 Wn.2d at 757; *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019). However, the authority of our Supreme Court controls over any secondary sources like the *Restatement*. *State v. Jussila*, 197 Wn. App.

[17] This determination also resolves Scott's and Muhleman's claim for negligent infliction of emotional distress (NIED), wherein they argue that "Amazon owed plaintiffs a duty to exercise reasonable care to avoid causing them severe emotional distress." "Bystander negligent infliction of emotional distress claims involve emotional trauma resulting from one person's observation or discovery of another's negligently inflicted physical injury." *Hegel v. McMahon*, 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998). "The bystander theory of recovery is a collateral claim for damages suffered indirectly as the result of the defendant's breach of a duty *owed to the decedent*." *Est. of Lee v. City of Spokane*, 101 Wn. App. 158, 175, 2 P.3d 979 (2000).

Thus, to recover under the bystander theory, as the parents of Mikael and Tyler attempt to do here as plaintiffs in their individual capacities, they must establish that Amazon breached a duty owed to the decedents. *Id.* As discussed, Amazon did not breach any duty owed to the purchasers because the act of suicide was an independent superseding cause, and therefore, the NIED claims fail as a matter of law even under the forgiving standard of CR 12(b)(6).

908, 931, 392 P.3d 1108 (2017) ("We must follow Supreme Court precedence, regardless of any personal disagreement with its premise or correctness."). So, while Amazon has a general duty under the more recent *Restatement (Second)*, that does not control over other case law from our Supreme Court that expressly set aside an exception to liability for negligence where suicide is the superseding cause of the death. Again, as an intermediate appellate court, we may not disturb or disregard binding precedent from our State's high court and must follow its more specific case law directly controlling on the nature of the cause of action presented. Reconciliation of the case law regarding suicide as a superseding cause and the seller's duty under the *Restatement (Second)* is beyond the authority of this court.

II. Washington Consumer Protection Act

The Viglis and Passannanti complaint also pleads a cause of action under our state's CPA. Specifically, they allege that "Amazon's conduct is a violation of the legislation against promoting a suicide attempt, RCW 9A.36.060, and is an unfair or deceptive act in trade or commerce in violation of the [CPA]." According to the complaint, Amazon knew sodium nitrite was commonly purchased for suicide but withheld that information and continued to sell the product. Viglis and Passannanti further contend that Amazon's "marketing of [s]odium [n]itrite and other recommended products to complete suicide" and "delivery of [s]odium [n]itrite to individuals at residential addresses is unlawfully deceptive in violation of the [Consumer Protection] Act." Amazon avers these claims are barred by the CPA's "injury-to-business-or-property requirement."

The CPA made unlawful any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The statute created a right of action for "[a]ny person who is injured in [their] business or property." RCW 19.86.090. To present a prima facie claim under the CPA, plaintiffs must establish the following five elements: "(1) an unfair or deceptive act or practice; (2) in the conduct of trade or commerce; (3) which impacts the public interest; (4) injury to the plaintiffs in their business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered." *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 852, 792 P.2d 142 (1990).

Here, the fourth element is at issue; Amazon contends the claim fails as Viglis and Passannanti do not present any facts, actual or hypothetical, to establish that the purchasers were injured in their business or property. "To state a valid CPA claim, a plaintiff must prove that the injury, separate from any monetary loss, is to business or property." *Ambach v. French*, 167 Wn.2d 167, 174 n.3, 216 P.3d 405 (2009). "Compensable injuries under the CPA are limited to 'injury to [the] plaintiff in [their] business or property.'" *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014) (first alteration in original) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). "Personal injuries, as opposed to injuries to 'business or property,' are not compensable and do not satisfy the injury requirement." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009). "[D]amages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA." *Id.* "Had the [l]egislature intended to include actions

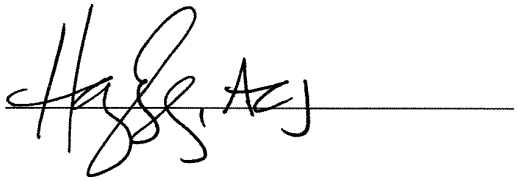
for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than 'business or property.'" *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989). "This limitation clearly excludes stand alone personal injury claims like those for pain and suffering." *Ambach*, 167 Wn.2d at 174. It also "prevents a plaintiff from claiming expenses for personal injuries as a qualifying injury in and of itself." *Id.* at 176 (emphasis omitted).

Although Viglis and Passannanti frame the issue as a mere attempt to recover the purchase price of the sodium nitrite and insist they are not seeking redress for personal injuries, their CPA claim is premised on the same factual allegations against Amazon that form the basis of their causes of action brought under the WPLA. *See id.* at 178-79 (rejecting Ambach's CPA claim for payment of surgery during which she was injured because "what she really seeks is redress for her personal injuries, not injury to her business or property"). The *Ambach* court emphasized that "the CPA was not designed to give personal injury claimants such backdoor access to compensation they were denied in their personal injury suits." *Id.* at 179 n.6. Similarly, here, Viglis and Passannanti use this claim to seek redress for personal injuries and not injury to business or property, and thus, their CPA claim should be dismissed under CR 12(b)(6).

