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SUPREME COURT NO. 101162-8
COURT OF APPEALS NO. 82132-6-I

SUPREME COURT OF THE
STATE OF WASHINGTON

LARRY L. ROEMMICH and GLORIA ROEMMICH, husband and
wife,

Appellants,

v.

3M COMPANY,

Respondent.

**APPELLANTS' ANSWER TO THE MEMORANDUM OF
AMICUS CURIAE THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC.**

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I. ARGUMENT

Amicus the Product Liability Advisory Council, Inc. (PLAC)—a non-profit funded by the profits of product manufacturers who seek to change the common law to shield manufacturer from liability—argues that: (1) the substantial factor test requires that a cause be sufficient by itself; (2) the Court of Appeal misapplied this requirement; and (3) Washington should diverge from the majority of states and well-settled precedent applying the substantial factor test in toxic tort cases. None of these arguments weight in favor of review.

First, Washington law is well-settled that multiple causes that combine to be the proximate cause of an injury, which cannot be assessed individually as standalone causes, should be evaluated using the substantial factor test. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 87-88(1995). Washington and the vast majority of states recognize that causation in toxic tort cases is assessed in terms of increased risk and that an

individual's ultimate development of a disease is the result of multiple factors.¹ As is the case with most carcinogens, it would be impossible for any expert to determine whether an individual would have developed an asbestos disease absent the other contributing causes. *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 977, 941 P.2d 1203, 1219–20 (1997).² Adopting the PLAC's position that each exposure must be sufficient by itself to cause a plaintiff's cancer would supplant decades of settled Washington law and create a sharp divergence from the majority of states that recognize the but-for test as improper in long-latency toxic tort cases. *See, e.g., Major v. R.J. Reynolds Tobacco Co.*, 14 Cal. App. 5th 1179, 1197, 222 Cal. Rptr. 3d 563, 579 (2017) (noting that "subsequent authority has

¹ *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2260 n. 21 (2015) ("States that still use the but-for causation standard for toxic torts include Arizona, Colorado, Delaware, Michigan, Missouri, and New Mexico.")

² Explaining that "[i]n many cases, such a burden will be medically impossible to sustain, even with the greatest possible effort by the plaintiff, because of irreducible uncertainty regarding the cellular formation of an asbestos-related cancer."

extended *Rutherford* to cancer caused by long-term exposure to multiple different toxins.”).

Second, the Court of Appeals correctly applied Washington’s substantial factor test. As explained above, the Court applied settled Washington law in determining that a Plaintiff need only show that 3M’s negligence increased “Roemmich’s exposure and harm, regardless of the other exposures.” *Roemmich v. 3M Co.*, 21 Wash. App. 2d 939, 952 (2022). It does not matter whether 3M’s mask contained asbestos because the Court of Appeals recognized that “[t]he evidence at trial established that 3M’s mask contributed at least partly to Roemmich’s exposure.” *Id.* This is no different than the contractors and premises-owner defendants whose conduct allegedly contributed to the pesticide “cloud” in *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d at 87-88 because the but-for standard improperly exonerates a defendant whose conduct operated concurrently and indivisibly with others to cause the plaintiff’s injury. Again, other states are in accord with the

Court of Appeals refusal distinguish between asbestos manufactures and other defendants whose conduct also contributes to a plaintiff's risk of asbestos disease.³

Third, there is no compelling reason to reconsider Washington's application of the substantial factor test for toxic tort cases. The PLAC's citation to *Nemeth v. Brenntag N. Am.* is not evidence of any change in New York's causation standard for asbestos cases. 194 N.E.3d 266, 271 (N.Y. 2022). Rather, *Nemeth* addressed the admissibility of medical expert testimony and took issue with the lack of support cited for the opinion by plaintiff's expert that a particular asbestos exposure substantially increased the risk of disease. *Id.* This issue was not before the Court of Appeals. Contrary to the PLAC's unsupported contention, the Court of Appeals' application of substantial factor causation in this toxic tort case is not an

³ See, e.g., *Lopez v. The Hillshire Brands Co.*, 41 Cal. App. 5th 679, 687, 254 Cal. Rptr. 3d 377, 383 (2019) (“[T]he difficulty of proving that a plaintiff's or decedent's illness was caused by particular asbestos fibers traceable to the defendant . . . [is] similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos.”).

outlier; it is the rule in Washington and the majority of other states.⁴ There is no benefit that will be derived from revisiting the standard here.

I certify that this brief contains 734 words pursuant to the Court's Order Calling for an Answer.

Signed in Seattle, Washington on the 4th day of November 2022.

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⁴ Note 1, *supra*.

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