SUPREME COURT NO. 101162-8

COURT OF APPEALS NO. 82132-6-I

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SUPREME COURT OF THE
STATE OF WASHINGTON

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

Appellants,

v.

3M COMPANY,

Respondent.

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# APPELLANTS' ANSWER TO 3M COMPANY'S PETITION FOR REVIEW

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## I. INTRODUCTION

3M Company's petition should be denied because nothing in the Court of Appeals' decision is inconsistent with any holding of this Court or any other appellate court in this state, or with Washington's public policy interest in holding safety product manufacturers liable for injuries their products cause.

Far from establishing conflict that would warrant review, 3M asks this Court to break with established precedent—including *Mavroudis v. v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 935 P.2d 963 (1989), which is the centerpiece of its motion—by granting review so that it can adopt a causation standard that no asbestos plaintiff could ever satisfy. Because it is impossible for plaintiffs in toxic tort cases to ever prove that any single exposure caused injury, Washington courts have long held that substantial factor causation is the proper standard to apply in asbestos cases with multiple sources of exposure. To establish a different standard of proof for manufacturers of

safety equipment, as 3M proposes, would be unprecedented, illogical, and unjust.

3M also claims that the Court of Appeals neglected to conduct a harmless error analysis. But the Court's opinion expressly analyzed prejudice, and its analysis is both consistent with established precedent and the factual record in this case.

Finally, 3M claims that this case involves a matter of substantial public importance. That, too, is incorrect, as the Court of Appeals' decision is entirely consistent with Washington public policy in protecting plaintiffs and holding manufacturers liable for the harm their products cause. Indeed, this Court has expressly acknowledged the necessity of imposing liability on respirator s manufacturers such as 3M:

> Imposing liability on safety product manufacturers can be an incentive to these manufacturers to provide adequate warnings that are necessary to protect people from the very hazards their products are designed to protect against. *A false sense of security can be worse than none in light of injuries that hazardous substances can cause.*

*Macias v. Saberhagen Holdings*, 175 Wn.2d 402,419, 282 P.3d 1069 (2012) (emphasis supplied).

The Court of Appeals' decision is consistent with this Court's reasoning in *Macias* and does not conflict with *Mavroudis* or any other Washington precedent. For all these reasons, the Court should deny 3M's petition for review.

## II. COUNTERSTATEMENT OF THE FACTS

### A. Larry Roemmich's Asbestos Exposure While Working as a Shipyard Insulator Caused His Mesothelioma.

Larry Roemmich worked as an insulator at Puget Sound Naval Shipyard ("PSNS") from 1968 to 1995.[1] From 1968 to 1972, he worked aboard Navy ships being constructed and overhauled.[2] During that period, Mr. Roemmich wore a respirator manufactured by co-defendant Mine Safety Appliances Company whenever he worked with asbestos-containing materials.[3]

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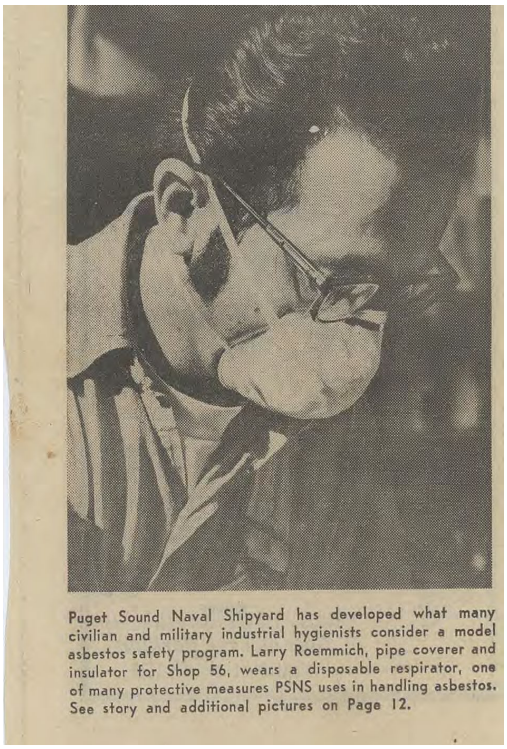
[1] 5 RP 2163.
[2] 5 RP 2164.
[3] 5 RP 2164, 2176.

