No. 10-0775

IN THE SUPREME COURT OF TEXAS

SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE, AND KYLE ANTHONY BOSTIC,

***Petitioners*,**

v.

GEORGIA-PACIFIC CORPORATION,

***Respondent*.**

From the Fifth Court of Appeals, Dallas, Texas

HONEYWELL INTERNATIONAL INC.'S *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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INTRODUCTION

Petitioners argue that they cannot find in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), anything suggesting that the Court was "adding to asbestos cases the requirement of but-for causation." (Pet. Br. on the Merits at 30-31.) They emphasize the statement in *Flores* that "we must determine whether the asbestos in the defendant's product was a *substantial factor* in bringing about the plaintiff's injuries." (*Id.* at 23 (quoting *Flores,* 232 S.W.2d at 770) (emphasis added).) Petitioners reason that the "substantial factor test is a separate test from 'but for' causation'" (*id.* at 28), and that this Court's failure to mention but-for causation must therefore mean that it is not required.

But by ignoring more than a century of Texas's jurisprudence, Petitioners have misframed the legal question. The question is not whether *Flores* "added" the but-for requirement; it has been a bedrock principle of Texas tort law for more than a century. Rather, the question is whether *Flores eliminated* the but-for requirement in asbestos cases. And it clearly did not.

Petitioners have committed the same mistake that a number of others have made before them: misreading the substantial-factor requirement in the Second Restatement of Torts as somehow eliminating the requirement of

but-for causation. This Court, by contrast, has consistently required *both* elements to be shown to establish causation in fact. Texas's interpretation is faithful to the Second Restatement and should not be abandoned.

INTEREST OF *AMICUS CURIAE*[1]

Honeywell International Inc., formerly Alliedsignal Inc. and Allied Corporation, is the successor-in-interest to Bendix Corporation, a manufacturer of automotive friction products, including brake pads. Honeywell has defended numerous cases in Texas and throughout the United States in which claimants have alleged that exposure to chrysotile asbestos in brake dust from Bendix products was a contributing cause of mesothelioma or asbestosis. Honeywell has seen firsthand how different jurisdictions have applied their own State law on the issues of causation-in-fact and proximate cause. Honeywell took the lead in briefing and arguing the causation issues in *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013), the principal case on which Petitioners relied in their Supplemental Letter Brief dated January 11, 2013, urging this Court to grant rehearing of its previous decision denying review. Accordingly, Honeywell's perspective on how different States have defined the requirement for proving causation in such cases may prove useful to this Court.

[1] This brief was not written in whole or in part by the parties' counsel, and no one other than Honeywell made a monetary contribution to its preparation.

ARGUMENT

1. This Court has always required proof of but-for causation and, since 1951, has followed the Restatement's definition of causation-in-fact, which includes *both* but-for *and* substantial-factor requirements.

A. Under Texas law, the but-for requirement is inherent in the idea of causation itself.

Since the nineteenth century, Texas tort law has defined the "cause of the injury" as "a cause without which the specific injury would not have been inflicted," *City of Dallas v. Jones*, 53 S.W. 377, 379 (Tex. 1899), or "but for" which the injury would not have happened, *City of Galveston v. Posnainsky*, 62 Tex. 118, 134 (1884); *Seale v. Gulf, Colo. & Santa Fe Ry. Co.*, 65 Tex. 274, 279 (1886). By 1940, this Court recognized that the "but-for" requirement was essential to the very idea of causation: "to say of a cause of an injury that it is one 'but for which the injury would not have happened' is to repeat something already included in the usual and ordinary meaning of the word cause." *Tex. Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026, 1030 (1940) (quoting *Tex. & Pac. Ry. Co. v. Short,* 62 S.W.2d 995, 999 (Tex. App.—Eastland 1933, writ ref'd)). The but-for requirement is so engrained that this Court has repeatedly (and recently) held that it is reversible error to *fail* to include the concept in a jury charge. *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 224-25, 232 (Tex. 2010) (following *Tex. & Pac. Ry. Co.*); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45-46 (Tex.

2007).

B. The incorporation of the substantial-factor requirement from Prosser and the Restatement is in addition to the but-for requirement, not in place of it, and this Court has consistently required both elements.

