COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

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
STAR MARKETS COMPANY, INC.,
Defendant.

ON APPEAL FROM THE COMMONWEALTH OF MASSACHUSETTS SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT, MIDDLESEX COUNTY

BRIEF OF THE AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

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STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

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

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

As part of fulfilling its purpose, the MassDLA has previously filed amicus briefs in the appellate courts of the

Commonwealth. The MassDLA offers its experience and perspective to the Court as amicus curiae to assist in its resolution of the matter now before it.

STATEMENT REGARDING PREPARATION OF BRIEF

Pursuant to Mass. R. App. P. 17(c)(5), MassDLA states: (1) no party or party's counsel authored this brief in whole or in part; (2) no party or party's counsel, nor any person or entity other than MassDLA, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief; and (3) neither MassDLA nor its counsel represents or has represented any party 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 THE ISSUES PRESENTED

I. Whether G. L. c. 231, § 6B, and G. L. c. 235, § 8, which set the rates for pre- and post-judgment interest at twelve percent per annum, are so excessive as to violate principles of due process.

II. Whether a new trial is required because the trial judge did not instruct the jury on "but-for" causation with respect to the plaintiffs' conspiracy claims. *See Doull v. Foster*, 487 Mass. 1 (2021).

Announcement: The Justices are soliciting Amicus Briefs, *Frederick Douglas Greene & Others v. Philip Morris USA Inc. & Another*, SJC-13330,Docet Entry #2 (SJC entered September 23, 2022) ("Amicus Announcement").

STATEMENT OF THE FACTS

The MassDLA, as amicus curiae, adopts the statements of facts regarding the prior proceedings and factual background as submitted in the briefs of Philip Morris (Defendants-Appellant), and Patricia Walsh Greene, individually, and Patricia Walsh Greene and Thomas Walsh, as personal representatives of the Estate of Frederick Douglas Greene, Jr. (Plaintiffs-Appellees).

STATEMENT OF THE CASE

MassDLA is answering the Commonwealth of Massachusetts Supreme Judicial Court's solicitation for amicus briefs in the matter of *Frederick Douglas Greene & Others v. Philip Morris USA Inc. & Another*, SJC-13330.

The central issues under consideration in *Greene v. Philip Morris USA*, arising within the context of a tobacco personal injury claim, concern the constitutionality of the current statutory 12% judgment interest rate as assessed under litigants' due process rights, as well as a determination of the proper causation standard to apply in an action involving the intentional tort of conspiracy.

SUMMARY OF THE ARGUMENT

The statutes governing pre- and post-judgment interest in Massachusetts are vestiges of decades-old policy that no longer reflect modern realities. The current interest rate functions as an outlier among similarly-situated jurisdictions that has outlived its original policy justifications and results in disparate, unfair outcomes for litigants of the Commonwealth.

Furthermore, following this Court's seminal decision in *Doull v. Foster*, 487 Mass. 1 (2021), Massachusetts courts, advocates, and jurors will benefit from further guidance on the broad application of but-for causation across numerous causes of action and the corresponding inappropriateness of substantial contributing factor causation as a misused, confusing standard. A but-for standard is best applied in intentional torts like the conspiracy claimed in the instant case. Uniform application of but-for causation under the Restatement (Third) of Torts (1999) will provide consistency for litigants and align with both the purposes of tort law and the interests of justice.

ARGUMENT

I. The Commonwealth's Judgment Interest Statutes Fail to Follow Market Conditions and Represent an Outdated Outlier Among the States.

For the past 40 years, The Commonwealth has maintained a pre- and post-judgment interest rate of 12% of all tort actions. M.G.L c. 231, § 6B (1982); M.G.L. c. 235, § 8 (1983). This rate

does not reflect market conditions, results in an impermissible windfall for plaintiffs, and goes beyond any rational extension of the policy arguments underlying it. Further, the 12% judgment interest rate in Massachusetts is an outlier; the vast majority of jurisdictions either tie judgment interest to market conditions or impose a flat judgment interest rate lower than that of the Commonwealth.

A. The Statutory 12% Rate Has Not Reflected Market Conditions in Decades.

Initially, the judgment interest statute did not specify an interest rate, because interest was awarded by the jury or the clerk's office. *See D'Amico v. Cariglia*, 330 Mass. 246, 247-48 (1953); M.G.L c. 231, § 6B (1982). In 1974, the Massachusetts Legislature began setting a flat rate of 8% for judgment interest. *See* 1974 Mass. Acts 122, c. 224 § 1. The Legislature periodically updated this rate in order to reflect market conditions, raising it to 10% in 1980 and to 12% in 1982. *See* 1980 Mass. Acts 297-98, c. 322 § 2; 1982 Mass. Acts 415, c. 183 § 2; *cf.* Bd. of Governors of Fed Reserve Sys., Market Yield on U.S. Treasury Secs. at 1-Year Constant Maturity (WGS1YR), https://fred.stlouisfed.org/series/WGS1YR.

