Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-13330

PATRICIA WALSH GREENE, individually, and PATRICIA WALSH GREENE AND THOMAS WALSH, as personal representatives of the estate of FREDERICK DOUGLAS GREENE, JR.,
Plaintiffs-Appellees,

v.

PHILIP MORRIS USA INC.,
Defendant-Appellant,

and

STARS MARKETS COMPANY, INC.,
Defendant.

Appeal from the Commonwealth of Massachusetts Superior Court
Department of the Trial Court, Middlesex County
Case No. 1581-CV-01808

AMICUS CURIAE BRIEF FOR THE MASSACHUSETTS ACADEMY OF TRIAL ATTORNEYS and AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFFS AND AFFIRMANCE

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ISSUES PRESENTED AND POSITION OF *AMICI*

The Massachusetts Academy of Trial Attorneys (Academy) and the American Association for Justice (Association) offer this brief in response to the two questions in the Court's solicitation in the above-captioned case:

1) Statutory Interest Rate

Amici submit that the statutes under review are not so excessive as to violate due process. Statutes are presumptively constitutional, and the burden to rebut that presumption is heavy. The statutory interest rate for pre- and post-judgment in Massachusetts is only 12%, yet on the open market, the interest rate on credit card debt is over 18% and that for personal loans ranges from 13% to 32%. As there is a rational basis for the 12% interest rate for tortfeasors, the statute is constitutional.

2) Causation Instruction

Amici submit that a new trial is not required. Trial judges have discretion when charging juries on the issue of causation. The judge below acted well within her ample discretion when she instructed the jury with the "substantial contributing factor" test rather than the "but-for" test on Plaintiffs' conspiracy claims.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Massachusetts Academy of Trial Attorneys

The Academy is a voluntary, non-profit, Commonwealth-wide professional association of lawyers. The Academy's purpose is to uphold and defend the Constitutions of the United States and the Commonwealth of Massachusetts; to promote the administration of justice; to uphold the honor of the legal profession; to apply the knowledge and experience of its members so as to promote the public good; to reform the law where justice so requires; to advance the cause of those who seek redress for injury to person or property; ardently to resist efforts to curtail the rights of injured individuals; and to help them enforce their rights through the courts and other tribunals in all areas of law. The Academy has been actively addressing various areas of the law in the courts and the Legislature of the Commonwealth since 1975.

The American Association for Justice

The American Association for Justice is a national, voluntary bar association founded in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and

abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 75 years, the Association has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

RULE 17(c)(5) DECLARATION

Amici state that some of Plaintiffs' counsel are members of both *amici*, and the current President of the Academy is Plaintiffs' lead appellate counsel's partner.

No party of party's counsel authored this brief in whole or part;

No party or party's counsel contributed money that was intended to fund preparing or submitting this brief;

No person or entity—other than Amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and

Neither Amicus nor its counsel represents or has represented any of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF CASE

Amici accept the Statement of the Case in Plaintiffs'-Appellees' brief.

SUMMARY OF ARGUMENT

The Massachusetts 12% statutory rate for pre- and post-judgment interest is not unconstitutionally excessive. (pp. 16-17). The statutes are presumptively constitutional. (pp. 16-17). The rates are fair given consumers' economic reality. (pp. 18-21).

The jury instruction on causation does not require a new trial. (p. 21). The standard of review here is abuse of discretion. (pp. 21). *Doull* does not suggest or endorse but-for jury instructions in conspiracy or other toxic tort cases. (pp. 21-22). *Doull* is limited to traditional negligence cases and explicitly excluded conspiracy cases. (pp. 23-36). The *Doull* Court acknowledged that toxic tort cases vary significantly from traditional negligence cases. (pp. 26-32). The reasoning in *O'Connor* v. *Raymark Indus., Inc*. stands. (pp. 32-37). Other jurisdictions concur the substantial contributing factor test is the appropriate one for toxic torts and other multiple-cause, concurrent cause cases. (pp. 37-39).

Retroactive application of *Doull* to toxic torts would be inappropriate. (pp. 39-41). Retroactive application of a rule not grounded in the

Constitution is inappropriate. (pp. 39-41). Plaintiffs had a due process right to rely upon this Court's existing rules. (p. 42).