The early Texas cases did not mention or require that the defendant's conduct also be a "substantial factor" in bringing about the injury. Instead, this Court borrowed that concept from Professor Prosser and the American Legal Institute (ALI). The ALI and Prosser, in turn, both credited Professor Jeremiah Smith as the father of the substantial-factor test. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, § 26 cmt. j at 367 (2010); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 267 n.28 (5th ed. 1984).

In 1911, Professor Smith wrote in the Harvard Law Review that some instances may arise in which a defendant's tortious conduct is the but-for cause of the injury but where the conduct is too remote "to justify the conclusion that the tort was the cause, in the legal sense, of the damage." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911). He proposed requiring for such cases that the defendant's tortious conduct be "distinctly traceable as one of the *substantial efficient antecedents*" of the injury. *Id.* (emphasis added). As the ALI later explained, Smith "intended [the substantial-factor test] to address the problem of

proximate cause, not factual cause." RESTATEMENT (THIRD), *supra*, § 46 cmt. j at 367; *see also* PROSSER & KEETON, *supra*, at 267 ("The 'substantial factor' formulation is one concerning legal significance rather than factual quantum.").

The substantial-factor test saw its judicial debut in a 1920 Minnesota case that immortalized the now famous two-fires scenario. The court ruled that where two fires converged to damage the plaintiff's property, the defendant who set only one of them could properly be found liable if its negligence was "a substantial factor in causing plaintiff's damage." *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie. Ry. Co.*, 179 N.W. 45, 47 (Minn. 1920). The defendant's negligent conduct was not strictly a but-for cause of the injury, since the other fire would have caused the harm anyway. But imposing liability was appropriate under a sufficient-to-have-caused standard; that is, the defendant's tortious conduct, "operating alone, would have been sufficient to cause the identical result …." PROSSER & KEETON, *supra*, at 266. "In such cases it is quite clear that each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it …." *Id.* at 267.

Thus, the substantial-factor test was created to address situations in which there are multiple *sufficient* causes for the harm. It was not intended

to address situations—like the one here—where there are multiple *insufficient* causes.

The ALI liked Smith's substantial-factor concept and incorporated it into the first Restatement of Torts. RESTATEMENT OF TORTS, §§ 431-32 (1934). Section 431 provided that an "actor's negligent conduct is a legal cause of harm to another if … his conduct is a substantial factor in bringing about the harm …." *Id.* § 431 at 1159. Consistent with Smith's views, comment (a) explained that the substantial-factor requirement was meant to be *in addition* to the requirement of but-for causation, not in place of it:

> 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 *also* be a substantial factor as well as an actual factor in bringing about the plaintiff's harm.

Id. cmt. a at 1159-60 (emphasis added). The comment went on to describe a "substantial factor" as conduct that "reasonable men" would "regard … as a cause, using that word in the popular sense in which there always lurks the idea of responsibility," rather than in a "philosophical" sense that might include "every one of the great number of events without which any happening would not have occurred," events that are "so insignificant that no ordinary mind would think of them as causes." *Id.*

Section 432 repeated that establishing causation-in-fact requires

satisfying *both* the but-for and substantial-factor elements:

> § 432. Negligent Conduct as Necessary Antecedent of Harm.
>
> (1) Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if it 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 harm to another*, the actor's negligence may be held by the jury to be a substantial factor in bringing it about.

Id. at 1161 (emphasis added). Thus, § 432(1) made clear that conduct that did not satisfy the but-for test could not be a substantial factor in causing the injury. And § 432(2) addressed the case of multiple causes by requiring, as a condition of liability, that each defendant's conduct, standing alone, be "of itself sufficient" to have caused the harm. The ALI mentioned the two-fires scenario as an example of a case in which either fire "would have been sufficient" to cause the injury. *Id.* § 432 illus. 6 at 1164-65.