Without explanation, the Legislature has failed to adjust the judgment interest rate since 1982 despite the fact that interest rates have dropped significantly since then. Indeed,

the market yield on U.S. Treasury Securities at 1-year constant maturity was continuously below 2% from 2008 to 2017 and between 2020 and 2022, whereas the yield hit upwards of 17.07% in 1981. Bd. of Governors of Fed Reserve Sys., Market Yield on U.S. Treasury Secs. at 1-Year Constant Maturity (WGS1YR), https://fred.stlouisfed.org/series/WGS1YR. Further, these rates have not reached 10% at any point since 1984. *Id.* In fact, the average 1-year constant maturity rate from 1985-2021 was just 3.49% when adjusted on a yearly basis. *See id.* Even with the sharp increase of interest rates in late 2022, this rate has only gone up to 4.73% as of December 2022, far below the 12% rate imposed by the Commonwealth. *See* M.G.L c. 231, § 6B; M.G.L. c. 235, § 8; *cf.* Bd. of Governors of Fed Reserve Sys., Market Yield on U.S. Treasury Secs. at 1-Year Constant Maturity (WGS1YR), https://fred.stlouisfed.org/series/WGS1YR. The Commonwealth's statutory scheme does not reflect the changing conditions of the market, and negatively impacts defendants and the judicial system.

B. The Statutory Rate is Excessive and Not Supported by Any Policy Arguments.

The award of judgment interest is intended to compensate litigants for the time value of their money. As this Court has stated, "Interest is awarded by law so that a person wrongfully deprived of the use of money should be made whole for his loss."

Perkins Sch. For the Blind v. Rate Setting Comm'n, 383 Mass. 825, 835 (1981). Awards based on interest rates that exceed the time value of money thus go beyond the purpose of these statutes. *See McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 717 (1990). The rate of 12% undoubtedly violates the policies on which the need for interest is based and amounts to punitive damages, particularly with respect to defendants in tort cases.

Recognizing the imbalance of the 12% rate, in 2012 this Court solicited amicus briefs to answer whether the rate was so excessive as to violate the Due Process Clause. Though the damages award was ultimately vacated and so the question was not answered by the Court, this case presents a necessary opportunity to reexamine the excessive and punitive nature of the Commonwealth's 12% rate. *See Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 448 n.18 (2013). Philip Morris will be liable for a judgment interest that far exceeds the amount of damages awarded by the jury below.

Further, the Legislature has already decreased the interest rate paid by the Commonwealth when the Commonwealth is a litigant and by defendants in medical malpractice suits. M.G.L. c. 231, §§ 6I, 60K. When the Commonwealth is a litigant, judgment interest is equal to the weekly average 1-year constant maturity treasury yield as published by the Federal Reserve

Board of Governors for the week preceding judgment, not to exceed 10%. M.G.L. c. 231, § 6I (2004). In medical malpractice actions, judgment interest is assessed at the same rate plus 2%. M.G.L. c. 231, § 60K (2012). Notably, both of these statutes have been examined and amended long after 1982. *Cf.* M.G.L c. 231, § 6B. Members of the Legislature have further identified the punitive nature of the discrepancy between those more reasonable rates specified above and the current 12% rate and have proposed bills to change the 12% rate to the weekly average 1-yr constant maturity treasury yield, as published by Federal Reserve Board of Governors for the calendar week preceding judgment. *See* 2021 MA H.B. 1693, 2021 MA S.B. 1075.

The Massachusetts pre- and post-judgment interest statutes are not intended to punish the defendant or to make the aggrieved party more than whole, however that is the undisputed effect, admitted previously by this Court. *See McEvoy Travel Bureau*, 408 Mass. at 717; *Trinity Church v. John Hancock Mut. Life. Ins. Co.*, 405 Mass. 682, 684 (1989); *Osbourne v. Biotti*, 404 Mass. 112, 114-15 (1989). Indeed, this Court had noted that adherence to a "significantly above-market interest rate, i.e., a flat twelve percent rate, would result in a windfall" for plaintiffs, "make than more than whole," and "run contrary to policy underlying interest awards." *Sec'y of Admin. & Fin. V. Labor Relations Comm'n*, 434 Mass. 340, 346-47 (2001).

Calculating judgment interest as reflected by market conditions, however, "yields a figure more akin to [the plaintiffs'] actual losses." *See id.* Though *Sec'y of Admin.* outlined the argument behind the Commonwealth being subject to a lower interest rate where it is a litigant, this policy argument tracks in tort cases as well, as this Court's language is particularly instructive. *See id.*

A 12% flat interest rate imposed in all tort cases (except for medical malpractice claims) results in a windfall for plaintiffs, goes far beyond compensating plaintiffs for the time value of money lost due to litigation, and is punitive in nature. *See Sec'y of Admin.*, 434 Mass. at 346-47; *McEvoy Travel Bureau*, 408 Mass. at 717. Where judgment interest rates go beyond compensating plaintiffs for the lost value of damages awards, the interest award ceases to be compensatory and becomes punitive in nature. *See Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 618 (6th Cir. 1998). As judgment interest awards are not intended to be punitive in nature, it simply does not follow that the Commonwealth and medical malpractice defendants should enjoy a rate tied to market conditions, while general tort defendants in cases such as this must be subject to an excessive flat rate of 12%. *See* M.G.L. c. 231, §§ 6I, 60K.

