IN THE SUPREME COURT OF THE STATE OF OREGON

ROBERTA HAAS and KEVIN HAAS, Plaintiffs-Appellants, Petitioners on Review, v. THE ESTATE OF MARK STEVEN CARTER and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendants-Respondents, Respondents on Review, and GERALD CAMPBELL, Defendant.	Multnomah County Circuit Court No. 16CV24579 CA No. A169932 SC No. S069255

JOINT BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND OREGON ASSOCIATION OF DEFENSE COUNSEL

Brief in Support of the Petition for Review of a December 1, 2021 decision of the Court of Appeals
From an Appeal of a Judgment of the Multnomah County Circuit Court
The Honorable Jerry B. Hodson, Judge.
Majority Opinion by Hadlock, Judge pro tempore, joined by Judge Lagesen;
Concurring Opinion by Judge James

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Janet M. Schroer, OSB No. 813645
HART WAGNER LLP
1000 SW Broadway, Twentieth Floor
Portland, OR 97205
Telephone (503) 222-4499
jms@hartwagner.com

Of Attorneys for Amici Curiae The Chamber of Commerce of the United States of America, American Tort Reform Association, and American Property Casualty Insurance Association

Kathryn H. Clarke, OSB No. 791890
4306 NE 30th Ave.
Portland, OR 97211
Telephone (503) 460-2870
kathrynhclarke@mac.com

Of Attorneys for Plaintiffs-Appellants

Leslie Kocher-Moar, OSB No. 933333
MCMILLAN SCHOLZ & MARKS, P.C.
900 SW 5th Ave., Suite 1800
Portland, OR 97204
Telephone (503) 224-2165
lkochermoar@msmlegal.com

Of Attorneys for Defendant-Respondent Estate of Mark Steven Carter

Lindsey H. Hughes, OSB No. 833857
KEATING JONES HUGHES PC
200 SW Market St Ste 900
Portland OR 97201
Telephone (503) 222-9955
lhughes@keatingjones.com

Of Attorneys for Amicus Curiae Oregon Association of Defense Counsel

Paul H. Krueger, OSB No. 802929
PAUL H. KRUEGER LAW FIRM, P.C.
4380 SW Macadam Ave., Suite 450
Portland, OR 97239
Telephone (503) 222-0226
knolan@paulkruegerlaw.com

Of Attorneys for Plaintiffs-Appellants

Ralph C. Spooner, OSB No. 732880
SPOONER & MUCH, P.C.
530 Center Street N.E., Suite 712
Salem, OR 97301
Telephone (503) 378-7777
rspooner@smapc.com

Of Attorneys for Defendant–Respondent State Farm Mutual Automobile Insurance Company

Travis Eiva, OSB No. 052440
EIVA LAW
101 E Broadway, Suite 303
Eugene, OR 97401
Telephone (541) 636-7480
travis@eivalaw.com

Of Attorneys for Amicus Curiae Oregon Trial Lawyers Association

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AMICI CURIAE INTERESTS

The *amici curiae* are organizations with an interest in the application of tort law that is fair to both plaintiffs and defendants, in Oregon, and nationwide. The causation standard proposed by plaintiffs, and urged by the concurring opinion in the Court of Appeals, would significantly reduce the causation requirement in the vast majority of Oregon tort cases. That diminished standard has been widely criticized and abandoned by the courts and academics alike, and it would greatly expand tort liability for defendants.

This brief is submitted to urge the Court to retain but-for causation cause as the primary causation test, and to reject the request to replace it with the substantial factor test.

This brief will not address in depth the arguments set out in Respondents' briefs. While *amici* agree with those arguments, the purpose of this brief is instead to refute the concurrence's invitation to adopt the substantial factor test as the default test for causation under Oregon tort law.

Amici will provide this Court with a summary of the contemporary law on causation, both as it has developed in Oregon and under a broader perspective. This brief will further inform the Court on issues that neither plaintiffs, their amicus, nor the concurrence acknowledge: recent tort case law and academic writings, and the Restatement Third of Torts §§ 26 and 27

(2010), which include significant criticisms of, and even abandonment of, the substantial factor test as confusing and difficult to apply.

Amici do not view this case as presenting a question of first impression on causation. Nor have plaintiffs made a case for changing the law. However, if this Court does wish to reexamine the causation standard in Oregon, rather than reverting to a standard that is widely viewed as confusing and setting a lower bar than but-for causation, it should adopt the causation rules set out in the Third Restatement of Torts §§ 26 and 27.

