

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

No. SJC-12921

SETH DOULL, As Personal Representative of the Estate
of LAURA DOULL; SETH DOULL; MEGAN DOULL;
and TROY DOULL, ppa SETH DOULL
Plaintiffs-Appellants,

vs.

ANNA C. FOSTER, N.P. and ROBERT J. MILLER, M.D.
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE
COUNTY OF FRANKLIN

**BRIEF OF THE AMICUS CURIAE
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION**

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STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The Massachusetts Defense Lawyers Association ("MassDLA"), amicus curiae, is a voluntary, non-profit, state-wide professional association of trial lawyers who defend corporations, individuals, and insurance companies in civil lawsuits. Members of the MassDLA work to promote the administration of justice, legal education, and professional standards and to promote collegiality and civility among all members of the bar.

As an association of civil defense lawyers, the MassDLA has a direct interest in the issues of public importance that affect MassDLA members and their clients. Those interests could be affected by the issues before the Court in this appeal, including whether the Court adopts a factual cause of harm standard in cases involving multiple potential tortfeasors or potential causes of injury.

As part of fulfilling its purpose, the MassDLA has previously filed amicus briefs in the appellate courts of the Commonwealth. The MassDLA offers its experience and perspective to the Court as amicus curiae to assist in its resolution of the matter now before it.

STATEMENT OF THE ISSUES PRESENTED

"In a case involving multiple potential tortfeasors or potential causes of injury, whether 'substantial contributing factor' may or must be used in lieu of 'but for' in the causation jury instructions; whether the court should adopt a 'factual cause' of harm standard, as provided in sections 26 and 27 of the Restatement (Third) of Torts (2005)." Announcement: The Justices Are Soliciting Amicus Briefs, Seth Doull & Others v. Anna C. Foster, N.P. & Another, SJC-12921, Docket Entry #2 (SJC entered Mar 13, 2020) ("Amicus Announcement").

STATEMENT OF THE FACTS

The MassDLA, as amicus curiae, adopts the statements of facts regarding the prior proceedings and factual background as submitted in the briefs of Anna C. Foster, N.P. and Robert J. Miller, M.D. (Defendants-Appellees), and Seth Doull as Personal Representative of the Estate of Laura Doull, Seth Doull, Megan Doull, and Troy Doull (Plaintiffs-Appellants).

STATEMENT OF THE CASE

MassDLA is answering the Commonwealth of Massachusetts Supreme Judicial Court's solicitation for amicus briefs in the matter of Seth Doull & Others v. Anna C. Foster, N.P. & Another, SJC-12921, to assist in determining the proper standard of causation to apply in a case involving multiple tortfeasors or potential causes of injury. In Doull v. Foster this issue arose

within the context of a medical malpractice claim arising out of a factual background involving several potential sources of injury, including, among others, multiple healthcare providers, a drug used during the course of treatment, and an undiagnosed underlying condition.

At base, the central issue under consideration concerns which standard of causation should or must be applied in a case involving multiple potential tortfeasors or sources of injury. Answering this question requires an assessment of both the substantial contributing factor test and the factual cause of harm standard. This will necessarily involve some discussion of the respective rationales of both causal standards, the origins, evolution, and current state of their use, and the potential advantages and disadvantages of using one standard in lieu of the other, especially within the context of cases involving multiple potential causes.

SUMMARY OF THE ARGUMENT

Presently, a court can use a jury instruction that encompasses a "substantial contributing factor" test in lieu of a "but for" test in a multiple tortfeasor case. O'Connor v. Raymark Industries, Inc., 401 Mass. 586 (1988). The "substantial contributing factor" test has never been intended as a wholesale replacement of "but for" causation, but it was

used by the O'Connor Court as a supplemental tool to help assess causation in a multi-defendant matter.

However, courts have failed to articulate the necessary concepts for factual determination by the factfinder. The confusion surrounding "substantial factor" as it is found in the Restatement (Second) of Torts (1997) has led to progressively loose applications and a diminished connection between causation and fact. The best approach to accurately and effectively untangle complex causal determinations would be to adopt a "factual cause" of harm standard as provided in Sections 26 and 27 of the Restatement (Third) of Torts (2010) represents a return to concepts central to the law of torts, including the "but for" standard.