Though some members of the Legislature have identified this discrepancy and introduced legislation to rectify it, this Court

should not take solace in the mere prospect of legislative intervention. The legislature has not voted to amend or modify the Commonwealth's judgment interest statutes since 1982 and 1983, respectively. *See* M.G.L c. 231, § 6B; M.G.L. c. 235, § 8. There is no reason to believe that the Legislature will make these necessary and equitable changes to the 12% interest rate without judicial intervention.[1]

C. The Statutory Rate is an Outlier Across the Several States.

Though the Commonwealth has been content to impose a 12% judgment interest rate over the last 40 years, this statutory scheme is a clear outlier among the several states. Roughly half of the states, in addition to the federal system and the District of Columbia, base their judgment interest rules on market conditions in some form. *See* Appendix A. Notably, each of these statutes have been enacted or amended since 1982, with 11 jurisdictions updating their statutes in the last decade. Most recently, Arizona, Arkansas, and Montana changed their judgment interest statutes from a flat rate to reflect market conditions since 2017. *See id.*

[1] MassDLA is aware that the Appeals Court, in an unpublished opinion, rejected a challenge to the Commonwealth's judgment interest rate in contract actions. M.G.L. c. 231 § 6C (1993); *Specialty Materials, Inc. v. Highland Power Corp.*, 98 Mass. App. Ct. 1103, at *5 (2020). Such summary decisions issued after February 25, 2008, may be cited for persuasive value but not as binding precedent. *See Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4 (2008).

In Maine, for example, post judgment interest in all civil actions not involving a contract is calculated at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, plus 6%. Pre-judgment interest is calculated using the same Treasury bill rate plus 3%. The Treasury bill rate is calculated based on the last full week of the calendar year immediately prior to the year in which interest accrues. *See id.* As such, while the statute does add to the rate published by the Federal Reserve, it at the very least attempts to align judgment interest to market conditions during the relevant years.

While several states employ flat judgment interest rates, the Commonwealth remains an outlier. *See* Appendix B. Only two states, Vermont and Rhode Island, impose an equal 12% judgment interest rate to the Commonwealth. *See id.* Further, only New Mexico imposes a higher judgment interest rate in tort actions at 15%. *See id.* All other states that impose a flat judgment interest rate do so at a lower rate than the Commonwealth, with only four of these jurisdictions imposing a rate as high as 10%. *See id.* Among the jurisdictions imposing a 10% rate includes Hawaii, a state that has not updated its judgment interest statute since 1986. *Id.* Recognizing the outdated and excessive nature of a 12% rate, two states, Alabama and Kentucky, have

lowered their flat judgment interest rates from 12% to 7.5% and 6%, respectively, since 2011. *See id.*

As such, the excessive 12% interest rate results in an impermissible windfall for plaintiffs, amounts to punitive damages, and extends beyond the rational limits of the policy arguments underlying the award of judgment interest. In this case and in many like cases, defendants find themselves liable for more money in judgment interest than the amount in damages awarded by the jury. The statutory schemes across the nation indicate that this elevated 12% rate is not a product of a conscious decision to impose an elevated rate but rather an example of legislative inaction. The Legislature's inattention to this statutory scheme and the vast changes in market conditions over the last four decades put this Court in the appropriate position to intervene and declare a flat 12% judgment interest rate to be impermissible.

II. The Trial Court Should Have Given a But-For Instruction on Causation.

Doull was a watershed case that re-established the broad application of but-for causation as the appropriate standard to be followed in Massachusetts. *See Doull v. Foster*, 487 Mass. 1-3 (2021). Accordingly, a but-for causation instruction, the instruction required by law, was the proper instruction in the instant case, especially as it does not involve multiple

potential tortfeasors or sources of injury that were at issue in *Doull*. The trial court should therefore have followed the law and instructed on but-for causation. *See id.*

A. A But-For Causation Instruction Better Encompasses Causation Here.

Even before *Doull* re-established the bedrock principle of but-for causation as the correct standard, a but-for instruction is still most fitting here because the substantial contributing factor standard is inappropriate in the intentional torts context, including conspiracy. *See id.*; *Kurker v. Hill*, 44 Mass. App. Ct. 184, 188 (1998). When this Court initially defined the substantial contributing factor standard in *O'Connor v. Raymark Industries, Inc.*, 401 Mass. 586, 591-92 (1988), the intended application was never meant to encompass intentional torts, but rather to act as a supplemental tool to distinguish between a substantial factor and a negligible factor for causation in exposure cases involving multiple potential tortfeasors. Intentional tort cases like conspiracy were not considered in the calculus of the substantial contributing factor standard of the time, even as that standard has been eroded and improperly expanded in modern years. *See Welch v. Keene Corp.*, 31 Mass. App. Ct. 157 (1991) (insulator exposed from carrying, mixing, and applying asbestos-containing insulation products in 1950s); *Holdren v. Buffalo Pumps, Inc.*,

614 F. Supp. 2d 129 (D. Mass. 2009) (boiler technician exposed to asbestos at shipyards and industrial sites from 1950s to 1970s); *Ingham v. Johnson & Johnson*, Missouri Circuit Court, No. 1522-CC10417-01 (June 2018) ($4.7 million plaintiff verdict where 22 women alleged cancer caused by asbestos exposure from talcum powder); *Lanzo v. Cyprus Amax Minerals Co.*, Middlesex County Superior Court, New Jersey, No. L-7385-16 (April 2018) ($117 million plaintiff verdict where plaintiff alleged cancer caused by asbestos exposure from 30 years of talcum powder use).