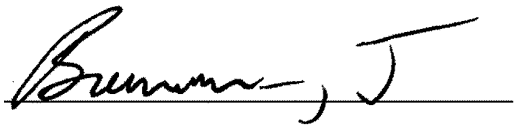
This case presents truly tragic facts about profound loss and illuminates some of the many impacts of the internet on suicidal ideation and mental health generally: the broad availability of instruction about, or support for, suicide, and the previously unfathomable accessibility to instrumentalities of death. It also poses compelling questions about the expansion of corporate liability in the context of

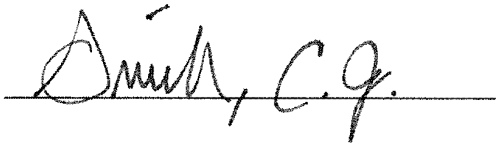
online retailers and algorithmic recommendations. Ultimately, it has highlighted a point in our cultural evolution where the controlling law has yet to adapt to our lived experiences and this intermediate appellate court is without the authority to harmonize them.

Reversed and remanded.



WE CONCUR:





IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RUTH SCOTT, ET AL., Petitioners, v. AMAZON.COM, INC., Respondent.	No. 102631-5 Court of Appeals No. 84933-6-I (consolidated with No. 85558-1-I) CORRECTED RULING DENYING REVIEW

This case arises from tragic and disturbing incidents where young people committed suicide with a chemical cocktail that included sodium nitrite obtained from online retailer Amazon.com. Two groups of petitioners in related cases—Ruth Scott, acting individually and as personal representative of the estate of her late son, Mikael Scott; Jeff Muhleman, acting individually and as personal representative of the estate of his late son, Tyler Muhleman; and Cindy Cruz; and Mary-Ellen Viglis, acting individually and as personal representative of the estate of her late son, Demetrios Viglis; James Passannanti, acting individually and as personal representative of the estate of his late daughter Ava Passannanti; and Annette Gallego (collectively petitioners)—jointly seek discretionary review of a decision by Division One of the Court of Appeals granting discretionary review of King County Superior Court orders denying respondent Amazon.com, Inc.'s (Amazon) motion under CR 12(b)(6) to dismiss petitioners' product liability actions for failure to state a claim. Petitioners claim

discretionary review is warranted because the Court of Appeals committed obvious error that renders further proceedings useless under RAP 13.5(b)(1). That argument is unpersuasive for reasons explained below; therefore, the motion for discretionary review is denied.

Because the superior court ruled on a CR 12(b)(6) motion, the following facts alleged in petitioners' complaint are presumed to be true. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Some of these facts are horrific. Amazon buys and maintains an inventory of industrial-strength sodium nitrite for retail sales to its online customers. Sodium Nitrite is intended ordinarily for scientific and industrial uses. Sodium nitrite is also highly toxic, fatal to a human being if ingested directly in certain amounts.

Due to its lethal properties, ingesting sodium nitrite has become known as a means of committing suicide. At relevant times, Amazon sold sodium nitrite to individual consumers. Amazon did not screen these customers as to age and intended use of the compound. Apparently due to sodium nitrite's association with suicide, Amazon's search algorithm would suggest to a customer buying sodium nitrite that they might be interested in purchasing a suicide manual, scales for measuring the compound, over-the-counter anti-emetic medication for preventing vomiting (a side-effect of ingesting sodium nitrite), and a known antidote to sodium nitrite poisoning. The method of taking one's life with sodium nitrite involves dissolving the needed amount of sodium nitrite in water as advised by online or published sources, drinking the toxic brew, and taking anti-emetic medication to prevent vomiting. Death takes hold in 20 minutes or so. It is a painful and ugly way to die.

Amazon received notice of the link between sodium nitrite and suicide when it received customer reviews imploring it to stop selling it. Such negative reviews were ignored generally, and some of these reviewers were banned from reviewing Amazon

products in future. Certain countries enacted laws or regulations banning or restricting sales of sodium nitrite to individual consumers, but not the United States. Some of Amazon's online sales competitors stopped selling sodium nitrite, possibly due to the suicide issue, but Amazon continued selling it during the relevant time.

The sodium nitrite sold by Amazon during this time had warning labels notifying the purchaser that the product is toxic, and advising that anyone who ingests it to contact health providers or a poison control center; however, the warning labels do not identify the available antidote or advise the purchaser to seek help if they are contemplating self-harm. Amazon did not sell sodium nitrite to individual consumers packaged with the antidote.

Petitioners' loved ones died painful and drawn-out deaths after consuming sodium-nitrite. One of the victims texted his mother while suffering from the effects, apparently expressing fear and regret. Another called 911 begging for help. The body of one decedent blocked his bedroom door, indicating he tried to leave to get help. The decedents were young, ranging in age from 17 to 27.

Petitioner Ruth Scott, the mother of one of the decedents, emailed Amazon about her son's death. An individual employed by or associated with Amazon responded, expressed some fleeting condolences, and invited Scott to submit an employee performance review. The sudden loss of her son was so devastating to Scott that she suffered mental health problems and could no longer work.

Scott and allied plaintiffs sued Amazon under the Washington Product Liability Act (WPLA), chapter 7.72 RCW. Scott in particular alleged negligent infliction of emotional distress. She later amended her complaint to add a claim of common law negligence (*Scott, et al. v. Amazon*, King County Superior Court Cause No. 22-2-01739-2 SEA).

Meanwhile, another group of families sued Amazon under the WPLA, alleging seller negligence, intentional concealment, common law negligence, and violations of the Consumer Protection Act (CPA), chapter 19.86 RCW (*Viglis, et al. v. Amazon*, King County Cause No. 23-2-05719-8 SEA).

In both cases, Amazon moved to dismiss the complaints for failure to state a claim for relief. CR 12(b)(6). The superior court denied both motions and denied Amazon's request for certification for immediate review under RAP 2.3(b)(4).

