Supreme Court No. 101162-8
Court of Appeals No. 82132-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Larry L. Roemmich and Gloria Roemmich,
husband and wife,
***Respondents*,**
v.
3M Company,
***Petitioner*.**

Memorandum of Amicus Curiae The Product Liability Advisory Council, Inc. in Support of Petitioner

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INTEREST OF AMICUS

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200

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[1] *See* https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx.

briefs as amicus curiae in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

INTRODUCTION

This Court should grant review of the decision below because its discussion and application of the "substantial factor" test for causation is incomplete and erroneous. The decision fails to insist upon, or even analyze, whether the alleged cause at issue—3M's respirator—could have been a *sufficient cause by itself* of plaintiff's harm. Under longstanding common law, summarized in two Restatements of Torts,[2] that is the *only* basis for finding causation-in-fact when the presence of other sufficient causes makes it impossible for plaintiff to satisfy the normal but-for causation standard.

Unfortunately, the error—or at least incomplete analysis—below is not uncommon among courts and practitioners alike. They may erroneously believe "that

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[2] *See* Restatement (Second) of Torts § 432(2) (1965); Restatement (First) of Torts § 432(2) (1934).

the but-for test can be jettisoned in favor of a much vaguer and less demanding substantial-factor inquiry in any case in which the tortfeasor's conduct has combined with other causal conditions in any way creating difficulties for the plaintiff."[3] That is not the law in Washington, and nor should it be.

"The cause-in-fact requirement is the linchpin of the corrective-justice theory" of tort law.[4] Not only is it unfair for an actor whose conduct is insufficient to cause plaintiff's harm to be treated as legally and morally responsible for that harm, but watering down the causation standard opens the gates for claims against countless parties and products that could not themselves have caused the injuries at issue. While courts may have

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[3] David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 Wake Forest L. Rev. 1007, 1019 (2009) (collecting cases).

[4] *Id.* at 1008 (internal quotation omitted).

become numb to asbestos cases involving dozens of defendants and innumerable products and premises, courts cannot become numb to the basic tort law requirement that each defendant's product or conduct—in a case involving asbestos or not—must be a sufficient cause by itself for the "substantial factor" test to be satisfied.

Because the mistaken analysis below could be applied in all multi-causal tort cases, this Court should grant review and apply the proper standard.

I. The substantial-factor test requires that a cause be legally sufficient by itself and is appropriate in only a very limited range of cases.

Consider this scenario: two noisy motorcycles simultaneously pass a horse on which the plaintiff is riding, frightening the animal and causing it to injure the plaintiff. *See Corey v. Havener*, 65 N.E. 69, 69 (Mass. 1902). Or, a fire is started through the negligence of a railroad that merges with a fire of unknown origin, and the two

together destroy the plaintiff's property. *See Anderson v. Minneapolis, St. P. & S. S. M.R. Co.*, 179 N.W. 45, 46 (Minn. 1920). Or, two people toss lit matches onto gasoline at the same time, causing an explosion. *See United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir. 1995).

In these "combined force" cases, the but-for test would deny the existence of cause-in-fact—i.e., but for either actor's conduct, the injury would still have occurred thanks to the conduct of the other. Yet our intuition (or sense of fairness to the plaintiff) rebels against that conclusion, and that is the genesis of the substantial-factor test. *See* Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 Stan. L. Rev. 60, 88–89 (1956) ("The but-for test has failed in such cases to justify itself policywise, so we search for other language that will allow us to do what we feel is right and proper.").

Both the First and Second Restatements capture this concept in section 432(2), explaining that, in combined-force situations, an actor's negligence may be treated as a cause-in-fact by way of the "substantial factor" label only if its negligence is itself sufficient to bring about the harm:

> If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and *each of itself is sufficient to bring about harm to another*, the actor's negligence may be found to be a substantial factor in bringing it about.

(emphasis added).

The Court of Appeals and others have recognized this definition of the substantial-factor test. *See, e.g.*, *Herrington v. David D. Hawthorne, CPA, P.S.*, 111 Wn. App. 824, 831, 47 P.3d 567 (2002) (citing the Restatement's section 432(2) standard); *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1010–11 (9th Cir. 2008)

(applying Washington law and affirming jury instruction on but-for test rather than substantial-factor test where plaintiffs could not show that any one of the multiple, independent causes was alone sufficient to cause the injury); *Hous. 21, L.L.C. v. Atl. Home Builders Co.*, 289 F.3d 1050, 1056 (8th Cir. 2002); *In re Bendectin Litig.*, 857 F.2d 290, 310–11 (6th Cir. 1988); *Skinner v. Square D Co.*, 516 N.W.2d 475, 480 n.8 (Mich. 1994); *Magee v. Coats*, 598 So. 2d 531, 536 (La. Ct. App. 1992).

Thus, the threshold requirement for any application of the "substantial factor" test is that, absent but-for causation, each alleged cause is sufficient by itself to cause the injury. The cause must also be "substantial" as opposed to *insubstantial* in the big-picture sense regarding the injury at issue. *See* Restatement (Second) of Torts § 431 cmt. a ("The word 'substantial' is used to denote the fact that the defendant's conduct has such an

effect in producing the harm as to lead reasonable men to regard it as a *cause*, . . . 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." (emphasis added)). Of course, most independently sufficient causes are likely to be "substantial" as well, but they are two separate inquiries.

