No. 23-35584

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NICHOLAS MCCARTHY and MARTINIQUE MAYNOR, individually and NICHOLAS MCCARTHY as successor-in-interest to ETHAN MCCARTHY a deceased individual; LAURA JÓNSSON and STEINN JÓNSSON, individually, and LAURA JÓNSSON as successor-in-interest to KRISTINE JÓNSSON, a deceased individual,
Plaintiffs/Appellants,

vs.

AMAZON.COM, INC.,
Defendant/Appellee.

On Appeal from the United States District Court for the Western District of Washington, Seattle (D.C. No. 2:23-cv-00263-JLR)

BRIEF OF CHILDREN'S ADVOCACY INSTITUTE AT THE UNIVERSITY OF SAN DIEGO SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

[brief supports reversal]

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STATEMENT OF INTEREST[1]

Founded in 1989 at the University of San Diego School of Law, the Children's Advocacy Institute ("CAI") is an academic center that promotes the well-being of children through scholarship, coursework, direct legal services, litigation, agency rulemaking, and California and federal legislative advocacy.

Child safety has long been one of CAI's priorities. CAI has written and sponsored numerous California statutes improving child safety in the areas of recreation, foster care, Internet privacy, and child sex trafficking. Most relevantly and recently, CAI co-sponsored California Assembly Bill 2408 (Cunningham and Wicks) in 2022, a bill that, in part, sought to prohibit social media companies from using technologies the platform knows will cause children to become medically addicted to it and AB 1394 (Wicks and Flora) that address the proliferation of sex trafficking of children on such platforms.

Although it asserts the District Court erred in granting the Rule 12[b][6] motion, CAI takes no position on whether the Appellant's claims against Amazon in this case should ultimately prevail at trial or summary judgment. CAI is interested in ensuring that courts adjudicating Rule 12[b][6] motions in cases where harms to children are alleged will hold on–line platforms responsible for harms allegedly

[1] No counsel for a party authored any part of this brief. No person other than amicus curiae, its charitable supporters, or its counsel made a monetary contribution intended to fund its preparation or submission.

caused, in whole or in part, by the platform's own conduct, just as any product distributor, without any special immunity.

INTRODUCTION

There is nothing in the District Court's statutory reasoning that cabins its holding solely to Amazon. As such, the safety of all children residing in Washington is implicated by the District Court's reasoning in this case. Under the District Court's reasoning — the key plank of which is not supported by cited case authority — the following defendants would under Washington Law categorically be excluded from being sued in negligence:

- A distributor that delivers a working flare gun to a kindergarten class.
- A sporting goods store that delivers a box of sharp hunting knives to a playground filled with elementary school–age children.
- A chemical company that delivers poison to teenagers whom it knows intend to ingest the poison to attempt suicide.

In each of these hypotheticals, if the flare gun, the knife, and the poison operated as their manufacturers intended, children under the District Court's interpretation of Washington law, would be unable to sue those who negligently placed these dangerous articles in their small hands. As described below, Washington law does not compel such a perilous result for its children.

RELEVANT BACKGROUND

Kristine and Ethan were teenagers. According to the presumably true and operative First Amended Complaint ("FAC"), they each were killed because

Amazon delivered to them a highly dangerous chemical, knowing the children wanted it in order to attempt suicide. (FAC, ¶¶5, 18, 27, 100).

The Food and Drug Administration has a special category of regulation for Sodium Nitrite (21 CFR §172.175). All retail packing requires labeling with "adequate instructions for use to provide a final food product" and which complies with strict federal limits on the amount of the dangerous compound used. Federal law requires labels provide safety warnings for children. "[T]he label of the additive, or of a mixture containing the additive, shall bear the statement 'Keep out of the reach of children.'"

However, the product Amazon delivered to Ethan and Kristine did not contain the warning required by Federal law. (FAC, ¶¶99, 138).

Notwithstanding the contrary allegation in the FAC that the product sold to the children Ethan and Kristine did not contain the required warning label, the District Court determined that the warning label on the suicide chemical Sodium Nitrite adequately informed the children that ingesting the chemical likely would kill them or at least cause serious injury.