ARGUMENT

I. Continued Dilution of O'Connor Erodes Well-Established Principles of Causation and Confuses Determinations of Liability Involving Multiple Causal Factors.

In O'Connor v. Raymark Industries, Inc., 401 Mass. 586 (1988), this Court charted a navigable course for cases involving potential multiple tortfeasors or sources of injury by defining core principles of causation, including "substantial contributing factor." Despite this Court's efforts to set sail on a clear course, subsequent courts have failed to define concepts of causation which has gradually led to treacherous

waters. As a result, the factfinder has lacked guidance as to the proper method for determining causation.

a. Abandonment of Key Premises from O'Connor Hinder Present Courts' Ability to Make Sound Determinations Involving Complex Causal Questions.

O'Connor involved a shipyard welder in the 1940s who, while welding, would cover himself with asbestos blankets made by Raymark Industries for protection from sparks. 401 Mass. at 587. Asbestos blankets made by Raymark Industries were made of Raybestos, which was "an asbestos cloth containing 65-95% asbestos." Shetterly v. Raymark Industries, Inc., 117 F.3d 776, 779 n.1 (4th Cir. 1997). At trial, the jury was instructed to find whether the plaintiff was exposed to asbestos from the asbestos blankets made by Raymark Industries, and if so, did such exposure substantially contribute to the cause of his mesothelioma. O'Connor, 401 Mass. at 588-589. The trial court noted that "[i]t doesn't have to be the only cause, but it has to be a substantial contributing cause ... It means something that makes a difference in the result." Id. at 589. The jury found that while the plaintiff was exposed to asbestos from the product, such exposure did not substantially contribute to the cause of his mesothelioma. Id. at 587. On appeal by the plaintiff, this Court held that the trial court properly instructed the jury on causation, finding that the trial judge's instruction was consistent with the principle of joint and

several liability and served to distinguish between a substantial factor and a negligible factor. Id. at 591-592.

When this Court decided O'Connor in 1988, asbestos litigation routinely involved products with high concentrations of asbestos generally used in a limited set of occupations and industries. The products in question contained extremely high concentrations of amphibole asbestos and most claims came from workers in "traditional" industries, including the shipyard and insulation trades. See Welch v. Keene Corp., 31 Mass. App. Ct. 157 (1991) (insulator exposed to asbestos from carrying, mixing, and applying asbestos-containing insulation products in 1950s); see also Holdren v. Buffalo Pumps, Inc., 614 F. Supp. 2d 129 (D. Mass. 2009) (boiler technician exposed to asbestos at shipyards and industrial sites from 1950s to 1970s).

Today, exposure cases generally do not involve the same uniformity of products or levels of exposure that the O'Connor Court faced in the 1980s. Modern courts are faced with exposure trials that more often involve "trace exposure" to a myriad of products in a variety of trades in both occupational and non-occupational settings. See, e.g., Ingham v. Johnson & Johnson, Missouri Circuit Court, No. 1522-CC10417-01 (June 2018) (\$4.7 million plaintiff verdict in case where 22 women alleged cancer caused by asbestos exposure from talcum powder); Lanzo v. Cyprus Amax Minerals Co., Middlesex County Superior Court, New Jersey,

No. L-7385-16 (April 2018) (\$117 million plaintiff verdict where plaintiff alleged cancer caused by asbestos exposure from 30 years of talcum powder use).

Unlike O'Connor, exposure litigation is now a more sophisticated scientific inquiry involving microscopic levels of contamination, a vast body of knowledge concerning the nature of substances and their effects, and empirically verifiable findings. In response to this change, courts have retooled their approach to the admissibility of scientific evidence to handle cases involving novel products, low levels of exposure, and significant reliance on the testimony of expert witnesses. See Commonwealth v. Lanigan, 419 Mass. 15, 26-27 (1994).