In contrast, but-for causation resembles the intentional tort standard for causation, and conspiracy claims are intentional torts. *See, e.g.*, *Kurker*, 44 Mass. App. Ct. at 188. But-for causation also mirrors the peculiar power of coercion standard. S*ee Doull*, 487 Mass. at 7-8; *Grant v. John Hancock Mut. Life Ins.*, 183 F. Supp. 2d 344, 362-63 (D. Mass 2002). Furthermore, concerted action conspiracies resemble joint and vicarious liability, which is often used in negligence cases. *See Thomas v. Harrington*, 909 F.3d 483, 490 (1st Cir. 2018). The trial court's instruction on substantial contributing factor was improper because its rationale did not apply and it differs from the intentional tort standard of causation. *See Doull*, 487 Mass. at 9, 13. Because of the error in instruction, a new trial is warranted. *See Hopkins v. Medeiros*, 48 Mass. App. Ct. 600, 611 (2000).

Doull re-established but-for causation as the appropriate standard in nearly all negligence cases. 487 Mass. at 2-3. This Court reasoned that a but-for standard ensures defendants will be held liable only if they caused the harm. *Id.* at 7. "The focus remains only on whether, in the absence of a defendant's conduct, the harm still would have occurred." *Id.* at 12-13. In so doing, it adopted the Third Restatement on causation in torts, but left two minor exceptions to be reconsidered in the appropriate future case. *See generally, id.* When determining the proper standard, this Court disfavored substantial contributing factor because of its confusing terminology and its conflation of factual and legal cause. *Id.* at 13-15. Moreover, an Amicus brief before this Court in *Doull* noted that substantial contributing factor was designed as an aide to a but-for analysis; not a substitute for it. Mass. DLA Amicus Br. (Sept. 16, 2020) at 7. The Court in *Doull* did note an exception for toxic torts or multiple sufficient causes cases because of the potential difficulty of identifying but-for causes. *See* 487 Mass. at 10-11. Neither limited exception applies here and therefore, the trial court should have given a but-for causation instruction as required by law.

B. Substantial Contributing Factor Was Inapplicable Here.

Two types of civil conspiracy claims exist under Massachusetts law: concerted action and peculiar power of

coercion.[2] *Grant*, 183 F. Supp. 2d at 362-63. In either, a but-for standard best applies. *See id.*

In a concerted action conspiracy claim, liability is imposed on a defendant for the tort of another. *See Kurker*, 44 Mass. App. Ct. at 188.[3] An underlying tort must exist. *See id.* Under a peculiar power of coercion conspiracy theory, the conspiracy itself is the tort, where the wrong is in the particular combination of the defendants. *See Thomas*, 909 F.3d at 492; *Grant*, 183 F. Supp. 2d at 363.[4]

Substantial contributing factor differs significantly from a conspiracy standard of causation such that it is not the proper standard to apply. *See* Restatement (Third) of Torts §§

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2 In a concerted action conspiracy claim, plaintiff must prove a common plan to commit a tortious act where the participants know of the plan, its purpose, and take affirmative steps to encourage the achievement of the result; defendant's substantial assistance contributing to the tortious plan is key. *See Kurker*, 44 Mass. App. Ct. at 189. Conversely, to prevail on a peculiar power of coercion conspiracy tort claim, plaintiff must prove that when defendants acted in unison, through sheer force of numbers, they exercised some peculiar power of coercion over plaintiff that an individual in a similar position could not have exercised. *See Thomas*, 909 F.3d at 492.

3 In *Kurker*, a contentious sale of a company to former-management-turned-rival led to a concerted action conspiracy claim in which seller alleged defendants conspired to deflate seller's assets. 44 Mass. App. Ct. at 186. The court agreed, finding defendant knowingly provided substantial assistance by plotting to secure a vote, orchestrating the asset purchase, and knowing the assets were undervalued. *See id.* at 189-90; *see also Thomas*, 909 F.3d at 487-92 (finding plaintiff's conspiracy claims failed where no communications showed defendant controlled or influenced the investigation or firing of plaintiff).

4 In *Grant*, following a physical altercation between plaintiff and a police officer when plaintiff was cleaning out his desk, plaintiff alleged defendant and the District Attorney's Office conspired where if plaintiff dropped his suit against defendant, the charges would be dropped. 183 F. Supp. 2d at 353-54. The claim failed because plaintiff failed to prove the sheer force of numbers made a difference; defendants did not exercise any power collectively that they would have been unable to exercise individually. *Id.* at 363.

1, 27 (Am. L. Inst. 1999). Conspiracy is an intentional tort. Intentional torts require that an act intentionally or knowingly cause harm. *See* Restatement (Third) of Torts § 1 (Am. L. Inst. 1999). Under that standard, a result can only be attributed to a defendant if the defendant's act necessitated that result. *See id.* "Necessitating a result" mirrors the but-for standard of causation. *See id.* If a potential cause was necessary to achieve the result, i.e., if a result would not have occurred without a certain factor, then that factor is a cause. Because a substantial contributing factor standard differs from a but-for standard, the intentional tort standard should apply. *See Doull*, 487 Mass. at 7-9.