Based on that determination contradicted by the FAC, the Court held that:

- The warning was "not defective" and, as such was "adequate" (Order, p. 16, see also fn. 11);
- The product was not defective because it worked as intended by the children who ingested it (Order, p. 16);
- Amazon marketed the product (Order, p. 28 [the court concludes that

Amazon's conduct falls squarely within the ordinary meaning of "marketing"] (and thus was a product liability claim under RCW §7.72.010[4]);

- The Washington Products Liability Act ["WPLA"} "preempted or subsumed" all forms of common law negligence. (Order, p. 31);
- "[A] plaintiff must establish that the injury- causing product is defective in order to recover against a negligent product seller under the WPLA." (Order, p. 31);
- "Because Plaintiffs' common law negligence claims are negligence-based claims for 'harm caused by the... marketing' of the Sodium Nitrite, RCW §7.72.010(4), they fall within the WPLA's preemptive scope." (Order, p. 28);
- Therefore, Plaintiffs cannot state any claim for relief (even one for "product-related harms under a negligence theory, RCW 7.72.040(1)(a)" [Order, p. 25]) unless the product is defective. (Order, p. 31).

As a result, the District Court concluded that no claims for relief were stated or could be stated as a matter of law.

It agreed with Amazon that "the 'text, history, and purpose' of the WPLA establishes that a seller cannot be liable in negligence unless the product at issue was defective." (Order, p. 12).

But the District Court itself cited no case that supports this conclusion.

Indeed, the Court contradicts itself and recognizes that "Amazon is incorrect to the extent it implies that the WPLA's preemption bars any common law negligence-based claims against product sellers." (Order, p. 26, fn. 15),

Nor did the Court address those portions of the WPLA's text that squarely contradict its holding (see discussion under Point 1, *infra*).

The Court also erred in making these determinations in the absence of allegations establishing as a matter of law that the children had the capacity — legal or otherwise — to understand the warning (which did not comply with Federal law) and, if so, to make an informed decision to ingest the lethal chemical. As such the Court erroneously adjudicated many fact issues on a Rule 12[b][6] motion. *Schuck v. Beck*, 19 Wn. App. 2d 465, 485–86, 497 P.3d 395 (2021) [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]; *Ayers v. Johnson & Johnson*, 117 Wn.2d 747, 755, 818 P.2d 1337 (1991) [court declines to rule for product manufacturer as a matter of law on warning adequacy or causation, where a 15-month-old child aspirated Johnson's Baby Oil, causing him permanent injuries, and bottle stated that the baby oil was for external use only; *see Ehlert v. Brand Insulations, Inc.*, 183 Wn. App. 1006 (2014); *O'Connell v. MacNeil Wash Sys., Ltd.*, 2 Wn. App. 2d 238, 254-56, 409 P.3d 1107 (2017).

The Court's determination (albeit erroneous) that the warning was adequate as a matter of law to inform children Ethan and Kristine that ingesting the chemical likely would kill them or at least cause serious injury was therefore, ipso facto, also adequate to inform the distributor Amazon that the product was potentially lethal, especially if sold to children. At minimum, the Court's determination establishes, for purposes of the 12[b][6] motion, Amazon's actual or constructive knowledge

based on the warning it was distributing a product that was likely lethal to children whom it knew are on its platform and were acquiring it in order to attempt suicide. (RCW §9A.36.060 [criminalizing the promotion of a suicide attempt by aiding a person to attempt suicide.].)[2]

The judgment also must be reversed, because the District Court erroneously assumed, on a motion to dismiss, the fact that the children wanted to successfully commit suicide, even though the operative complaint did not allege this. (FAC, ¶¶151–54).[3]

Nor did the District Court take as true the allegations that Ethan's mother stated to Amazon that she had not ordered the Sodium Nitrite, that Amazon agreed to cancel the order, and that despite doing so, it sent the poison to Ethan's home, who promptly ingested it with fatal consequences. This is an independent act of

[2] Aiding in another person's death is illegal in Washington State, where Amazon was founded, and in Ohio where Kristine died. (*See* Washington State RCW §9A.36.060, Ohio Revised Code §3795.04). In West Virginia, where Ethan died, there is a common law tradition allowing prosecution for aiding a suicide.