Rigorous evaluation of expert testimony in such increasingly complex cases is vital, but the ultimate utility of objective scientific evidence is necessarily diminished by a departure from the central teachings of O'Connor.

b. O'Connor Provides Essential Guidance for Effectively Resolving Complex Causal Questions.

O'Connor relies on the longstanding principle of causal determinations made where there are multiple potential tortfeasors: "If two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable."

401 Mass. at 591, quoting Chase v. Roy, 363 Mass. 402, 408 (1973).

A plaintiff should not have the burden of apportioning the injury, "at least to the extent of separating out the effect of the defendant's product from the combined effect" of all potential causes. O'Connor, 401 Mass. at 591. Put simply, where there are multiple defendants, a court's primary concern must be determining whether the defendants' conduct, as a single combined set of many potential factors, caused the plaintiff's injury. Id. at 591-592. This is a familiar and often straightforward determination under a factual "but for" standard of causation, but, as we continue to drift off the course charted by O'Connor, devolves into a subjective approximation of what the word "substantial" actually implies.

The O'Connor Court sought to forestall the confusing and potentially burdensome implications of the substantial contributing factor test by articulating that a substantial contributing factor is simply "something that makes a difference in the result." O'Connor, 401 Mass. at 592. Intuitively it seems clear that an action or lack thereof cannot logically be defined as a cause unless it shapes the outcome in some discernible way. Although there may be a spectrum of the potential intensity or importance of any given cause, a

substantial contributing factor is still something which is necessary for reaching a given result.

When evaluating the jury instructions provided in O'Connor, the Court states that when read in context, "the judge's statement served to distinguish between a 'substantial factor,' tending along with other factors to produce the plaintiff's disease and death, and a negligible factor, so slight or so tangential to the harm caused that, even when combined with other factors, it could not reasonably be said to have contributed to the result." O'Connor, 401 Mass. at 592. So, a substantial contributing factor is not a negligible factor. Id. It is an essential feature of an event, meaning that the outcome would not have been the same without it. Id.

Defining a substantial contributing factor as "something that makes a difference in the result," simply implies that "the plaintiff had the burden of proving that the defendant's product contributed in fact" to the eventual outcome "in a legally cognizable manner." O'Connor, 401 Mass. at 592. If a potential cause made no difference in the result, then it cannot possibly be considered a factual or legal cause. If a result would not have occurred without a certain factor, then that factor is a cause.

c. O'Connor Sets Forth the Frequency, Proximity and Duration Test for Causal Determinations.

The analytical framework set out in O'Connor was substantial enough to anchor any decision involving multiple causes or tortfeasors in a judicially manageable standard capable of consistent results. Unfortunately, rather than anchoring their analysis in the framework provided by O'Connor, far too many courts have allowed the ambiguity of the substantial factor test to guide their causation determinations, drifting far afield from analytically sound determinations of factual causation. Luckily, advances in science and the formulation of the law allow for Massachusetts courts to reap the benefits of the O'Connor framework, while discarding some of the uncertainties that courts have struggled with in the wake of that decision.

Although the knowledge surrounding the effects of asbestos exposure has advanced significantly since O'Connor was decided, it has long been accepted that the nature of some toxic tort cases, exemplified by those involving asbestos exposure, require courts to adapt the standard of proof necessary to establish causation. See Morin v. Autozone Northeast, Inc., 79 Mass. App. Ct. 39, 42-43 (2011). This is especially true with asbestos exposure due to the prolonged latency period of asbestos-induced mesothelioma, the multiple points of exposure, and the

indistinguishability of contributory exposures. Morin, 79 Mass. at 43. At the heart of these difficulties lie questions surrounding what constitutes sufficient exposure to asbestos-containing products to hold defendant manufacturers liable.

O'Connor addressed the issue head on by providing what has become a touchstone of toxic tort law -- the Frequency, Proximity, and Duration (FPD) Test. See O'Connor, 401 Mass. at 588. In its opinion, the O'Connor Court quoted the trial judge's well-reasoned jury instructions which defined the test as:

"[E]vidence of some exposure, more than just casual or minimum exposure on a regular basis over some period of time where Mr. O'Connor was actually working with the product himself or in proximity to where others were working with the product." Id.

