No. 103730-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RUTH SCOTT, individually, and as personal representative of the ESTATE OF MIKAEL SCOTT, a deceased individual; JEFF MUHLEMAN, individually, and as the personal representative of the ESTATE OF TYLER MUHLEMAN, a deceased individual; and CINDY CRUZ, individually,

Petitioners,

vs.

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,

vs.

AMAZON.COM, INC., a Delaware corporation,

Respondent.

AMICUS CURIAE BRIEF OF THE UNITED STATES CHAMBER OF COMMERCE

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members, and it indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

This case has implications beyond the interests of the parties. As demonstrated below, if accepted, the plaintiffs' liability theory would dramatically alter product-liability law in Washington and upset the balance it appropriately and necessarily strikes. Such an expansion would

[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

impose unreasonable burdens on manufacturers and sellers of products and, ultimately, on the consuming public.

INTRODUCTION

Traditional tort law requires manufacturers to design products to be reasonably safe for their intended uses. The law does not require the manufacturer—or a potential downstream seller—to design a product that cannot be misused in an intentionally harmful way.

There are products that, no matter how carefully designed and manufactured, may be used to cause serious harm. When a product's potential danger is obvious, the law assumes the user will take steps to avoid the danger. If the potential danger is not obvious, the law requires the manufacturer to provide a warning to inform the user of the danger. It is assumed that the user will heed such a warning.

Although Division One's decision in these cases focused to some degree on their particular facts, the court also reached broader conclusions. Those conclusions are consistent with the Washington

Product Liability Act (the "WPLA") and with more general principles of product-liability law applicable across the United States.

The Chamber focuses here on those broader principles since the plaintiffs' liability theory, if embraced by this Court, could upend necessary limits on product-liability law in contexts far beyond those in these cases. And, in doing that, the court would make Washington a national outlier. The Court should affirm the Court of Appeals and reject the plaintiffs' efforts to distort negligent-entrustment doctrine to impose on sellers a duty to investigate whether a potential buyer might choose to intentionally misuse a product to cause harm.

STATEMENT OF THE CASE

The plaintiffs filed two suits against Amazon.com, Inc. ("Amazon"). On discretionary review after the trial court denied motions to dismiss, Division I held that Amazon could not be liable under the WPLA because it had no duty under the circumstances presented and because the intentional conduct of the persons who purchased the product

broke the chain of proximate causation. *Scott v. Amazon.com, Inc.*, 33 Wn. App. 2d 44, 559 P.3d 528 (2024).

This Court accepted review.

ARGUMENT

I. The plaintiffs' liability theory contradicts basic principles of tort law.

In Washington, as elsewhere, the law does not impose liability on a manufacturer or seller merely because a product causes harm. *Seattle-First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 150, 542 P.2d 774 (1975).[2]

A manufacturer or other supplier is required to provide a product without defects—whether those defects are latent dangers or unwarned-

[2] Washington codified its product-liability law in 1981. RCW 7.72.020(1) provides that "previously existing applicable law of this state on product liability is modified only to the extent set forth in" the statute. The statute also limits a seller's potential liability to those situations in which the plaintiff can prove negligence. *McCarthy v. Amazon.com, Inc.*, 679 F. Supp.3d 1058, 1069 n.6 (W.D. Wash. 2023). While the Chamber focuses on broader product-liability issues that apply to both manufacturers and other suppliers (including sellers), the Washington statute's limitation on a seller's potential liability provides additional support for the Court of Appeals' decision here.

about, non-obvious inherent dangers—but there must always be a defect for there to be liability. "[T]here must be something wrong with the product, and if nothing is wrong there will be no liability." *Baughn v. Honda Motor Company, Ltd.*, 107 Wn.2d 127, 147, 727 P.2d 655 (1986) (quoting, with approval, *DeRosa v. Remington Arms Co.*, 509 F. Supp. 762, 769 (E.D.N.Y. 1981) and A. Murphy & K. Santagata, *Analyzing Product Liability* 4 (1979)).

If a product has inherent dangers that cannot be designed out of it, the manufacturer or other supplier must provide a warning unless the dangers are obvious to the user. *See Campos v. Firestone Tire & Rubber Co.,* 485 A.2d 305 (N.J. 1984). Some courts, including this one, have suggested that the failure to provide a warning when one is necessary renders the product defective. *Baughn*, 107 Wn.2d at 136; *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 434, 739 P.2d 1177 (1987). A manufacturer or supplier that provides such a warning may assume that it will be read and heeded by the user of the product. *Id*.