Oregon Association of Defense Counsel

The Oregon Association of Defense Counsel ("OADC") is a nonprofit organization for defense-oriented civil litigators whose goals are to provide a unified voice for defense concerns in Oregon. The OADC appears amicus curiae to address issues of significance to Oregon courts and practitioners. Here, with the other amici in support of the defense, OADC brings historical perspective concerning application of "but-for" causation and reasons it should not be abandoned in favor of a lesser causal standard.

Chamber of Commerce of the United States of America

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function

of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

American Tort Reform Association

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

American Property Casualty Insurance Association

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and write more than $3.5 billion in premiums in the State of Oregon. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and

regulatory forums at the federal and state levels and submits amicus curiae briefs in significant cases before federal and state courts, including this Court.

INTRODUCTION

This case is the most recent attempt to revisit the question of the scope and application of Oregon law on causation, and in particular the "but-for" and "substantial factor" causation instructions in Oregon Uniform Civil Jury Instructions (UCJI) UCJI 23.01 (but-for causation) and UCJI 23.02 (substantial factor causation).

Plaintiffs and *amicus* Oregon Trial Lawyers Association (OTLA), supported by the concurring opinion of Court of Appeals Judge James, seek a dramatic and unwarranted shift in the Oregon law of causation. They urge this Court to adopt the substantial factor jury instruction as the default causation instruction, rather than the but-for instruction that currently is and should remain the default instruction.

This Court has already examined this issue and held that but-for causation is the appropriate causation standard in the majority of cases. *Joshi v. Providence Health System,* 342 Or 152, 149 P3d 1164 (2006). Since then, jurists and scholars have advocated for *abandoning* the substantial factor test entirely because it is confusing and unfair. Plaintiffs' approach would move Oregon in the opposite direction of the modern trend. If this Court intends to address this issue, *amici* submit that it should abandon substantial factor

altogether, consistent with the approach found in the most recent version of the *Restatement of Torts*.

Also, in any event, pre-existing medical conditions do not qualify as alternative sufficient causes to support the substantial factor instruction.

I. Court of Appeals Opinions

The Court of Appeals majority correctly described Oregon tort law governing causation:

> By its terms (as requested by plaintiffs) and consistently with *Joshi*, the uniform substantial-factor instruction applies only when there are multiple causes of a plaintiff's injury that act together or independently to cause an injury. In other negligence cases—the majority of cases, according to *Joshi*—the but-for instruction is appropriate. 342 Or. at 162, 149 P.3d 1164.

Haas v. Est. of Carter, 316 Or App 75, 87–88, 502 P3d 1144, 1151 (2021). *Id.*

Judge James concurred in the court's affirmance because plaintiffs requested the very but-for instruction that they now argue on appeal was erroneous. 316 Or App at 88. The concurrence nonetheless criticizes applying UCJI 23.01's but-for instruction in most cases, arguing that UCJI 23.02's substantial factor instruction should instead be the default causation instruction, because it purportedly is "the more elegant, accurate and understandable way to instruct jurors." 316 Or at 88.

With respect, none of these things are true. While the concurrence suggested that other jurisdictions are rejecting but-for causation in favor of

substantial factor, it failed to acknowledge or address the many authorities showing that the modern trend is to move *away* from substantial factor causation, specifically because it is neither elegant, accurate nor easy to understand.

If the Court reaches this issue, it should reject the invitation to change Oregon law to embrace the substantial factor instruction.

II. The Court of Appeals Majority Decision Was Correct Based on This Court's Case law

The Court should recognize the arguments raised by petitioners and *amicus* OTLA for what they are: a time-worn request to reduce the causal standard in every negligence action. Plaintiffs advocate for the substantial factor instruction over the but-for standard precisely because "substantial" is a term of relativity, without definite meaning, which would move Oregon closer to adopting "possibility" as the causal standard.

As noted in the comments to UCJI 23.02, this court in *Furrer v. Talent Irr. Dist.*, 258 Or 494, 511, 466 P2d 605 (1970), acknowledged the difficulty in expressing the causation standard presented by the substantial factor jury instruction: "'Little, if anything, can be done with words to help the jury decide how much causal relationship must exist between conduct and damage before it constitutes a basis for recovery.'" Although this Court has since identified limited circumstances in which the substantial factor instruction is appropriate,

Joshi, 342 Or at 161, the Court of Appeals was correct that the present case is not one of them.