Amazon sought discretionary review of both orders in the Court of Appeals. RAP 2.3. A Court of Appeals commissioner consolidated the *Scott* and *Viglis* cases and granted discretionary review, reasoning the superior court committed obvious error that renders further proceedings useless. RAP 2.3(b)(1). A panel of judges denied petitioners' motion to modify the commissioner's ruling. RAP 17.7.

Petitioners now seek discretionary review in this court. RAP 13.3(a)(2), (c), (e); RAP 13.5(a). They also ask that the case be transferred to this court. RAP 4.4. Amazon opposes discretionary review and transfer. The parties argued the case at a videoconference hearing on February 7, 2024.

As indicated, petitioners assert discretionary review is justified because the Court of Appeals committed obvious error that renders further proceedings useless. RAP 13.5(b)(1). The Court of Appeals commits "obvious error" within the meaning of RAP 13.5(b)(1) if its decision is clearly contrary to statutory or decisional authority with no discretion involved. *See* I WASHINGTON APPELLATE PRACTICE DESKBOOK, § 4.4(2)(a) at 4-34—4-35 (4th ed. 2016) (interpreting analogous rule under RAP 2.3(b)(1)). Stated another way, the error is obvious because it is plain or manifest. The obvious error also must render further proceedings "useless." *See id.* at 4-36. Or stated more simply, the court "made a plain error of law that markedly affects the course of the proceedings." II WASHINGTON APPELLATE PRACTICE DESKBOOK, § 18.3 at 18-

14 (4th ed. 2016) (discussing RAP 13.5(b)(1)). More generally, interlocutory review is disfavored, appellate courts being very reluctant to insert themselves into superior court proceedings. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010).

Superior courts rarely grant CR 12(b)(6) motions and must be careful in doing so. *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 642 P.2d 793 (1984). The court must not grant a dismissal motion under CR 12(b)(6) unless the court determines beyond a reasonable doubt that the plaintiff cannot prove any set of facts that would justify relief. *Kinney*, 159 Wn.2d at 842. Under this standard, which is rather deferential to the plaintiff, the court presumes the truth of all facts alleged in the plaintiff's complaint, including hypothetical, un-pleaded facts supporting the plaintiff's claims. *Id.*

The Court of Appeals order denying petitioners' motion to modify could be interpreted as an endorsement of the commissioner's apparent view that the WPLA preempts petitioners' negligence claim against Amazon in its capacity as a retailer and distributor of sodium nitrite, or the court simply expressed a desire to review the issue. In any event, the Court of Appeals may have committed obvious error in granting review. The WPLA specifically preserves negligence claims against product sellers. RCW 7.72.040(1)(a); *see City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1102-03 (W.D. Wash. 2017) (recognizing some common law claims against distributor or seller of product may survive under RCW 7.72.040). That is a major component of petitioners' complaint against Amazon. The superior court did not clearly articulate a basis for denying Amazon's CR 12(b)(6) motion in *Scott*, but seemingly agreed that the WPLA does not foreclose petitioners' negligence claims.

Amazon relies heavily on a recent federal district court decision granting its F.R.C.P. 12(b)(6) motion to dismiss similar claims asserted by two other plaintiffs, the parents of teenagers who took their lives with sodium nitrite. *McCarthy, et al. v.*

Amazon, *Inc.*, 2023 WL 4201745 (W.D. Wash.). Of course, this court is not bound by that federal decision. To the extent *McCarthy* may serve as persuasive precedent, it applies a federal civil rule 12(b)(6) standard that is arguably less deferential than the standard applied in Washington courts. *See id.* at *3. Further, the federal court's interpretation of the WLPA as it applies to product sellers is debatable in that the parties there did not dispute that the product at issue must be defective before the seller can be held liable for negligence under the act. *See id.* at *5. That is a disputed issue in this case. In any event, the parties represent that *McCarthy* is currently on appeal to the Ninth Circuit. The parties speculate that the Ninth Circuit may certify a question of Washington law to this court, but we have yet to see that happen.

Moving along, petitioners here assert the product need not be defective in the usual sense. They may have a point. There is no allegation that sodium nitrite is defective with respect to its intended scientific and industrial uses. Here and in *McCarthy*, Amazon relies a great deal on *Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wn. App. 267, 748 P.2d 661 (1988), a case involving a claim against a pawn shop that sold a cheap revolver to a disturbed man who shot and paralyzed a fellow hotel dweller. In *Knott*, Division One rejected the claim that the type of handgun at issue—a so-called "Saturday Night Special" (a cheap and junky handgun)—was by its nature of "unreasonably safe design," quoting the definition of unreasonably safe design set forth in RCW 7.72.030(1)(a). *Id.* at 663-64. The court effectively held that a product liability claim would not lie because the harm likely would have been caused by any type of firearm. *Id.* at 664. The court also rejected the plaintiff's claim of negligent distribution, reasoning there was no common law duty to control the distribution of a nondefective handgun to a general public that would recognize the danger of handguns and would assume the attendant responsibility. *Id.* The Court of Appeals also declined to adopt a common law cause of action for injuries caused by criminal use of certain types of

handguns, reasoning there must be a showing of a defective weapon for liability to attach. *Id.* at 665. On this point, the court followed *Baughn v. Honda Motor Company*, 107 Wn.2d 127, 727 P.2d 655 (1986), where this court rejected a claim that mini-trail bikes were too dangerous to be sold, reasoning liability cannot attach if nothing is wrong with the product. *Id.* at 147.

