Supreme Court No. 101162-8

NO. 82132-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

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

Respondents,

v.

3M COMPANY,

Petitioner.

ON APPEAL FROM KING COUNTY SUPERIOR COURT

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page(s)

Washington Cases

TABLE OF AUTHORITIES

Page(s)

Other State Cases

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Constitutional Provisions, Statutes and Court Rules

Other Authorities

TABLE OF AUTHORITIES

Page(s)

I. Introduction

In this product liability case involving a respirator, the Court of Appeals incorrectly held the substantial-factor standard was the exclusive means for determining cause-in-fact. The court reasoned that the traditional but-for standard didn't apply because the plaintiff had an asbestos-related illness, and the precise sources of his asbestos exposures could not be determined. *Roemmich v. 3M Co.*, 21 Wn. App. 2d, 939, 952, 509 P.3d 306 (2022) (No. 82132-6-I, slip op. at 10, attached hereto as App. A). For well over a century, this Court has declared but-for the customary test to determine cause-in-fact in negligence cases. *See Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 289, 481 P.3d 1084 (2021); *Gray v. Wash. Water Power Co.*, 27 Wash. 713, 718, 68 P. 360 (1902). Only a handful of exceptions to the but-for standard are recognized; the substantial-factor test is applied in those discrete circumstances. The substantial-factor test is used to evaluate liability in cases involving multiple-defendant asbestos manufacturers or distributors. However, the

3M 8710 respirator (a safety product) didn't contain asbestos. Rather, when used correctly in an environment for which it was designed, the 3M 8710 respirator reduced the user's exposures to harmful substances like asbestos.

Reversing the trial court, the Court of Appeals held that it had abused its discretion by instructing the jury on both standards, and instead should have instructed the jury only on the substantial-factor standard. The Court of Appeals approached this as an asbestos-products case even though there were no asbestos defendants at trial, noting "Roemmich was exposed to asbestos by a number of parties, so individual responsibility for the harm cannot be proved under the 'but for' test." Slip. op. at 10. It was undisputed that 3M was not one of the parties who exposed Mr. Roemmich to asbestos, rather its product *reduced* his exposures. The Court of Appeals ignored this evidence, finding instead that "mesothelioma was a cumulative harm where the exact event or party that caused the harm could not be

identified," rendering substantial-factor the sole applicable factual cause test. Slip op. at 12.

In holding that the evidence supported an instruction limited to the substantial-factor standard, the Court of Appeals relied heavily on Plaintiffs' evidence about alleged design defects in the 3M 8710 respirator (slip op. at 10, 12). The jury, in fact, rejected that evidence—when asked if the 8710 was "not reasonably safe" in its design and warnings, they answered "no." The Court of Appeals affirmed the no-defect portion of the verdict, even while crediting Plaintiffs' defect evidence to support the substantial-factor instruction.

Review under these circumstances is warranted. This Court should decide the novel issue presented here: whether the manufacturer of a defect-free respirator, or other asbestos *protective* product, should be subjected to the same causation standard customarily reserved for those who created and distributed harmful asbestos.

II. Identity of the Petitioner and Decision

Petitioner is 3M Company, manufacturer of the 3M 8710 respirator. 3M seeks review of the published decision in *Roemmich v. 3M Co.*, No. 82132-6-I (attached as Appendix).

III. Issues for Review

1. The "but-for" causation standard is the traditional means of establishing cause-in-fact. The use of the substantial-factor standard is justified in limited circumstances, such as when a plaintiff was exposed to multiple defendants' asbestos products, and can't establish which defendant's asbestos caused the injury. Is it a matter of substantial public interest for this Court to review whether the manufacturer of products designed to protect people from asbestos should be subjected to the same causation test reserved for those responsible for exposing people to asbestos?

2. Did the Court of Appeals misapply this Court's precedential holdings by determining that substantial-factor was the only appropriate factual causation test for the Roemmiches' claims against 3M?

IV. Statement of the Case

Plaintiff Larry Roemmich began work as an insulator at the Puget Sound Naval Shipyard in 1968. RP 1744. From 1968 to 1972, he was exposed daily to airborne amosite asbestos while working aboard Navy ships. RP 1075. He used a respirator made by a different manufacturer during the 1968-72 period, RP 1744-45, but wore that respirator only some of the time. RP 2274. Plaintiffs' medical expert admitted that Roemmich's asbestos dose from 1968 to 1972—before he ever put on a 3M respirator—was sufficient to cause his mesothelioma. RP 960-61.

In 1972, Roemmich moved from working aboard ships to an insulating shop, where his asbestos exposures were much

lower than those he had received when working as an insulator (pre-1972). RP 1018-39, 2118. Also in 1972, the 3M 8710 respirator was certified for use as protection against many kinds of dusts, including asbestos. RP 1153-55, 1405, 1505, 1520-22. Roemmich claimed to have used a 3M 8710 respirator while working in the shop, RP 2201-03. Decades later, he was diagnosed with mesothelioma and filed this lawsuit.

3M was the only defendant at trial, and the only product at issue was a safety product that didn't contain asbestos. RP 255. Recognizing that this was not a traditional asbestos case, the trial court instructed the jury on the definitions of "proximate cause" based on both the but-for and substantial-factor standards. CP 1665.

Before trial, Plaintiffs tendered a non-pattern jury instruction for the substantial-factor test. CP 660. The instruction was based partly on *Lockwood v. A C & S*, 109 Wn.2d 235, 268, 744 P.2d 605 (1987) and *Mavroudis v. Pitt.-Corning Corp.*, 86 Wn. App. 22, 28, 935 P.2d 684 (1997).

3M tendered a but-for causation instruction taken directly from WPI 15.01, reflecting the fact that Washington law does not support using a substantial-factor test outside the context of asbestos-containing products. CP 703. 3M later tendered a different instruction that offered but-for and substantial-factor as alternative tests for causation. CP 1516, 1600.

The trial court heard argument on jury instructions before the close of evidence.[1] CP 3013-36, 3173-86. It then gave the jury final instructions, which included a causation instruction the court prepared on its own. CP 1665; RP 3203-04. The trial court's instruction on proximate cause combined the text of WPI 15.01 and WPI 15.02 with introductory language found in Plaintiffs' originally tendered causation instruction:

> [1] *If two or more causes combine to bring about an injury*, the term "proximate cause" means a cause that was a substantial factor in bringing about the injury even if the injury would have occurred without that cause.