ARGUMENT

I. The Massachusetts 12% statutory rate for pre- and post-judgment interest is constitutional.

A. The statutes are presumptively constitutional.

Statutory pre-judgment interest for personal injury or property damage under G.L. c. 231, § 6B began just after the Second World War, St. 1946, c. 212, § 1, and some thirty years later the Legislature set the rate at 8%. St. 1974, c. 224, § 1. In some fifty years since, there have been two changes in the rate: six years later it went to 10%, St. 1980, c. 322, § 2; and two years after that to 12%, where it has remained for forty years. St. 1982, c. 183, § 2. Still later, the Legislature set pre-judgment interest in death cases as "the same rate of interest per annum as" provided in § 6B. St. 1988, c. 223, § 1.

Those like Philip Morris who challenge the constitutionality of statutes such as the two under review, neither of which burdens either a suspect group or a fundamental constitutional right, bear a heavy burden in overcoming the presumption of constitutionality which they enjoy. *Chief*

of Police of City of Worcester v. *Holden*, 470 Mass. 845, 853 (2015). "'Every rational presumption is indulged in favor of the validity of an act of the General Court. Enforcement of such legislative enactment will not be refused unless its conflict with some provision of the Constitution is established beyond reasonable doubt.'" *American Mfrs. Mut. Ins. Co.* v. *Comm'r of Ins.*, 374 Mass. 181, 190 (1978), quoting *Campbell* v. *Boston*, 290 Mass. 427, 429 (1935).

> [It] follows that "[u]nless the act of the Legislature cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it, the court has no power to strike it down as violative of the Constitution." *Sperry & Hutchinson Co.* v. *Dir. of Div. on Necessaries of Life*, 307 Mass. 408, 418 (1940). A court must sustain economic legislation if it has a permissible legislative objective and if the legislation bears a rational relation to that objective. *Pinnick* v. *Cleary*, 360 Mass. 1, 14, (1971). "Whether [the statute is] wise or effective is not, of course, the province of [courts]." *Hoffman Estates* v. *Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 505, 102 S.Ct. 1186, 1196, 71 L.Ed.2d 362 (1982). *Commonwealth* v. *Lammi*, 386 Mass. 299, 300, 435 N.E.2d 360 (1982).

Klein v. *Catalano*, 386 Mass. 701, 707 (1982).

Indeed, Philip Morris's plaint does not even rise to the level of a constitutional challenge. Rather, it is simply a way of bemoaning policy set by the Legislature – where venue is proper for such an allegation.

B. The rates are fair given consumers' economic reality.

Interest is the time-value of money. It is awarded as a matter of law when one wrongfully deprived of the use of her money is made whole for her loss; she is entitled to a return on the money that she would have had but for the wrongful act. *Sec'y of Admin. & Fin*. v. *Lab. Rels. Comm'n,* 434 Mass. 340, 345 (2001); *McEvoy Travel Bureau, Inc*. v. *Norton Co*., 408 Mass. 704, 717 (1990). Here, Philip Morris insists that because the interest rate on Treasury Securities is quite low, 12% statutory interest in tort cases necessarily represent a "disconnect" from "economic reality." Opening Br. 48. But exactly whose economic reality is that?

Consider this: the general experience of *amici*'s membership is that these interest rates are often *in*adequate to compensate for the injury victims and their families have endured during their litigation (from date of loss to date of payment) and seldom, if ever, result in a "windfall." In setting or sustaining the interest rate, the Legislature is entitled to consider the economic realities confronting tort victims, not only those of institutional investors with commercial acumen, investment portfolios, and ample resources.

This Court has recognized, in the context of interest, that the personal injuries and other damages enumerated in G.L. c. 231, § 6B, are "quite different" from damages subject to a back pay award which is subject to the sliding scale rate in G.L. c. 231, § 6I. *Sec'y of Admin. & Fin.*, 434 Mass. at 345.

Indeed, a recent Bankrate survey reported that only "about 4 in 10 Americans have enough savings to cover an unplanned expense of $1,000, meaning more than half would need to find other means to pay for an unexpected car repair or emergency room visit." K. Bennett, Survey: Less Than Half of Americans Have Savings to Cover a $1,000 Surprise Expense | Bankrate, (Jan. 19, 2022), https://www.bankrate.com/banking/savings/financial-security-january-2022/. And the Federal Reserve reports that 32% of adults could not cover a $400 emergency expense with cash or its equivalent. Board of Governors of the Federal Reserve System, The Fed – Dealing with Unexpected Expenses, https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-dealing-with-unexpected-expenses.htm.