From 1972 to 1982, Mr. Roemmich worked in Shop 56, which housed the insulators.[4] He fabricated insulation pads with asbestos materials and cleaned up spilled asbestos around the shipyard.[5] During this period, Mr. Roemmich wore 3M's 8710 mask whenever he worked with or around asbestos materials.[6] A newspaper article from the Bremerton Sun dated November 1, 1972, shows Mr. Roemmich wearing the 3M 8710.[7] The caption reads:

> Puget Sound Naval Shipyard has developed what many civilian and military industrial hygienists consider a model asbestos safety program. Larry Roemmich, pipe coverer and insulator for Shop 56 wears a disposable respirator, one of many protective measures PSNS uses in handling asbestos.

[4] 5 RP 2199-200.
[5] 5 RP 2200, 2199-200, 2226, 21972218-24.
[6] 5 RP 2201-03, 2221-22; Ex. 19.
[7] 3 RP 1128-30; Ex. 77.



Puget Sound Naval Shipyard has developed what many civilian and military industrial hygienists consider a model asbestos safety program. Larry Roemmich, pipe coverer and insulator for Shop 56, wears a disposable respirator, one of many protective measures PSNS uses in handling asbestos. See story and additional pictures on Page 12.

In 1982, Mr. Roemmich returned to shipboard work.[8] For the rest of his career, he used either an air-fed or elastomeric respirator when working with or around asbestos and sustained minimal exposure.[9]

Mr. Roemmich was diagnosed with mesothelioma in the fall of 2019. It is undisputed that his mesothelioma was caused

[8] 5 RP 2226.
[9] 5 RP 2241.

by the asbestos exposures he sustained at PSNS.[10] It was also undisputed at trial that mesothelioma is a cumulative dose disease.[11] As Plaintiffs' medical expert explained, "the greater the exposure to asbestos cumulatively, the greater the risk for developing mesothelioma."[12] He testified without contradiction that from a medical and scientific perspective, when a person has multiple exposures to asbestos, it is impossible to determine that one exposure and not another caused the individual's mesothelioma.[13]

### B. 3M Promoted its 8710 Mask as Protecting Users from Asbestos Despite Knowing That It Did Not Protect Users from Malignant Disease.

Mr. Roemmich's use of 3M's 8710 mask as a PSNS insulator was no coincidence. 3M developed the 8710 mask specifically for the insulation trade for use by asbestos workers.[14] 3M actively pursued the insulation and shipyard

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[10] 5 RP 2159.
[11] 2 RP 830.
[12] 2 RP 830.
[13] *See* 3 RP 1083.
[14] 3 RP 1132.

markets, directly targeting shipyard insulators like Larry Roemmich.[15] In 1971, 3M sent samples of its 8710 mask to PSNS to test user acceptance among insulators.[16]

In the early 1970s, 3M obtained a U.S. Government approval to market and sell the 8710 mask for protection from pneumoconiosis and fibrosis-producing dusts, of which asbestos is one.[17] 3M exploited this approval in a 1973 advertisement entitled: "You don't have to work yourself to death."

[15] 3 RP 1132-34, 1181.
[16] 3 RP 1169-70, 1177-78.
[17] 3 RP 1145-46.


As this advertisement shows, 3M specifically promoted the 8710 mask as protective against "stonecutters disease, asbestosis, grinder's rot."[18]

[18] Ex. 583.

Asbestos causes two types of harms in exposed individuals: 1) non-malignant disease consisting of pleural plaques or asbestosis, and 2) malignant disease involving lung cancer or mesothelioma.[19] Importantly, malignant disease can result from a much lower dose of asbestos fibers than what causes plural plaques or asbestosis.[20]

Since the 1960s, 3M knew that in addition to causing non-malignant diseases, asbestos could cause cancer.[21] In 1980, the National Institute for Occupational Safety and Health (NIOSH) expressly warned 3M that single use dust masks, like the 8710, had the propensity to leak and should not be used to protect users against the cancer-causing effects of asbestos.[22]

> Excessive leakage of the substance, such as asbestos, into the respirator due to either ineffective filtration or leakage around a poor seal is unacceptable and presents a potentially serious hazard to the wearer. The

[19] 2 VRP 801-05.
[20] 2VRP 835; 5 VRP 2047-48.
[21] 3 RP 1134, 1139.
[22] 3 RP 1366-68.