This analytical framework serves as the threshold burden that the plaintiff must satisfy before moving on to the next inquiry. Id. Although not explicitly stated, in addressing issues regarding scope of liability, the FPD test serves to satisfy the legal causation requirement. See id.

If the evidence presented by plaintiff establishes sufficient exposure in frequency, proximity, and duration to defendant's products, the next part of the inquiry requires that the plaintiff's exposure to the toxic product cause, or substantially contribute to cause, the harm plaintiff alleges. O'Connor, 401 Mass. at 589. Again, although the opinion does

not explicitly label it as such (a fact that likely contributed to the confusion that followed in the wake of the O'Connor decision), this second step in the framework satisfies the function of but for factual causation. This second component of the O'Connor framework, coupled with a survey of the development and current status of causation determinations, reveals that no matter the circumstances, the but for test plays a vital role in preserving the integrity of the factual causation requirement.

As discussed supra, the trial judge in O'Connor defined "substantial contributing cause" in his jury instructions as "something that makes a difference in the result" -- i.e., a but for cause of plaintiff's harm. See O'Connor, 401 Mass. at 589. In the context of a case involving multiple causes, a substantial contributing cause is what Section 27 of the Restatement (Third) of Torts (2010) considers a necessary component of a causal set sufficient to cause plaintiff's harm. In other words, but for that necessary component of the causal set, the plaintiff would not have suffered the same alleged harm. As is the case today, this Court was unequivocal in recognizing the general exception that in the context of a case involving multiple potential tortfeasors whose several negligent acts contribute concurrently so as to render neither a true but for cause of the harm, both defendants will still be held jointly and severally liable for the plaintiff's harm.

O'Connor, 401 Mass. at 591. However, what is implicitly recognized in that statement of the rule and explicitly recognized in Section 27 of the Restatement (Third) of Torts (2010) is the exception still requires that the factfinder determine that either of the concurrent causes, standing alone, would have (i.e., probably) been a but for cause of plaintiff's harm. See id.

Although largely praiseworthy for introducing the FPD test and the Court's required showing of legal and factual causation, the O'Connor decision is not without its own ambiguities and shortcomings. Relying on the limitation for trivial but for causes found in Sections 430, 431, and 433 of the Restatement (Second) of Torts (1997), the O'Connor Court used the definition of "substantial contributing cause" as "something that makes a difference in the result" to classify the second prong of the test as part of the determination of legal, rather than factual causation. O'Connor, 401 Mass. at 592. As noted above, in discussing the trial judge's instructions, the O'Connor Court also failed to clearly label which part of the causation determination each step in the two-pronged test corresponded to. See id. at 590-91. Nevertheless, the analytical framework O'Connor provided for causation is far more preferable than the misguided analysis of subsequent cases ignoring the instruction of O'Connor.

II. Factual Causation as Defined in the Restatement (Third) of Torts is the Proper Standard Where There are Multiple Potential Tortfeasors or Sources of Injury.

a. The Restatement (Third) of Torts Puts Causation Back on Course.

While the substantial contributing factor test initially presented a promising path toward answering difficult questions of causation, "its overuse, abuse, and the confusion generated by it in determining factual causation counsel against its continued employment." Restatement (Third) of Torts, § 26 cmt. j (2010). What once appeared as a navigable strait by defining substantial contributing factor has been diminished by overuse. The Restatement (Third) of Torts is the rudder needed to come about and sail the ship back onto the safe course charted by O'Connor.

b. The Restatement (Third) of Torts Reinvigorates Crucial Aspects of Clarity and Objectivity in Causal Determinations.

The Restatement (Third) of Torts provides clear standards of causation that use an objective "but for" assessment of facts. The relevant portions, as reproduced below, demonstrate the utility of a comprehensive approach to causation that is both simple enough to ensure consistent application and flexible enough to guide the determination of even the most complex questions of causation.