It follows that Massachusetts families suffering the disruption of wrongfully death or injury commonly turn to the market, not for investment but for their daily bread. In December 2022, the Federal Reserve reported that by October, the average interest rate on credit cards had increased to 18.43%. Board of Governors of the Federal Reserve System, Consumer Credit - G.19, https://www.federalreserve.gov/releases/g19/current/. In October 2022, Bankrate reported that the average interest rate on personal loans for those with exceptional credit scores ranged from 10.73% to 12.50%. For those with lesser scores, the interest ranges were from 13.5% to as high as 32.0%. H. Johnson, Average Personal Loan Interest Rates | Bankrate (Oct. 7, 2022), https://www.bankrate.com/loans/personal-loans/average-personal-loan-rates/. Moreover, many injury victims lack access (or have exhausted what access they had) to the credit necessary for relief from the burgeoning lawsuit loan industry. Interest rates on such transactions run between 27% and 60%. C. Nicks, How to Shop for a Lawsuit Loan | Nolo, https://www.nolo.com/legal-encyclopedia/how-shop-lawsuit-loan.html.

Accordingly, when viewing the market and all its players (and payors) as a whole, there is ample justification supporting the 12% pre- and post-judgment interest rates in tort cases as rational, reasonable, and right.

II. The jury instruction on causation does not require a new trial.

A. The standard of review here is abuse of discretion.

Trial judges have quite broad discretion when making evidentiary rulings and determining "the method by which [such] evidence is brought to the jury's attention" in jury instructions. *Tocci* v. *Tocci*, 490 Mass. 1, 9 (2022). "The party claiming error bears the 'burden of showing an abuse of [that] discretion.'" *Id*., quoting *Commonwealth* v. *Amazeen*, 375 Mass. 73, 84 (1978).

B. *Doull* does not suggest or endorse but-for jury instructions in conspiracy or other toxic tort cases.

1. *Doull* generally.

This Court in *Doull* v. *Foster*, 487 Mass. 1 (2021), a medical negligence case, held that a "but-for" instruction was appropriate in that case because it "is the proper standard in most negligence cases." *Id*. at 2, 17. But the Court also acknowledged that there are times when the but-for standard "does not work and has been altered to avoid unjust and illogical results." *Id*. at 8.

Scholars have long observed that, in most cases, the substantial factor approach "produces the same legal conclusion as the but-for test" and that test "was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result." W.P. Keeton, Prosser and Keeton on the Law of Torts § 41 (5th ed. 1984).

Doull recognized certain concerns peculiar to multiple-cause cases such as toxic torts, and that a strict but-for standard in those cases could frustrate a plaintiff's ability to recover when multiple defendants each engage in acts sufficient to cause the harm. *Id*. at 10-11. See *Matsuyama* v. *Birnbaum*, 452 Mass. 1, 30-31 (2008) (limiting substantial contributing factor test to cases with multiple causes). In other multiple-cause situations, however, one or more actors act and their actions combine to cause harm to a plaintiff. Conspiracy and toxic torts involving tobacco and asbestos are prime examples. This case falls squarely under both *Doull* exceptions because it involves a toxic tort and conspiracy claims, which necessarily involve multiple actors.

2. *Doull* is limited to traditional negligence cases and explicitly excluded conspiracy cases.

Massachusetts has recognized civil conspiracy as actionable since just after the Civil War. That is, "if two or more persons combine to accomplish an unlawful purpose, or a [lawful] purpose … by unlawful means," that is a *criminal* conspiracy" but if "in pursuance of such a conspiracy, they do an act injurious to any person, he may have an action against them to recover the damage they have done him." *Carew* v. *Rutherford*, 106 Mass. 1, 10 (1870). In the years since, two types of civil conspiracy developed: "concerted action" and "peculiar power of coercion" conspiracy.

To prove "concerted action" conspiracy, "plaintiffs must show an underlying tortious act *in which two or more persons acted in concert* and in furtherance of a common design or agreement" (emphasis added). *Bartle* v. *Berry*, 80 Mass. App. Ct. 372, 383-384 (2011). See *Kurker* v. *Hill*, 44 Mass. App. Ct. 184, 188-189 (1998). Under this type of conspiracy, a plaintiff must prove (1) that there was a common design or agreement (express or otherwise) between the defendant and another to accomplish an unlawful purpose, and (2) that the defendant in question provided substantial

assistance or encouragement in furtherance of that agreement or design.[1] See Massachusetts Superior Court Civil Practice Jury Instructions § 24.6.1 (3d ed. 2014 & Supp. 2018). Plaintiff's burden is to show defendants conspired in a common plan, that defendants carried out that common plan, that plaintiffs were injured or otherwise deprived of some right because of defendants' acts, and that "the purpose of the conspiracy was [thus] effected." *Willett* v. *Herrick*, 242 Mass. 471, 478 (1922).