> possibility of the development of lung cancer or mesothelioma in the case of asbestos exposure cannot be ignored when both filtration efficiency and adequate face seal are questionable.[23]

Despite this unambiguous warning from government regulators, 3M continued to promote its 8710 mask as protecting users from asbestos hazards. Although NIOSH explicitly told 3M in 1980 that the 8710 would not protect users from mesothelioma, 3M continued to sell the mask for use with asbestos through 1986.[24] Indeed, 3M sold the mask in boxes lauding the product as "approved for lung-damaging dusts including asbestos."[25]

The Roemmiches also presented testimony from government regulators that 3M misled regulatory agencies and its customers about the 8710's ability to meet NIOSH certification criteria.[26] Importantly, PSNS conditioned its use

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[23] 3 RP 1367-68; Ex. 421.
[24] 3 RP 1371.
[25] Ex. 590.
[26] 4 RP 1889-90.

of the 8710 to protect its workers on the NIOSH approval.[27] Thus, the Roemmiches argued, had 3M truthfully informed NIOSH about the 8710 mask's inability to meet certification requirements and told the shipyard that the certification was misleading, PSNS would have used a different, more effective respirator for its asbestos workers or otherwise taken measures to protect its workforce.

### C. The Jury Returned an Adverse Verdict.

Following a 12-day trial, the jury found that the Roemmiches had proved that 3M was negligent but that such negligence was not a proximate cause of Mr. Roemmich's disease. The jury also answered "no" to whether the 3M 8710 was not reasonably safe as designed or not reasonably safe because inadequate warnings were provided and, thus, did not reach the question of causation on that theory.

Judgment was entered on November 16, 2020, and the Roemmiches filed their Notice of Appeal on November 24,

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[27] 3 RP 1186-88.

2020. The Court of Appeals issued its opinion on May 9, 2022. On July 12, 2022, the Court of Appeals denied 3M's motion for reconsideration. This petition followed.

Mr. Roemmich passed away from his mesothelioma on July 31, 2022.

## III. ISSUES

1. Should the Court deny review where the Court of Appeals opinion merely applied long-standing and consistent authority to conclude that substantial factor causation applies in multi-exposure toxic tort cases?

2. Should the Court deny review where the Court of Appeals conducted a prejudice analysis consistent with authority analyzing erroneous jury instructions?

3. Should the Court deny review where the Court of Appeals decision does not implicate an issue of substantial public interest?

## IV. ARGUMENT

### A. The Court of Appeals' Decision Does Not Conflict with Decisions of This Court or the Court of Appeals (RAP 1.4(b)(1)-(2)).

#### *1. The Court of Appeals' Decision Does Not Conflict with* Mavroudis.

##### a. *Mavroudis* Applies the Substantial Factor Test and Provides Strong Support for the Court of Appeals' Decision.

3M's primary complaint is that the Court of Appeals confirmed that substantial factor causation applies in multi-exposure asbestos cases. It maintains—contrary to all Washington authority—that "but for" causation should apply. 3M bases its petition for review on a purported conflict with the Court of Appeals' decision in *Mavroudis*. Its principal argument is that the products at issue in *Mavroudis* and other cases applying the substantial factor test involved products that were toxic in and of themselves, while the 3M mask contained no asbestos.

Contrary to 3M's assertion, *Mavroudis* does not stand for the proposition that only asbestos product manufacturers and

suppliers are subject to the substantial factor test. Instead, it is the nature of the plaintiff's claims, the plaintiff's exposure, and the plaintiff's burden of proof that require application of the substantial factor test. The Court of Appeals correctly analyzed the issue, and its decision is entirely consistent with—and certainly does not conflict with—the Court of Appeals' decision in *Mavroudis*.

In *Mavroudis*, after extensive discussion of this Court's reasoning in *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985), and *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 87-88, 896 P.2d 682 (1995), the Court of Appeals held that the substantial factor test should be used in asbestos injury cases where all the plaintiff's exposures play a role in causing disease. *Mavroudis*, 26 Wn. App. at 29-32. The court noted expert testimony that "all of the plaintiff's exposure probably played a role in causing the injury and that it is not possible to determine which exposures were, in fact, the cause of the condition." *Id*. at 32. The court concluded that requiring a

plaintiff to meet the heightened "but for" causation standard would be impossible and inappropriate in asbestos cases because the alleged harm resulting from all the plaintiff's exposures is the same injury: asbestos disease. *Id*. at 30.