To reiterate, then, independent "sufficiency" is *required* to even be able to get to the big-picture question of substantiality. Merely satisfying some nebulous concept of "substantial" is *not* the test, and it is *never* enough by itself.[5]

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[5] Confusion surrounding the test's application is somewhat understandable given the various meanings ascribed to the term since it first entered the lexicon. *Compare* Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 223, 303 (1911) (proposing the phrase as a guide for resolving legal (proximate) cause issues), *with Ganey v. Beatty*, 391 So. 2d 545, 547 (La. Ct. App.

That is why the test is properly applied only in very limited situations. As Professor Robertson explains, "the only multiple causation cases that are legitimately solved by the substantial factor test are the 'combined force' situations in which we are morally certain that the but-for test stubbornly persists in yielding the wrong answer." David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1779–80 (1997); *see Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862–63 (Mo. 1993) ("We now reiterate that the 'but for' test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury, i.e., the 'two fires' cases.").

1980) (defining the substantial-factor test as identical to the but-for test).

Problems arise, however, when courts venture outside this narrow realm and assume incorrectly "that the but-for test can be jettisoned in favor of a much vaguer and less demanding substantial-factor inquiry in any case in which the tortfeasor's conduct has combined with other causal conditions in any way creating difficulties for the plaintiff." Robertson, *supra* note 3, at 1019. The court below was guilty of precisely this mistake.

II. The Court of Appeals' discussion and application of the substantial-factor test is incomplete and erroneous.

At no point in the decision below did the court acknowledge or analyze the critical requirement for the substantial-factor test that the cause at issue be *sufficient by itself* to cause the injury. And its language around "substantial factor" analysis aligns with erroneous impressions that "substantial factor" is some watered-down, less rigorous standard than but-for

causation, and is satisfied so long as some nebulous concept of "substantial" is satisfied.

For example, the court says that "the substantial factor test should be used in cases where it is difficult to establish the exact event or party that caused the harm." *Roemmich v. 3M Co.*, 21 Wn. App. 2d 939, 950, 509 P.3d 306 (2022) (citing *Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 25, 935 P.2d 684 (1997)). While that is true so far as it goes (the "difficult[y]" arising from the presence of other causes that are themselves sufficient, either individually or collectively), it leaves out the additional requirement that to justify holding a defendant *legally culpable*, that defendant's conduct must at least by itself be sufficient to cause the harm. *See Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985) ("[T]he [substantial-factor] 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."); *cf. Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 422, 161 P.3d 406 (2007) ("[T]he [plaintiffs] did not face two causes, either of which would have caused the harm, making it impossible for them to prove 'but for' causation . . . ." (citing *Daugert*, 104 Wn.2d at 262)).

Here, 3M's respirator was indisputably not itself "sufficient to bring about the harm"—i.e., mesothelioma—because it was not asbestos-containing. *See* Restatement (Second) of Torts § 432(2).[6] Rather than address the legal sufficiency prerequisite, however, the court below instead mistakenly concluded that because "there was substantial evidence from which the jury

[6] For this reason, the trial court should have instructed the jury under the but-for standard only, without any alternative for satisfying the substantial-factor test.

could determine that the mask . . . *contributed* to [plaintiff's] injury," the substantial-factor test was satisfied. *Roemmich*, 21 Wn. App. 2d at 950–51 (emphasis added).

Long-settled, foundational principles of tort causation are not suddenly rendered inapplicable simply because the product or conduct at issue involves asbestos. In *Mavroudis*, for example, an asbestos case cited by the court below, the court applied a substantial-factor test that tracked the Restatement's—i.e., the conduct, operating alone, must have been "sufficient to cause the injury." 86 Wn. App. at 28. The court held that even if "the substantial factor instruction in this case went further than the Supreme Court would require," any error was not prejudicial because plaintiff had shown that defendant's product, by itself, "would have been sufficient to cause" his injury. *Id.* at 31.

Similarly, the New York Court of Appeals has recently made clear, even without citing the Restatements, that an asbestos plaintiff must prove he "was exposed to sufficient levels of the toxin from the defendant's products to have caused his disease," *Nemeth v. Brenntag N. Am.*, 194 N.E.3d 266, 271 (N.Y. 2022) (internal quotation omitted), and that this causation standard "must be met whether the toxin is mold, benzene, or asbestos," *id.* at 272 (citation omitted).

III. Providing a clear statement of the requirements for substantial-factor causation is important for all multiple-cause tort cases.

Proper understanding and insistence upon the "substantial factor" requirement that a cause be sufficient by itself to cause the claimed injury is vitally important. It is the only way to permit the proper work of the term "substantial" in accordance with established common law. A substantial factor is a cause that—if not

a but-for cause—is both *sufficient by itself* and also not *insubstantial* in the big picture of what occurred.

By contrast, merely asking if a particular cause is "substantial" in some linguistic or philosophical sense, and nothing more, is both a legal and public policy disaster. As here, plaintiffs can and will sue every manufacturer or other actor whose product or conduct could have conceivably *contributed* in some manner to the injury. *Cf. Roemmich*, 21 Wn. App. 2d at 952 ("The evidence at trial established that 3M's mask contributed at least partly to [the plaintiff's] exposure and harm, regardless of the other exposures."). And juries will be left to ponder what is "substantial" without objective criteria such as but-for or independently sufficient.

Under deep-rooted and fundamental principles of tort causation, mere contribution is insufficient and not "substantial"; rather, but-for or independently sufficient

causation, plus big-picture substantiality, is required. Fundamental tort principles do not magically disappear simply because a lawsuit involves asbestos. The lower court's erroneous ruling will affect *every* tort case—product liability or otherwise—that involves multiple potential causes. This Court should therefore grant review to ensure that Washington does not become an outlier on the requirements for tort causation.

CONCLUSION

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

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DATED this 10th day of October, 2022 at Seattle, Washington.

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