The "peculiar power of coercion" type of conspiracy is different: a plaintiff must show that a defendant entered into a common plan with one or more others (who may or may not also be defendants), that the combination of their efforts acting together created a greater power of coercion over the plaintiff than they otherwise would have had if they each acted alone, and that the injury to the Plaintiff resulted from the very power exercised by the combined efforts of the defendant and his co-conspirators. See Massachusetts Superior Court Civil Practice Jury Instructions § 24.6.2 (3d ed. 2014 & Supp. 2018).

[1] Notably, there is no specific causation requirement articulated in relation to this intentional tort.

The causation standard most appropriate for conspiracy claims is "substantial contributing factor." See Restatement (Second) of Torts § 876 comment e (1979 & Supp. 2022) ("When one personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if his act, considered by itself, constitutes a breach of duty and *is a substantial factor in causing the result*, irrespective of his knowledge that his act or the act of the other is tortious" [emphasis added]).

Philip Morris has pointed to nothing – and there is nothing – indicating that the jury here misunderstood the "substantial contributing factor" instruction. In fact, that the jury decided that Philip Morris's negligent marketing/distribution of cigarettes *alone* was not a substantial contributing cause of the plaintiff's disease, but also found that the "power of coercion exercised by Philip Morris and other tobacco companies" was a substantial contributing cause, shows that the jury understood the instruction. See RAI/184-187 (Jury Verdict Form).[2] For the jury, Philip Morris's actions alone were not enough to rise to the level of a substantial

[2] Citations to the Record Appendix are: RA[Volume]/[Page(s)].

contributing cause, but its actions in concert with others – the combined efforts of the group – was a cause of the injury. Because the jury understood the meaning of "substantial contributing factor" and was able to distinguish between the counts and defendants, this Court need not disturb the longstanding causation standard for conspiracy claims.

3. *Doull* acknowledged that toxic tort cases vary significantly from traditional negligence cases.

To require but-for causation in toxic tort cases would defy long-standing, accepted principles of etiology of numerous toxic torts, particularly cancer cases, such as caused by tobacco and asbestos. See *Donovan* v. *Philip Morris USA, Inc.*, 268 F.R.D. 1, 6 (D. Mass. 2010) (discussing tobacco litigation as toxic tort).

Proof of causation (*i.e.*, cause-in-fact) in toxic tort cases is markedly different from such proof in a traditional negligence action. *Elam* v. *Alcolac, Inc.*, 765 S.W.2d 42, 173-174 (Mo. Ct. App. 1988). See *James* v. *Chevron U.S.A., Inc.*, 301 N.J. Super. 512, 531 (N.J. Super. Ct. App. Div. 1997) (applying substantial contributing factor causation standard in toxic tort cases noting "A less traditional standard is essential"). Toxic torts usually involve chronic and repeated exposure to a chemical, carcinogen, or other

hazardous substances or material, and the presenting injury is rarely acute, or from immediate trauma and more often than not from a genetic mutation or biochemical disruption. *Elam,* 765 S.W.2d at 173. Furthermore, toxic torts almost always involve a latency period, different sources of exposure, and a level of background incidence of the resulting disease or injury, all of which significantly frustrate a plaintiff's ability to isolate the exact exposure that resulted in the injury. *Id*. at 174. See *Borel* v. *Fibreboard Paper Prods. Corp*., 493 F.2d 1076, 1083 (5th Cir. 1973) ("All these factors combine to make it impossible, as a practical matter, to determine which exposure or exposures to asbestos dust caused the disease").

This Court acknowledged this truism in *Doull*:

> It may be clear that a toxic substance or asbestos caused the harm, [however] the but-for standard is inadequate, as it could allow all defendants to avoid liability despite their negligent exposure of the plaintiffs to the substances, as it may not be possible to prove which exposures were necessary to bring about the harm and which were not. The substantial factor test again fixes this problem by relaxing the causal requirement and permitting liability in these circumstances.

Doull, 487 Mass. at 10 (2021).