Importantly, the but-for and substantial factor casual standards are not just jury instructions: they describe the substantive tort law governing the causal link required in all forms of negligence cases. Summary judgment motions and motions for directed verdict based on the lack of evidence or failure of proof are just a couple of examples in which the appropriate causation standard can determine a case. *E.g., Oregon Steel Mills Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 340, 83 P3d 322 (2004).

The Court should outright reject the renewed invitation to weaken the causal standard from reasonable probability, or more likely than not, by supplanting the general but-for standard with a substantial factor standard in all cases. The Court previously rejected that exact request in *Joshi*, explaining that "the 'but-for' test is sufficient in the majority of cases". 342 Or at 161. *Joshi* was not novel in its analysis or approach. Although framed differently than the arguments in *Joshi*, petitioners here seek the same underlying result: a ruling that "more probable than not" is no longer the required causal link.

The Court must recognize that, however the arguments are framed, a standard that abandons but-for causation in the majority of cases ignores the entire body of Oregon law on causation. Nearly a century ago, in *Lippold v. Kidd*, 126 Or 160, 269 P 210 (1928), this Court considered the question of

whether a plaintiff could recover damages based on the possibility that an eye injury could have been lessened or avoided had the defendant doctor not acted negligently. The physician could not find a piece of steel that the plaintiff thought had gone into his eye and advised the plaintiff that he was mistaken. Several months later, after the eye was seriously inflamed, the plaintiff consulted another doctor, who found the steel and then attempted to remove it, but ultimately the plaintiff lost his eye. The plaintiff sued the first physician for negligence. He failed, however, because the plaintiff did not prove that his eye could have been saved after his injury, and before he saw defendant. All the plaintiff proved was that several factors may have caused his injury. Not surprisingly, *Lippold* held that the plaintiff could not prevail because he did not prove that any damage was more probably than not caused by his first physician's negligence.

Horn v. National Hospital Ass'n, 169 Or 654, 131 P2d 455 (1942), similarly required proof by a reasonable probability that swifter action would have made a difference in the plaintiff's condition. The plaintiff alleged injuries due to failure to diagnose and resulting delay in surgery for her gall bladder condition. The Court held that, to establish causation, the plaintiff must prove "that competent action would have been substituted for negligent inaction, and that there was a reasonable probability that the subsequent

ailments would have been less if the substitution had been made." *Id.* 169 Or at 679 (citations omitted).

Other decisions by the Court are in accord. For example, in *Austin v. Sisters of Charity*, 256 Or 179, 185-186, 470 P2d 939 (1970) this Court held that it was reversible error not to instruct the jury that there could be no recovery for aggravation of a "pre-existing" medical condition not caused by the defendant's treatment. *See also Howerton v. Pfaff*, 246 Or 341, 346, 348, 425 P2d 533 (1967) (Trial court erred in denying motion to withdraw allegation of inguinal hernia injury from jury where causation was medical question and jury could do no more than guess about it); *Cleland v. Wilcox*, 273 Or 883, 887-88, 543 P2d 1032 (1975)(No error in granting defendant's motion for nonsuit in the absence of expert medical evidence to establish causal relation between plaintiff's injuries and the accident).

The but-for standard is not limited to claims of medical negligence. *E.g.*, *Oregon Steel Mills*, 336 Or at 329; *Towe v. Sacagawea, Inc.*, 357 Or 74, 95 n 8, 374 P3d 766 (2015) (agreeing with Court of Appeals and concluding that whether the "but-for" or "substantial factor" tests applied, the result would be the same as to whether the defendant's conduct in placing signs was a cause in fact of plaintiff's injuries); *Watson v. Meltzer*, 247 Or App 558, 565, 270 P3d 289 (2011)(citing *Joshi* in claim for legal malpractice, court stated "in order to prevail in negligence action, a plaintiff must establish that *but for* the

negligence of the defendant, the plaintiff would not have suffered the harm that is the subject of the claim.").

Nor has the but-for standard been criticized for half a century, as the concurring opinion claimed. 316 Or App at 91 (James, J., concurring). The concurrence cites *Smelser v. Pirtle*, 242 Or 294, 409 P2d 340 (1965) as support for this claim. But respectfully, *Smelser* did not opine generally that the "but-for" instruction "is a poor manner of instructing a jury." *Id.* Instead, *Smelser* reaffirmed that the but-for instruction was correct, so giving the instruction was not reversible error, despite the possibility of some jury confusion in that particular case.