In 1941, Prosser incorporated the but-for and substantial-factor elements into the discussion of causation-in-fact in the first edition of his treatise. WILLIAM LLOYD PROSSER, HANDBOOK OF THE LAW OF TORTS, § 46, at 321-25 (1941). And when the ALI published the Second Restatement in 1965, it kept §§ 431-32 and the comments virtually unchanged. *See* RESTATEMENT

(SECOND) OF TORTS §§ 431-32 at 428-32 (1965).[2]

The substantial-factor concept first entered this Court's jurisprudence in 1951, when the Court adopted it from Prosser (who adopted it from the Restatement).[3] *Hopson v. Gulf Oil Corp*., 237 S.W.2d 352, 355 (Tex. 1951) ("As to causation, it is said that if the defendant's act or omission was a substantial factor in bringing about the result, it will be regarded as a cause, and that ordinarily it will be such a substantial factor if the result would not have occurred without it." (citing PROSSER ON TORTS, § 46, at 321)).

Since then, this Court has issued countless opinions in which it has required the but-for and substantial-factor elements—*both* of them—to be satisfied. A typical statement of the legal test in Texas reads like this:

> Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, *and* without it, the harm would not have occurred.

Crump, 330 S.W.3d at 222-23 (quoting *IHS Cedars Treatment Ctr. of Desoto Tex., Inc. v. Mason,* 143 S.W.3d 794, 798-99 (Tex. 2004)) (emphasis

[2] The two-fires scenario was moved to illustration 3 for § 432. *Id.* at 431. And the ALI added that the causation rules applied equally to cases involving strict liability, a doctrine new to the Second Restatement. *Id.* § 432 cmt. e. For other minor changes between the First and Second Restatement versions, see RESTATEMENT (THIRD), *supra,* § 26 cmt. a, at 346-47.

[3] PROSSER (1941), *supra*, § 45 at 318 (noting that the substantial-factor test was "proposed by the late Jeremiah Smith" and adopted by the Restatement of Torts).

added).[4]

Indeed, as this Court recently emphasized in *Crump*: a "definition that omits *either* the substantial factor or but-for components 'is incomplete.'" 330 S.W.2d at 223 (quoting *Ledesma*, 242 S.W.2d at 46) (emphasis added). And the Court has consistently followed the Restatement's requirements,[5] and has repeatedly quoted § 431, comment a—the same text excerpted above—for its explanation that the but-for and substantial-factor elements must *both* be satisfied. *See Mason,* 143 S.W.3d at 799; *Union Pump*, 898

[4] For similar, single-sentence formulations, see *BIC Pen Corp. v. Carter*, 346 S.W.3d 533, 541 n.3 (Tex. 2011); *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009) (per curiam); *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 246 (Tex. 2008); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45 (Tex. 2007); *LMB, Ltd. v. Moreno,* 201 S.W.3d 686, 688 (Tex. 2006) (per curiam); *Western Invs., Inc. v. Urena,* 162 S.W.3d 547, 551 (Tex. 2005); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003); *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820 (Tex. 2002); *Sw. Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001); *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 737 (Tex. 1998); *Brown v. Bank of Galveston, N.A.*, 963 S.W.2d 511, 514 (Tex. 1998); *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 481 (Tex. 1995); *Union Pump Co. v. Allbritton,* 898 S.W.2d 773, 775 (Tex. 1995); *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993); *Travis v. City of Mesquite,* 830 S.W.2d 94, 98 (Tex. 1992); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991); *Havner v. E-Z Mart Stores, Inc.,* 825 S.W.2d 456, 458-59 (Tex. 1992); *Brown v. Edwards Transfer Co.,* 764 S.W.2d 220, 223 (Tex. 1988); *City of Gladewater v. Pike*, 727 S.W.2d 514, 517 (Tex. 1987); *Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 549 (Tex. 1985); *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980); *Mo. Pac. R.R. Co. v. Am. Statesman,* 552 S.W.2d 99, 103 (Tex. 1977); *Tex. & Pac. Ry. Co. v. McCleery*, 418 S.W.2d 494, 497 (Tex. 1967); *Baumler v. Hazelwood*, 347 S.W.2d 560, 564 (Tex. 1961).

[5] *See Crump*, 330 S.W.3d at 224; *Flores,* 232 S.W.3d at 770; *Mason,* 143 S.W.3d at 799; *Lear Siegler*, 819 S.W.2d at 471-72; *Union Pump*, 898 S.W.2d at 775; *McCleery*, 418 S.W.2d at 497.

