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May 23, 2017

Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Phillips v. Honeywell Int'l Inc.*, No. S241544
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Amicus Curiae Washington Legal Foundation (WLF) respectfully submits this letter, pursuant to Rule 8.500(g)(1) of the California Rules of Court, in support of Honeywell International Inc.'s petition for review in the above-captioned appeal. While Honeywell's petition raises two issues worthy of review, WLF focuses here on the first of those questions:

QUESTION PRESENTED FOR REVIEW

Whether expert testimony espousing the "every exposure" theory of causation or its variants (including the "every identified exposure" theory offered in this case) is admissible in California toxic tort cases.

INTEREST OF *AMICUS CURIAE*

WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 states, including California. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, limited government, and the rule of law. To that end, WLF has appeared frequently in this Court in a variety of cases relevant to its free-enterprise mission. (See, e.g., *Bristol-Myers Squibb Co. v. Superior Court* (2016) 1 Cal.5th 783; *In re Cipro Cases I & II* (2015) 61 Cal.4th 116; *Sargon Enterprises, Inc. v. Univ. of S. California* (2012) 55 Cal.4th 747.)

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles concerning legal and policy issues related to tort liability in asbestos cases. (See, e.g., Thomas J. LoSavio, *California Appeals Court Breaks with Ninth Circuit, Accepts Government-Contractor Defense in Asbestos Liability Suit*, WLF Legal Opinion Letter, February 10, 2017; Hon. Dick Thornburgh & Hon. Peggy L. Ableman, *Why Transparency Is Imperative When Litigating Asbestos Liability Claims*, WLF Conversations With, Autumn 2014; Eric G. Lasker & Richard O. Faulk, *Texas Supreme Court Rejects "Any Exposure" Causation in Asbestos Litigation*, WLF Legal Opinion Letter, August 1, 2014.)

WLF opposes novel theories of liability—including the "every identified exposure" theory relied on below—that have the practical effect of requiring a manufacturer to serve as an insurer to indemnify anyone whose injury is somehow remotely related to the manufacturer's product. Instead, WLF believes that a manufacturer's liability should be limited to cases where a plaintiff can establish by a preponderance of the evidence that his injury was *caused* by a defect in the *defendant*'s product. Accordingly, in cases brought by claimants who have been exposed to asbestos from multiple sources over many years, this Court's guidance is desperately needed as to whether such plaintiffs can establish causation from minor exposures based solely on expert testimony that *every* exposure to asbestos contributed to their asbestos-related injury.

WHY REVIEW SHOULD BE GRANTED

Honeywell's petition for review presents a recurring legal question of great significance. As asbestos litigation increasingly comprises a disproportionate share of California lawsuits, the need for this Court's guidance on the evidentiary standard for proving causation in toxic tort litigation could hardly be greater. By effectively relieving plaintiffs of their burden to prove causation in even the most tenuous of cases, the lax evidentiary threshold embraced below will have the unintended consequence of reducing the amount of compensation available for those claimants who can legitimately prove causation under more traditional standards.

Because the influx of asbestos claims shows no sign of abating, the unduly lax causation standard many lower courts—including the Court of Appeal in this case—have adopted will ensure that California remains a magnet jurisdiction for the ever-growing "elephantine mass of asbestos cases"

filed each year. (*Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821.) Those lower-court decisions make California an outlier among the many other jurisdictions that have squarely rejected the "every exposure" theory of causation adopted in this case.

Whether "every exposure" to a defective product can logically be deemed a substantial factor in causing a plaintiff's disease—regardless of the frequency, proximity, or circumstances of that exposure—is a question that has confounded the lower courts for many years. By granting the petition in this case, the Court can provide a uniform answer to that question for all California courts.

I. Review Is Warranted to Clarify *Rutherford*'s "Substantial Factor" Test

Twenty years ago, in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, this Court attempted to settle the question of causation in the asbestos liability context. Resisting the plaintiffs' contention that ordinary causation rules should not apply in asbestos cases, *Rutherford* held that an asbestos plaintiff must not only "establish some threshold *exposure* to the defendant's defective asbestos-containing products," but he "must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, *i.e.*, a *substantial factor* in bringing about the injury." (*Id.* at p. 982.)

Although *Rutherford* did not squarely address whether *every* asbestos exposure can suffice to establish causation, the Court emphasized that any analysis of the substantial-factor prong must account for "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (*e.g.*, other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk, [to determine whether] inhalation of fibers from the particular product [may] be deemed a 'substantial factor' in causing" the plaintiff's injury. (*Id.* at p. 975.)