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[1] Late in the trial, Plaintiffs tendered an alternative proximate cause instruction based on the specific text of WPI 15.02. CP 1636-42.

> [2] *If two or more causes did not combine to bring about an injury*, the term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause produces the injury complained of and without which such injury would not have happened.
>
> [3] There may be more than one proximate cause of an injury.
>
> CP 1665; RP 3203-04 (bracketed numbers and emphasis added).

In essence, the court combined the text of WPI 15.01 (but-for causation) and WPI 15.02 (substantial-factor causation) in instructing the jury, and allowed the parties to argue their respective causation theories in closing.

The jury found the 3M 8710 respirator reasonably safe in its design, warnings, and instructions. CP 1643. Finding no defect, the jury followed the directions on the verdict form and bypassed the question asking whether any defect was a proximate cause of Roemmich's mesothelioma. CP 1644. The jury separately found that 3M was negligent, but that any negligence by 3M wasn't a proximate cause of Roemmich's

injuries. CP 1644. The Roemmiches didn't challenge any inconsistencies in the jury's verdict.

The Roemmiches appealed the jury verdict, asserting that the trial court had reversibly erred in its instruction on proximate cause, as well as a separate instruction on 3M's superseding-cause defense. Based on these instructional-error arguments, Plaintiffs sought a new trial on their negligence claim, the only claim on which the jury found no causation.

The Roemmiches also argued that the trial court had abused its discretion in excluding their expert on consumer survey research and limiting the testimony of one of two product-defect experts. Based on these claims of evidentiary error, Plaintiffs sought a new trial on their strict-liability claims for design defect and failure to warn.

The Court of Appeals affirmed the trial court's evidentiary decisions regarding the Roemmiches' experts, and thereby affirmed the jury's findings "that 3M's 8710 respirator was reasonably safe in design and contained adequate warnings and

instructions." Slip op. at 2, 21. Nevertheless, the appellate court relied on product-defect evidence the Roemmiches' presented at trial (even though that evidence was rejected by the jury) to conclude that the but-for causation test was unsupported. So, even though the appellate court affirmed the jury's finding that the 3M 8710 respirator was reasonably safe in its design and warnings, it falsely concluded that "[t]he evidence at trial established that 3M's mask contributed at least in part to Roemmich's exposure and harm…. Applying the 'but-for' causation test would absolve 3M of responsibility despite this evidence." Slip op. at 12. Of course, the jury's no-defect finding absolved 3M of responsibility even without an analysis of causation, a fact the appellate court never considered.

The reviewing court went even further, asserting that, as legal matter, substantial-factor "should be used in cases where it is difficult to establish the exact event or party that caused the harm." Slip op. at 10. Essentially, the appellate court found that the trial court had erred in giving the causation instruction that

included the customary but-for standard. The appellate court also concluded, based on the same product-defect evidence rejected by the jury, that the trial court had abused its discretion by instructing the jury on the superseding-cause defense, rendering the instruction inappropriate. Slip op. at 16. The appellate court then considered the combined prejudice of the two instructional errors it had found and concluded that a new trial was required on the negligence claim due to prejudice. Slip op. at 17.

V. The Published Opinion Merits Review Under RAP 13.4(b)(1) and (4).

1. The but-for test is the default causation standard in Washington.

The Court of Appeals' analysis of the applicable causation standard is in conflict with this Court's decision on when to apply the substantial-factor test—a narrow exception to the but-for test. This case also raises issues of substantial public interest that should be determined by the Supreme

Court, meriting the exercise of discretionary review under RAP 13.4(b).

Washington follows the but-for standard for cause-in-fact, asking whether, but for the defendant's actions the plaintiff's injury would have occurred. *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 198 Wn.2d 768, 803, 500 P.3d 119 (2021). As such, it focuses on "the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *Budd v. Kaiser Gypsum Co.*, 21 Wn. App. 2d 56, 73, 505 P.3d 120 (2022).

But-for causation requires a showing that: "(1) the cause produced the injury in a direct sequence, and (2) the injury would not have happened in the absence of the cause." *Anaya Gomez v. Sauerwein*, 180 Wn.2d 610, 624, 331 P.3d 19 (2014); *see also Hartley*, 103 Wn.2d at 777.

The substantial-factor test is an "exception to the general rule of proving but for causation and requires that a plaintiff prove that the defendant's alleged act or omission

was a substantial factor in causing the plaintiff's injury, even if the injury could have occurred anyway." *Mohr v. Grantham*, 172 Wn.2d 844, 852-53, 262 P.3d 490 (2011); *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 684, 183 P.3d 1118 (2008).

This Court has held that, in certain circumstances, the substantial-factor standard is appropriate to use:

- [W]here either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the "but for" test;
- [W]here a similar, but not identical, result would have followed without the defendant's act; or
- [W]here one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.

Dunnington v. Va. Mason Med. Ctr., 187 Wn.2d 629, 634-35, 389 P.3d 498 (2017); *Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985); W. Page Keeton, Dan B.

Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on Torts* § 41 (5th ed. 1984).

The three circumstances identified in the bullet points above constitute a "narrow class of cases. *Dunnington*, 187 Wn.2d at 636. Specifically, it applies to cases where "a plaintiff is unable to show that one event alone was the cause of the injury." *Daugert*, 104 Wn.2d at 262; WPI 15.02 Comment. Since *Daugert*, Washington courts have applied the substantial-factor test in only three types of cases—those involving:

- discrimination or unfair employment practices;
- securities; and
- toxic-tort cases, including multi-supplier asbestos injury cases.

Fabrique, 144 Wn. App. at 685.[2]

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[2] The *Fabrique* court listed a fourth category, medical-malpractice cases involving the loss of a chance. But, in *Dunnington*, 187 Wn.2d at 640, this Court clarified that the but-for test applies in loss-of-a-chance cases.

Under the substantial-factor test, "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Keeton et al.*, *supra,* § 41.

The substantial-factor test doesn't offer a path around but-for causation in all or even many cases. It is reserved only for "combined active conduct" cases where multiple tortfeasors might each escape liability if but-for causation were applied. *See Daugert*, 104 Wn.2d at 262. But, "[t]he only 'combined active conduct' cases in which the substantial factor test is needed are those in which the defendant's conduct was *by itself sufficient* to accomplish the harm but didn't seem to be a but-for cause of the harm because it was fortuitously joined by the causal conduct of another that was also by itself sufficient to accomplish the harm." David W. Robertson, *W. Page Keeton Symposium on Tort Law:*

The Common Sense of Cause in Fact, 75 Tex. L. Rev. 1765, 1778 (June 1997).