The trial court should have given a but-for causation instruction on plaintiff's concerted action conspiracy claim. *See Doull*, 487 Mass. at 7; *Kurker*, 44 Mass. App. Ct. at 188-89. Any tort, such as a concerted action conspiracy, requires causation. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013). "When the law grants persons the right to compensation for injury from wrongful conduct, there must be some demonstrated connection, some link, between the injury sustained and the wrong alleged." *Id.* at 342. Causation in intentional torts generally requires an actor cause a result knowingly or purposefully. Restatement (Third) of Torts § 1 (Am. L. Inst. 1999). As described above, the general standard

of an intentional tort closely resembles but-for causation because both require that the act was necessary to cause the alleged injury. *See id.* Moreover, the Supreme Court has applied a but-for causation standard to an intentional tort before. *Nassar*, 570 U.S. at 362-63. In *Nassar*, the Supreme Court held but-for causation was the correct standard for dealing with Title VII retaliation claims. *Id.* The Court reasoned that the but-for standard for causation is "textbook tort law" in negligence and intentional tort cases. *See id.* at 346-47.

In addition, Massachusetts courts have also consistently reasoned that concerted action conspiracy claims resemble joint liability or vicarious liability. *See, e.g.*, *Thomas*, 909 F.3d at 490. All hold someone responsible for another action or the action of another. *See id.* Joint liability and vicarious liability are commonly applied in negligence suits. *See, e.g.*, *Elias v. Unisys Corp.*, 410 Mass. 479, 481-82 (1991). Because of the underlying similarities, it follows that concerted action conspiracy should use the same causation standard that would apply to vicarious liability or joint liability; namely, but-for. *See id.*; *Thomas*, 909 F.3d at 490.

Similarly, peculiar power of coercion mirrors the but-for causation standard. *See Doull*, 487 Mass. at 7; *Grant*, 183 F. Supp. 2d at 363. This resemblance demonstrates why a trial

court should give a but-for causation instruction on a peculiar power of coercion claim. *See Doull*, 487 Mass. at 7; *Grant*, 183 F. Supp. 2d at 363. A peculiar power of coercion claim asks if a group exercises power through sheer numbers it would not have exercised as individuals. *Grant*, 183 F. Supp. 2d at 363. But-for causation asks the same question: if defendant's action was removed, would plaintiff's harm still have occurred? *See Doull*, 487 Mass. at 7. In both, the underlying question is counterfactual. To answer either question, it requires removing something that happened to see if the result would still be the same. They follow the same logic, as the assessment of whether a factor is or is not a cause has a binary result. Accordingly, when a peculiar power of coercion conspiracy is alleged, the court should be required to use a but-for causation instruction. *See Doull*, 487 Mass. at 7; *Grant*, 183 F. Supp. 2d at 363. This instruction also ensures that defendants will only be held liable if the peculiar power of coercion conspiracy caused the harm. *See Doull*, 487 Mass. at 7; *Grant*, 183 F.Supp.2d at 363.

Also, because intentional torts are not accidental, the concerns with identifying the cause or causes do not apply. *See* Restatement (Third) of Torts § 1 (Am. L. Inst. 1999). Intentional torts require that an act intentionally or knowingly cause harm, reflecting a standard that requires an act necessitate a result. *See id.* That is a but-for approach.

Because conspiracy is an intentional tort, an intentional tort standard of causation should apply. *See* Restatement (Third) of Torts §§ 1, 27 (Am. L. Inst. 1999). Specifically, here, plaintiff only smoked Marlboro cigarettes. *See* Appellant's Br. at 17-20; Appellee's Br. at 20-21. While she bought them at Star Markets, the product she alleged caused her harm was from one company. Accordingly, although *Doull* made clear that there can be multiple but-for causes for an injury, in the present case there can be no doubt that only one cause is at issue. *See Doull*, 487 Mass. at 19-20; Appellant's Br. at 17-20; Appellee's Br. at 20-21. No difficulty exists in determining what product may have caused her injury. *See* Appellant's Br. at 17-20; Appellee's Br. at 20-21.

The dichotomy of but-for causation also better represents a conspiracy case. *See Doull*, 487 Mass. at 7, 8; *Kurker*, 44 Mass. App. Ct. at 188-89. Joining a conspiracy is intentional. *See* Restatement (Third) of Torts § 27 (Am. L. Inst. 1999). Once a conspiracy is formed, one is either in or out of it. *See id.* There is no in-between. *See id.* But-for causation works in a similar way. *See Doull*, 487 Mass. at 7-8. Either plaintiff's harm would not have occurred but-for defendant's action or it still would have come to pass. *See id.* Again, there is no in-between. *See id.* Because substantial contributing factor has gradation, its internal logic is inconsistent with the zero-sum

nature of conspiracy and but-for causation. *See id.* at 9; Restatement (Third) of Torts § 27 (Am. L. Inst. 1999).