S.W.2d at 775; *Lear Siegler*, 819 S.W.2d at 472.

2. Some courts in other jurisdictions have misread the Second Restatement to abandon but-for causation in favor of the substantial-factor test alone, while others have correctly required, like Texas, that *both* the but-for and substantial-factor elements be satisfied.

A. A number of courts have misapplied the substantial-factor test.

Although this Court in *Crump* held that it is error to omit "either" the but-for or substantial-factor requirements, 330 S.W.2d at 223, some jurisdictions have unwittingly dropped the but-for requirement, purportedly in reliance on the Second Restatement. The original culprit may well have been the Fifth Circuit's decision in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973). Although *Borel* was an asbestosis case arising in Texas, the Fifth Circuit did not cite any Texas cases with regard to the legal standard for proving causation in fact. It purported to rely, instead, on Prosser and the Second Restatement, but the court incorrectly summarized their teachings for the proposition that: "The traditional rule is that a defendant's conduct is the cause of the event if it was a substantial factor in bringing it about. PROSSER, LAW OF TORTS § 41 at 240 (3 ed. 1971); SECOND RESTATEMENT OF TORTS, §§ 431, 433." *Id.* at 1094. *Borel* unfortunately failed to mention the but-for requirement in § 431, comment a, or the but-for and sufficient-to-have-caused requirements in § 432.

Borel's failure to mention those requirements is hard to explain. The ALI has recognized that it may have sowed the seed for the error by including the but-for requirement in a comment to § 431, rather than putting it prominently in the text of § 431 itself. *See* RESTATEMENT (THIRD), *supra*, § 26 cmt. b at 347 ("Both the first and Second Restatements of Torts included this [but-for] standard as an aspect of legal cause, but lowered its profile by placing it in a clause in a Comment. Section 431, Comment a ('the harm would not have occurred had the actor not been negligent')."") The but-for test is also clearly found in the text of § 432. *Borel* and its progeny simply overlooked it. As the ALI explained:

> [S]ome courts have accepted the proposition that, although the plaintiff cannot show the defendant's tortious conduct was a but-for cause of harm by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm. *That proposition is inconsistent with the substantial-factor standard* adopted in the Restatement Second of Torts § 431, Comment a … .

Id. at 354 (emphasis added).

Courts making the same mistake have included the Fourth Circuit in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986), the Maryland Court of Appeals in *Eagle-Picher Industries, Inc. v. Balbos*, 604 A.2d 445, 459 (Md. 1992), and the California Supreme Court in

Rutherford v. Owens-Ill., Inc., 941 P.2d 1203, 1219-20 (Cal. 1997).

Without the simple logic of asking if the defendant's conduct *by itself* was sufficient to have caused the plaintiff's injury, courts relying on the substantial-factor test alone have had no reliable way to determine whether the exposure to a particular defendant's product was *actually* causative. "The simple, straightforward question of whether an injury would have occurred 'but for' an alleged cause gets lost or obscured through misuse of the 'substantial factor'" test. Bert Black & David H. Hollander, Jr., *Unravelling Causation: Back to Basics*, 3 U. BALT. J. ENVTL. L. 1, 2 (1993). "Where the 'but for' test clearly addresses the kind of relationship the law requires between an alleged cause and an alleged effect, the 'substantial factor' test provides no guidance at all on this question." *Id.* at 4. It "is little more than a jurisprudential Rorschach blot." John D. Rue, *Returning to the Roots of the Bramble Bush: the "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2723 (2003).

Indeed, the vagueness of the substantial-factor test, standing alone, led the Fourth Circuit in *Lohrmann* to improvise. It modified the substantial-factor inquiry to require the plaintiff to prove that the exposure occurred "on a regular basis over some extended period of time in proximity to where the

plaintiff actually worked." 782 F.2d at 1162-63. *Lohrmann*'s regularity-proximity-duration requirement is better than the nebulous substantial-factor inquiry. But a candid assessment would say that the improvised standard is really serving as a policy limitation on the legal extent of liability—the job of the proximate cause requirement. It is not doing the job of the causation-in-fact inquiry: asking whether each defendant's conduct, in the words of § 432(2) of the Second Restatement, was, by "itself," "sufficient" to bring about the harm. As this Court put it in *Flores, Lohrmann*'s requirement for "proof of mere frequency, regularity, and proximity is necessary, but not sufficient … to support causation under Texas law." 232 S.W.3d at 772.