Contrary to the concurrence's suggestion that the but-for instruction has been routinely criticized, this Court has, on each occasion presented, upheld that causal standard in the majority of cases, including recently. *See Smith v. Providence Health & Services*, 361 Or 456, 393 P3d 1106 (2016) (ordinarily the plaintiff must prove that the defendant's conduct more likely than not caused the alleged injury). Again, very recently, while exploring the bounds of liability under the foreseeability test, this Court reiterated that to prove liability in an ordinary negligence case, a plaintiff must prove factual causation. Citing *Oregon Steel Mills*, this Court noted: "[a] plaintiff, of course, still must prove factual or 'but-for' causation- that there is a causal link between the defendant's conduct and the plaintiff's harm." *Scott v. Kesselring*, 370 Or 1, 12 (2022).

A. Oregon UCJI 23.01 and 23.02

The Oregon Uniform Civil Jury Instructions previously defined "cause" by using the phrase "substantial factor". *See* UCJI 23.01 (12/05). The uniform instructions have since abandoned that phrasing in the but-for causation instruction in UCJI 23.01.[1] The current substantial factor instruction, UCJI 23.02[2], allows the jury to find causation if "***defendant's act or omission was a substantial factor, even though it was not the only cause." UCJI 23.02 ends with a bracketed sentence - "[A substantial factor is an important factor and not one that is insignificant.].

The accompanying comments to this instruction, referencing this Court's own statements, put to rest the view that this substantial factor instruction "is more elegant, accurate and understandable" than the traditional but-for

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[1] UCJI 23.01 provides: The defendant's conduct is a cause of the plaintiff's [harm/injury] if the [harm/injury] would not have occurred but-for that conduct; conversely, the defendant's conduct is not a cause of the plaintiff's [harm/injury] would have occurred without that conduct.

[2] UCJI 23.02 provides: Many factors [or things] may operate either independently or together to cause [harm/injury]. In such a case, each may be a cause of the [harm/injury] even though the others by themselves would have been sufficient to cause the same [harm/injury].

If you find that the defendants' act or omission was a substantial factor in causing the [harm/injury] to the plaintiff, you may find that the defendants' conduct caused the [harm/injury] even though it was not the only cause.[A substantial factor is an important factor and not one that is insignificant.]

instruction. The comments explicitly acknowledge that the substantial factor causation standard is difficult, if not impossible, to define and apply:

> The final sentence is bracketed because the UCJI Committee could find no Oregon case defining *substantial factor* in this context. (citation omitted, emphasis in original).

The comment to UCJI 23.02 continues:

> Most commentators consider the phrase undefinable. *Furrer v. Talent Irr Dist,* 258 Or 494, 511, 466 P2d 605 (1970) ('The term "substantial factor' expresses a concept of relativity which is difficult to reduce to further definiteness. Little if anything, can be done with words to help the jury decide how much causal relationship must exist between conduct and damage before it constitutes a basis for recovery.')".

OTLA's *amicus* brief supporting petitioners cites pre-*Joshi* Oregon appellate cases, decades old, which rely on the now-superseded Second Restatement of Torts to support the substantial factor instruction they urge. OTLA Br. p. 12. But the Third Restatement of Torts has *abandoned* the substantial factor standard and that phrase. This Court has likewise rejected the "concept of relativity" in the substantial factor test referenced in the *Furrer* case. As explained in detail below, the commentary to the Third Restatement further makes clear that the drafters agree with the vast majority of scholars and jurists that the substantial factor standard is confusing and unworkable. It should not be adopted as the default standard for causation.

B. The Substantial Factor Standard is Widely Disfavored and Increasingly Abandoned as Confusing, Controversial and Subject to Misuse in the Manner Advocated by Plaintiffs, their A*micus* and the Concurring Opinion

Substantial factor causation has been the subject of controversy for some time, and courts have misused the phrase since nearly as soon as it was devised. *See, e.g., Wilkins v. Lamoille Cty. Mental Health Servs., Inc*., 179 Vt 107, 115, 889 A2d 245, 251 (2005) ("[W]e have occasionally employed the phrase 'substantial factor' in referring to proximate cause, but we have never abandoned the but-for test of causation or suggested that 'substantial factor' represents anything other than an equivalent formulation of the but-for test.").