A new trial is warranted because the trial court should have given a but-for causation instruction. *See Hopkins*, 48 Mass. App. Ct. at 611. When reviewing jury instructions, the court seeks to "determine whether or not the error was harmless." *Id.* If the error caused harm, the court should grant a new trial. *See id.* A jury instruction is harmful when the judge does not instruct on the applicable law. *See id.* Here, the error was harmful. *See id.*; Appellant's Br. at 21. The trial court should have given a but-for causation instruction because it is the law and alternatively because substantial contributing factor is improper in the context of intentional torts. *See Doull*, 487 Mass. at 2-3; *Kurker*, 44 Mass. App. Ct. at 188. Instead, it gave a substantial contributing factor instruction. Appellant's Br. at 21. Because that instruction gave a different standard than what should have been given, harm occurred. *See Doull*, 487 Mass. at 2-3; *Kurker*, 44 Mass. App. Ct. at 188; *Hopkins*, 48 Mass. App. Ct. at 611-12. A new trial is therefore warranted.

A but-for causation instruction was the proper instruction here. *See Doull*, 487 Mass. at 1-3. A but-for causation instruction is the proper instruction in most negligence cases because it better embodies tort law. *See id.* The same

rationale applies to intentional torts, such as conspiracy claims. *See, e.g.*, *id.*; *Grant*, 183 F. Supp. 2d at 362-63. But-for causation and intentional torts require that a defendant's act necessitate the result to hold a defendant liable. *See, e.g.*, *Doull*, 487 Mass. at 1-3; *Grant*, 183 F. Supp. 2d at 362-63. Specifically, conspiracy claims resemble negligence claims through their internal logic or elements. *See, e.g.*, Restatement (Third) of Torts §§ 1, 27 (Am. L. Inst. 1999). Because the improper instruction was given, a new trial is warranted. *See Hopkins*, 48 Mass. App. Ct. at 611.

III. This Court Should Completely Adopt the Restatement (Third) of Torts on Factual Causation.

This Court should adopt a but-for causation standard in all negligence cases. But-for causation better represents tort law because it ensures that liability shall only follow where there is fault. *See Doull*, 487 Mass. at 7-8; *Nassar*, 570 U.S. at 346-47. If there is no fault, there should be no liability. *See Doull*, 487 Mass. at 6-7. Conversely, substantial contributing factor as a standard allows innocent parties to be held liable. *See id.* at 8-9. A substantial contributing factor instruction would also confuse a jury because of the murky level of gradation required for the analysis. *See id.* at 13-15. Lastly, completely adopting a but-for causation standard would create uniformity for litigants and the courts.

A. But-For Causation Better Represents Tort Law.

Uniformly adopting but-for causation as a standard best embodies the underpinnings of tort law, including personal responsibility and corrective justice. *See, e.g.*, *id.* at 6-7. Tort law seeks to hold people liable who cause injuries. *See, e.g.*, *Wainwright v. Jackson*, 291 Mass. 100, 102 (1935). It imposes liability on those who are at fault. *See id.* But-for causation ensures only those at fault will be held liable. *See, e.g.*, Restatement (Third) of Torts § 26 (Am. L. Inst. 1999).

Massachusetts courts have consistently held that liability should not be imposed unless the defendant caused the injury. *See, e.g.*, *Doull*, 487 Mass. at 6-7. "It is a bedrock principle of negligence law that a defendant cannot and should not be held liable for a harm unless the defendant caused the harm." *Id.* at 6-7; *see Nassar*, 570 U.S. at 346 ("Causation in fact—*i.e.,* proof that the defendant's conduct did in fact cause the plaintiff's injury—is a standard requirement of any tort claim."); *Wainwright*, 291 Mass. at 102 ("The general rule is that one cannot be held liable for negligent conduct unless it is causally related to injury of the plaintiff."); *Leavitt v. Brockton Hosp., Inc.*, 454 Mass. 37, 43 (Mass. 2009) (dismissing a negligence claim in part because defendant did not cause plaintiff's injury). Substantial contributing factor holds conduct to a less rigorous and overall lesser standard. *See*

Doull, 487 Mass. at 8. It allows one who did not cause the injury to be held liable because it only requires that defendant's conduct "make a difference." *See O'Connor*, 518 N.E.2d at 512 ("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."). Conversely, but-for causation tests whether plaintiff's harm would have occurred "in the absence of" defendant's conduct. *See Nassar*, 570 U.S. at 347. A defendant cannot be a cause if the event would have occurred anyway. *See id.* at 346-47.

But-for causation better embodies that notion than substantial contributing factor because a defendant's conduct will only be held to be the cause when it actually caused the harm. *See, e.g.*, *id.* at 346-47. But-for causation determines whether defendant's conduct was a necessary element to precipitating the result. *Id.* If plaintiff would have been harmed with or without defendant's conduct, defendant did not cause the result. *See Doull*, 487 Mass. at 7-8. If plaintiff would have been harmed regardless of defendant's conduct, defendant was essentially a bystander. *See id.* Tort law does not seek to punish bystanders. Conversely, substantial contributing factor allows a defendant to be held liable even if plaintiff would have been harmed in the absence of defendant's conduct. *See id.* at 9, 13. Under that standard, a defendant

could be held liable even if the defendant did not affect the outcome. *See id.* Such a standard runs counter to a foundational concept of tort law, that liability should not be imposed without fault. *See id.* at 7-8; *Nassar*, 570 U.S. at 346.

B. Using Substantial Contributing Factor as an Instruction Will Lead to Confusing Results.

Substantial contributing factor should be abandoned because it confuses juries. *See Doull*, 487 Mass. at 13-15. Jury instructions are supposed to clearly guide the jury in its deliberations. *Pfeiffer v. Salas*, 360 Mass. 93, 100-01 (Mass. 1971). Because substantial contributing factor is a confusing standard, it cannot clearly guide juries. *See id*; *Doull*, 487 Mass. at 13-15.