Massachusetts tort law holds "accountable those whose defective products cause injuries." *Donovan* v. *Philip Morris USA, Inc.*, 268 F.R.D. 1, 18 (D. Mass. 2010). Underlying this policy is that the cost of injury should be borne by those who control the source of the danger, not those who are powerless to protect themselves from it. *Elam*, 765 S.W.2d at 176. See *Correia* v. *Firestone Tire & Rubber Co.*, 388 Mass. 342, 354 (1983). But requiring a toxic tort plaintiff to prove but-for causation would hold him or her to an insurmountable standard, allowing tortfeasors to escape liability for their harmful acts. Toxic-tort cases include many factors, all working against a plaintiff's ability meet a "but-for" standard, ranging from the defendant's conduct, the often-ubiquitous nature of the product, the passage of time during the latency period, and the nature of the underlying disease process. See generally *Potter* v. *Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1000 (1993) (disposal of hazardous waste contaminated drinking water); *Thacker* v. *UNR Indus., Inc.*, 151 Ill. 2d 343, 356 (1992) (miniscule nature of asbestos fibers means "they cannot always be seen drifting in the air or entering a plaintiff's body… [and that] fibers from different sources are generally indistinguishable from one another"); *Elam*, 765 S.W.2d at 179 (company's lack of monitors deprived plaintiffs of ability to identify,

measure, and quantify chemical compounds released, and their "imperfect incineration" methods further distorted identity and toxic makeup of compounds); *Holcomb* v. *Georgia Pacific, LLC*, 128 Nev. 614, 622 (2012) ("Given the often lengthy latency period between exposure and manifestation of injury, poor record keeping, and the expense of reconstructing such data, plaintiffs in asbestos litigation typically are 'unable to prove with any precision how much exposure they received from any particular defendant's product'"). Given genetic mutations, biological disruption, and disease manifestation, courts have recognized that "[p]laintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis" and "may [instead] prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested," "without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth." *Rutherford* v. *Owens-Illinois, Inc.*, 16 Cal. 4th 953, 976-977 (1997).

No plaintiff could meet a but-for causation standard in toxic tort cases because experts cannot so testify. Particularly in toxic tort cases, experts are required to testify on both exposure and the nature of the plaintiff's injuries. For example, Dr. David C. Christiani in his December 13, 2022 statement explains in detail that the "but-for" test is "unworkable when it comes to diseases caused by toxic substances." Add. 256.[3] See Anthony Roisman, Preserving Justice: Defending Toxic Tort Litigation, 15 Fordham Envtl. L. Rev. 191, 205 (2004) ("Much of the evidence that forms the basis of a plaintiff's case, from the safety of drugs and consumer products to whether pollution has caused harm, is based on science"). See also *Elam*, 765 S.W 2d at 186 n. 62 ("in mass tort toxic cases…determination of the essential cause-in-fact element of the causes of action depends virtually altogether on scientific evidence"); *Landrigan* v. *Celotex Corp.*, 127 N.J. 404, 413 (1992) ("nowhere is [the need for expert testimony] more compelling than on the issue of causation in toxic-tort litigation concerning diseases of indeterminate origin"). Experts in occupational and/or environmental medicine are often required to educate the jury on the

[3] Dr. Philip J. Landrigan agrees with Dr. Christiani. Add. 257.

plaintiff's diagnosis, including the probable causes thereof. See *Elam*, 765 S.W.2d at 185. See also *Hagen* v. *Celotex Corp*., 816 S.W.2d 667, 670 (Mo. 1991) (causal relationship in an asbestos case must be established by expert testimony).

Given the progress of diseases, especially cancer, isolating a "but-for" cause is impossible. See *Rutherford*, 16 Cal. 4th at 977. In fact, in one asbestos case a retired associate pathologist from Massachusetts General Hospital and expert in mesothelioma (an asbestos-related cancer), Dr. Richard Kradin, testified that he was unable to say that any particular exposure to a particular defendant's asbestos product was a but-for cause of the plaintiff's mesothelioma. See Deposition Tr. Dr. Richard Kradin, *Rountree* v. *Bayer Cropscience, Inc.* (June 17, 2010) at 40. Add. 86.

A "but-for" standard is particularly problematic in toxic exposure cases that are either dose-dependent or where each exposure contributes to the risk of harm or the disease developing; it is virtually impossible to tell which straw broke the camel's back. See *id*. The "twin-fires" analogy instruction in *Doull* is inappropriate in such cases, where each exposure contributes to the overall cumulative dose and it is impossible to separate their respective causal impact. In the "twin fires" analogy, the house or

cabin would still be destroyed even after removal of one of the two fires. *Doull*, 487 Mass. at 18 n. 23. But where an individual is exposed to a toxic substance, one could not discern whether the disease would have developed absent either of the exposures.