[3] Ethan and Kristine were vulnerable youth, far more susceptible to Amazon's sales tactics than mature adults. Suicide experts recognize that having access to lethal means, e.g. readily available, highly effective methods like Sodium Nitrite significantly increases the risk of death by suicide. (See, The Centers for Disease Control and Preventions' 10-year survey of teens [published in 2023], which measured the prior 12 months, in 2021, and determined 30% of girls had seriously considered suicide, 23.5% made a plan, 13.3% attempted, and 3.9% required medical attention from an attempt. Youth Risk Behavior Survey Data Summary & Trends Report: 2011–2021, CENTER FOR DISEASE CONTROL AND PREVENTION (February 2023) https://www.cdc.gov/healthyyouth/data/yrbs/pdf/yrbs_data-summary-trends_report2023_508.pdf (last visited Dec. 7, 2023); WISQARS Explore Fatal Injury Data Visualization, CENTER FOR DISEASE CONTROL AND PREVENTION (2023), https://wisqars.cdc. gov/explore/ (last visited Dec. 7, 2023). Only 0.004% of girls in that age group died from suicide. *Id.* For boys, 13.3% seriously considered suicide, 11.3% made a plan, 6.6% attempted, 1.7% required medical attention from an attempt. Id. Only 0.011% of boys died from suicide. *Id*.

negligence. (FAC, ¶¶26, 59).

It also must be assumed based on the averments of the FAC that Amazon:

- knew or should have known that it was selling the poison to children (FAC, ¶¶110, 211, *see also* ¶¶5-15, 18, 25-33, 81–89, 100–129, 144-160, 211–215, 218). (At minimum, it cannot be assumed at the pleading stage that Amazon reasonably believed it was selling the poison to adults).

- knew or should have known that Ethan and Kristine (both of whom were children) were buying the poison with the intent to commit self-harm (FAC, ¶¶5–15, 18, 25–33, 81–89, 100-129, 144–160, 157–204, 211–215, 218).

- knew or should have known that many suicides attempted by children (teenage or otherwise) are cries for help, and are not intended to be lethal. (See FAC, ¶¶151–154).[4]

- knew or should have known that Ethan and Kristine (both of whom were children) were incapable (legally or factually) of understanding that ingesting the poison would cause their irreversible deaths.[5]

Further, the Court should have addressed and assumed to be true that Amazon, in the exercise of reasonable care, knew or should have known that:

- Ethan and Kristine were teens (FAC, ¶¶5-15, 18, 25-33, 81-89, 100-129, 144-160, 157-204, 211–215, 218);

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[4] [W]hen his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract..." *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209 (1904).

[5] Amazon's bundling of Sodium Nitrite with acid-reducers, personal use scales, and an "Amazon edition" suicide manual that instructed people how to use Sodium Nitrite and referred them (with a link) to purchase it for cheap and with easy and fast delivery from Amazon are evidence of Amazon's knowledge and are just two of the many ways Amazon caused these deaths. These facts, if proved, establish that Amazon knew or should have known what Ethan and Kristine's intended use of the product was. (FAC, ¶206).

- attempted suicide by teens is not uncommon;
- succeeding in those attempts is not common;
- many children who attempt suicide do not want to die;
- there is a correlation between the success rate of the attempted suicide and the method used to attempt the suicide (FAC, ¶¶152-155);
- ingesting Sodium Nitrite is very effective way to commit suicide (FAC, ¶¶151–153).

By mid-September 2020, before either Kristine or Ethan purchased Sodium Nitrite, Amazon had full knowledge that young people, including minors, were purchasing Sodium Nitrite from Amazon for the purpose of attempting suicide. (FAC, ¶¶5–15, 18, 25–33, 81-89, 100–129, 144–160, 157-204, 211–215, 218). It knew this from parents of children who had died from ingesting Sodium Nitrite purchased from Amazon, and because its own algorithm bundled Sodium Nitrite with suicide aids, including a scale, an anti-emetic, and a "how- to" handbook, confirming that purchasers of Sodium Nitrite sought it out as a suicide agent and not for any other purpose (*Id*.).

Put simply, the bottom line of the facts averred in the FAC is that the death of two children proximately resulted from Amazon's distribution to them an inherently dangerous product which Amazon knew or should have known they intended to ingest for purposes of self-harm.