The record here mirrors precisely what the court relied upon to justify application of the substantial factor test in *Mavroudis*. It was uncontested at trial that Mr. Roemmich sustained multiple exposures to asbestos and that his mesothelioma was a result of his cumulative dose exposure to asbestos—regardless of whether the exposure was attributable to 3M's defective mask or some other source.[28] Plaintiffs' medical expert Carl Brodkin, MD, MPH provided virtually identical testimony in this case, explaining that all asbestos exposures contributed to Mr. Roemmich's mesothelioma and it was not possible to discern which specific exposure caused the injury. Under the asbestos-specific holding in *Mavroudis*, the

[28] 2 RP 877-80.

Roemmiches were entitled to the substantial factor causation instruction. Because the Court of Appeals' decision does not conflict with *Mavroudis*, review is not warranted under RAP 13.4(b)(2) and 3M's petition should be denied.

b. 3M's Efforts to Manufacture a Conflict with Washington Precedent Easily Fail.

Because the Court of Appeals' analysis is consistent with *Mavroudis*, 3M resorts to a series of misleading and irrelevant arguments to manufacture a conflict. 3M contends that Dr. Brodkin's testimony established that the pre-1972 exposures were sufficient to cause disease. But the Court of Appeals correctly pointed out that Dr. Brodkin's opinion on this matter was hypothetical:

> Dr. Brodkin explained that this was a hypothetical because mesothelioma is a dose-response disease and it was also true that a worker like Roemmich, whose asbestos exposure continued on for another eight years, would be at increased risk for mesothelioma. He testified that it is an aggregate risk and that both of those periods resulted in the aggregate dose that led to his mesothelioma. Ultimately, he testified that all of Roemmich's asbestos exposures contributed to his injury and it

> was not possible to discern which specific exposure caused the injury.

*Roemmich v. 3M Co.*, 21 Wn. App. 2d 939, 950-51, 509 P.3d 306 (2022). Thus, the Court of Appeals agreed with *Mavroudis* that it was impossible to determine which exposures were *the* cause of disease.[29]

3M also attempts to differentiate cases that involve alternative asbestos exposures from cases like this one that involve a product that did not contain asbestos. This is a false distinction. While 3M's product did not contain asbestos, the mechanism of harm is the same as any other product or

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[29] 3M also claims that the Court of Appeals improperly determined that the substantial factor causation standard applies when it is merely "difficult" to establish causation. This mischaracterizes the opinion's analysis which relied on the impossibility of the plaintiffs' burden. Further, noting the difficulty of a plaintiff's burden of proof has been a theme of seminal Washington authority on asbestos, *Lockwood v. AC&S., Inc.*, 109 Wn.2d 235, 248, 268, 744 P.2d 605 (1987), and application of the substantial factor test, *Sharbono v. Universal Underwriters Ins. Co*., 139 Wn. App. 383, 420, 161 P.3d 406 (2007) ("The substantial factor test is appropriate in these cases, where causation is difficult to prove, largely due to public policy considerations that strongly favor eradication of discrimination and unfair employment practices.").

misconduct at issue in asbestos injury cases: exposure to asbestos that, absent the defendant's misfeasance, would not have occurred. The resulting injury is also the same: mesothelioma. In this case—like every other asbestos case—it is the combined effect of multiple parties who caused Mr. Roemmich to be exposed to asbestos in sufficient amounts to cause his disease. No basis exists, therefore, to apply a different causation standard to 3M when its mask contributed to this cumulative exposure.

Indeed, contrary to 3M's argument, Washington courts have consistently held that liability for asbestos exposure extends to defendants who never manufactured or sold asbestos-containing products, including respirator manufacturers. *See Macias,* 175 Wn.2d at 402 (safety product manufacturers); *Woo v. General Electric Co.*, 198 Wn. App. 496, 393 P.3d 869 (2017) (equipment manufacturers); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 240 P.3d 162 (2010) (premises owners). To accept 3M's proposition that the

substantial factor causation standard applies only to asbestos product manufacturers and sellers would allow countless non-manufacturer defendants to escape liability under the "but for" test even where their negligence, as here, contributed to the plaintiff's injurious exposures.

Additionally, there is substantial Washington precedent applying the substantial factor causation standard to non-product defendants outside of asbestos litigation. In *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 70, 896 P.2d 682 (1995), substantial factor causation applied to both the manufacturers of the toxic pesticide as well as the landowners of the farms who purchased the pesticides. In *City of Benton v. Adrian*, 50 Wn. App. 330, 342, 748 P.2d 679 (1988), substantial factor causation applied to a claim against landowners in a nuisance flooding case.