The "word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm" that a reasonable person would "regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred." Restatement (Second) of Torts § 431 cmt. a (1965).

Under section 432 of the Restatement (Second) of Torts, an actor's negligent conduct is *not* a substantial factor in bringing about harm if the harm would have occurred even if the actor had not been negligent. *Herrington v. Hawthorne*, 111 Wn. App. 824, 831, 47 P.3d 567 (2002). It is true that a defendant's negligence can be a substantial factor, even if there is another, independent, force actively operating to cause the harm. But even under substantial-factor analysis, a particular defendant is liable only if

that defendant's negligence would have *sufficed* to cause the harm *on its own*. *Id.*; *see* Restatement (Second) of Torts § 432 (1965); *see also State v. Meekins*, 125 Wn. App. 390, 397, 105 P.3d 420 (2005). In other words, to be a *substantial* factor, an alleged cause must be *sufficient* to cause injury. *See Hanford Nuclear Rsrv. Litig. v. E.I. DuPont de Nemours & Co.*, 534 F.3d 986, 1010-11 (9th Cir. 2008) (rejecting reading of Washington law allowing substantial-factor test to supplant but-for causation in virtually all toxic tort cases).[3]

With this background, it isn't surprising that some courts—including Washington's—apply the substantial-factor test to asbestos personal-injury claims against multiple asbestos-

[3] *See Coulbourn v. Crane Co.*, 728 F. App'x 679, 681 (9th Cir. 2018); *United States v. Aguirre*, 448 F. App'x 670, 674 (9th Cir. 2011); *June v. Union Carbide Corp.*, 577 F.3d 1234, 1245 (10th Cir. 2009); *Basko v. Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969); *Maryland v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 455 (D. Md. 2019); *Joshi v. Providence Health Sys. of Or. Corp.*, 108 P.3d 1195, 1198 (Or. Ct. App. 2005); *Wilkins v. Lamoille Cnty. Mental Health Servs.*, 889 A.2d 245, 250 (Vt. 2005).

product manufacturers. As one court explained: "Asbestos is known to cause … mesothelioma, and that this product is a sufficient cause of harm is rarely a contested issue in asbestos litigation. Thus, since asbestos in itself is sufficient to cause harm, the substantial factor test has been properly applied . . . to determine whether there has been adequate proof of causation." *Aldridge v. Goodyear Tire & Rubber Co.*, 34 F. Supp. 2d 1010, 1020 (D. Md. 1999), *rev'd on other grounds*, 223 F.3d 263 (4th Cir. 2000).

2. The Court of Appeals' holding conflicts with *Mavroudis v. Pittsburgh-Corning*.

I*n Mavroudis*, 86 Wn. App. at 22, a case involving defendants who made asbestos-containing products, the appellate court approved a substantial-factor jury instruction, stating: "If you find that two or more causes have combined to bring about an injury and *any one of them operating alone would have been sufficient to cause the injury*, each cause is considered to be a proximate cause of the injury if it is a substantial factor in bringing it about, even though the result would have occurred

without it." *Id*. at 28 (emphasis added). The *Mavroudis* court concluded that *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682 (1995), didn't "require a showing that an individual defendant's contribution to the pesticide cloud would have been sufficient to cause the injury." *Mavroudis*, 86 Wn. App. at 30. But there was no question that *all* of the individual products at issue in both *Hue* and *Mavroudis* were capable of causing the claimed injuries. *See id.* at 29-30. The evidence in *Mavroudis* prompted "a rational jury to find that exposure to Kaylo, standing alone, would have been sufficient to cause Mr. Mavroudis to contract mesothelioma." *Id.* at 31.

This case is different. The 3M 8710 respirator didn't contain asbestos. Standing alone, it was incapable of causing any harm; it didn't do anything but reduce exposure to asbestos. Thus, this is not the type of case contemplated by section 432(2) of the Restatement. Instead, the traditional but-for causation test should apply. Unlike *Mavroudis*, there aren't multiple defendants whose products were independently capable of

causing harm, and who could escape liability if a but-for causation test were applied. The only defendant at trial was a non-asbestos defendant, and the only product at issue was a non-harmful respirator, necessitating the but-for test.

3. Even assuming *arguendo* that giving both a but-for and a substantial-factor instruction was erroneous, the Court of Appeals' decision conflicts with this Court's precedent regarding harmless error in jury instructions.

Even an erroneous jury instruction should be subjected to harmless-error analysis. *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, 15*1 Wn.2d 203, 211, 87 P.3d 757 (2004). This Court has made clear that such analysis is not merely an option for appellate courts, but a duty. *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) ("[I]t becomes our duty, whenever such a question is raised, to scrutinize the entire record in each particular case, and determine whether or not the error was harmless or prejudicial.").

Here, at the very least, in the circumstances presented, there was a factual issue for jury determination: whether the

"plaintiff [was] unable to show that one event alone was a cause of the injury." *Daugert*, 104 Wn.2d at 262. Plaintiffs insisted that they couldn't (or at least wouldn't try to) show that only one portion of Roemmich's work history caused his injury; they compared his lifetime asbestos exposures to a "cloud" that couldn't be separated into its constituent parts. RP 2454. 3M disagreed, asserting throughout the trial that Roemmich's work history could (and should) be separated into distinct phases, with markedly different levels of asbestos exposure and significantly different respirator protection:

- 1968-72 (working shipboard in a "snowstorm" of asbestos duct while using a different manufacturer's respirator, if he wore any respirator at all);
- 1972-80 (working in Shop 56 with measurably lower exposure levels, with engineering controls to reduce exposures even more, and while wearing a 3M 8710 respirator, much (but still not all) of the time); and
- 1981-85 (working shipboard again but with an air-supplied respirator).

RP 697-98, 2848-49, 3221.

In these circumstances, the inclusion of the alternate "but-for" instruction did not affect the outcome. The jury found that the respirator was not defective, so under either instruction, 3M's product could not have caused the harm. The trial court acted appropriately under the circumstances and provided an instruction that: correctly stated both the but-for and substantial-factor causation tests; directed the jury how to decide which test to apply; and provided a basis for both parties to argue their respective causation theories to the jury.