The general trend now is to eliminate the substantial factor test in favor of traditional but-for causation. *See. e.g., Owens v. Republic of Sudan*, 412 F Supp 2d 99, 110 (DDC 2006), *aff'd and remanded*, 531 F 3d 884 (DC Cir 2008) ("[T]he conventional wisdom among modern tort scholars is that "[t]he substantial-factor test has not***withstood the test of time, as it has proved confusing and been misused." (quoting the Third Restatement of Torts § 26 Comment (j)); *Drumgold v. Callahan*, 707 F3d 28, 51 n 15 (1st Cir 2013) ("The modern trend, is to retain the term 'factual causation' but abandon the 'substantial factor' test, *see* Restatement (Third) of Torts § 26 cmt. J." (2010)).

The substantial factor standard has been heavily criticized by scholars. *See, e.g*., Dorsaneo, *Judges, Juries, and Reviewing Courts*, 53 S M U L Rev

1497, 1528-1530 (2000) (substantial factor "render[s] the causation standard considerably less intelligible"); Fischer, *Insufficient Causes*, 94 Ky L J 277 (2005) ("Over the years, courts also used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate***. [T]he test now creates unnecessary confusion in the law and has outlived its usefulness"); Robertson, *The Common Sense of Cause in Fact*, 75 Tex L Rev 1765, 1776 (1997) ("By using the term ["substantial factor"] in three different senses, the Restatement [Second] of Torts has contributed to a nationwide confusion on the matter"); Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vanderbilt L Rev 941, 945, 978 (2001) (Describing substantial factor as obfuscating terminology that should be replaced); Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 V and L Rev 1071, 1080 (2001); *see also* H.L.A. Hart & T. Honoré, *Causation in the Law* 124 (2d ed 1985) ("Little, however, seems to be gained by describing, even to a jury, such cases in terms of the admittedly indefinable idea of a 'substantial factor'"). W.L. Prosser & W.P. Keeton, *Torts* § 41, at 43-45 (5th ed Supp 1988) ("Even if 'substantial factor' seemed sufficiently intelligible as a guide in time past, however, the development of several quite distinct and conflicting meanings for the term 'substantial factor' has created a risk of confusion and

misunderstanding, especially when a court, or an advocate or scholar, uses the phrase without indication of which of its conflicting meanings is intended").

Courts, too, have increasingly abandoned altogether the substantial factor standard and terminology. Just last year, the Massachusetts Supreme Judicial Court thoroughly analyzed the standard, its origins, and the criticisms and arguments in favor of eliminating it, ultimately concluding that it too would abandon the standard in favor of the traditional but-for causation standard, even for cases with multiple causation. *Doull v. Foster*, 487 Mass 1, 13, 163 NE 3d 976, 987 (2021) (noting that the substantial factor standard produces confusion, is misused by litigants in the way that plaintiffs propose here, and "unsurprisingly" has "few supporters"). As set out below, other courts have done the same, for the same reasons. *See, e.g.*, *Thompson v. Kaczinski*, 774 NW2d 829, 838 (Iowa 2009).[3]

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[3] The concurrence quotes from *Mitchell v. Gonzales*, 54 Cal 3d 1041, 1052-53, 819 P2d 872 (1991), to suggest that courts are rejecting the but-for standard in favor of substantial factor. 316 Or App at 92. A review of that case reveals that the California Supreme Court did not address this issue. Instead, it rejected the use of the term "proximate cause" to describe factual causation. *Id.* 819 P2d at 876-879. This Court already abolished the terms and concepts of "proximate" and "legal" cause decades ago, so that is not an issue in either Oregon law or its jury instructions. *Lasley v. Combined Transport, Inc*, 351 Or 1, 6, 261 P3d 1215 (2011).

C. Restatement of Torts

The First and Second Restatement of Torts, dating from 1934 and 1965, included the concept of but-for harm, but incorporated the substantial factor concept into the factual cause definition to address multiple causation scenarios. *See* Restatement of Torts Second §§ 431, 433. This was before many states adopted comparative fault to apportion fault among multiple tortfeasors and refined concepts of joint and severable liability. It was intended to distinguish between *de minimis* and significant or substantial causes, and it was not intended that the substantial factor test serve as a substitute for but-for cause. Second Restatement of Torts § 431, Comment a. Second Restatement of Torts § 433; *see also* Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv L Rev 303, 309-10 (1911) (notion of substantial as a limitation on the proximate cause prong).