For example, a manufacturer that knows the lawnmower it sells may tip over and expose its blade if operated on certain sorts of hills must warn the consumer of that proclivity. *See Mavity v. MTD Products, Inc.*, 714 F. Supp.2d 577, 580 (W.D. Va. 2010). But the manufacturer of a knife or axe need not tell a consumer that those products are sharp and, so, inherently dangerous, because the consumer can plainly see and know about the danger. *See Plante v. Hobart Corp.,* 771 F.2d 617, 620 (1st Cir. 1985).

While framed and phrased in different ways in different jurisdictions, the most common approach to product liability may be summarized as follows: the manufacturer or other supplier of a product must design it so that it is free of dangers, but if some attribute of the product presents an inherent, non-obvious danger, the manufacturer or other supplier must warn users so they can protect themselves. *See* RCW 7.72.010 (a product is defective if it is not reasonably safe in design, manufacture, or warnings).

Applied to the cases now before this Court, those basic principles of product-liability law establish that Amazon could have no duty to guard against intentionally dangerous misuse. The product at issue is inherently dangerous, but the manufacturers that provided it plainly warned of its dangers. The manufacturers had no duty beyond warning of the danger inherent in the product, and neither did Amazon.

In these cases, there was no defect in the product's design or labeling. Established principles of product liability—in Washington and elsewhere—preclude liability.

II. The plaintiffs' suggestion that they be permitted to proceed on a negligent-entrustment theory ignores the underpinnings of that doctrine and would itself expand potential liability in worrisome ways.

In an effort to find a foothold for their claims in existing product-liability law, the plaintiffs point to the negligent-entrustment theory set out in Section 390 of Restatement (Second) of Torts. That theory cannot accommodate the plaintiffs' sprawling claims, which if recognized here would make Washington an outlier, creating a negligent-entrustment duty

more expansive than that of any other jurisdiction. Among other things, adopting this approach would impose a significant and potentially insurmountable burden on many retailers and customers.

A. Negligent entrustment is not properly applied in a completed-sale setting.

As a fundamental, threshold issue, negligent entrustment focuses on a supplier that retains control of a chattel while allowing it to be used by a party who causes harm. *See Lopez v. Langer,* 761 P.2d 1225 (Idaho 1988) ("[T]he paramount requirement for liability under a theory of negligent entrustment is whether or not the defendant had a right to control the vehicle."); Goldberg & Zipursky, "Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling," 44 WAKE FOREST L. REV. 1211, 1219-20 & n.37 (2009) (the possessor's continuing dominion over the chattel is the linchpin of liability for negligent entrustment) ("Goldberg & Zipursky"). This characteristic of the tort likely explains why it is so commonly used in situations in which the defendant has lent his chattel—say, a car—to

another. The vehicle owner retains the right of control over the vehicle but has entrusted it to another person who is alleged to have misused it.

By contrast, a party that sells a product no longer has any right of control over it. The party has not simply lent the product to another; it has relinquished ownership and given the recipient the right of control.[3] Where the thread of control is severed, there should be no liability on a negligent-entrustment theory. That is why most states have concluded that sales cannot be the basis for entrustment claims. *See* Goldberg & Zipursky, *supra*, at 1220 & n.37 (collecting cases).

Although this is a question of first impression here, this Court should conclude that negligent entrustment does not apply in completed-sale situations, given the seller's lack of continuing control over the

[3] As some courts and others have noted, Comment a to Section 390 refers to "sellers" among the potential defendants. The comment does not explain that reference, and it simply refers to situations in which a seller allows a potential buyer to try out a product before buying it, as in an automotive test drive.

product.[4] The majority view should at least caution against expanding the doctrine beyond the "significant factual" limitations the Court of Appeals identified. *Scott*, 33 Wn. App. at 65.

B. Negligent entrustment focuses on the supplier's actual or constructive knowledge about a specific recipient.

Section 390 of the Second Restatement of Torts imposes liability on a supplier that provides a chattel for the use of another "whom the supplier knows or has reason to know to be likely because of youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others ...." Restatement (Second) of Torts § 390. The standard focuses on specific persons, about whom the supplier has or could have particular knowledge.