Similarly, the California Supreme Court in *Rutherford*, purporting to rely on the substantial-factor test from § 431 of the Second Restatement, 941 P.2d at 1214, came up with the loosest causation standard in the country in asbestos-exposure cases. *Rutherford* asks only whether exposure to the defendant's product "was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer." 941 P.2d at 1219-20 (emphasis altered). *Rutherford* also overlooked the requirement in § 432(2) that a plaintiff show that "each" defendant's conduct "of itself" be "sufficient to bring about harm." RESTATEMENT (SECOND) § 432(2), at 430.

B. Many courts have gotten it right.

By contrast, numerous courts have correctly applied the Second Restatement by recognizing that the substantial-factor test alone is insufficient in cases involving multiple causes. For example, Supreme Court of Missouri explained in 1993 that "[t]here has been some confusion in the Missouri cases as to when the 'but for' causation test applies. This confusion arose as a result of the recent trend among courts to describe causation as requiring that the defendant's conduct be a substantial factor in bringing about the plaintiff's harm." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 861 (Mo. 1993). The Court eliminated the confusion with a stroke of the pen by confirming that "'[b]ut for' is an absolute minimum for causation because it is merely causation in fact. Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with." *Id.* at 862.

Callahan also debunked the notion that but-for causation cannot work in a case involving multiple causes. The court explained that each cause must be evaluated independently to see if it would have been sufficient to have caused the injury, subjecting each defendant essentially to an independent but-for analysis:

> [T]here is nothing inconsistent or different about applying a "but for" causation test to a circumstance

> involving multiple causes. The "but for" causation test operates only to eliminate liability of a defendant who cannot meet this test because such defendant's conduct was not causal. The fact that the conduct of a particular defendant either does or does not meet "but for" causation has no impact on the remaining defendants. The remaining defendants rise or fall on their own "but for" causation test.

Id.

Similarly, in *Phillips v. E.I. Dupont de Nemours & Co.*, 534 F.3d 986 (9th Cir. 2007), the Ninth Circuit held that Washington-state law required class-action plaintiffs to prove that the defendants' nuclear waste "was the 'but for' cause" of their cancers, and "not just a contributing cause under the more lenient 'substantial factor' test." *Id.* at 996. Using only a substantial-factor standard, the court said, would "supplant but-for causation in virtually all toxic tort cases." *Id.* at 1011.

The Tenth Circuit likewise ruled that New Mexico law requires a showing of but-for causation in a toxic tort case. *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1169 (10th Cir. 2010) ("We see no basis in New Mexico law for creating an exception to but-for causation simply because a case involves toxic torts, nor have Plaintiffs established any other basis for an exception to but-for causation in this case.").

Delaware applies the same standard, including in asbestos cases. *See Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991) (holding that Delaware

law requires proof of but-for causation, not simply substantial-factor causation); *Money v. Manville Corp. Asbestos Disease Compensation Trust Fund*, 596 A.2d 1372, 1377 (Del. 1991) (applying *Culver* in holding that "to make a *prima facie* showing with respect to the cause of an asbestos-related disease, a plaintiff must introduce direct competent expert medical testimony that a defendant's asbestos product was a proximate cause of the plaintiff's injury. This holding requires the plaintiff's expert medical witness to state, in terms of reasonable medical probability, that there was a causal relationship between the defendant's product and the plaintiff's physical injury, *i.e.*, that but for the plaintiff's exposure to the defendant's asbestos product, the plaintiff's injury would not have occurred").

C. Concerned with those courts that misapplied the substantial-factor test, Prosser and the ALI rejected it altogether.

By 1988, the final supplement of Prosser's treatise recognized that courts using only a substantial-factor test had "created risk of confusion and misunderstanding … ." W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 41 at 43 (Supp. 1988); *see also* RESTATEMENT (THIRD), *supra,* at 371 ("Even the venerable Prosser treatise, in its final edition, turned its back on substantial factor as a useful concept for causation."). The ALI, in 2010, rejected it as well in the Third Restatement, concluding that "the substantial-factor test has not … withstood the test of

time, as it has proved confusing and been misused …. The element that must be established, by whatever standard of proof, is the but-for or necessary-condition standard ….” RESTATEMENT (THIRD), § 26 cmt. j, at 353-54.