Knott and *Baughn* are distinguishable. Both cases were decided on summary judgment, meaning there was at least some discovery and opportunity to amend complaints. *Knott* concerned liability in the firearm context, a fraught issue generally. There was also no discussion in that case of the availability of common law negligence claims under RCW 7.72.040. *Baughn* did not involve the WPLA at all, since it concerned incidents that occurred well before the act's effective date, therefore conducting a common law analysis in light of the unique facts in that case.

Further, there is no defective product predicate within the text of RCW 7.72.040(1)(a), which provision expressly allows a negligence claim against a product seller. Petitioners assert Amazon is liable for negligence as a product seller, raising the issue of liability under RCW 7.72.040(1)(a). The Court of Appeals commissioner's ruling contains no mention of RCW 7.72.040(1)(a). In light of the plain text of RCW 7.74.040(1)(a) and the lack of clearly controlling decisional authority, it is fairly debatable whether a functionally defective product is a necessary predicate to an actionable claim of product seller negligence under the WPLA, at least for purposes of surviving a CR 12(b)(6) motion.

What makes this case particularly unique is the way the product was marketed and delivered. No one claims that the sodium nitrite was defective for its originally intended use, much like a cheap handgun is not defective for inflicting death or injury or a mini-trail bike is not defective for traversing off-road terrain. But here, the sodium

nitrite was knowingly[1] put to use for a purpose for which it was not designed: to end the consumer's own life. Again, presuming the truth of petitioners' allegations, Amazon knew this was going on, and its algorithms seemingly encouraged this misuse of the product by way of urging purchase of measuring scales, anti-vomiting medication, an antidote (in case the user changed their mind, one supposes), and a suicide manual. The warning labels may have been fine for conventional use of the product in a scientific laboratory or industrial setting but contained no useful warnings or guidance to someone contemplating whether to consume the toxic stuff to end their life. From a policy standpoint, the "defective product" approach to the product liability question makes no sense in this context.

Amazon also relies on *Webstad v. Stortini*, 83 Wn. App. 857, 924 P.2d 940 (1996), where the Court of Appeals declined to recognize a common law duty to prevent a person from committing suicide or to aid someone in peril. *Id.* at 866. The court also declined to find a special relationship between the decedent and the person with whom she was romantically involved, and who was present when the decedent overdosed, for purposes of creating a duty actionable in negligence. *Id.* at 867-76. But *Webstad* turns on its own facts (the defendant there did not provide the instrumentality of death to the decedent) and petitioners here assert a fairly arguable claim that a special relationship existed between Amazon and its customers. *See Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991) (recognizing a business may have a special relationship with its customers that is protective in nature).

Petitioners for their part rely on *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982), where this court held a gun shop owner was potentially liable for agreeing to sell a firearm to an intoxicated customer who then took the weapon before

[1] I use this term reluctantly in light of the decedents' fragile mental state. No disrespect is intended.

the transaction was completed and a few minutes later shot and killed his wife with it. *Id.* at 933-34. The holding as to liability was grounded on Restatement (Second) of Torts § 390 (1965), which provides that a person who supplies a chattel to another whom the seller knows to be likely to use the item in a manner involving an unreasonable risk of physical harm to the user or another is liable for the resulting harm. *Id.* at 933. Petitioners rely on this section of the Restatement (and others). In this instance Amazon had notice that the sodium nitrite it was selling was being used by young people to commit suicide. Its algorithms effectively created a suicide kit for these troubled individuals. This case is much more like *Bernethy* than *Webstad*.

In light of the foregoing, it seems to me the superior court got it right: petitioners' complaint was sufficient to avoid dismissal under CR 12(b)(6). If that decision stands, Amazon retains the ability to seek summary judgment after discovery, like the defendants in *Knott* and, *Baughn*, and *Webstad.* In my view, the Court of Appeals arguably committed obvious error in granting review at this juncture.

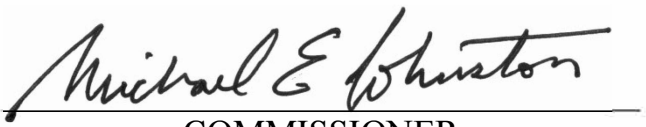
But the question then becomes whether further proceedings are useless. They are not. Here is why. The Court of Appeals decided only to review the narrow question at hand: whether the superior court erred in denying the CR 12(b)(6) motions. A panel of Court of Appeals judges will therefore now decide that issue on the merits. If the panel affirms the superior court, it will remand the case to the lower court for further proceedings. If, on the other hand, the Court of Appeals reverses the superior court and directs dismissal of the WPLA and common law claims, petitioners still can seek review in this court. Either way, the Court of Appeals might issue a published decision on this novel interlocutory issue of first impression, establishing helpful precedent going forward.

Petitioners complain review of the CR 12(b)(6) question in the Court of Appeals will cause a delay. But a delay in the ultimate outcome is not the same as rendering

further proceedings "useless," that is, a complete waste of time. A thoughtful decision by the Court of Appeals may assist in the ultimate determination of this dispute. In short, this case has a long way to go even if the Court of Appeals committed obvious error on the instant interlocutory question.[2]

In sum, though petitioners make a compelling argument that the Court of Appeals committed obvious error, they fail to show that further proceedings are useless within the meaning of RAP 13.5(b)(1). Accordingly, review of the CR 12(b)(6) issue on the merits will proceed in the Court of Appeals.

The motion for discretionary review is denied.