As is evidenced by its conflicting language, where it upheld the jury's finding that the respirator was not defective, but then reversed the jury's verdict based on evidence of defects, the Court of Appeals did not perform its duty to scrutinize the record and properly conduct harmless-error analysis.

4. The Court of Appeals misapplied this Court's prior precedent in holding that the substantial-factor test is the sole applicable causation standard.

The Court of Appeals, citing *Mavroudis*, stated "the substantial factor test should be used in cases where it is difficult

to establish the exact event or party that caused the harm." Slip op. at 10. But nothing in *Mavroudis* or in any of this Court's cases on which the *Mavroudis* court relied, applied the substantial-factor test simply because "it is difficult to establish" causation. In tort cases involving complex mechanisms of injury, it is almost always difficult to establish causation. Difficulty alone has never justified altering the traditional standard of proof of causation. *Daugert* justified the application of substantial-factor causation "only when a plaintiff is *unable* to show that one event alone was the cause of the injury." *Daugert*, 104 Wn.2d, at 262 (emphasis added). And *Mavroudis* likewise applied the substantial-factor test based on the plaintiff's inability to prove causation among separate defendants who were responsible for analogous harmful products. *Mavroudis*, 86 Wn. App. at 31.

The Court of Appeals in this case treated the 3M 8710 respirator as though it was an asbestos-containing product, rather than a safety product that reduces the risk of asbestos exposure. It assumed that the 8710 caused harm, that Plaintiffs would find

it "difficult" to prove their case, and therefore the traditional but-for test shouldn't apply here. The Court never reconciled itself with the jury's finding that the 8710 was reasonably safe in design and warnings, even though it affirmed that same conclusion in the latter part of its opinion. Instead, the court mined the Plaintiffs' defect evidence to justify treating the 8710 respirator like an asbestos product.

5. Substantial public policy interests are implicated by the Court of Appeals decision to equate a respiratory protection product designed to be used in risky environments to the products that create the environmental risk in the first place.

Safety products, like the 3M 8710 respirator, are uniquely ill situated for evaluation with the substantial-factor test. Safety products are relegated to situations where the user is already encountering a risk. The safety product is specifically designed to safeguard the user against that risk. The product-defect causation standard is measured by the "injuries or harm proximately caused by the defective design over and above the damages that would have occurred if its product had been

reasonably safe." *See Couch v. Mine Safety Appliances Co.*, 107 Wn.2d 232, 243, 728 P.2d 585 (1986). This is, by necessity, a but-for causation analysis. It is only by ignoring the distinction between the safety product and the original source of risk that the Court of Appeals is able to treat the 3M 8710 respirator as, in essence, just another source of asbestos and therefore subject to the substantial-factor test.[4] However, that approach is antithetical to this Court's protocol for determining factual causation in tort cases. Further, it undermines important public policy goals:

> [T]he safety purpose of the respirators cuts against imposing liability here. A fundamental policy

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[4] This Court's holding in *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012), doesn't suggest a contrary result here. First, *Macias* addressed a respirator manufacturer' duty to warn, not the causation standard. Second, the product at issue in *Macias* was a reusable respirator with detachable cartridges that required periodic cleaning. After using the product around asbestos, the product would become contaminated with asbestos, which could then be released during the cleaning process. Here, as the trial court recognized, the 3M 8710 respirator is a single-use disposable respirator that is not intended to be cleaned and therefore does not discharge asbestos like the cartridge respirator in *Macias*. Therefore, nothing in the *Macias* analysis impacts the causation test applicable here.

> underlying product liability law is the promotion of safe products. Victor E. Schwartz et al., *Respirators to the Rescue: Why Tort Law Should Encourage, Not Deter, the Manufacture of Products that Make Us Safer*, 33 Am. J. Trial Advoc. 13, 50-51 (2009). Safety products, such as the respirators involved in this case, are of great social value and promote this essential goal. The expansion of liability for asbestos exposure to safety product manufacturers provides a strong disincentive to continue making safety products, such as protective respirators. This could impact both the availability and affordability of respirators, frustrating the safety objective of product liability.

Macias, 175 Wn.2d at 426 (Johnson, James, J. dissenting).

The Court of Appeals' decision equating respirators to asbestos-containing products for purposes of determining causation is inconsistent with this Court's longstanding case law and undermines core public policy goals. It should not stand.

VI. Conclusion

The Court of Appeals misapplied policy and precedent intended for the creators of products with certain identifiable risks to safety products that do not, and cannot, "cause" harm in the same way as the harmful products themselves. Respirators and asbestos products are not all just parts of the same toxic

"cloud." Everything this Court has said about the narrowness of the substantial-factor test as a seldom-applicable exception to the but-for test is meaningless if the nature of the product being examined is irrelevant. The Court should use this opportunity to review the case and provide valuable guidance for lower courts on the appropriate use of the but-for and substantial-factor tests in safety-product cases.

This document contains 4,456 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 11th day of August, 2022.

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APPENDIX A

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LARRY L. ROEMMICH and GLORIA ROEMMICH, husband and wife, Appellants/Cross-Respondents, v. 3M COMPANY, Respondent/Cross-Appellant, AIR & LIQUID SYSTEMS CORPORATION, as Successor by Merger to BUFFALO PUMPS, INC.; FRASER'S BOILER SERVICE, INC.; GENERAL ELECTRIC COMPANY; IMO INDUSTRIES, INC., individually and as successor-in-interest to DE LAVAL TURBINE, INC.; INGERSOLL-RAND COMPANY; ITT LLC, as successor-in-interest to FOSTER VALVES; METROPOLITAN LIFE INSURANCE COMPANY; MINE SAFETY APPLIANCES COMPANY, LLC; NORTH COAST ELECTRIC COMPANY; PFIZER, INC.; P-G INDUSTRIES, INC., as successor-ininterest to PRYOR GIGGEY CO., INC.; UNION CARBIDE CORPORATION; VIACOMCBS, INC.; and WARREN PUMPS, LLC, Individually and as successor in interest to QUIMBY PUMP COMPANY, Defendants.	No. 82132-6-I DIVISION ONE PUBLISHED OPINION

SMITH, A.C.J. — Larry Roemmich wore 3M Company's 8710 mask from 1972 to around 1980 while working as an insulator at Puget Sound Naval Shipyard (PSNS), where he was exposed to asbestos and asbestos-containing products. In 2019, after being diagnosed with mesothelioma from asbestos exposure, Roemmich and his wife Gloria Roemmich filed a strict products liability claim and negligence claim against 3M, alleging that the 8710 mask was not adequately designed and that 3M failed to provide adequate warnings. After a jury trial, the jury returned verdicts in favor of 3M. The jury found that 3M was negligent in the manufacture and sale of the 8710 mask, but that such negligence was not a proximate cause of Roemmich's disease. The jury also denied the Roemmiches' strict liability claim, determining that 3M's 8710 respirator was reasonably safe in design and contained adequate warnings and instructions.