ARGUMENT

Point 1 – The District Court Misconstrued the Washington State Products Liability Act.

The District Court misconstrued the WPLA. First, the Court added to that statute non-existent preemptive protection for negligent conduct by distributors of products that, according to the Court, perform as intended.

At subparagraph (1), RCW §7.72.010 defines "Product seller" as:

> 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. (Italics added).

The FAC avers that Amazon was a distributor of the relevant product.

Subparagraph (4) describes the instances in which the statute may preempt certain common law claims. It first defines "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. (Emphasis added)

Notably, subparagraph (4), establishing the scope of the preemption, does not use the term "distributor."

Since that term *is* used in subparagraph (1) of the same statute, it must be inferred that distributors are *not* within the preemptive scope of subparagraph (4). As such, claims or actions brought for *harm caused by the distribution* of the relevant product are *not* a "Product liability claim" under Washington's statute.

The definition of "marketing" in *Black's Law Dictionary* does not override the Washington Legislature's decision to omit the word "distributor". The District Court erred in inserting language the Legislature did not see fit to include. *State v. Peeler*, 183 Wn.2d 169, 180, 349 P.3d 842 (2015) (A court declines to insert additional language or requirements in an unambiguous statute when the legislature chooses not to do so); *State v. Bravo Ortega*, 177 Wn.2d 116, 124, 297 P.3d 57 (2013) (relying on the doctrine of expressio unius est exclusio alterius ["to express or include one thing implies the exclusion of the other"].)

Here, the harm was allegedly caused by the distribution of the product to children whom Amazon additionally knew were ordering it to attempt suicide. Preemption in such an instance is not within the reach of the plain language of the statute, since the statutory definition of "Product liability claim" does not include distribution.

This is also made clear by RCW §7.72.040(1)(a), which states:

> (1) Except as provided in subsection (2) of this section,[6] a product seller other than a manufacturer is liable to the claimant only if the claimant's

[6] Subsection (2) does not apply to this case.

harm was proximately caused by:

(a) The negligence of such product seller....

The District Court recognized in its footnote 15 (Order, p. 26) that "Amazon is incorrect to the extent it implies that the WPLA's preemption bars any common law negligence-based claims against product sellers. (*See generally*, MTD at 10–11; Reply at 6–7; Def. Supp.) Preemption works differently with respect to common law negligence claims for product-related harms asserted against a product manufacturer."

Nonetheless, the District Court incorrectly determined that Amazon, as "a product seller other than a manufacturer," is not liable, *even* for its own negligence. RCW §7.72.040(1)(a).

Instead of applying the plain language of RCW §7.72.040(1)(a), the District Court erred in using RCW §7.72.030's different standard for a products manufacturer. This violated the plain language of §7.72.040(1)(a). *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991) (when the meaning of statutory language is plain, the statute is not ambiguous. The only permissible interpretation is that which gives effect to the statute's plain language). The court should have "assume[d] the legislature means exactly what it says." *Berger v. Sonneland*, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). The Court should not have searched for ambiguity by imagining alternative interpretations of clear language. *W. Telepage, Inc.v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000).

The District Court's misreading of the statutory language has lead to an absurd result. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011) (The interpretation of a statute must be reasonable in light of the statute's language and structure. To be reasonable, an interpretation must, at a minimum, account for all of the words in the statute.)

Under the District Court's logic, a suit against a business distributing flare guns to kindergartners on a playground would be preempted. So, too, would the other hypotheticals above. This broadly child endangering, counter-intuitive interpretation of Washington legislative intent cannot be upheld, absent the clearest of legislative intent compelling it. Yet no legislative history or statutory language reveals such an intent. Amazon did not show and the District Court did not cite authority establishing that the Washington Legislature in reforming products liability law intended to immunize this type of dangerous distributing conduct. RCW §7.72.020(1) (stating that "[t]he previously existing applicable law of this state on product liability is modified *only* to the extent set forth in this chapter") (italics added).