COMMISSIONER

February 12, 2024

[2] Petitioners' request to transfer the case to this court is premature. RAP 4.4. Further, if this court was to grant a motion to modify this ruling, the case would be in this court in any event for at least a limited purpose. Aside from that, it is better for now to keep the case in the Court of Appeals for a considered decision on the CR 12(b)(6) question. As indicated, there is a reasonable possibility the case will end up here eventually, but the better use of judicial resources is to let it play out below. The request to transfer the case is therefore denied without prejudice.

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NICOLAS MCCARTHY; MARTINIQUE MAYNOR; ESTATE OF ETHAN MCCARTHY; LAURA JONSSON; STEINN JONSSON; ESTATE OF KRISTINE JONSSON, Plaintiffs-Appellants, v. AMAZON.COM, INC., Defendant-Appellee.	No. 23-35584 D.C. No. 2:23-cv-00263-JLR Western District of Washington, Seattle ORDER

Before: W. FLETCHER, BERZON, and R. NELSON, Circuit Judges.

Submission of this case is withdrawn and the case is deferred until (i) the plaintiffs in *Scott v. Amazon.com, Inc.*, No. 84933-6-I, fail to timely petition for review of the Washington Court of Appeals' Nov. 25, 2024, decision, (ii) the Washington Supreme Court denies a petition for review by the *Scott* plaintiffs, or (iii) the Washington Supreme Court issues a decision in *Scott*, whichever is later. The parties shall promptly inform this court if any of these events occur.

Congress of the United States
Washington, DC 20515

January 25, 2022

Mr. Andy Jassy
President and Chief Executive Officer
Amazon.com, Inc.
410 Terry Avenue N. Seattle, WA 98109

Dear Mr. Jassy:

It has come to our attention through the independent reporting of the *New York Times* and our own efforts that Amazon is providing minors and adults with easy access to sodium nitrite, a deadly chemical popularized on Sanctioned Suicide, a website which "provides explicit directions on how to die."[1] A recent study based on data from the National Poison Data System found that suicide attempts associated with sodium nitrite poisoning in the United States were first reported in 2017 and these reported attempts have been increasing in frequency ever since.[2] Accordingly, our questions are centered around your sale of sodium nitrite from 2016, right before this spike, to the present day. When a person is having suicidal thoughts, limiting fast access to methods by which to die can make the difference between life and death, making the fact that sodium nitrite can be sold and delivered overnight with Amazon Prime, a grave concern.

Our questions are as follows:

1) How many sodium nitrite units has Amazon sold in the United States between January 1, 2016 and January 1, 2022? How many units has Amazon sold worldwide in that same timeframe?
    i) How many units were sold by Amazon (such as via first party vendor arrangements)?
    ii) How many units were sold by third party sellers?
    iii) How many units of sodium nitrite were delivered same-day or two-day?
    iv) How do the sales break down by the product's level of purity?
    v) How do the sales break down on a year-by-year basis since 2016?

2) Since January 1, 2016, how many minors (known or predicted to be under 18 algorithmically) have purchased sodium nitrite on Amazon?

3) How many unique listings for sodium nitrite has Amazon hosted since January 1, 2016?

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[1] Megan Twohey and Gabriel J.X. Dance, *Where the Despairing Log On, and Learn Ways to Die,* N.Y TIMES (Dec. 9, 2021), https://www.nytimes.com/interactive/2021/12/09/us/where-the-despairing-log-on.html.

[2] Sean D. McCann, Marit S. Tweet & Michael S. Wahl, *Rising Incidence and High Mortality in Intentional Sodium Nitrite Exposures Reported to US Poison Centers*, 59:12 CLINICAL TOXICOLOGY 1264-1269, (2021).

4) Since January 1, 2016, has Amazon received any requests to take down a product listing for sodium nitrite? If so, how many requests and how did Amazon respond?

5) Since January 1, 2016, have any reviews been taken down from product pages for sodium nitrite?
   i) If so, how many reviews has Amazon removed?
   ii) How many one-star reviews have been left for sodium nitrite products?
   iii) How many reviews have mentioned the dangers of ingesting sodium nitrite or references to fatalities?
   iv) Has Amazon ever taken action (e.g.: suspended the customer's ability to leave reviews) against individuals who wrote a review about a sodium nitrite product?

6) Since January 1, 2016, how many different customers have purchased sodium nitrite?
   i) How many customers were individuals?
   ii) How many customers were businesses?
   iii) How many customers who bought sodium nitrite purchased it one time only?

7) Since January 1, 2016, does Amazon know how many of its customers who have purchased sodium nitrite have died by ingesting it? If so, how many?

8) Since January 1, 2016, how many customers have purchased sodium nitrite and then had a considerable drop-off in their Amazon account activity?

9) What actions, if any, has Amazon taken to address the dangers of sodium nitrite in the United States? In other countries?

10) Does Amazon provide any clear labeling on its product pages for sodium nitrite that indicate its toxicity in specific concentrations?

11) Does Amazon provide any clear labeling on its product pages for sodium nitrite that indicate what to do in the event of ingestion in large concentrations?

12) Does Amazon have an internal policy system or procedure when it is reported to Amazon that an Amazon product has caused a customer's death? Contributed to a customer's suicide?

13) Does Amazon have cookies or other methods to track what website directed a customer to its website? If so, how many visitors to sodium nitrite product pages were on Google immediately before coming to Amazon? How many visitors were on Sanctioned-Suicide.org before coming to Amazon?

14) How many searches for sodium nitrite has Amazon had since January 2016? Please break that down by year. Did Amazon retarget ads for sodium nitrite based on any of these searches?