In the medical malpractice context, too, substantial factor causation can apply. *See, e.g.*, *Herskovits v. Group Health Co-op. of Puget Sound*, 99 Wn.2d 609, 664 P.2d 474 (1983). This

Court's opinion applying substantial factor in the *Herskovits* case illustrates the flaws in 3M's argument. In *Herskovits*, the defendant health care provider negligently failed to diagnose the plaintiff with lung cancer, thus reducing his chances of survival from 36 to 25 percent. *Id*. at 610-11, 614. In holding that this reduction was sufficient to take the issue of proximate cause to the jury, the Court observed that "the defendant's act or omission failed in a duty to protect against harm from another source. Thus . . . the fact finder is put in the position of having to consider not only what did occur, but also what might have occurred." *Id*. at 616 (citing *Hamil v. Bashline*, 481 Pa. 256, 392 A.2d 1280 (1978)). The Court concluded that "once a plaintiff has demonstrated that the defendant's acts or omissions . . . have increased the risk of harm to another, such evidence furnishes a basis for the fact finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm." *Id*. at 617. Here, like in *Herskovits*, Plaintiffs have alleged—and provided evidence to

show—that 3M's negligence failed to protect Mr. Roemmich from harm, increased his asbestos exposure, and thus increased his risk of developing mesothelioma. All Washington authority supports this Court of Appeals decision that substantial factor causation—and only substantial factor causation—can apply here.[30] For this reason too, the Court should deny review of this issue.

Lastly, 3M repeatedly claims that "[t]he jury found that the 3M 8710 respirator was reasonably safe in its design and

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[30] Other jurisdictions, too, have confirmed that substantial factor causation is the correct standard when considering claims against a mask manufacturer in asbestos cases. *See Kilty v. Weyerhaeuser Co.*, No. 16-CV-515-WMC, 2018 WL 2464470, at *7 (W.D. Wis. June 1, 2018) (noting that the plaintiffs' burden under Wisconsin law is to establish—under either a strict liability or negligence theory—that the exposure to asbestos caused by 3M's defective mask was a substantial contributing factor to their mesothelioma diagnoses); *Lafrentz v. Lockheed Martin Corp.*, No. 4:18-CV-4229, 2021 WL 4350175, at *2 (S.D. Tex. Sept. 10, 2021) (observing that under Texas law, the plaintiff was required to show that while he was wearing the 3M mask, the dose of asbestos was a substantial factor in causing his mesothelioma because the 8710 Respirator did not sufficiently protect him from asbestos in products manufactured by others).

warnings."[31] 3M's motion is unclear about why this entitled it to a "but for" causation instruction. In any event, 3M's interpretation of the jury's verdict is false, and its assertions that the jury affirmatively found that the 8710 mask was "reasonably safe" and that its product was "defect free" are misleading at best. The jury's verdict contained no such finding and there were no special interrogatories on the safety of the 8710 mask. Rather, the jury simply found that Plaintiffs failed to carry their burden of proof on their strict product liability claim. Peculiarly absent from 3M's factual recitation is the critical point that the jury found 3M negligent.

The trial court's instructions to the jury allowed the jury to find the 3M mask defective under *either* a products liability theory or a negligence theory. At the conclusion of trial, the jury was instructed as follows on Plaintiffs' two lability claims:

> The plaintiff brings this action against the defendant on the basis of two separate claims:

[31] 3M Petition at 12.

1. Product Liability

2. Negligence

*You are to consider each claim separately with respect to the plaintiff's alleged injury*. If an instruction has a heading at the top that states "PRODUCT LIABILTIY" or "NEGLIGENCE," the instruction applies that that claim, respectively.

With respect to the plaintiff's product liability claim, the plaintiff contends that the defendant sold an 8710 respirator that was not reasonably safe for use because:

1. This product as designed was not reasonably safe; or

2. This product was not reasonably safe because it did not contain adequate warnings or instructions.

With respect to the plaintiff's negligence claim, he contends that the defendant was negligent in one or more of the following respects:

1. Failure to adequately warn foreseeable product users;

2. Failure to test the products;

3. Failure to substitute safe products; and/or

4. Failure to remove the products from the market.

> The plaintiff claims that one or more of these acts was a proximate cause of his injuries. The defendant denies these claims and, further, denies the nature and extent of the plaintiff's claimed injuries.[32]

Based on the above instruction—which 3M did not challenge on appeal—the jury could have found that 3M was negligent by failing to test its 8710 mask, which presupposes that there was some "imperfection" with the 8710 that testing would reveal. This, by itself, is sufficient to justify the word "defect" in describing the mask.