Some California courts have correctly interpreted *Rutherford*'s substantial-factor test to mean that mere evidence of exposure—without more—cannot satisfy a party's burden to prove causation. In *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1094, although the plaintiff presented evidence of the decedent's exposure to the defendant's asbestos

products, the court decided that his exposure lacked "sufficient frequency to create a reasonable probability that this exposure contributed to his disease." Likewise, in cases where asbestos defendants have attempted to allocate comparative fault among non-party tortfeasors, courts have invoked *Rutherford*'s substantial-factor test to prevent them from doing so. (*See, e.g., Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1286 [holding that asbestos defendant had failed to satisfy *Rutherford*'s substantial-factor test because "the record discloses no evidence quantifying Pfeifer's exposure to asbestos from the other sources"].)

But *Rutherford* also included language suggesting that causation may be proven by demonstrating that a plaintiff's exposure to a defendant's asbestos-containing product was "a substantial factor in causing or contributing to [the plaintiff's] risk of developing" asbestos-related diseases. (*Id*. at pp. 957-958.) Relying on that language, lower California courts have increasingly allowed plaintiffs to establish causation merely by proffering expert testimony that *any* exposure to asbestos during a person's lifetime substantially contributes to the mere *risk* of disease.

In *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, for example, the Court of Appeal affirmed a jury's substantial factor finding based on expert testimony that "all exposures constitute a substantial factor contributing to the risk of developing mesothelioma." (*Id*. at pp. 976-977.) Likewise, in *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, the appeals court affirmed a jury verdict on the basis of expert testimony that "every exposure, including asbestos releases from defendant's packing and gasket products, contributed to the risk of developing lung cancer." (*Id*. at p. 999.) And last year, in *Davis v. Honeywell Int'l Inc.* (2016) 245 Cal.App.4th 477, the Court of Appeal held that an expert's "any exposure" testimony was sufficient to satisfy *Rutherford*'s substantial-factor test—even though the expert admittedly performed no calculations to estimate the dose of asbestos that the plaintiff likely received from working on brake linings. (*Id*. at p. 492.)

Allowing plaintiffs' experts to establish a defendant's liability by equating mere exposure with causation, the Courts of Appeal have effectively relieved California plaintiffs of the burden of actually proving causation—rendering *Rutherford*'s "substantial factor" test a nullity. Far from settling the issue of causation in asbestos cases, then, *Rutherford*'s substantial-factor test has produced a great deal of uncertainty and confusion. The time has

come for this Court to explicitly clarify that "every identified exposure" to asbestos does not automatically satisfy this Court's "substantial factor" threshold for proving causation.

II. California Courts Are Out of Step with Other State and Federal Courts That Have Considered the Question

The decision below falls well outside the mainstream of state and federal court decisions that have considered the evidentiary threshold for proving causation based on exposure to a defendant's asbestos-containing product. Indeed, the Ninth and Sixth Circuits have joined several state supreme courts in squarely rejecting the untethered "every exposure" theory of causation used to establish liability in this case. This Court should join those jurisdictions in precluding tort liability premised on such a flimsy causation standard.

The U.S. Courts of Appeals have consistently rejected the notion of "every exposure" liability. Most recently, in *McIndoe v. Huntington Ingalls, Inc.* (9th Cir. 2016) 817 F.3d 1170, 1176, the Ninth Circuit held that a plaintiff suing in tort for mesothelioma-related injuries must prove that those injuries were caused by actual exposure to defendant's asbestos-containing materials, and "that any such exposure was a *substantial contributing factor* to his injuries." (Emphasis in original.) The plaintiffs presented testimony from a medical expert who opined that "*every* exposure to asbestos above a threshold level is necessarily a substantial factor in the contraction of asbestos-related diseases." (*Id.* at p. 1177.) The Ninth Circuit, however, rejected that theory of causation as "precisely the sort of unbounded liability that the substantial factor test was developed to limit." (*Ibid.*)

The Ninth Circuit based its *McIndoe* holding in part on an earlier Sixth Circuit decision. In *Moeller v. Garlock Sealing Techs., LLC* (6th Cir. 2011) 660 F.3d 950, the Sixth Circuit held that plaintiffs had failed to prove that exposure to the defendant's asbestos-containing product was a substantial factor in causing the decedent's mesothelioma. The plaintiffs presented expert testimony that "all types of asbestos can cause mesothelioma and that any asbestos exposure counts as a 'contributing factor.'" (*Id.* at p. 954.) Yet the Sixth Circuit rejected that shortcut to proving causation, explaining that such "testimony does not establish that exposure to [defendant's products] in and of itself was a *substantial* factor in causing" the decedent's mesothelioma, given that the decedent "sustained massive exposure to asbestos" from other

sources unrelated to the defendant. (*Id.* at pp. 954-55.) The Sixth Circuit concluded by observing that to hold otherwise "would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." (*Id.* at p. 955.)