The Roemmiches appeal, asserting that the court failed to give an adequate proximate cause instruction and incorrectly gave a superseding cause instruction. They also claim that the court abused its discretion by excluding testimony from two of their experts. We conclude that the court did not abuse its discretion by excluding the expert testimony. However, the proximate cause jury instruction misstated the law and the superseding cause instruction was not supported by substantial evidence, and these erroneous instructions prejudiced the outcome of the trial on the issue of negligence. Therefore, we affirm in part, reverse in part, and remand for a new trial on the issue of negligence.

FACTS

In 1970, 3M obtained approval from the U.S. Bureau of Mines[1] for the single-use 8710 mask that protected against pneumoconiosis and fibrosis producing dusts, which include asbestos fibers. 3M directed its marketing for the 8710 mask at asbestos workers in the insulation trade. In 1973, 3M advertised the mask with the tagline "You don't have to work yourself to death," and claimed that the 8710 masks were protective against "Stonecutter's disease[,] Asbestosis[, and] Grinder's rot." Asbestos causes two types of harm to individuals, non-cancerous diseases including pleural plaques and asbestosis, and cancerous malignant harms including lung cancer and mesothelioma.[2] A dose of asbestos is sufficient to increase the risk of mesothelioma.

Larry Roemmich worked at PSNS from 1968 to 1995 and was exposed to asbestos and asbestos-containing products as part of his work from 1968 until the early 1980's. In the 1970's, PSNS began recommending the 8710 mask to its workers based on the Bureau of Mines approval. Roemmich wore the 8710 mask from 1972 until around 1980 while working with asbestos-containing products. In 1980, the National Institute for Occupational Safety and Health

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[1] The Bureau of Mines later became a part of the National Institute for Occupational Safety and Health (NIOSH).

[2] Asbestosis and pleural plaques are non-cancerous conditions. Asbestosis is scarring inside the lung tissue that can impact lung function, and pleural plaques are scarring in the lining of the lungs that may not necessarily impair lung function or cause cancer, but are a marker of significant asbestos exposure. As for the cancerous diseases, mesothelioma is the cancer that forms in the pleural lining around the lungs where the pleural plaques first form, and lung cancer is a cancer of the parenchymal tissue of the lung.

(NIOSH) warned 3M that single-use dust masks had the propensity to leak and should not be used to protect users against asbestos because of leakage from the face seal. But 3M continued to promote and sell its 8710 mask as protective against asbestos through 1986. In 2019, Roemmich was diagnosed with mesothelioma.

In January 2020, the Roemmiches sued 3M for product liability and negligence. 3M moved for summary judgment on all of the Roemmiches' claims and the Roemmiches moved for partial summary judgment on 3M's affirmative defense that PSNS's negligence was a superseding cause of Roemmich's injuries. The trial court denied both motions, and the case proceeded to trial in October 2020.

At trial, the Roemmiches sought to introduce expert testimony from Dr. Dwight Jewson and Dr. James Johnson. They wanted Dr. Jewson to testify regarding consumer expectations about the 8710 mask. Specifically, Dr. Jewson would have testified that he conducted a package test poll to understand what potential users would believe about the 3M 8710 Respirator based on the information displayed on its packaging. The study demonstrated that the 3M brand name provided the advertised product credibility.

Dr. Johnson was prepared to testify about his opinion on the 3M 8710 mask based on his review of 3M documents. First, Dr. Johnson intended to testify at trial that the 3M 8710 mask would collapse and create the potential for a poorer fit and leakage; that the mask's leakage created lower levels of protection than advertised; and that the wearer would not be able to detect leaks caused by

minor collapses in the masks, which would then become major collapses causing a poorer fit before completely collapsing. Second, Dr. Johnson would have testified that 3M documents showed that 3M had manipulated the NIOSH Silica Dust approval test with minimal and misleading supporting documentation to make the mask seem more effective.

3M moved in limine to exclude the expert testimony from Dr. Jewson and Dr. Johnson under Evidence Rule (ER) 702. The trial court granted the motion with respect to both experts, but allowed Dr. Johnson to testify on rebuttal regarding the NIOSH certification issue. Although the trial court stated that it would limit Dr. Johnson's testimony to issues related to the certification, Dr. Johnson was still able to incorporate his opinions about the fit and the imperceptible leakage over 3M's objections.

On October 28, before closing arguments, the Roemmiches moved for judgment as a matter of law under Civil Rule (CR) 50 with respect to 3M's superseding cause, contributory negligence, assumption of the risk, and failure to mitigate defenses. With respect to the superseding cause defense, the Roemmiches stated that 3M failed to show that PSNS knew that the NIOSH approval was not adequate and that the 8710 mask leaked in dangerous amounts, and that therefore the evidence was not sufficient to prove that PSNS had actual knowledge of the mask defects. The court denied the motion and gave a superseding cause jury instruction:

> A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's product liability and/or negligence and an injury.

> If you find product liability and/or negligence of the defendant but that the sole proximate cause of the injury was a later independent intervening cause that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any product liability and/or negligence of the defendant is superseded and such product liability and/or negligence was not a proximate cause of the injury. If, however, you find product liability and/or negligence and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening cause, then that cause does not supersede defendant's original product liability and/or negligence and you may find that the defendant's product liability and/or negligence was a proximate cause of the injury.

The trial court also granted 3M's request to instruct the jury on both the substantial factor and "but-for" causation standards. The resulting proximate cause instruction stated:

> If two or more causes combine to bring about an injury, the term "proximate cause" means a cause that was a substantial factor in bringing about the injury even if the injury would have occurred without that cause.
>
> If two or more causes did not combine to bring about an injury, the term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause produces the injury complained of and without which such injury would not have happened.
>
> There may be more than one proximate cause of an injury.

The jury returned a verdict for 3M. The jury found that 3M was negligent but that such negligence was not a proximate cause of Roemmich's disease. The Roemmiches appeal.