Jury instructions exist to help the jury. *Pfeiffer*, 360 Mass. at 100-01. "The primary purpose of instructions to a jury is to assist them in the discharge of their responsibility for finding the facts in issue and then in applying to the facts found the applicable rules of law to enable them to render a proper verdict." *Id.* Clear instructions best help juries. *Id.* It is also important to take the demographics of a jury into account. *Id.* "Instructions are not addressed to the lawyers in the case but to the jurors who are persons of varying degrees of education and experience, drawn at random from the community and from all walks of life, but who are not trained in the field of

law." *Id.* Accordingly, a confusing standard would not serve the goal of jury instructions. *See id.*

Substantial contributing factor is a confusing standard. *See* Restatement (Third) of Torts § 26 (Am. L. Inst. 1999). The authors of the Third Restatement of Torts ultimately concluded "[t]he substantial-factor test has not, however, withstood the test of time, as it has proved confusing and been misused." *Id.* While courts have allowed the substantial contributing factor standard in certain situations based on policy and "availability of evidence," the standard still "tends to obscure, rather than to assist, explanation and clarification of the basis of these decisions." *Id.* As a result, it has weakened the necessary relationship between causation and fact. Mass. DLA Br. in *Doull* (Sept 16, 2020) at 7. The current notion of the substantial contributing factor test - that plaintiff can prevail by showing defendant's tortious conduct was a substantial factor in causing harm - is inconsistent with the Second Restatement's notion of substantial contributing factor, which many courts adopted. *See generally, id.*

Substantial contributing factor is not a helpful instruction because it is confusing. *See Pfeiffer*, 360 Mass. at 100-01. Because juries are normally composed of non-lawyers, being clear on the law is helpful. *Id.* In fact, just last year this Court has determined the substantial contributing factor

standard is confusing. *Doull*, 487 Mass. at 3. One source of confusion is its terminology. *Id.* at 13. It only provides murky guidance on how to approach causation to determine how much of conduct was enough to "make a difference" in the outcome. *Id.* at 13-15. Substantial contributing factor is unhelpful to juries because it is an unclear instruction. *See id.*; *Pfeiffer*, 360 Mass. at 100-01.

The instant case illustrates the confusing nature of the substantial contributing factor analysis and further demonstrates how a bifurcated standard – wherein some tort cases utilize the but-for standard and others the substantial contributing factor standard – will result in ridiculous and inconsistent outcomes. Plaintiffs-Appellees argue that the trial court's substantial contributing factor instruction was proper because this is a smoking case and "[s]moking claims are 'toxic torts' that are excluded from the rule set out in *Doull*. *See* Appellee's Br. at 42-43; *Doull*, 487 Mass. at 29, n. 21 (choosing not to disturb the Court's decision in *O'Connor* for toxic tort and asbestos cases because the specific issue was not before the Court but further stating that use of substantial contributing factor causation in such cases could be reconsidered in an appropriate case). To the contrary, the issue at bar involves the causation standard in a conspiracy action that happens to include cigarette smoking. *See*

generally, Appellee's Br. Plaintiffs-Appellees cannot shoehorn their conspiracy claims into a box of "toxic torts" to avoid proper scrutiny by this Court or the application of but-for causation merely because Patty Greene was diagnosed with cancer. *See id.* at 22. To allow Plaintiffs-Appellees to do so would open the door to other plaintiffs labeling their disparate injuries as "toxic torts" to litigate under the lesser, improper standard of substantial contributing factor. A bifurcated causation analysis would therefore become a name game leading to significant injustice for future parties.

C. Judicial Uniformity is Better Served Under a But-For Causation Approach.

Eliminating the substantial contributing factor standard will create judicial uniformity. *See Doull*, 487 Mass. at 2-3; *cf. Kisor v. Wilkie*, 139 S.Ct. 2400, 2422 (2019). In turn, judicial uniformity will create consistency for Massachusetts judges, jurors, and advocates. *Kisor*, 139 S.Ct. at 2422. A uniform adoption of the but-for standard of causation will serve important legal principles such as promoting "the evenhanded, predictable, and consistent development of legal principles, foster[ing] reliance on judicial decisions, and contribut[ing] to the actual and perceived integrity of the judicial process." *See Doull*, 487 Mass. at 2-3; *cf. Kisor*, 139 S.Ct. at 2422 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

The Supreme Court has noted the value of judicial uniformity. *Kisor*, 139 S.Ct. at 2422. In *Kisor v. Wilkie*, the Supreme Court determined judicial uniformity, by following precedent, served numerous important legal principles. *Id.* It creates consistency, which allows judicial developments to be more predictable and dependable. *Id.* It also creates more reliance on judicial decisions. *Id.* Lastly, it helps the integrity of the judicial process. *Id.* Here, uniformly adopting but-for causation would create similar benefits. *See id.* It would create a consistent causation standard across negligence cases. *See Doull*, 487 Mass. at 16-17. That would allow for consistent legal development. *See id*; *cf. Kisor*, 139 S.Ct. at 2422. It would unite factual causation across negligence cases, instead of the current bifurcated approach. *See Doull*, 487 Mass. at 16-17; *cf. Kisor*, 139 S.Ct. at 2422.