Comment b to Section 390 underscores that understanding. The comment provides that "… one who supplies a chattel for the use of

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[4] The Court did adopt the negligent-entrustment doctrine in *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982), but it has not indicated that the WPLA, enacted only a year before *Bernethy*, incorporates the doctrine.

another who knows its exact character and condition is not entitled to assume that *the other* will use it safely if the supplier knows or has reason to know that *such other* is likely to use it dangerously ….” Restatement (Second) § 390, cmnt b (emphasis added). The inquiry focuses on the supplier’s actual or constructive knowledge of a specific recipient. The comment offers six examples, each of which describes a situation in which the supplier provides a chattel to someone he has encountered and about whom he has specific knowledge. For example, the comment suggests there might be liability for a person who allows a 10-year-old boy with no prior experience to drive a car. Each example describes an encounter between the supplier and the recipient that would give the supplier specific knowledge of the recipient’s likelihood to use the chattel dangerously.

Courts across the country have agreed with that narrow focus. The Connecticut Supreme Court has, for example, explained that “[m]ost jurisdictions that have recognized a cause of action in negligent entrustment likewise require that the actor have actual or constructive

knowledge that the specific person to whom a dangerous instrumentality is directly entrusted is unfit to use it properly." *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 281 (Conn. 2019); *see also, Kyte v. Philip Morris, Inc.*, 556 N.E.2d 1025, 1029 (Mass. 1990); *Johnson v. Patterson*, 570 N.E.2d 93, 96-97 (Ind. Ct. App. 1991). Importantly, any constructive knowledge must be specific and based on objectively observable characteristics. *See* Restatement (Second) of Torts § 390, cmnt c.

Thus, a claim for negligent entrustment might succeed where, for example, a car owner gives his keys to a person who is plainly intoxicated and that person hits a pedestrian. In that situation, the defendant had at least constructive knowledge—rooted in an objectively observable incapacity—that a specific person's known condition made it likely he would pose a danger to himself or others.

C. The plaintiffs' theory would impose a duty far greater than negligent-entrustment cases have recognized or should recognize.

Plaintiffs here seek to impose a very different duty. Rather than considering whether a supplier had actual or constructive notice of the condition of a specific recipient, and setting aside the supplier's lack of control over the product after it was sold, plaintiffs would have the court adopt a rule that a seller must (1) identify classes of buyers who might misuse a product no matter how obvious its danger or how clear the warnings; (2) affirmatively make inquiry about whether a particular, proposed buyer falls into one of those classes; and (3) refuse to sell to any proposed buyer who falls into one of those classes. That is a far heavier burden than the one the plain text of Section 390 imposes.

1. The plaintiffs' proposed duty exceeds the sort of duty tort law should impose.

This Court should reject the plaintiffs' theory for reasons both doctrinal and practical. As commentators have noted, such a theory would fundamentally change the aim of product-liability law, which has

traditionally been to keep sellers from placing unreasonably dangerous products into the stream of commerce where they may harm those who seek to use them safely. The plaintiffs' theory would instead obligate sellers to identify classes of buyers who might intentionally misuse non-defective products that are properly in the stream of commerce. *See* Goldberg & Zipursky, *supra*, at 1218 ("Theoretically, it threatens to reduce the concept of a tort—conduct that is wrongful toward and injurious of another—to the distinct and broader concept of antisocial conduct that causes harm."). That is a sea change properly left to the Washington Legislature, which codified the state's product-liability law.

2. The plaintiffs' theory would impose on sellers a duty that would be extraordinarily difficult if not impossible to satisfy.

The plaintiffs' theory is not just doctrinally inapt. The requirement that the supplier have actual or constructive knowledge specific to the recipient is a critical restraint on the negligent-entrustment theory because, without it, the duty on the supplier would be far greater, more

difficult and costly to meet, and in some cases virtually impossible to satisfy.

Consider customers with conditions that are not readily observable and that may occasionally cause them to be violent. If a retailer knows that statistically some small number of persons who buy baseball bats, for example, might use them to cause harm, should the retailer have a duty to investigate if each particular customer is one of those potentially dangerous persons, despite no observable indicia of dangerousness? Setting aside the reality that it will often be impossible for a seller to ascertain whether buyers might be dangerous, as well as the likelihood of false positives and resulting litigation, such a duty would be far more onerous than the law now recognizes.[5] Such a duty would be all the more extraordinary and burdensome for online retailers, which receive limited

[5] Some commentators have suggested that the Kansas Supreme Court imposed such a duty in *Shirley v. Glass*, 308 P.3d 1 (Kan. 2013), but the facts of that case indicate otherwise. The purchaser there affirmatively disclosed to the store clerk that he was legally ineligible to buy the product, which he used to do harm after the clerk nonetheless completed the sale.

information and have no opportunity for direct physical observation of, or discussion with, customers. It is difficult even to imagine how an online retailer could successfully comply with a general duty of inquiry.