The highest courts of several states have similarly rejected the "every exposure" theory of asbestos liability. Last year, in *Scapa Dryer Fabrics, Inc. v. Knight* (2016) 299 Ga. 286 [788 S.E.2d 421], the Georgia Supreme Court rejected expert witness testimony on the basis that it was not helpful to the jury in determining whether exposure to defendant's asbestos was the cause of plaintiff's mesothelioma. The plaintiff's expert was allowed to testify at trial that because *any* asbestos exposure contributed to the plaintiff's cumulative harm, "it was unnecessary to resolve the extent of exposure" to the defendant's asbestos. (*Id.* at p. 291.) The Georgia Supreme Court reversed, holding that such testimony was inadmissible because the expert's cumulative exposure theory did not show that exposure to defendant's asbestos was more than *de minimis*, and thus could not assist the jury in determining the extent of exposure to defendant's asbestos or whether it caused the plaintiff's injuries. (*Id.* at 293.)

In *Bostic v. Georgia-Pac. Corp.* (Tex. 2014) 439 S.W.3d 332, the Texas Supreme Court rejected plaintiffs' contention that evidence of "some exposure" or "any exposure" to asbestos sufficed to prove mesothelioma causation. The court explained that, under the substantial-factor test, "the plaintiff must establish the dose of asbestos fibers to which he was exposed by his exposure to the defendant's product." (*Id.* at p. 353.) The court refused to "ignore the importance of dose in determining a causative link, and impose liability even where, for all the jury can tell, the plaintiff might have become ill from his exposure to background levels of asbestos or for some other reason." (*Id.* at p. 339.) Such a lax approach to tort liability, the court explained, improperly "negates the plaintiff's burden to prove causation by a preponderance of the evidence." (*Id.* at p. 340.)

The Pennsylvania Supreme Court has also rejected the "each and every exposure" or "any exposure" theory of asbestos liability. (*Betz v. Pneumo Abex, LLC* (2012) 615 Pa. 504 [44 A.3d 27].) Anticipating that the plaintiffs would advance an "any exposure" theory of causation, the defendants moved to exclude as inadmissible any expert testimony to that effect. The court granted the defendant's motion, holding that the "any exposure" theory does not properly take into account the potency, concentration, or duration of the

asbestos to which the plaintiff is exposed, all of which are required to establish "substantial-factor causation." (*Id.* at p. 550.) "Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive." (*Ibid.*)

Given the obvious forum-shopping implications on California of the lower courts' *sui generis* "every exposure" theory of causation, it is all the more urgent that this Court grants review to clarify that merely establishing some exposure to asbestos—regardless of the frequency, proximity, or circumstances of that exposure—cannot satisfy the evidentiary burden of proving asbestos-related causation in tort cases. If allowed to stand, the lower courts' relaxed approach to causation will simply encourage more plaintiffs from across the country to pursue their asbestos claims in California. Such forum shopping serves no useful purpose, imposes unwelcome administrative burdens on the California courts, erodes the integrity of California's civil-justice system, and is deeply unfair to litigants.

CONCLUSION

This case presents the Court with an excellent opportunity for addressing the persistent confusion among the Courts of Appeal over asbestos causation. In light of the ongoing instability and uncertainty that *Rutherford*'s substantial-factor test apparently has created, the Court will not be able to avoid clarifying the demands of that crucial test indefinitely. WLF respectfully requests that the Court grant the petition for review.

Respectfully submitted,

/s/ Michelle Stilwell

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PROOF OF SERVICE

At the time of service, I was over 18 years of age, not a party to this action, and employed in the District of Columbia. My business address is 2009 Massachusetts Avenue, NW, Washington, DC 20036.

On May 23, 2017, I served a copy of the foregoing **MAY 23, 2017 *AMICUS CURIAE* LETTER OF WASHINGTON LEGAL FOUNDATION** on the interested parties in this action via U.S. First Class Mail, by placing a true copy thereof, enclosed in individually sealed envelopes with postage prepaid, for collection and mailing at Washington Legal Foundation (WLF), 2009 Massachusetts Ave., NW, Washington, DC 20036, in accordance with WLF's ordinary business practices and addressed to each recipient below as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

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Cory L. Andrews