Philip Morris has perplexingly failed to show any case, let alone a toxic tort case, where the jury did not understand the "substantial contributing factor" instruction; this case is no different. The substantial contributing factor standard is proper in toxic tort cases given the nature of the claims, exposures, science, and the jury's understanding of how causation-in-fact works in the real world. This Court should not disturb that standard here.

4. The reasoning in *O'Connor* v. *Raymark Indus., Inc.* stands.

O'Connor provided a judicially manageable set of instructions for any case involving multiple causes or multiple tortfeasors, producing consistent results without evidence of juror confusion. Nothing in over thirty years since suggests that juries have struggled to apply the substantial factor test.

The *O'Connor* Court held that the plaintiff need not prove "but-for" causation and does not have the burden of identifying the particular effect of the defendant's product in a way that distinguishes it from the effect of another defendant's product. *O'Connor*, 401 Mass. 586, 598 (1988). Rather, "the plaintiff had the burden of proving that the defendant's product contributed in fact to [the plaintiff's] disease and death in a legally cognizable manner." *Id*. at 592.

The key is how the trial court explains this to the jury. In *O'Connor*, the judge instructed the jury that they could find either that the defendant's product caused or substantially contributed to the cause of the plaintiff's disease and death. *Id*. at 512. The Court further instructed:

> It isn't necessary for the plaintiff to persuade you that the exposure actually caused it. It's enough if that exposure contributed to cause it in whole or in part…. It 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. There can be and often are more than one cause present to produce an injury, and more than one person legally responsible for an injury or disease, so here, even if other manufacturers of asbestos-containing products were at fault, and their products contributed to [plaintiff's] disease, [defendant], is not thereby relieved from liability….

Id. at 511-512. The judge went on to explain that the jurors make that determination by reviewing the evidence, both on exposure and the expert

testimony provided. This Court specifically concluded that the judge's statement – "[i]t means something that makes a difference in the result" – correctly distinguished 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." *Id*. at 592.

The Massachusetts Model Jury Instructions have since mimicked the *O'Connor* instructions and this Court's concern about the word "substantial." See Massachusetts Superior Court Civil Practice Jury Instructions § 2.1.9 (3d ed. 2014 & Supp. 2018).[4] Philip Morris has not shown any specific case in which a jury did not understand that distinction. This is likely because "the substantial contributing factor test better replicates how many people understand causation" and thus avoids confusion. *Doull*, 487 Mass. at 27 (Lowy, J., concurring). Indeed, the but-for standard invites speculation – what might have resulted in the absence of

[4] The language of the model jury instruction on breach of warranty is almost identical. *See* Massachusetts Superior Court Civil Practice Jury Instructions § 11.3.4 (3d ed. 2014 & Supp. 2018).

the defendant's conduct? – whereas the substantial contributing factor standard encourages the jury to focus on the ultimate determination: what happened and what role, if any, did defendant's conduct play in producing the result. *Doull*, 487 Mass. at 27. Given the complexities inherent in toxic tort cases, the substantial contributing factor instruction "focuses the jurors attention directly on what ought to determine legal responsibility: the conduct of the parties." *Id.*

Since *O'Connor*, this Court and the Appeals Court have re-affirmed the substantial contributing factor test and found that juries have reasonably understood and followed these instructions. See *Morin* v. *AutoZone Northeast, Inc.*, 79 Mass. App. Ct. 39, 42-44 (2011) ("substantial contributing factor" causation standard in asbestos claim); *Welch* v. *Keene*, 31 Mass. App. Ct. 157, 162 (1991) (finding of causation proper where no factual basis for jury to conclude Plaintiff's exposure to defendants' products de minimis). See also *Hannon* v. *Calleva*, 87 Mass. App. Ct. 1135 (2015) (Rule 1:28 disposition) (attached) ("judge's instruction properly differentiated between substantial factor that could give rise to liability and a negligible factor that could not").