15) What did the process involve in making HiMedia a first party vendor? Please provide step-by-step details about the process of contracting with HiMedia, the creation of the sodium nitrite product page, the decision-making around the photography and product description, the role Amazon played

with regards to the product inventory acquisition, shipping, replenishment of inventory, price-setting, customer service, and user complaints.

Please send us your responses to these questions by February 1, 2022.

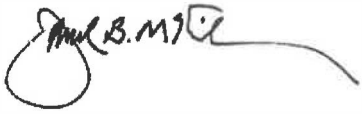
Sincerely,

Lori Trahan
Member of Congress

David Cicilline
Member of Congress

Susan Wild
Member of Congress

Jamie Raskin
Member of Congress



David B. McKinley, P.E.
Member of Congress

Kathy Castor
Member of Congress

Mark DeSaulnier
Member of Congress

The New York Times https://www.nytimes.com/2022/02/04/technology/amazon-suicide-poison-preservative.html

Lawmakers Press Amazon on Sales of Chemical Used in Suicides

Even as grieving families tried to warn Amazon and other e-commerce sites of the danger, there were more purchases and more deaths.


By Megan Twohey and Gabriel J.X. Dance

Feb. 4, 2022

The pleas to Amazon were explicit. A food preservative sold by the online retailer and other e-commerce sites was being used as a poison to die by suicide.

“Please stop selling this product,” began one review, posted on Amazon in July 2019 by a person who wrote that a niece had used it to kill herself. “I’ve already notified Amazon and they said they would help with this but they have not.”

Since then, suicides linked to sales of the preservative through Amazon have continued. The New York Times identified 10 people who had killed themselves using the chemical compound after buying it through the site in the past two years, including a 16-year-old girl in Ohio, a pair of college freshmen in Pennsylvania and Missouri, and a 27-year-old in Texas whose mother has filed a wrongful-death suit against Amazon. Enough people purchased the preservative to attempt suicide that the company’s algorithm began suggesting other products that customers frequently bought along with it to aid in such efforts.

But when family members left behind and others alerted Amazon to the deaths and to the danger of the sales, the company declined to act.

Now, members of Congress are demanding answers. In a letter sent last week to Andy Jassy, Amazon's president and chief executive, a bipartisan group of House members sought an accounting of the company's sales of the preservative and related suicides, details on how the retailer had addressed the dangers, and an explanation of how it had responded to complaints.

The move comes just weeks after publication of a Times investigation that linked a website, which provides explicit instructions on suicide, to a long trail of deaths. Most were from the chemical compound, sold legally in many countries. Site members advised one another on where to buy it and how to use it. Many of those who died — The Times has now identified more than 50 people — were under 25; some were minors.

In response to the article, members of Congress have sought briefings from Google and other tech companies that help make the suicide site accessible, and have asked Attorney General Merrick B. Garland to consider ways to prosecute its operators.

In their letter to Amazon, seven House lawmakers pressed the company, saying that the ease and swiftness with which vulnerable people could buy the compound, called sodium nitrite, was a "grave concern."

The lawmakers are targeting Amazon for questioning because they believe it to be the e-commerce site most often used to buy the compound and get it quickly delivered, and because of claims by parents and others that product reviews on Amazon warning about the danger were removed, said Representative Lori Trahan, Democrat of Massachusetts and a member of the House Energy and Commerce Committee.

In a written response to the lawmakers on Thursday, Brian Huseman, Amazon's vice president for public policy, extended condolences to families of the dead while defending Amazon's practices and sales of the compound. He said it was used for a range of purposes and was available from other retailers.

“Amazon makes a wide selection of products available to our customers because we trust that they will use those products as intended by the manufacturers,” he wrote. “Like many widely-available consumer products,” he added, the compound “can unfortunately be misused.”

The lawmakers found the company’s answers insufficient.

“Amazon had the opportunity with their response to collaborate with us on this issue that’s tragically ending the lives of people across our nation,” Representative Trahan said. “Instead, they failed to answer many of our most critical questions”

In email exchanges with The Times, an Amazon spokeswoman declined to comment on the 10 deaths that The Times identified.

Other sites said they had restricted sales of the compound.

Last year, an eBay director wrote to a coroner in England that the company had prohibited global sales of the compound in 2019 after receiving a report of its potential use in suicides. However, The Times identified eight suicides involving eBay sales of the poison since then, including a death the coroner was reviewing.

EBay did not respond to detailed emails and messages seeking comment. But in the letter to the coroner, the eBay director acknowledged that despite the ban, it was possible for “unscrupulous or unaware sellers to circumvent our policies and filters.” He wrote that the company would support government restrictions on online sales of the chemical to prevent future suicides.

In November 2020, Etsy banned sales of the compound, said a spokesperson, who declined to explain why. An Etsy customer posted in May 2018 that he was planning to use his purchase to kill himself. In August 2020, a 35-year-old in Mississippi wrote on the suicide site that he had bought the compound on the site. Days later, he was dead.

The United States is among many countries that allow the chemical compound to be sold as a food preservative, and the federal Food and Drug Administration regulates its use for that purpose.

There is no systematic tracking of suicides involving the compound, but The Times identified dozens of people who had used it since 2018 in the United States, the United Kingdom, Italy, Canada and Australia. More than 300 members of the suicide website had announced intentions to use the compound to kill themselves.

A study of 47 cases of poisoning by the preservative reported to the National Poison Data System over a five-year period found that suicide attempts with it had been increasing since 2017. A 2020 article in The Journal of Emergency Medicine warned that because the compound "is readily accessible through online vendors, and is being circulated through various suicide forums," emergency rooms might see more patients who have used it.