Section 26 Factual Cause:

"Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a cause of harm under § 27." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26 (2010).

Section 27 Multiple Sufficient Causes:

"If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 27 (2010).

The importance of this change may not be immediately apparent, but comments to the Restatement (Third) of Torts clarify the precise reasoning behind this return to a factual cause of harm standard, and why a simple and objective approach to causation is crucial in settling inquiries that are fundamentally factual in nature.

Regarding instances where there are multiple potential tortfeasors or sources of injury, the Restatement (Second) of Torts contains ambiguity which gives the factfinder "discretion to decide that, although a sufficient, but not necessary, cause exists, it is nevertheless not a factual cause of the harm." Restatement (Third) of Torts, § 27 cmt. b (2010). This can be explained in part by the inclusion of two words, which, when read together in context, allow subjective judgment to play a decisive role in a determination requiring an objective assessment grounded in fact.

First, the factfinder's substantial factor determination turns on the word "may," which immediately throws what should be an objective mandate into discretionary obscurity, giving the factfinder boundless choice to make independent judgments regarding central elements of causation. Restatement (Third) of Torts, § 27 cmt. b (2010). It is intuitively problematic to characterize an objective assessment of fact as a discretionary decision. The critical role of the factfinder is to make objective determinations based on the facts before them, and should not, in any way, hinge on a personal choice of infinite discretion.

Second, the adjective "substantial" is itself an evaluative term, devoid of any objective standard or constant metric. Restatement (Third) of Torts, § 27 cmt. b (2010). Even Black's Law Dictionary defines "substantial" in nine different ways, including "real and not imaginary," suggesting that anything in existence is substantial, and "important, essential, and material," which itself relies on terminology of subjective significance. See Substantial, Black's Law Dictionary (11th ed. 2019). While potential causes may have varying levels of influence on an outcome, the assessment of whether a factor is or is not a cause has a binary result. Injecting evaluative language of indefinite significance into a determination of

causation only serves to confuse the factfinder and undermine the objectivity required to properly assess the facts.

When “may” and “substantial,” both indeterminate terms requiring subjective evaluation, combine to characterize a key factual determination, the resulting proposition unnecessarily imperils factfinder neutrality and subjects litigation to problematic uncertainty. While the subjective nature of the substantial contributing factor test may seem trivial at first glance, it is necessarily untenable when assessed in the proper context.

c. Factual Causation as Set Forth in The Restatement (Third) of Torts is Not a New Standard, but Instead a Clarification of Essential Characteristics of Causation in Accordance with Existing Law.

Adoption of a factual causation standard in line with the guidance of the Restatement (Third) of Torts does not create a novel approach to issues of causation, but instead represents a reminder of concepts central to the law of torts. At the core of these concepts is the return to the “but for” standard as the test for factual causation. See Restatement (Third) of Torts, § 26 (2010). This test for factual causation is desirable from both a practical and policy standpoint.

Although the but for test is not without its critics, it is conceptually the most straightforward standard for juries to understand when determining whether a defendant was the factual

cause of an injury. Essentially the inquiry surrounding the but for test is a question of "what if." Whether consciously or unconsciously, anyone who successfully navigates everyday life reverts to this "what if" question in determining the likely outcome resulting from their actions (or inactions). Thus, applying the counterfactual "what if" question posed by the but for test in order to determine the hypothetical state of the world in the absence of the defendant's alleged tortious conduct is something that practically every jury member is both familiar with and capable of doing. See T.A. Weigand, The Wrongful Demise of But For Causation, 41 W. New Eng. L. Rev. 75, 79-80 (2019).

Perhaps even more importantly, from a policy standpoint, the but for test endorsed by the Restatement (Third) of Torts is desirable as it is essential in furthering the concepts of individual responsibility and corrective justice, both essential characteristics underlying the purposes of our tort law. See id. at 80. Determining whether a defendant is the factual cause of a harm or injury is intended to be an objective inquiry: if the defendant's wrongful conduct caused plaintiff's harm or injury then it is a "but for" cause; if it did not cause that harm or injury, then it is not a "but for" cause. Thus, for the purposes of deciding factual causation, the binary choice posed by the but for test is much more adept for a jury to properly

apportion responsibility then the plethora of subjective determinations which could possibly come into play with the substantial contributing factor test.