Defendants in asbestos cases, specifically emphasizing they want the instruction to include the word "substantial," have asked for the substantial contributing factor instruction because they believe it leads to less juror confusion.[5] See Motion in Limine of the Defendant, Columbia Boiler Company, on Standard of Proof for Causation, *Cammarata* v. *Columbia Boiler Co*., Docket No. 09-4995 (Middlesex Sup. Ct., Sept. 13, 2013) (attached); Motion in Limine of the Defendant, Taco, Inc., on Standard of Proof for Causation, *Keefner* v. *Taco, Inc*., Docket No. 09-1847 (Middlesex Sup. Ct., Dec. 07, 2012) (attached). Notably, even tobacco defendants have asked for the substantial contributing factor instruction not only for negligence, but also for breach of warranty and intentional misrepresentation cases. See Defendants' Amended Jointly Proposed Jury Instructions, *Summerlin* v. *Philip Morris USA Inc*., Docket No. 15-5255 (Middlesex Sup. Ct., Oct. 3, 2018) (excerpts attached).[6] With these toxic tort

[5] The Academy renews the argument it made during the Court's consideration of *Doull* that any change in the jury charge, particularly to the causation charge contemplated by the Restatement (Third) of Torts, would result in more juror confusion, not less, and would lead to more judicial errors and the need for retrials or further appellate review.

[6] That the tobacco defendants and the asbestos defendant in *Summerlin* requested both a but-for instruction and a substantial contributing factor instruction does not negate the fact that they asked for substantial

defendants, such as Philip Morris, requesting the substantial contributing factor language in their requests for instructions, surely there can be no prejudice in its use.

5. Other jurisdictions concur the substantial contributing factor test is the appropriate one for toxic torts and other multiple-cause, concurrent cause cases.

Allowing for some variation,[7] numerous courts across the country have found that substantial contributing factor is the appropriate standard in toxic tort and multiple-cause cases. See *Basko* v. *Sterling Drug, Inc.*, 416 F.2d 417, 429 (2d Cir. 1969) (but for test "will not work … where two independent forces concur to produce a result which either of them alone would have produced"); *Rutherford*, *Union Pac. R.R. Co.* v. *Ameron Pole Prods. LLC*, 43 Cal. App. 5th 974, 981 (2019) (substantial factor test for cause in fact); 16 Cal. 4th at 969 (substantial factor standard "has been embraced as a clearer rule of causation" because it "subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those

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contributing factor instruction, particularly where they did not raise the issue of the judge's instruction in post-trial motions.

[7] While there are some variations on what an asbestos plaintiff must establish in order to show "substantial contributing factor," this non-asbestos case is not the appropriate occasion to evaluate those variations.

involving independent or concurrent causes in fact"); *Mitchell* v. *Gonzales*, 54 Cal. 3d 1041, 1049 (1991) ("but for" test "should not be used when two causes concur to bring about an event and either one of them operating alone could have been sufficient to cause the result" because "one cannot escape responsibility for his negligence on the ground that identical harm would have occurred without it"); *Perkins* v. *Entergy Corp*., 782 So. 2d 606, 611 (La. 2001); *Pontchartrain Nat. Gas Sys*. v. *Tex. Brine Co., LLC*, 317 So. 3d 715, 745 (La. Ct. App. 2020); *Hagen*, 816 S.W.2d at 670 ("requires evidence that the product of each defendant sought to be held liable was a 'substantial factor' in causing the harm"); *Elam*, 765 S.W.2d at 174 (substantial factor standard "is particularly suited to injury from chronic exposure to toxic chemicals where the subsequent manifestation of biological disease may be the result of a confluence of causes"); *James*, 301 N.J. Super. at 528; *Bostic* v. *Georgia-Pacific Corp*., 439 S.W.3d 332, 336 (Tex. 2014) (mesothelioma); *Borg-Warner Corp*. v. *Flores*, 232 S.W.3d 765 (Tex. 2007) (asbestos).

Thus, Massachusetts' longstanding use of the "substantial contributing factor" causation standard in toxic tort and multiple concurrent cause is in keeping with other jurisdictions. Absent any

evidence of juror confusion, the shift away from plain language with which jurors are clearly familiar and comfortable to a new standard that would require significantly more explanation, would be mistaken.