D. The Virginia Supreme Court’s recent decision in *Boomer* applied the correct standard in mesothelioma cases.

The Supreme Court of Virginia is the most recent jurisdiction to examine causation requirements in an asbestos case. *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013). The court noted that it had never adopted the substantial-factor test and had always been a but-for causation state. *Id.* at 728. It also noted that Virginia law already provided a mechanism for imposing liability on a defendant in a multiple causation scenario “where two causes concur to bring about an event and *either alone* would have been *sufficient* to bring about an *identical* result.” *Id.* (emphasis altered) (citation and quotation omitted). The court rejected an unduly strict approach that would require the plaintiff to undertake “the difficult if not impossible task of proving that any one single source of exposure, in light of other exposures, was *the sole* but-for cause of the disease.” *Id.* at 729 (emphasis added).

But *Boomer* also found that Virginia’s existing law “provides a means of holding a defendant liable if his or her negligence is one of multiple concurrent causes which proximately caused an injury, when any of the

multiple causes would have *each* have been a *sufficient* cause." *Id.* (emphasis added). Applying that approach, *Boomer* held that an asbestos plaintiff in a mesothelioma case must prove "that exposure to the defendant's product *alone* must have been *sufficient* to have caused the harm …." *Id.* at 731 (emphasis added). In other words, "the plaintiff must show that it is more likely than not that [the decedent's] alleged exposure to dust from [the defendant's product] occurred prior to the development of [his] cancer and *was sufficient to cause his* mesothelioma." *Id.* at 733 (emphasis added).[6]

Boomer was applied, most recently, by the U.S. District Court for the District of Columbia, which ruled that expert testimony that "every exposure" to asbestos contributes to the risk of developing mesothelioma is insufficient to satisfy *Boomer*'s sufficient-to-have-caused standard. *Wannall*

[6] The opinion in *Boomer* also declined to adopt the Restatement (Third)'s approach to disease causation. 736 S.E.2d at 732. That approach is found in comments f and g to § 27. Restatement (Third), § 27 cmt. f, g at 380-82. The Petitioners here mention the comments in a footnote. (Pet. Br. on the Merits at 25-26 n.24.) But those two comments have been roundly criticized. *E.g.*, David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1021, 1028 (2009) (noting that the complicated "'causal set' idea" that forms the basis for comments f and g has drawn fire as "an academic creation that belongs in [a law professor's] 'penetrating and puzzling' cabinet," not in the Restatement); John D. Rue, *supra*, at 2732 (noting that Judge Guido Calabresi has criticized the Third Restatement for departing from the ALI's tradition of attempting to identify and describe trends in the law in favor of offering its own "prescriptive vision" of how the law might be changed). They represent a radical departure from the Second Restatement and should not be considered, especially when Petitioners "do not ask this Court to overturn" *Flores*. Pet'rs Supp. Letter Br. at 2 (Jan. 11, 2013).

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Boomer is thus consistent with the sufficient-to-have-caused standard in § 432(2) of the Second Restatement and, as shown below, consistent with this Court's approach in *Flores*.

3. *Flores* did not signal any departure from the traditional causation standard.

The history discussed above shows that Petitioners pose the wrong question in asking whether *Flores* can be read as "*adding* to asbestos cases the requirement of but-for causation." (Pet. Br. on the Merits at 30-31 (emphasis added).) There is nothing to "add." As shown above, Texas has consistently imposed both but-for and substantial-factor requirements, and this Court has made clear that omitting either one makes the causation definition "incomplete." *Crump*, 330 S.W.2d at 223.

The proper question, instead, is whether anything in *Flores* can be read to *eliminate* the but-for requirement that Texas law has unwaveringly demanded. The answer is no.

First, given that but-for causation has been the bedrock of Texas tort law for well over a century—a concept inherent in the very idea of "cause," *Staggs*, 134 S.W.2d at 1030—this Court would have said so if it were eliminating that requirement altogether in asbestos cases.