Second, and more broadly, no authority supports the District Court's broad conclusion that there can be no common law negligence liability where a product retailer, distributor or marketer (*not* a manufacturer or a seller) negligently provides dangerous products to children, which themselves may not be defective, whom the retailer or distributor knows or should intends to use the product for self-harm. The District Court's conclusion both misreads RCW §7.72.010 and reads RCW

§7.72.040(1)(a) out of the Act. The District Court's conclusion also cannot be reconciled with its recognition that "Amazon is incorrect to the extent it implies that the WPLA's preemption bars any common law negligence-based claims against product sellers." (Order, p. 26, fn. 15).

Point 2 – The Court Misapplied Rule 12[b][6]

This was a motion to dismiss under Rule 12[b][6]. The pleader's labels for its claims do not matter. The facts alleged do. *Benavidez v. County of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021) (In reviewing a complaint under Rule 12[b][6], all well-pleaded allegations of material fact are taken as true and construed in the light most favorable to the non-moving party); *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000) (In deciding a motion to dismiss under Rule 12[b][6], the Court must construe the facts alleged in the complaint in the light most favorable to the drafter of the complaint, and the Court must accept all well-pleaded factual allegations as true.)

The FAC stated facts that if proved, would have established unfair conduct, as well as intentional conduct. At minimum, either intent, or negligent conduct, or both, can be inferred from the facts averred. Also, the Court determined fact issues underlying duty, breach and causation, including adequacy of warnings.

Product liability claims do not include intentionally caused harm or a claim or action under the consumer protection act, chapter 19.86 RCW (§19.86.090. Civil action for damages).

Here, intentional wrongdoing and unfair business practices in violation of the consumer protection act, chapter 19.86 RCW could have been proved by the facts averred (FAC, ¶¶5–15, 18, 25–33, 81–89, 100–129, 144–160, 157–204, 211–215, 218).

Amazon provides the method and means for children to complete suicide attempts. Individuals can obtain Sodium Nitrite (and the products Amazon recommends —Tagamet, a suicide handbook, and a scale) from Amazon within a few days of learning about it and within a period of time short enough for the bout of suicidal ideation originating at the point of purchase to persist.

At bottom: the FAC alleges that Amazon intended to profit by providing the product. It allegedly knew the product was being bought by the children to attempt suicide. It allegedly knew the product was lethal if ingested. It allegedly delivered the product to the two children, who promptly ingested it and died. The FAC thus alleges that Amazon aided and abetted suicide. This describes possible criminal conduct under Washington law, which under these facts was knowingly caused. The facts also showed unfair conduct in violation of the consumer protection act, 19.86 RCW.

As to Ethan, Amazon was allegedly told not to deliver the deadly product (FAC, ¶¶190–195). Amazon represented it would not do so when stating the order would be cancelled. It did so anyway. Ethan died as a result. This is further act of distributor negligence, outside of any preemptive effect of the WPLA.

Because the District Court failed to integrate these presumably true facts into its reasoning, the Court failed to take the FAC as it was pleaded and therefore erroneously applied Rule 12[b][6], in effect ruling on a complaint that was not before it, and in doing so adopting a child-endangering theory of the WPLA.

Point 3 – The Matter Should Be Certified to a Washington Court If There Is Any Uncertainty.

It seems obvious that Washington lawmakers generally speaking would not have intended to blanket Amazon or the hypothetical actors described above in total tort immunity for placing inherently dangerous — even lethal — items into the hands of children. If there is any question on this score, the wisest course is to certify this question to a Washington court before, in essence, codifying this interpretation through federal interpretation.

CONCLUSION

For Washington to be a safe place for children, the result here simply and respectfully cannot stand.

To ensure that courts are not inadvertently offering more immunity to product distributors than the Washington Legislature intended when it enacted the WPLA, to the profound detriment of our children, courts should carefully distinguish between those harms allegedly caused, in whole or in part, by distributive acts, and those harms allegedly caused by manufacturers of products. If being able to determine Amazon's role turns on "it depends" considerations, as may often be the

case with the technologies involved here, then Rule 12[b][6] motions should be denied in favor of courts surgically effectuating the text and intent of the law on the basis of hard facts and a full record.

December 12, 2023

Respectfully submitted,

s/ Edward P. Howard

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CERTIFICATE OF COMPLIANCE
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s/Edward P. Howard Date: December 12, 2023

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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