C. Retroactive application of *Doull* to toxic torts is inappropriate.

1. Retroactive application of a rule not grounded in the Constitution is inappropriate.

"[R]ules of court . . . 'are indispensable to the orderly and efficient conduct of a court's business. They are not to be set aside . . . by the caprice or design of counsel.'" *In re Clark*, 34 Mass. App. Ct. 191, 194 (1993), quoting *Commonwealth* v. *Cooper*, 356 Mass. 74, 79 (1969), abrogated on unrelated grounds in *Commonwealth* v. *Lopes*, 362 Mass. 448, 451 (1972). "When a decision is 'not grounded in constitutional principles,' [this Court is] free to make its effect only prospective." *Fitzpatrick* v. *Wendy's Old Fashioned Hamburgers of New York, Inc.*, 487 Mass. 507, 516-517 (2021) (procedural rule), quoting *Eaton* v. *Fed. Nat'l Mtge. Ass'n*, 462 Mass. 569, 588 (2012). This is especially true when a decision "announces 'a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of our superintendence power, [as] there is [then] no constitutional requirement that the new rule or new interpretation be

applied retroactively.'" *Eaton*, 462 Mass. at 588 (statute), quoting *Commonwealth* v. *Dagley*, 442 Mass. 713, 721 n.10 (2004) (superintendence power), cert. denied, 544 U.S. 930 (2005).

This Court also considers: "(1) the extent to which the decision creates a novel and unforeshadowed rule; (2) the benefits of retroactive application in furthering the purpose of the new rule; and (3) the hardship or inequity likely to follow from retroactive application." *Schrottman* v. *Barnicle*, 386 Mass. 627, 631-632 (1982). "It is sometimes necessary to depart from the general rule of retroactivity, in order to protect the reasonable expectations of the parties." *Id*. at 631.

Extending *Doull* to toxic torts would be unwise, bad policy, and leave a significant blast radius. But if it is to be, then it should be prospective only. Such an extension would not be "grounded in constitutional principles," *Fitzpatrick*, 487 Mass. at 516-517, but would instead be the Court's interpretation of a rule of procedure or "a new rule in the exercise of [its] superintendence power." *Eaton*, 462 Mass. at 588. Indeed, constitutional principles militate in favor of adherence to the existing rule and the preservation of the plaintiffs' due process rights.

Here, the *Schrottman* factors each support prospective application. *Schrottman*, 386 Mass. at 631-632. Creation of a new jury instruction in abrogation of *O'Connor* "is certainly novel and unforeseen." *Shirley Wayside Ltd. Partnership* v. *Bd. of Appeals of Shirley*, 461 Mass. 469, 481 (2012). "No development in the law since" *Doull* in February of 2021 "has foreshadowed the [advent] of [a] special rule of [ex]clusion." *Tamerlane Corp*. v. *Warwick Ins. Co*., 412 Mass. 486, 490 (1992). There are no "benefits of retroactive application in furthering the purpose of the new rule." *Schrottman*, 386 Mass. at 631. Here, "convenience should not trump the patent inequity of denying [the plaintiffs] the opportunity for [appellate] relief due to [their] failure to divine such a dramatic shift in [this Court's] decisional law." *Shapiro* v. *City of Worcester*, 464 Mass. 261, 269 (2013). "It is . . . necessary to depart from the general rule of retroactivity, in order to protect the reasonable expectations of the parties"—expectations founded in the plain language of the rules. *Schrottman*, 386 Mass. at 631. See *Cummings* v. *City Council of Gloucester*, 28 Mass. App. Ct. 345, 349 (1990) (declining to retroactively apply new rule regarding notices of appeal), rev. denied, 407 Mass. 1002 (1990).

2. Plaintiffs had a due process right to rely upon this Court's existing rules.

Any litigant, including these plaintiffs, "ha[ve] a right to rely upon the [rules] of the court, as an authority emanating from a competent jurisdiction." *Perkins* v. *Fairfield*, 11 Mass. 227, 228 (1814). "To hold a party in contempt, 'there must be a clear and unequivocal command and an equally clear and undoubted disobedience.'" *Linardon* v. *United States Dep't of Hous. & Urban Dev.*, 485 Mass. 1005, 1006 (2020), quoting *Parker* v. *Commonwealth*, 448 Mass. 1021, 1022 (2007).

Reversal and vacating Plaintiffs' judgment after relying upon this Court's unambiguous rules would deprive them of due process under the Fourteenth Amendment to the United States Constitution. Such "would be 'the equivalent of denying [them] an opportunity to be heard upon [their] claimed right[s].'" *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982), quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 380-381 (1971). Due process demands that this Court interpret the rules consistent with their unambiguous language.

CONCLUSION

The Massachusetts Academy of Trial Attorneys and the American Association for Justice urge this Court to reject the suggestion that the interest rates required by G. L. c. 231, § 6B, and G. L. c. 235, § 8 are unconstitutionally excessive and further suggest that a new trial is not required here because a "but-for" jury instruction is not called for in the conspiracy claim, nor would it be in any toxic tort case.

Respectfully submitted,

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