ANALYSIS

The Roemmiches assert that the trial court abused its discretion by giving an erroneous proximate cause instruction and an unsupported superseding

cause instruction, and by excluding their expert witnesses without a Frye[3] hearing. We agree that the trial court gave an erroneous proximate cause instruction when it combined the "but-for" causation standard with the substantial factor standard. And we agree that the court erred in giving the superseding cause instruction. Both errors prejudiced the Roemmiches with respect to their negligence claim. But the court did not abuse its discretion by excluding the expert witnesses' testimony. We therefore affirm the products liability verdict and reverse and remand for a new trial on the negligence issue.

Jury Instructions

The Roemmiches contend that the court provided erroneous causation instructions to the jury which prejudiced them.

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). A trial court may only give jury instructions that are supported by substantial evidence. State v. Douglas, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). Conversely, "[w]here substantial evidence supports a party's theory of the case, trial courts are required to instruct the jury on the theory." Taylor v. Intuitive Surgical, Inc., 187 Wn.2d 743, 767, 389 P.3d 517 (2017).

[3] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

We review a trial court's decision whether to give a jury instruction " 'de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact.' " Id. (quoting Kappleman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)). "[A]n instruction's erroneous statement of the applicable law is reversible error where it prejudices a party." Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). The party challenging the instruction bears the burden of demonstrating prejudice. Albertson v. State, 191 Wn. App. 284, 296, 361 P.3d 808 (2015). "Even if an instruction is misleading, it will not be reversed unless prejudice is shown." Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). We presume prejudice if a jury instruction clearly misstates the law. Id.

1. Proximate Cause Instruction

The Roemmiches assert that the court erred by giving a combined "but-for" and substantial factor instruction to the jury and that this error was prejudicial. Because 3M did not provide sufficient evidence to warrant the "but-for" instruction, it was an abuse of discretion for the court to give the instruction. The substantial factor standard is the correct proximate cause standard when the exact cause of the harm cannot be determined.

To be liable for negligence, a plaintiff must show that a defendant's actions were a proximate cause of the plaintiff's injury. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "Proximate cause is composed of both cause in fact and legal cause." Meyers v. Ferndale Sch. Dist., 197 Wn.2d 281, 289, 481 P.3d 1084 (2021). "[T]he cause in fact inquiry focuses on a 'but-for'

connection, [while] legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." Id.

"Traditionally, cause in fact has referred to the 'but-for' consequences of an act—the physical connection between an act and an injury." Daugert v. Pappas, 104 Wn.2d 254, 260, 704 P.2d 600 (1985). "The 'but-for' test requires a plaintiff to establish that the act complained of probably caused the subsequent disability." Id. But in cases involving multiple sources of toxic materials, plaintiffs need not prove individual causal responsibility. Hue, 127 Wn.2d at 91-92. Plaintiffs may instead prove causation using a substantial factor, rather than a "but-for" causation test. Mavroudis v. Pittsburgh-Corning Corp., 86 Wn. App. 22, 25, 935 P.2d 684 (1997). The substantial factor test requires plaintiffs "to show that a portion of [the toxic material] became part of the total cloud" of toxic materials that caused the damage. Id. at 30. The substantial factor test aids in the disposition of three types of cases:

> First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for plaintiff to prove the but-for test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it. Second, the test is used where a similar, but not identical, result would have followed without the defendant's act. Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where [they] throw[ ] a lighted match into a forest fire.

Daugert, 104 Wn.2d at 262. The change from the "but-for" test to the substantial factor test is normally justified only when a plaintiff is unable to show that one event alone was a cause of the injury. Id. The nature of asbestos products, as

well as the development of asbestosis and asbestos-related diseases, makes it extremely difficult for the plaintiff in an asbestos case to establish proximate cause. Lockwood v. AC & S, Inc., 109 Wn.2d 235, 248, 744 P.2d 605 (1987). Therefore, the substantial factor test should be used in cases where it is difficult to establish the exact event or party that caused the harm. Mavroudis, 86 Wn. App. at 31.

Roemmich was exposed to asbestos by a number of parties, so individual responsibility for the harm cannot be proven under the "but-for" test. Daugert, 104 Wn.2d at 262. 3M asserts that the "but-for" test was appropriate because the Roemmiches' medical expert, Dr. Carl Brodkin, testified that Roemmich's exposure to asbestos from 1968 to 1972, before he had the 8710 mask, was a significant enough dose to cause mesothelioma by itself. But 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. Thus, regardless of whether 3M's mask was the only reason for Roemmich's mesothelioma, there was substantial evidence from which the jury could determine that the mask was defective and contributed to his injury. And because the harm done by 3M and the other defendants was identical—

Roemmich developing mesothelioma—the substantial factor test applies. Therefore, the court improperly instructed the jury on the applicable law by giving a combined "but-for" and substantial factor test instruction.

3M disagrees and contends that the rule from Mavroudis should not apply. In Mavroudis, a jury found that an asbestos supplier was liable for Mavroudis's mesothelioma, and the supplier assigned error to the substantial factor jury instruction, claiming that a "but-for" instruction should have been used instead. Mavroudis, 86 Wn. App. at 25. A pathologist specializing in asbestos-related disease testified that the asbestos included in the products that Mavroudis handled could cause mesothelioma, that the scientific information indicated that all of Mavroudis's exposure to asbestos at the PSNS from 1957 to 1963 played a role in causing the mesothelioma, and that he could not say which exposures were, in fact, the cause of the condition. Id. at 27. The pathologist also testified that as little as 10 percent of Mavroudis's exposure was sufficient to cause mesothelioma. Id. The Mavroudis court applied our Supreme Court's finding from Hue, stating that the asbestos supplier's assignment of error was incorrect, because where multiple sources of toxic materials exist, "the plaintiff only needed to show that a portion of a defendant's pesticide became part of the total cloud of pesticide that caused the damage." Id. at 30; Hue, 127 Wn.2d at 91-92.