Further, contrary to the concurrence's view that but-for causation is a subset of the substantial factor test, the Restatement commentary reveals just the opposite – that substantial factor was meant to narrow the class of but-for causes, *i.e.* legally sufficient causes that ought to be recognized as a basis of liability by excluding insubstantial or trivial causes. Anthony J. Sebok, *Actual Causation in the Second and Third Restatement: Or the Expulsion of the Substantial Factor Test, Causation in European Tort Law, Cardozo Law* (Marta Infantino & Eleni Zerogianni Eds, Cambridge Univ Press (2017).

In any event, after evaluating decades of experience with courts applying the substantial factor test, the Third Restatement of Torts abandoned the substantial factor language used in the Second Restatement of Torts §§ 431-432. The Third Restatement notes that the substantial factor language had been widely criticized as vague and confusing, and over-applied by courts: "The substantial-factor test has not withstood the test of time, as it has proved confusing and been misused." Third Restatement of Torts § 26, Comment (j).

The Third Restatement provides strong support for Oregon's continued use of the but-for instruction as the primary causation instruction. Significantly, it provides simplified and understandable language to apply in multiple causation cases to supplant the substantial factor test, while not abandoning the but-for test. The Third Restatement's language and commentary, notably unmentioned in briefs filed by plaintiffs and OTLA, or the *Haas* concurrence strongly refute arguments for a change in Oregon law that would adopt the disfavored substantial factor test.

The Third Restatement of Torts § 26, entitled "Factual Cause" states:

> "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 factual cause of harm under § 27."

The Third Restatement of Torts § 27, entitled "Multiple Sufficient Causes," in turn provides:

> If multiple acts occur, each of which under § 26 alone would have been a factual cause of 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.

The Third Restatement commentary acknowledges that in any negligence case, there are virtually always multiple causes; the pivotal question is whether one, or more, of those causes is a sufficient cause of the plaintiff's harm. *See* Third Restatement § 26, Comment (c). Notably, "the existence of other causes of the harm does not affect whether specified tortious conduct was a necessary condition for the harm to occur." *Id*. Further, "recognition of multiple causes does not require modifying or abandoning the but-for standard" – though where there are multiple sufficient causes, supplementation of the but-for standard with a multiple causation instruction is appropriate. *Id*., Comment (c), (i).

Comment (j) to § 26 cites opinions from many of the states that routinely affirm the use of the but-for test for factual causation, and rejecting the use of the substantial factor jury instruction. *Stanley v. City of Philadelphia*, 69 PA D&C 4th 63 (Ct C P 2004), is noted for its elimination of substantial factor from its standard jury instructions and employing in its place the standard that now appears in §26. Further cases cited include *Vincent v. Fairbanks Mem'l Hosp*., 862 P2d 847 (Alaska 1993); *Stewart v. Federated Dep't Stores*, 234 Conn 597, 662 A2d 753 (1995); *Culver v. Bennett*, 588 A2d 1094 (Del 1994); *Gerst v. Marshall*, 549 NW2d 810, 816-817 (Iowa 1996); *Daugert v. Pappas*, 104 Wash

2d 254, 704 P2d 600, 605-606 (1985); *McDowell v. Davis*, 104 Ariz 69, 448 P2d 869, 871, 872 (1968).

Since the new standard was adopted in the Third Restatement of Torts, multiple states have adopted its approach on causation. As noted above, the Massachusetts Supreme Judicial Court recently did so in *Doull v. Foster, supra*, noting that the substantial factor test "unsurprisingly" has "few supporters." Virginia did so as well in 2013, noting "we agree with the explicit rejection of substantial contributing factor language in the recent Restatement (Third) of Torts," because it is confusing to jurors. *Ford Motor Co. v. Boomer,* 285 Va 141, 154, 736 SE2d 724, 730 (2013). Iowa also adopted the (then-proposed draft) Third Restatement's causation test in *Thompson v. Kaczinski*, *supra*, (Iowa 2009) (stating that the Second Restatement's substantial factor test "has been the source of significant uncertainty and confusion").