CONCLUSION

Based on the foregoing, MassDLA respectfully requests that this Honorable Court find the current judgment interest rate unconstitutional and adopt a uniform standard of but-for causation as set forth in the Restatement (Third) of Torts.

Dated: December 21, 2022

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

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

Signed under the pains and penalties of Perjury this 21st day of December, 2022.

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CERTIFICATE OF SERVICE

I, Jennifer A. Creedon, hereby certify that on this 21st day of December 2022, a true copy of the foregoing was served on to all counsel of record via electronic mail pursuant to the Supreme Judicial Court Order concerning email service in cases under Rule 5(b) of Mass. Rules of Civil Procedure added effective as of March 30, 2020.

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APPENDIX A

Jurisdictions with Market-Based Judgment Interest Rates

JURISDICTION	STATUTE
Alaska	Alaska Stat. Ann. § 09.30.070(a) (West 1999)
Arizona	Ariz. Rev. Stat. Ann. § 44-1201(B) (West 2022)
Arkansas	Ark. Code Ann. § 16-65-114(a)(1)(B) (2019)
Delaware	1 Del. Code Ann. § 2301 (West 2012)
District of Columbia	D.C. Code § 28-3302(c) (1988)
Federal	28 U.S.C. § 1961 (2000)
Florida	Fla. Stat. Ann. § 55.03(1) (West 2011)
Georgia	Ga. Code Ann. § 7-4-12(a) (West 2003)
Idaho	Idaho Code Ann. § 28-22-104(2) (West 1996)
Iowa	Iowa Code Ann. § 668.13(3) (West 2003)
Kansas	Kan. Stat. Ann. § 16-204(e) (West 1996)
Louisiana	La. Rev. Stat. Ann. § 13:4202(B)(1) (2012)
Maine	Me. Rev. Stat. Ann. Tit. 14, §§ 1602-B(3), 1602-C(1)(B) (West 2003)
Michigan	Mich. Comp. Laws Ann. § 600.6013(8) (West 2013)
Minnesota	Minn. Stat. Ann. § 540.09(c)(1)(i) (West 2022)
Missouri	Mo. Ann. Stat. § 408.040(3) (West 2015)
Montana	Mont. Code Ann. § 25-9-205(1)(a) (West 2017)
Nebraska	Neb. Rev. Stat. Ann. § 45-103 (West 2002)
New Hampshire	N.H. Rev. Stat. Ann. § 336.1 (2001)
New Jersey	N.J. Stat. Ann. § 4:42-11 (West 2014)
Nevada	Nev. Rev. Stat. Ann. § 17.130 (West 1987)
North Dakota	N.D. Cent. Code Ann. § 28-20-34 (West 2005)
Ohio	Ohio Rev. Code Ann. §§ 1343.03, 5703.47 (West 2016)
Oklahoma	Okla. Stat. Ann. tit. 12, § 727.1 (West 2013)
South Carolina	S.C. Code Ann. §34-31-20(B) (2005)
Tennessee	Tenn. Code Ann. § 47-14-121(a) (West 2013)
Texas	Tex. Fin. Code Ann. § 304.003(c) (West 2005)
Utah	Utah Code Ann. § 15-1-4(3)(a) (West 2018)
Washington	Wash. Rev. Code Ann. § 4.56.110(3)(b) (West 2019)
West Virginia	W. Va. Code Ann. § 56-6-31(b)(1) (West 2018)
Wisconsin	Wis. Stat. Ann. § 814.04 (West 2021)

APPENDIX B

Jurisdictions with Flat Judgment Interest Rates

JURISDICTION	STATUTE
Alabama	Ala. Code § 8-8-10 (2011)
California	Cal. Civ. Proc. Code § 685.010 (West 2022)
Colorado	Colo. Rev. Stat. Ann. § 5-12-102 (West 1984)
Connecticut	Conn. Gen. Stat. Ann. § 37-3a (West 2018)
Hawaii	Haw. Rev. Stat. § 478-3 (West 1986)
Illinois	735 Ill. Comp. Stat. 5/2-1303 (West 2021)
Indiana	Ind. Code Ann. § 24-4.6-1-101 (West 1993)
Kentucky	Ky. Rev. Stat. Ann. § 360.040 (West 2017)
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 11-107 (West 2006)
New Mexico	N.M. Stat. Ann. § 56-8-4(A)(2) (West 2004)
New York	N.Y. C.P.L.R. Law § 5004 (McKinney 2022)
North Carolina	N.C. Gen. Stat. Ann. § 40A-53 (West 1981)
Oregon	Or. Rev. Stat. § 82.010 (West 2003)
Pennsylvania	41 Pa. Stat. and Const. Stat. Ann. § 202 (West 1974)
Rhode Island	R.I. Gen. Laws Ann. §§ 9-21-8, 9-21-10 (1981, 1989)
South Dakota	S.D. Codified Laws §§ 21-1-13.1, 54-3-16 (2000, 2003)
Vermont	Vt. Stat. Ann. Tit. 12, § 2903 (2020)
Virginia	Va. Code. Ann. § 6.2-302 (West 2010)
Wyoming	Wyo. Stat. Ann. § 1-16-102 (West 2003)