III. Reliance on the Restatement (Second) of Torts is no Longer Appropriate.

a. Progressively Loose Applications of the Restatement (Second) of Torts Have Diminished the Connection Between Causation and Fact.

The concept of substantial contributing factor has its roots as a device for determining legal, not factual causation. See J. Smith, Legal Cause in Actions of Tort, 25 Harv. L. Rev. 303, 310 (1911). It was first mentioned in a 1911 Harvard law review article by Jeremiah Smith, who took issue with the foreseeability standard used for determining legal causation. See id. Aside from the oft-cited "twin fires" case, Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45 (Minn. 1920), the substantial contributing factor concept was not widely adopted until after it was included in the Restatement (Second) of Torts.

However, instead of proving to be a beacon of light providing safe guidance to judges, juries, and advocates trying to make causation determinations in difficult cases, the confusion surrounding the term "substantial factor" as it is found in the Restatement (Second) of Torts has led far too many a court into treacherous, uncharted waters. The Tenth Circuit

in June v. Union Carbide Corp., 577 F.3d 1234 (10th Cir. 2009), did a particularly exceptional job of explaining this confusion which has arisen amongst courts relying on the Restatement (Second) of Torts in making causation determinations.

June was a class action suit brought by the residents and representatives of a former Colorado uranium and vanadium mining town against the mining company, asserting claims for personal injury and medical monitoring allegedly caused by radiation exposure from the mines. 577 F.3d at 1236-1237. Similar to the arguments Appellants raise before this Court, since there were potential multiple or concurring causes for their injuries, the plaintiffs in June argued that Colorado applies the substantial factor test instead of the but for test usually applicable in determining factual causation. Id. at 1239. Relying on language from the Restatement (Second) of Torts, § 431 cmt. a, the plaintiffs in June claimed that an actor's conduct can be deemed to be causal "where it is of sufficient significance in producing the harm as to lead reasonable persons to regard it as a cause and to attach responsibility."¹ Id.

¹The relevant language from § 431 cmt. a, is as follows:

a. Distinction between substantial cause and cause in the philosophic sense. In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in § 432(2), this is necessary, but it is not of itself sufficient. The negligence must

The Tenth Circuit, noting the difficulty and confusion surrounding the application of the substantial factor test, rejected plaintiffs' assertion that the circumstances of the case warranted an abandonment of but for causation in favor of the substantial factor test. June, 577 F.3d at 1239. The Tenth Circuit correctly noted that both the Restatement (Second) and Restatement (Third) of Torts require a determination of factual causation and employ the same standards in making that determination. See id. The court came to this conclusion through a careful reading and comparison of the provisions relating to causation in both Restatements. See id.; see also Restatement (Third) of Torts, §§ 26-27 (2010); Restatement (Second) of Torts, §§ 430-433 (1997). What follows below is summary of the June Court's analysis comparing the causation requirements in the Restatement (Second) and (Third) of Torts.

also be a substantial factor in bringing about the plaintiff's harm. 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 . . .* (emphasis added). Restatement (Second) of Torts, § 431 cmt. a (1997).

Notably, although § 431 cmt. a addresses 'legal cause,' the first portion of the text italicized recognizes the requirement of factual 'but for' cause in order to impose liability; the second italicized portion is the language plaintiffs relied upon in June when formulating their proposed test for factual causation.

Regarding the Restatement (Second) of Torts, the Tenth Circuit examined the provisions relating to factual and legal causation found in Sections 430, 431, 432, and 433. See June, 577 F.3d at 1240-1245. Of those four sections, the court noted that Sections 430, 431, and 433 all relate to legal causation, while Section 432 covers factual causation. See id.