Similarly, the trial court's instructions allowed the jury to find that 3M failed to exercise reasonable care by failing to substitute the 8710 with a safe product or remove it from the market *because* the mask had an "an imperfection or abnormality that impair[ed] [its] quality, function, or utility." Finally, a jury finding that 3M was negligent in not "adequately warning foreseeable product users" required that there was

[32] CP 1663 (emphasis supplied).

some "deficiency" associated the 8710 that it should reasonably have warned about. The Court of Appeals' analysis of causation as it relates to the allegations of "defect" is fully consistent with the instructions the jury received from the first day of trial and the record on appeal. No inconsistency in the opinion exists, and this, too, is not a proper reason to grant review under the considerations set forth in RAP 13.4(b).

*2. The Court of Appeals' Decision Does Not Conflict with This Court's Harmless Error Decisions.*

3M next claims that the Court of Appeals failed to conduct a harmless error analysis. But the Court expressly analyzed prejudice and correctly determined that Plaintiffs were prejudiced by the erroneous jury instructions. Specifically, the Court of Appeals determined that had the jury received the proper causation instructions, it could have concluded that 3M's negligence was a substantial factor in causing Mr. Roemmich's mesothelioma.

To begin with, the Court's opinion correctly concluded that the instructional errors were legal in nature and therefore

appropriately presumed prejudice. A clear misstatement of the law is presumptively prejudicial. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 873, 281 P.3d 289 (2012). The proximate cause instruction is legally erroneous because the instruction did not properly inform the jury of the correct causation standard and allowed it to render its verdict on the incorrect legal standard. *Id*. at 872 (presuming prejudice when the jury instructions presented the incorrect inquiry); *Keller v. City of Spokane*, 146 Wn.2d 237, 251, 44 P.3d 845 (2002) (a jury instruction was legally erroneous to the extent that it allowed a jury to premise liability on an incorrect interpretation of the law).

But the Court of Appeals also conducted a prejudice analysis, and its analysis is sound. The Court observed that 3M explicitly relied on the erroneous "but for" instruction in closing and that the jury could have found for 3M under this erroneous standard. This prejudice analysis is all that was required. *See Capers v. Bon Marche, Div. of Allied Stores*, 91

Wn. App. 138, 145, 955 P.2d 822 (1998) (opposing counsel's arguments under the improper "but for" proximate cause standard demonstrated prejudice where substantial factor standard applied).

Moreover, the prejudice is plain. Remarkably, 3M claims that the "but for" instruction did not affect the outcome because the jury found that the product was not unreasonably unsafe. Certainly, a harmless error does not warrant a new trial. Thus, if the jury had found that Plaintiffs had failed to meet their burden on both negligence and strict product liability, incorrect causation instructions could not have affected the outcome of the trial. Here, however, the jury found that 3M was negligent, but that the defendant's negligence was not a cause of Mr. Roemmich's disease. Thus, the erroneous causation instructions were far from harmless. Indeed, the Court of Appeals acknowledged as much when it found that "the jury could have found that, although negligent, 3M was not the proximate cause of Roemmich's injury because he would

have developed mesothelioma from his other asbestos exposures regardless of 3M's negligent acts." *Roemmich*, Wn. App. 2d at 956.

3M contends that it asserted throughout trial that Mr. Roemmich's exposures could somehow be separated and that it was an individual exposure, not the cumulative dose, that caused his disease.[33] But 3M offered no expert testimony—or evidence of any kind—to support this position. Instead, its counsel made this assertion in argument to the trial court. Such statements are contrary to the scientific record in this case and any authority involving asbestos exposure. 3M cannot simply make an unfounded statement to support its requested "but for" jury instruction.

[33] 3M Petition at 30.

### B. Because an Unsafe Safety Product Ultimately Causes the Same Harm as the Underlying Risk, the Substantial Public Interest Prong (RAP 13.4(b)(4)) Also Does Not Warrant Discretionary Review.