Dr. Kyle Pires, a resident emergency room physician at Yale University Hospital who treated a 28-year-old woman who had bought the compound on Amazon, wrote in the journal Clinical Toxicology about her death and the recent rise in suicides by this method. The article, published last May, said policymakers should be aware of the preservative's use in suicides, and encouraged emergency rooms to stock doses of an antidote, methylene blue, that can prevent death if administered early.

In an interview, Dr. Pires said that businesses should be able to buy the preservative, but sales to individuals should be banned.

"There's an argument that it's a slippery slope to restrict sales of something that is legal just because some people are using it to kill themselves," Dr. Pires said. But, he added, "this is a cost-benefit analysis of a small number of hobbyists using this chemical to cure meat at home versus these growing numbers of young people, including teenagers, using it to kill themselves. For me, it's an easy calculation."

In the United Kingdom, coroners for nearly two years have been highlighting suicides involving online purchases of the preservative and asking the government to take action. A cross-government group is working with businesses — including manufacturers and online suppliers of the preservative — to reduce access and end some sales to individuals, according to a spokeswoman for the government's

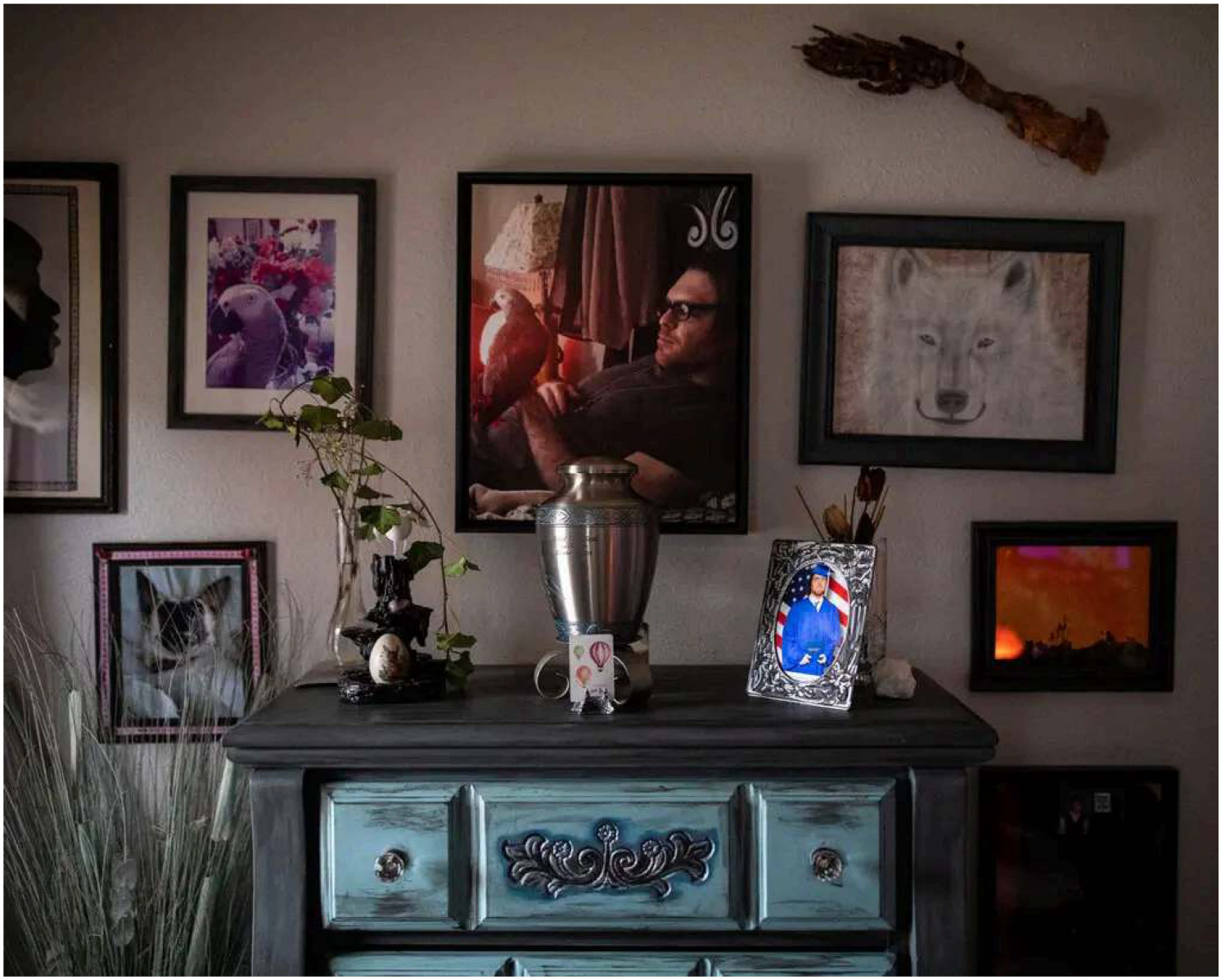
Department of Health and Social Care. The United Kingdom already requires sellers to inform law enforcement officials of any suspicious purchases of the compound, though it's unclear how often such reports are made.

Some businesses have gone further.

Metalchem, a British vendor, stopped selling the compound to the public in April 2020 after learning that it had been used for suicide. Mike Keay, the company's chief executive, also notified an English coroner that he had asked other businesses to stop selling the compound online "when the reason for the purchase cannot be reasonably ascertained."