Section 430 states that a negligent person is liable for another's harm only if the negligent conduct was a "legal cause" of the harm. Restatement (Second) of Torts, § 430 (1997). Section 431 then introduces the concept of "substantial factor" providing that "negligent conduct is a legal cause of harm to another if ... his conduct is a substantial factor in bringing about the harm" and no rule of law exempts him from liability. June, 577 F.3d at 1241; Restatement (Second) of Torts, § 431 (1997). Furthermore, in defining "substantial factor," Comment a to Section 431 provides that "[t]he 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, using the word in the popular sense, in which there always lurks the idea of responsibility" Restatement (Second) of Torts, § 432 cmt. a (1997).

Section 433 goes on to provide a list of considerations important in determining whether the actor's conduct constitutes

a substantial factor in bringing about harm to another.² June, 577 F.3d at 1241; Restatement (Second) of Torts § 433 (1997). Thus, when read in conjunction, the use of the term "legal cause" in Sections 430 and 431, the definition of substantial factor provided in Comment a to Section 431, and the list of considerations set forth in Section 433 to determine if an actor's conduct is a substantial factor in another's harm, make evident that Sections 430, 431, and 433 relate to the scope of liability determination traditionally reserved for the legal causation. June, 577 F.3d at 1241.

After examining the sections related to legal causation, the Tenth Circuit went on to discuss the factual causation requirement in Section 432 of the Restatement (Second) of Torts. June, 577 F.3d at 1241-45. Even a cursory glance at Section 432 makes clear that the Restatement (Second) of Torts retains the same requirements for factual causation and employs the same

²The factors set out in Section 433 are:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; (c) lapse of time. Restatement (Second) of Torts, § 433 (1997).

standards that can be found in the Restatement (Third). Section 432 states:

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

(2) 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 the harm to another, the actor's negligence may be found to be a substantial factor in bringing it about. Restatement (Second) of Torts, § 432 (1997).

By comparison, the aforementioned factual causation requirement in the Restatement (Third) of Torts can be found in Sections 26 and 27, discussed supra at p. 18.

When read side by side, Section 26 of the Restatement (Third) of Torts mirrors Section 432(1) of the Restatement (Second) of Torts with both applying the same but for standard used to determine the factual causation requirement. Similarly, Section 432(2) of the Restatement (Second) of Torts recognizes what has become the exception for "multiple sufficient causes" in Section 27 of the Restatement (Third) of Torts. In concluding its discussion on the factual causation requirements found in both Restatements, the Tenth Circuit provided a coherent and well-reasoned statement of the test:

To sum up, as we understand the Restatement (Second) and the Restatement (Third), a defendant cannot be liable to the plaintiff unless its conduct is either

(a) a but for cause of the plaintiff's injury or (b) a necessary component of a causal set that (probably) would have caused the injury in the absence of other causes. In particular, conduct was not a "substantial factor", within the meaning of the term in the Restatement (Second), in bringing about a plaintiff's injury unless it satisfied (a) or (b), and also was a sufficiently significant factor under the considerations set forth in Restatement (Second), § 433. June, 577 F.3d at 1244.

Admittedly though, the use of the phrase "substantial factor" throughout sections of the Restatement (Second) of Torts relating to both factual and legal causation tends to obscure the line between these two separate components of the causation determination.

The Restatement (Third) of Torts abandoned the use of the term "substantial factor" because it proved to be "confusing and misused." Restatement (Third) of Torts, § 26 cmt. j (2010). Yet, countless cases before and, undoubtedly, countless cases in the future, will continue to drift rudderless into the treacherous waters created by the growing confusion that is the "substantial factor test." However, adoption of the factual causation standards set forth in Sections 26 and 27 of the Restatement (Third) of Torts will provide Massachusetts judges, jurors, and advocates with a comprehensible set of directions capable of consistent application. Indeed, it is the rudder that put the law of causation back on course -- benefitting all involved in the judicial process by avoiding the substantial

confusion that has been caused by the substantial contributing factor test.

b. Overbroad Applications of the Substantial Contributing Factor Test are No Longer Necessary or Appropriate.