3M specifically asserts that this case is distinguishable from Mavroudis because here there are not multiple defendants whose products were independently capable of causing harm and who could escape liability if a "but-for" causation test was applied, 3M is a non-asbestos defendant, and the mask at

issue is a non-harmful respirator because it did not contain asbestos. But here, as in Mavroudis, experts testified that Roemmich's mesothelioma was a cumulative harm where the exact event or party that caused the harm could not be identified. Although Roemmich's exposure to asbestos varied over the years, 3M fails to point to a specific time or exposure that led to Roemmich's injury. Roemmich's mesothelioma developed after his continued exposure to asbestos at different sources. The evidence at trial established that 3M's mask contributed at least partly to Roemmich's exposure and harm, regardless of the other exposures. Applying the "but-for" causation test would absolve 3M of responsibility despite this evidence. The court erred in giving an instruction combining the "but-for" and substantial factor causation tests.

2. Superseding Cause Instruction

The Roemmiches next challenge the trial court's superseding cause instruction, asserting that the instruction was unsupported because any negligence on the part of PSNS in failing to train Roemmich on the use of the 8710 mask was foreseeable, because there was no evidence in the record that PSNS had actual specific knowledge of the defects, and because the instruction failed to make 3M's burden of proof clear. We agree.

An act generally is a proximate cause of an injury if it produces the injury. Crowe v. Gaston, 134 Wn.2d 509, 519, 951 P.2d 1118 (1998). But when a new, independent act breaks the chain of causation, it supersedes the original act as the proximate cause of the injury. Id. The Restatement of Torts defines "superseding cause" as "an act of a third person or other force which by its

intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." RESTATEMENT (SECOND) OF TORTS § 440 (AM. LAW INST. 1965).

In determining whether an intervening act constitutes a superseding cause we consider "whether (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; [and] (3) the intervening act *operated independently* of any situation created by the actor's negligence." Campbell v. ITE Imperial Corp., 107 Wn.2d 807, 812-13, 733 P.2d 807 (1987) (alterations in original) (citing RESTATEMENT § 442). The act has to be " 'so highly extraordinary or unexpected that [it] can be said to fall [ ] [out of] the realm of reasonable foreseeability as a matter of law,' " and " '[i]f the acts . . . are within the ambit of the hazards covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence.' " Cramer v. Dep't of Highways, 73 Wn. App. 516, 521, 870 P.2d 999 (1994) (some alterations in original) (quoting Brashear v. Puget Sound Power & Light Co., 33 Wn. App. 63, 69, 651 P.2d 770 (1982), rev'd on other grounds, 100 Wn.2d 204, 667 P.2d 78 (1983)). Thus, " 'only intervening acts which are not reasonably foreseeable are deemed superseding causes.' " State v. Frahm, 193 Wn.2d 590, 600, 444 P.3d 595 (2019) (quoting Crowe, 134 Wn.2d at 519).

Whether a third party's intervening act rises to the level of a superseding cause is generally a question of fact for the jury, but it may be determined as a matter of law if reasonable minds could not differ as to the foreseeability of the

act. Frahm, 193 Wn.2d at 601; Smith v. Acme Paving Co., 16 Wn. App. 389, 396, 558 P.2d 811 (1976).

Campbell and Albertson are instructive. In Campbell, the appellant worked as a wireman for Snohomish County Public Utility District (PUD) and as part of his job cleaned roof bushings located on top of metal-clad switchgears. 107 Wn.2d at 809. Electrical power was not supposed to be flowing through the feeder lines on the bushings when they were cleaned, but because a "circuit breaker on one of those feeder lines was closed to allow power to be 'backfed' . . . . [it] caused both the main bushings and the auxiliary bushings to be energized while the initial maintenance was being performed." Id. at 809-10. When Campbell attempted to clean the bushings with the steel wool pad, he was "jarred by a high-voltage surge of electricity" and was severely injured. Id. at 810.

Campbell sued ITE Imperial, who manufactured the unusual wiring configuration, "on theories of strict product liability, negligence, and breach of warranty." Id. at 811. At the end of testimony, "the trial court instructed the jury that if [ ] PUD was negligent in failing to discover and warn of the defect and take appropriate precautions and if PUD's negligence was 'so unanticipated that it can be said to fall without the realm of reasonable foreseeability' by the manufacture," then ITE would be relieved of liability because PUD's negligence was a superseding cause. Id. at 812. The jury returned a verdict in favor of ITE. Id.

On appeal, our Supreme Court concluded that PUD's negligence did not constitute a superseding cause. Id. at 815. It reasoned that because PUD's

intervening negligence did not create a different type of harm, PUD's intervening negligence did not operate independently of the danger created by ITE, nor did PUD have actual or specific knowledge that the product was unreasonably unsafe and failed to warn or protect. Id. at 817.

The court came to a similar conclusion in Albertson, where a newborn suffered from abuse by a parent. After the infant's first trip to the hospital, the Child Protective Service (CPS) social worker assigned to the infant's case formulated a safety plan for the parents to follow. Albertson, 191 Wn. App. at 291. But the safety plan was not implemented, the parents did not participate, the case worker failed to follow up, and the infant was abused again. Id. at 292. The Department of Social and Health Services (DSHS) initiated a termination petition, and after the trial court terminated parental rights, the infant's guardians sued DSHS for conducting a negligent investigation. Id. at 293.

The trial court instructed the jury that DSHS was claiming as a defense that any injuries to the child were only caused by the parent. Id. at 293-94. It gave an instruction defining proximate cause as " 'a cause which in a direct sequence *unbroken by any superseding cause* produces the injury complained of and without which such injury would not have occurred,' " and defined superseding cause as well. Id. at 294 (emphasis in original). The jury found that DSHS was negligent in its investigation but that its negligence was not a proximate cause of the infant's injury and entered judgment in favor of DSHS. Id. at 295. The infant's guardians appealed and claimed that the court erred in instructing the jury on superseding cause in its proximate cause instructions

because the instructions allowed DSHS to argue that the parent's "subsequent abuse of [the infant] . . . was 'a superseding cause' of [the infant's] injuries and broke the causal chain between DSHS's negligence and [the infant's] injuries, even if the jury found, as it did, that DSHS was negligent." Id. at 298.

The court held that because the abuse the infant endured was "precisely the kind of harm that would ordinarily occur as a result of a faulty or biased investigation of child abuse" and the parent's abuse was foreseeable, the trial court erred in instructing the jury on the issue of superseding cause and reversed accordingly. Id. at 298-99.