"Sadly, nearly two years later and the preservative is still available online, even on Amazon, with worldwide shipping," Mr. Keay wrote in an email to The Times this week.

In the United States, Amazon continued to receive complaints about its sales of the compound — including, in May 2020, from someone whose father had just used it to die; in October 2020, from the grieving mother of an 18-year-old who had killed himself; and last year from Ruth Scott of Schertz, Texas, who is now suing the company.



An Amazon representative expressed condolences and told Ms. Scott that “at least your son is now on our God’s hand.” Tamir Kalifa for The New York Times

Her 27-year-old son, Mikael, who had struggled with depression, learned about the compound on the suicide website and bought it on Amazon. He killed himself in December 2020.

Ms. Scott said she had reached out five times to inform Amazon, only to hit brick walls. A customer service representative wrote to her that her message would be passed along.

“I am sorry for your loss,” said the email, which was reviewed by The Times. “But at least your son is now on our God’s hand.”

After Carrie Goldberg, a lawyer for Ms. Scott, wrote to Amazon's general counsel and implored the company to remove the product from its platform, lawyers for Amazon pointed out a Texas law and court decisions protecting the seller of a legal product used in a suicide.

"They know it's killing people," Ms. Scott said in an interview. "They are fully aware. They just don't care."

If you are having thoughts of suicide, in the United States call the National Suicide Prevention Lifeline at 800-273-8255 (TALK) or go to SpeakingOfSuicide.com/resources for a list of additional resources. Go here for resources outside the United States.

Megan Twohey is a prize-winning investigative reporter and best-selling author. More about Megan Twohey

Gabriel J.X. Dance is the deputy investigations editor. His reporting focuses on the nexus of privacy and safety online and has prompted Congressional inquiries and criminal investigations. More about Gabriel J.X. Dance

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A version of this article appears in print on , Section A, Page 17 of the New York edition with the headline: Lawmakers Press Amazon on Its Sales of a Chemical Used in Suicides

WA STATE:

Case Name	No. of Decedents	Date filed	Trial Case No.	Trial court	AMZ's Motion to Dismiss	Division I RAP 2.3(b)(1) & (3) Decision	Division I Decision on Review
Scott, et al. v. Amazon.com, Inc.	2	2/3/22	22-2-01739-2 SEA	Judge Josephine Wiggs	Denied	Granted	Reversed and remanded
Viglis, et al. v. Amazon.com, Inc..	2	3/20/23	23-2-05719-8 SEA	Judge Aimée Sutton	Denied	Granted	Reversed and remanded
Janus, et al. v. Amazon.com, Inc., et ano.	5	8/3/23	23-2-14460-1 SEA	Judge Brian McDonald	Denied (negligence and outrage)	Stayed pending WASC resolution of *Scott/Viglis*	N/A
Wolf, et al. v. Amazon.com, Inc., et ano.	1	9/6/23	23-2-18436-0 SEA	Judge Nicole Gaines Phelps	Denied (negligence and outrage)	Stayed pending WASC resolution of *Scott/Viglis*	N/A
Jenks, et al. v. Amazon.com, Inc., et ano.	3	3/22/24	24-2-06395-1 SEA	Judge Josephine Wiggs	Stayed pending *Scott/Viglis*	Stayed pending WASC resolution of *Scott/Viglis*	N/A
Whitten, et al. v. Amazon.com, Inc., et ano.	3	6/3/24	24-2-12332-6 SEA	Judge Jim Rogers	Unopposed motion for stay pending	Unopposed motion for stay pending	N/A
Quiroz, et al. v. Amazon.com, Inc et ano.	4	7/12/24	24-2-15684-4 SEA	Judge Paul Crisalli	Stayed pending *Scott/Viglis*	Stayed pending WASC resolution of *Scott/Viglis*	N/A
Hearst, et ano. v. Amazon.com, Inc., et ano.	1	8/13/24	24-2-18276-4 SEA	Judge Angela Kaake	Unopposed motion for stay pending	N/A	N/A

WA FEDERAL:

Case Name	No. of Decedents	Date filed	California District Case No.	Washington District Case No.	AMZ's Motion to Dismiss	Ninth Circuit Decision on Appeal
McCarthy, et al. v. Amazon.com, Inc.	2	10/4/22	3:22-cv-05718 (N.D. Cal.)	C-23-0263-JLR (W.D. Wash.)	Granted	Stayed pending WASC resolution of *Scott/Viglis*

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 84933-6-I (consolidated with No. 85558-1-I) to the following parties:

Gregory F. Miller
W. Brendan Murphy
Michelle L. Maley
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099

Carrie Goldberg
Naomi Leeds
C.A. Goldberg, PLLC
16 Court Street, 33rd Floor
Brooklyn, NY 11241

Corrie J. Yackulic
Corrie Yackulic Law Firm PLLC
110 Prefontaine Place So., # 304
Seattle, WA 98104

Original electronically filed with:
Court of Appeals, Division I
Clerk's Office

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

DATED: December 24, 2024 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

December 24, 2024 - 12:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84933-6
Appellate Court Case Title:	Ruth Scott, et al, Respondents v. Amazon.com, Inc., Petitioner

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- gary@tal-fitzlaw.com
- gmiller@perkinscoie.com
- matt@tal-fitzlaw.com
- mmaley@perkinscoie.com
- naomi@cagoldberglaw.com
- patricia@cjylaw.com

Comments:

Petition for Review; Motion to Include Extrarecord Materials in Appendix

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Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

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