It is no answer to say that the duty could be limited so that the seller would only be obligated not to sell a particular product to a class of persons that statistically has a history of misusing the product at a higher rate than the general population. That would still impose on the seller the affirmative obligation to determine which classes it should not sell to and then to determine whether any given customer falls within one of those classes. Both obligations would be hugely onerous, and the second would perhaps be impossible to meet in situations, like this one, in which a customer seeking to purchase a dangerous product would likely mask his or her membership in an identified class of buyers.

3. The plaintiffs' theory would impose significant costs on sellers, customers, and insurers.

The practical consequences of burdening sellers with a duty to inquire about the fitness of their customers would be significant. As one commentator has noted,

> [s]uch judicial regulation of commerce will dramatically alter the way that business has traditionally been conducted in this country, harming the national economy by increasing the cost of producing goods and decreasing the supply of goods to consumers.

Robert M. Howard, "The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to 'Defective' Customers, 1988 DUKE L.J. 755, 780-81 ("Howard"). It requires no stretch of the imagination to recognize at least some of the ramifications of the substantial costs and exposure such a duty would impose on sellers. Numerous (perhaps most) consumer products can be intentionally misused to cause harm. Faced with a burdensome duty to guard against or investigate such potential misuse, sellers might simply choose not to sell certain inherently dangerous products, such as

prescription medications, knives, axes, welding torches, matches, oxygen tanks, lawnmowers, baseball bats, bowling balls, and myriad others. The proposed duty might well cause supply problems for all sorts of legitimate, widely used products simply because some potential users might intentionally misuse them and sellers deem the cost of trying to thwart that misuse to be too high.

Sellers could try to screen customers who might intentionally misuse products, but such onerous measures would no doubt often be unsuccessful. It is, after all, difficult to predict human behavior. *See* Andrew Holder, "Negligent Entrustment: The Wrong Solution to the Serious Problem of Illegal Gun Sales in Kansas," 50 WASHBURN L.J. 743, 762 n.173 (2010-11) ("[L]aypersons lack the expertise to accurately diagnose the mental incompetencies that would make a purchaser a liability."). And even assuming that reliable indicators exist, purchasers could, and likely often would, evade detection in various ways.

These challenging and perhaps fruitless efforts would also impose significant costs on sellers and customers alike. The added expense to the

sellers' operations would inevitably be passed along to buyers who seek only to use products as intended and instructed. Howard, *supra,* at 784. And the burden for customers would not be limited to price increases. They would presumably have to respond to potentially intrusive inquiries from sellers and incur significant delays in making what would otherwise be simple and quick purchases.

Further, the potential lack of success of such detection measures would require sellers to obtain additional insurance to manage the heightened risk. Some sellers—such as small businesses—might be unable to absorb the additional insurance costs, forcing them to raise prices and limit access to legitimate products. *Id.*

***

The duty that plaintiffs ask the Court to adopt is foreign to product-liability doctrine in Washington and elsewhere. It would cause sellers of non-defective products to bear the immense burden of identifying which potential buyers might intentionally misuse those products and then to refuse to sell to them. That is not the role of product-liability law, be it

the WPLA, similar statutes in other states, or the common law. Fulfilling such a screening duty would be extraordinarily difficult if not impossible for sellers, exposing them to substantial risk and costs inevitably passed along to consumers who overwhelmingly seek only to use products as intended and instructed. And, despite sellers' best efforts, such a duty would unfortunately very likely fail to prevent intentional misuse of lawful products anyway.

CONCLUSION

The Chamber of Commerce of the United States asks the Court to continue to adhere to the principles of product-liability law codified in the WPLA and reflected in Washington case law and general American tort jurisprudence. The Court should reject the plaintiffs' proposed expansion of sellers' duties. It should, instead, affirm the Court of Appeals.

DATED THIS 24th day of July 2025.

Respectfully submitted,

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By /s/ Robert B. Mitchell
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1. This brief includes 3,422 words, excluding the parts of the brief exempted from the word count by Rule 18.17(c).

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/s/ Robert B. Mitchell

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