Here, PSNS's negligence in failing to train Roemmich on the use of the 8710 mask was reasonably foreseeable, and therefore not an extraordinary act. There was no evidence presented at trial that PSNS had actual specific knowledge of the defects that made the 8710 mask unsafe for asbestos use. PSNS's negligence and 3M's mask defect both led to the same harm that otherwise would have resulted from 3M's failure to warn, which was exposure to asbestos and the resulting mesothelioma. In addition, PSNS's failure to train Roemmich on proper mask usage did not result in any injury that was extraordinary or different than the consequences of inhaling asbestos through a defective mask. Finally, PSNS did not operate independently from the danger that 3M created because 3M's failure to warn of the mask leakage is the same hazard that makes PSNS's failure to train Roemmich on the mask use unreasonably unsafe. Therefore, the superseding cause instruction was erroneous because it was not supported by substantial evidence. Because the

intervening act's foreseeability establishes that the instruction was not appropriate, we need not reach the failure to warn and the burden of proof issues.

3. Prejudice

Both instructions misinformed the jury and prejudiced the Roemmiches. Because the proximate cause instruction misstated the law, we presume it to be prejudicial. Keller, 146 Wn.2d at 249. Furthermore, 3M explicitly relied on the instruction during closing argument and 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. Additionally, having been given the improper superseding cause instruction, the jury could have found that 3M's negligence was the proximate cause of Roemmich's injury, but still found 3M not liable based on PSNS's concurrent negligence. Therefore, we reverse and remand for a new trial on negligence with the correct jury instructions.

Strict Product Liability and Expert Testimony

The Roemmiches contend that the trial court erred by excluding expert testimony regarding consumer expectations and product defects for their strict product liability claim. The Roemmiches claim that they were prejudiced because the trial court should have conducted a Frye hearing instead of only relying on ER 702. We conclude that the trial court did not err in excluding the testimony and affirm the jury's verdict on the strict product liability claim.

"In Washington, expert testimony must satisfy both the Frye test and ER 702." State v. Arndt, 194 Wn.2d 784, 798, 453 P.3d 696 (2019). Under ER 702, if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." Id. at 798 n.6. Decisions to admit or exclude testimony under ER 702 are reviewed for abuse of discretion. Id. at 798. In reviewing for abuse of discretion, "we may affirm the trial court on any basis that the record supports." Id. at 799. " 'A court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds.' " L.M. v. Hamilton, 193 Wn.2d 113, 134, 436 P.3d 803 (2019) (quoting Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 919, 296 P.3d 860 (2013)). " 'Unreliable testimony does not assist the trier of fact.' " L.M., 193 Wn.2d at 137 (quoting Lakey, 176 Wn.2d at 918).

1. Dr. Jewson's Testimony on Consumer Expectations

The Roemmiches assert that it was legal error for the court not to hold a Frye hearing before determining that Dr. Jewson's methodology was speculative and unreliable. They claim that the court erred in rejecting Dr. Jewson's testimony because it was based on methodologies that were generally accepted and produced no novel evidence. The Roemmiches further claim that the trial court's conclusion that Dr. Jewson's testimony would not have been helpful to the jury is based on an incorrect understanding of product liability law because the court believed that a manufacturer's advertisements are not relevant to consumer

expectations unless reviewed and relied upon by the injured plaintiff, Roemmich, and cite to Rublee v. Carrier Corp., 192 Wn.2d 190, 204, 428 P.3d 1207 (2018) in support of this claim. We disagree.

In Rublee, our Supreme Court stated that, "it is appropriate to assess apparent manufacturer liability by considering all evidence relevant to reasonable consumers of the product at issue, consistent with Washington's 'ordinary consumer expectation' approach." Id. at 210. Under a reasonable consumer of the product test, "the plaintiff is required to show that an ordinary, reasonable consumer could have (1) inferred from the defendant's representations in the advertising, distribution, and sale of the product that the defendant manufactured the product and (2) relied on the defendant's reputation as an assurance of the product's quality." Id. at 210-11.

Here, Dr. Jewson's testimony did not involve novel scientific evidence which required a Frye hearing and the court appropriately applied ER 702 in determining whether the expert testimony should have been admitted. Though 3M's advertisements did not specifically need to be reviewed by Roemmich for testimony about an ordinary consumer's reasonable expectations to be admissible under Rublee, the court nonetheless correctly concluded that Dr. Jewson's testimony was speculative and unreliable. Dr. Jewson did not have scientific, technical, or other specialized knowledge that would have assisted the jury in understanding the evidence or determining the fact in issue. The court found that Dr. Jewson did not qualify as an expert based on experience because he did not have any formal training in public-opinion surveys and had never

submitted survey data in court. Cf. Watness v. City of Seattle, 11 Wn. App. 2d 722, 751-52, 457 P.3d 1177 (2019) (An expert was qualified because of their biomechanical engineer experience of 40 years combined with academic and forensic experience). Additionally, evidence indicated that Dr. Jewson did not follow well-established methodologies for consumer and public opinions polls. The court did not abuse its discretion by excluding Dr. Jewson's testimony under ER 702.

2. Dr. Johnson's Testimony on Product Defects

The Roemmiches assert that the trial court applied an incorrect legal standard and abused its discretion in partially excluding Dr. Johnson's testimony without a Frye hearing and instead excluding it under ER 702. The Roemmiches specifically claim that Dr. Johnson's testimony was not speculative, it would have assisted the jury, and that the court ignored legal key elements of the expert's claims. We disagree.

The trial court initially excluded Dr. Johnson's testimony under ER 702 as speculative, unreliable and not based on scientific, technical, or other specialized knowledge that would assist the jury in understanding the evidence. The court later indicated that testimony based on two undisclosed studies would be excluded as unfairly prejudicial, but that Dr. Johnson might be allowed to testify on rebuttal if 3M asserted or implied that the 8710 respirator was not defective because of its NIOSH certification or its OSHA assigned protective factor of 10. The trial court did not abuse its discretion by partially excluding Dr. Johnson's testimony under ER 702. Moreover, the court ultimately allowed Dr. Johnson to

testify on the 8710 mask's defects like pressure drop and leakage in rebuttal after determining that 3M had opened the door to the testimony. In addition, another expert witness of the Roemmiches, Darrell Bevis, had already testified on the same topic as Dr. Johnson regarding the mask's leakage. We conclude that the court did not err in excluding Dr. Johnson's testimony.

We affirm the jury verdict on the product liability claim and reverse and remand for a new trial with regard to the negligence claim.

Smith, A.C.J.

WE CONCUR:

Andrus, C.J.

CARNEY BADLEY SPELLMAN

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Filing Petition for Review

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