Numerous scholars are in accord with the Third Restatement's approach to causation. *See* David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 Wake Forest L Rev 1007, 1019 (2009) ("Courts sometimes***go badly wrong by assuming that the but-for test can be jettisoned in favor of a much vaguer and less demanding substantial-factor inquiry in any case in which the tortfeasor's conduct has combined with other causal conditions in any way creating difficulties for the plaintiff"); Joseph S. Berman, *Theory Meets Reality: Clarifying the Standard in Multiple Cause*

Negligence Cases, 103 Mass L Rev 12, 14 (2022) ("Confusingly, the substantial factor test crept into negligence cases where multiple causes (as distinct from multiple sufficient causes) were alleged. Since most negligence cases may involve multiple causes (even if those causal factors were not sufficient on their own to have harmed the plaintiff and even if they were not tortious), the instruction became a fixture"); Tory A. Weigand, *Tort Law-the Wrongful Demise of But For Causation*, 41 W New Eng L Rev 75, 101 (2019) ("The use of 'substantial factor' is 'less appropriate' in a single defendant action*** because using 'substantial factor' in lieu of 'but for' is to invite the potential alteration of the necessary showing between the negligent act and the harm").

There is no reason to change Oregon law on causation. If this Court does wish to adopt a different causation standard, it should follow the lead of other states and the Third Restatement of Torts §§ 26 and 27, and abandon the substantial factor test altogether. At a minimum, it should emphasize to lower courts that but-for is the default standard, and that substantial factor remains limited to exceptional cases.

I. Pre-Existing Conditions Do Not Qualify As Alternate Sufficient Causes to Support Giving the Substantial Factor Instruction

Plaintiffs argue that their pre-existing medical conditions constitute other sufficient causes warranting a substantial factor instruction. This is wrong.

Generally, a pre-existing disease or other pre-existing medical condition may be factored into the value of the interest destroyed (i.e., a damages analysis), but it does not alter the causation analysis. Instead, pre-existing conditions are relevant to a person's susceptibility to injury or the aggravation of a prior injury. They are not concurrent causes of injury to which the substantial factor or multiple cause instruction applies.[4]

As discussed in the defendants' briefs, UCJI 70.07, on aggravation of pre-existing injury or disability, given here, covers this traditional "eggshell plaintiff" concept and permits the jury to award damages to the plaintiffs for aggravation of their conditions based on pre-existing conditions.

Both the Second and Third Restatements of Torts note that, in the philosophical sense, every case of negligence involves numerous, perhaps infinite causes (the birth of a tortfeasor, for instance, is technically a cause of the plaintiff's injury, or the presence of oxygen is a cause of a fire). Second

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[4] The impact of recognizing, categorically or otherwise, pre-existing conditions as causes of injury anytime they are present cannot be understated. The Department of Health and Human Services several years ago determined that 50 to 129 million (19 to 50 percent of) non-elderly Americans have some type of pre-existing health condition. *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans: 129 Million People Could Be Denied Affordable Coverage Without Health Reform*, https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/preexisting (CMS.gov). The number for older Americans is even more staggering; 48 to 86 percent of older Americans between ages 55 and 64 were determined to have some type of pre-existing health condition. *Id*.

Restatement of Torts § 431, Comment a, Restatement Third of Torts, § 26, Comments c, d, i. If any case which had more than one "cause" entitled a plaintiff to a substantial factor or multiple causation factor jury instruction, one would be required in every single negligence case, which plainly contradicts the position of *Joshi* and the Third Restatement that the but-for causation analysis should be applied in the majority of cases.

While the Third Restatement does not distinguish between background conditions and causes, the critical question is whether those background conditions are *sufficient* on their own to cause the plaintiff's harm. § 26 Comments (c), (d), (i). Forces that only "could have" or "would have" caused harm at some time after the harm actually occurred do not qualify as sufficient causes for the harm as it actually occurred. See, Third Restatement § 27, Comment (h).

This case does not involve a situation in which "one defendant has made a clearly proved but quite insignificant contribution to the result." *Joshi*, 342 Or at 161. The record also does not support a finding that "a similar, but not identical, result would have followed without the defendant's act." *Id*. *Joshi* further makes clear that the burden of demonstrating that a second sufficient cause existed, such that a multiple cause jury instruction was merited, rests with the party requesting the instruction. 342 Or at 161 ("plaintiff here has not demonstrated that two tortfeasors acted concurrently to bring about decedent's

death***. Further, plaintiff has not shown facts suggesting that this case is like either of the other two types of cases [which would merit such an instruction]").