Second, this Court's statement in *Flores*—that the "Restatement section 431's 'substantial factor' test has informed our causation analysis on several occasions," 232 S.W.2d at 770—cannot reasonably be interpreted as abandoning Texas's long-standing requirement to prove *both* elements: that "the act or omission was a substantial factor in bringing about the injuries, *and* without it, [that] the harm would not have occurred." *Crump*, 330 S.W.3d at 223-24. This Court, for instance, used the same shorthand to refer to the "substantial factor" test in *Mason,* never once suggesting that it meant jettisoning but-for causation:

> The two elements of proximate cause are cause in fact (or *substantial factor*) and foreseeability … . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, *and without it, the harm would not have occurred*.

Mason, 143 S.W.3d at 798-99 (emphasis added).

Third, *Flores* repeated this Court's continued reliance on § 431 and on comment a of the Second Restatement. 232 S.W.3d at 769-70. As shown above, the Restatement clearly requires satisfying both but-for and substantial-factor requirements. Indeed, *Flores* quoted the text from § 431, comment a, that the purpose of the substantial-factor test is to weed out those but-for causes for which liability should be imposed from other but-for causes that are too remote, despite that all such causes are ones "without

which [the] happening would not have occurred." *Id.* at 770 (quoting RESTATEMENT (SECOND) § 431 cmt. a).

Finally, Petitioners are wrong to argue that a but-for or sufficient-to-have-caused standard is inconsistent with *Flores*'s acknowledgement that a plaintiff does not have to prove that the *particular fibers* from the defendant's product were the ones that actually caused the disease. While not adopting California's loose, increase-the-risk test for causation, *Flores* agreed with *Rutherford*'s observation that a plaintiff does not have to "demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth." 232 S.W.3d at 773 (quoting *Rutherford*, 941 P.2d at 1219). *Flores* requires, instead, only that a plaintiff provide sufficient evidence to show that it is more likely than not that exposure to the defendant's product supplied a dose that was sufficient to have caused his disease. Without such evidence of dose, "the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts *were sufficient to cause asbestosis*." *Id.* at 771-72 (emphasis added). *Flores* went on to explain that one way of proving causation-in-fact would be through "epidemiological studies showing … at least a doubled risk of asbestosis," *id.* at 772 (citing *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706,

715 (Tex. 1997)), assuming that the injured person's "exposure or dose levels were comparable to or greater than those in the studies," *id.* at 771 (quoting *Havner*, 953 S.W.2d at 720-21).

Thus, Petitioners build a straw man—and proceed to beat the stuffing out of it—when they claim that the court of appeals below "require[d] proof that the asbestos fibers from the defendant's product were the actual fibers that produced the harm" (Pet. Br. on Merits at 2). Nothing in the court of appeals' opinion says that.

What the court of appeals' opinion does require is proof "that the defendant's conduct was *a cause-in-fact* of the harm." *Ga. Pac. Corp. v. Bostic*, 320 S.W.3d 588, 596 (Tex. App.—Dallas 2010, pet. granted) (emphasis added). That is fully consistent with *Flores,* which required proof "that asbestos fibers [from Borg-Warner's product] were released in an amount *sufficient* to cause *Flores's* asbestosis." *Id.* at 772 (emphasis added). And it comports with *Boomer* and § 432(2) of the Second Restatement, which require a plaintiff in a case involving multiple actors to prove that each defendant's conduct alone was sufficient to have caused the injury.

CONCLUSION

The Court should decline the Petitioners' invitation to water down Texas tort law by eliminating the but-for causation requirement in mesothelioma

cases. That would be an unprecedented departure from more than a century of this Court's jurisprudence. The but-for/sufficient-to-have-caused standard in § 432(2) of the Second Restatement, and as applied in cases like *Boomer*, strikes the correct balance in mesothelioma cases by ensuring that a defendant is held liable only when exposure to that defendant's product alone would have been sufficient to cause the injury.

The court of appeals' decision below is faithful to Texas's causation standard and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface requirements of TEX. R. APP. P. 9.4(e), because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of TEX. R. APP. P. 9.4(i), because it contains 5,505 words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

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