The issue which has arisen in subsequent exposure cases is a lack of guidance for the factfinder as to the proper method for determining causation. In their jury instructions, judges have not mentioned the FPD test used to assess exposure, but instead have given free-floating instructions letting the jury find causation if a defendant's negligent conduct is a substantial contributing factor in the plaintiff's harm -- without giving the proper definition for a substantial contributing factor.

Jury instructions from two recent multiple tortfeasor cases illustrate how cases with the essentially the same set of facts get different variations of instructions absent more guidance. In Summerlin v. Philip Morris, Middlesex Superior Court, Massachusetts, Civil Action No. 1581-CV-05255 (Oct. 2018)³, a trial ending in a split verdict, the jury instructions did not define the term "substantial contributing factor" or mention the difference between legal and factual causation. See Trial of

³ Summerlin v. Philip Morris was tried against two cigarette makers and an auto parts company, which the plaintiff claimed were responsible for her husband's fatal cancer and subsequent death. The trial ended in a split verdict.

Summerlin v. Philip Morris, Oct. 9, 2018, Vol. 30 at 5304-5339. Whereas, in Ross v. A.O. Smith Corp., Middlesex Superior Court, Massachusetts, Civil Action No. 1381-CV-05580 (Oct. 2017)⁴, the jury instructions define substantial contributing factor as “not an insignificant factor.” See Trial of Ross v. A.O. Smith Corp., Sept. 28, 2017, Vol. 6 at 895. The jury instructions identified what a substantial contributing factor *is not* but left open uncertainties by not identifying what a substantial contributing factor *is*. Id. at 890, 895-896; compare O’Connor, 401 Mass. at 592 (defining substantial contributing factor as “something that makes a difference in the result”).

When O’Connor was decided, the substantial contributing factor test may have been an appropriate tool for determining factual causation in the still burgeoning field of exposure litigation. However, the wide divergence from the central teachings of O’Connor, coupled with the scientific advancements of the past 32 years in our knowledge of the nature and effects of toxic substances, render the overbroad application of the substantial contributing factor test no longer necessary or desirable. What is needed in today’s age of exposure litigation is a causation standard that will put the law back on the course

⁴ Ross v. A.O. Smith Corp. was tried against an insulation contractor, which plaintiff claimed failed to warn her husband about the dangers of working in close proximity to asbestos. The trial ended in a verdict in favor of the plaintiff.

charted by O'Connor -- a causation standard with clearly defined and delineated tests for factual and legal causation.

The most efficient means to right the course is to align with the factual causation standard of the Restatement (Third) of Torts. Sections 26 and 27 of the Restatement (Third) of Torts provide clear standards of factual causation that would eliminate any confusion caused by the substantial contributing factor test and ensure consistent application for even the most complex questions of causation. Adoption of the factual causation standard would not be an imposition as courts, juries, and advocates have already tested the waters. See O'Connor, 401 Mass. at 591-592 (defining substantial contributing factor as "something that makes a difference in the result.").

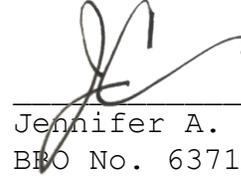
CONCLUSION

Based on the foregoing, MassDLA respectfully requests that this Honorable Court adopt a clear standard of factual causation set forth in Sections 26 and 27 Restatement (Third) of Torts (2010) to ensure objectivity and consistency in cases involving multiple tortfeasors or potential causes of injury.

Respectfully submitted,

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Dated: September 16, 2020

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

I hereby certify that the foregoing brief complies with all of the rules of the court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

Signed under the pains and penalties of Perjury this 16th day of September, 2020.



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CERTIFICATE OF SERVICE

I, Jennifer A Creedon, hereby certify that I have filed the foregoing document through the eFileMA.com system and notice was sent electronically to the following participants and also a courtesy copy sent via first class mail, postage prepaid:

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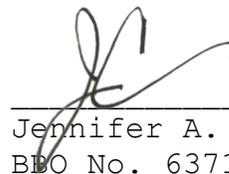
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