Here, the surgeon who operated on Roberta Haas testified that he "would not have been surprised if she presented with the same symptoms that prompted him to perform surgery even in the absence of a car accident," and that for someone with Ms. Haas's underlying condition, "even a sneeze could have made her symptomatic." *Haas*, 316 Or App at 78. However, a single witness's hypothesis about Ms. Haas' need for the same surgery, or that other hypothetical causes (e.g. a sneeze) might have triggered those symptoms does not demonstrate that, more probably than not, an alternate sufficient cause of her injuries actually existed. Neither plaintiff nor defendant presented any evidence indicating that Ms. Haas would not have required surgery and suffered the same symptoms, without the car accident. As for the second plaintiff, Kevin Haas, the appellate court opinion notes only that he had "degenerative symptoms that were not uncommon for people his age". *Id*. at 78. Again, there is no suggestion that any party presented evidence indicating that he or she would not have suffered the alleged injuries without the car accident.

In short, the pre-existing conditions, while they may have contributed to the severity of the plaintiffs' injuries, or even increased the likelihood of injury

from an accident, do not create a question of multiple sufficient causes. The question they present goes to damages.

As *Joshi* made clear, and as confirmed recently in *Scott v. Kesselring*, Oregon's default causation formula for negligence is the but-for analysis. Regardless of whether the language of UCJI 23.02, the substantial factor instruction, is confusing and misleading or elegant and understandable, pre-existing medical conditions are simply not concurrent "causes" which trigger application of the substantial factor test. Nor do plaintiffs' purported multiple causative factors, which included only prior infirm conditions, fit within the terms of the Third Restatement multiple cause instruction. Therefore, no multiple causation instruction was appropriate in this garden variety car crash case.

Furthermore, even if plaintiffs' degenerative diseases were considered sufficient causes, Oregon law should not require that a substantial factor jury instruction be given - nor should this Court impose such a requirement- as the substantial factor language is confusing to juries and does not aid their understanding of causation in multiple cause cases.

CONCLUSION

As shown above, there is no principled reason to change Oregon law on causation and adopt the substantial factor test as the primary or default test. Conversely, there are many good reasons to reject that proposition. If the Court

nonetheless does revisit Oregon causation law, *amici* urge the court to either reaffirm that the but-for standard applies in the majority of cases or, alternatively, reject the substantial factor test altogether and adopt the approach taken by the Third Restatement of Torts.

Respectfully submitted this 19th day of July, 2022

HART WAGNER LLP

/s/ *Janet M. Schroer*

Janet M. Schroer, OSB No. 813645
Of Attorneys for *Amici Curiae* The Chamber of Commerce of the United States of America, American Tort Reform Association, and American Property Casualty Insurance Association

KEATING JONES HUGHES

/s/ *Lindsey H. Hughes*

Lindsey H. Hughes, OSB No. 833857
Of Attorneys for *Amicus Curiae* Oregon Association of Defense Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that on the 19th day of July, 2022, I filed the original **JOINT BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND OREGON ASSOCIATION OF DEFENSE COUNSEL** with the State Court Administrator by Electronic Filing.

I further certify that on same day, I caused the foregoing be served upon the following counsel of record by electronic filing:

Lindsey H. Hughes
KEATING JONES HUGHES PC
200 SW Market St Ste 900
Portland OR 97201
lhughes@keatingjones.com

Paul H. Krueger
PAUL H. KRUEGER LAW FIRM, P.C.
4380 SW Macadam Ave., Suite 450
Portland, OR 97239
knolan@paulkruegerlaw.com

Ralph C. Spooner
SPOONER & MUCH, P.C.
530 Center Street N.E., Suite 712
Salem, OR 97301
rspooner@smapc.com

Kathryn H. Clarke
4306 NE 30th Ave.
Portland, OR 97211
kathrynhclarke@mac.com

Leslie Kocher-Moar
MCMILLAN SCHOLZ & MARKS, P.C.
900 SW 5th Ave., Suite 1800
Portland, OR 97204
lkochermoar@msmlegal.com

///

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Travis Eiva, OSB No. 052440
EIVA LAW
101 E Broadway, Suite 303
Eugene, OR 97401
Telephone (541) 636-7480
travis@eivalaw.com

DATED the 19th day of July, 2022

HART WAGNER. LLP

By: /s/ *Janet M. Schroer*
Janet M. Schroer, OSB No. 813645
Of Attorneys for *Amici Curiae* The Chamber of Commerce of the United States of America, American Tort Reform Association, and American Property Casualty Insurance Association

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HART WAGNER. LLP

By: /s/ *Janet M. Schroer*
Janet M. Schroer, OSB No. 813645
Of Attorneys for *Amici Curiae* The Chamber of Commerce of the United States of America, American Tort Reform Association, and American Property Casualty Insurance Association