3M continues to assert that it deserves special treatment from every other defendant in asbestos cases because it manufactured a safety product, not an asbestos product. It claims some abstract impact on manufacturers of safety products. However, the balancing test of measuring the desirability of manufacturing useful products against the harm those products cause is the same for safety product manufacturers as against all other manufacturers. Moreover, the harm of an unsafe protection product is exactly the same as the harm of the underlying risk: increased asbestos exposure that, barring the defendant's misfeasance, would not have occurred. Both legally and logically, there is no compelling reason to create a new and different causation standard where the exposure to a harmful substance is created by a safety device that fails to provide proper protection.

Indeed, this Court has already noted the vital importance of holding respirator manufacturers responsible for the dangers associated with their product's use. Writing for the Court in the *Macias* case, Justice Madsen wrote:

> Imposing liability on safety product manufacturers can be an incentive to these manufacturers to provide adequate warnings that are necessary to protect people from the very hazards their products are designed to protect against. A false sense of security can be worse than none in light of injuries that hazardous substances can cause.

*Macias*, 175 Wn.2d at 419. The Court further observed that "the legislature has authority to immunize manufacturers of safety equipment from liability, but they have not implemented such public policy in the [Washington Products Liability Act] itself. If there is any such policy set out elsewhere by the legislature or Congress . . . it is not before us." *Id*. at 419 n.5.

While 3M claims (erroneously) that the Court of Appeals' decision conflicts with *Mavroudis* and other Washington decisions, it improperly ignores this Court's recognition in *Macias* that safety products are vital tools in

protecting Washingtonians from exposure to hazardous substances. Worse still, 3M asks the Court to adopt a causation standard that no asbestos plaintiff could ever meet. Under 3M's proposed test, no plaintiff could ever prove causation against 3M or any other defendant in a toxic tort case. Many individuals exposed to asbestos never develop cancer. It is uncontroverted that when an individual does develop cancer, it is the result of the individual's *cumulative* exposure, which is almost always comprised of multiple sources. Sometimes these sources of exposure are to different asbestos-containing products; sometimes they are at different locations; and sometimes they are during different time periods. Under a traditional "but for" causation test, it would be impossible for an asbestos plaintiff to prove that any individual exposure was solely responsible for his or her injury. A defendant could avoid liability by simply arguing that because another exposure would have been sufficient to cause the plaintiff's disease, no particular defendant can be held responsible. Rather than bar

asbestos disease victims from recovery and avoid an unjust result, Washington courts have universally applied the substantial factor test articulated in *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985), in asbestos injury cases. *See Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 248, 744 P.2d 605 (1987); *Mavroudis*, 86 Wn. App. at 32.

The Roemmiches faced the same insurmountable hurdle as the plaintiff in *Daugert*: 3M's contribution to Mr. Roemmich's asbestos exposure was less than his total cumulative dose. As such, the most Plaintiffs could ever prove was that the level of exposure attributable to 3M's conduct was a substantial factor in causing Mr. Roemmich's mesothelioma; they could never establish that without 3M's negligence he would not have been injured.

Notably, this Court in *Herskovits* refused to approve "a blanket release from liability for doctors and hospitals any time there was less than a 50 percent chance of survival, regardless of how flagrant the negligence." 99 Wn.2d at 614. To accept

3M's argument would be just as harmful to asbestos plaintiffs, relieving any defendant in an asbestos case of liability when other asbestos exposures are hypothetically enough to cause disease. If each asbestos defendant is able to point to other exposures significant enough to breach this threshold, asbestos plaintiffs could never prove their case against a single one. Whatever public policy concerns may exist, surely the remedy should be left to legislation rather than obliterating the standard of proof for toxic tort plaintiffs, which would have far-reaching and catastrophic results for future plaintiffs.

## V. CONCLUSION

For the foregoing reasons, the Court should deny 3M's petition for review.

I certify that this brief contains 4,916 words pursuant to the Court's Order Calling for an Answer.

Signed in Seattle, Washington on the 30th day of August 2022.

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**CERTIFICATE OF SERVICE**

I certify that on August 30, 2022, I caused to be served a true and correct copy of the foregoing document upon the below-listed attorneys of record by the following method:

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BERGMAN DRAPER OSLUND UDO

*/s/ Stephanie Simmons*
Stephanie Simmons

**BERGMAN DRAPER OSLUND UDO**

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**Transmittal Information**

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| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 101,162-8 |
| **Appellate Court Case Title:** | Larry and Gloria Roemmich v. 3M Company, et al. |

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