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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GREGORY CANNARD and SUSAN CANNARD, husband and wife,

Plaintiffs,

v.

CBS CORPORATION, a Delaware corporation, et al.,

Defendants.

Civil No. 3:14-cv-05588-RBL

DEFENDANT FORD MOTOR COMPANY'S TRIAL BRIEF

Ford incorporates, and restates in their entirety, all defendants' Motions in Limine, including those of settling defendants Navistar, Inc. and Crane Co.

I. INTRODUCTION

Plaintiff Gregory Cannard served in the United States Navy as an engineman from October 1965 to May 1969, where he was exposed to pipe and machinery insulation containing amphibole asbestos. Mr. Cannard now has mesothelioma, a disease associated with inhalation of amphibole asbestos fibers. In fact, Mr. Cannard applied for and received 100 percent disability benefits from the Veteran's

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Administration owing to his disease. Plaintiffs admit Mr. Cannard's inhalation of amphibole asbestos fibers while serving in the Navy was "a cause" of his mesothelioma.

As to Ford Motor Company (Ford), the main fact question is whether Mr. Cannard's mesothelioma was also caused by inhalation of chrysotile asbestos fibers used in automotive head gaskets on gasoline powered truck and automobile engines he refurbished 10 to 13 years after he first inhaled amphibole asbestos fibers in the Navy. As addressed below, plaintiffs have no evidence Mr. Cannard even breathed asbestos fibers from any Ford head gaskets. Even if they are allowed to speculate on that subject, they cannot prove Mr. Cannard developed mesothelioma as a result.

II. SUMMARY OF FACTS

Gregory Cannard was an engineman in the Navy for four years. He worked in close proximity to amphibole asbestos insulation, the manufacturers of which are almost uniformly in bankruptcy and, in any event, not defendants in this action. Epidemiological studies confirm that individuals employed in similar occupations to enginemen in the Navy, have a significantly increased risk of developing mesothelioma. Auto mechanics, to the contrary, are at no increased risk of developing the disease.

Mr. Cannard testified his naval job duties required him to clean up insulation material that was blown down into the bilges of the USS Bradley following repairs to the insulated superchargers on that ship; he would routinely unwrap or break insulation in order to access bolts on valves; insulation dust fell from the ship's pipes when the guns were fired on a nightly basis when the ship was stationed off the coast of Vietnam; he cleaned up dust from insulation material in the engine room; he was in the vicinity of workers removing insulation on the USS Bradley's superchargers; and he worked in the vicinity of the diesel generator on the U.S.S. Mulaney when insulation was removed

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from its exhaust manifold. He also spent six months aboard ship during two overhauls at different naval shipyards on the west coast.

Plaintiffs' experts concede that amphibole asbestos is more toxic and carcinogenic than chrysotile asbestos. As discussed in Navistar's Motion in Limine No. 1 To Exclude the "Every Exposure" or "Every Identified Exposure" Theory of Causation (which Ford joined), science has not determined the threshold of toxicity for chrysotile exposure. What is known is that mesothelioma is a dose response disease and it develops at a much lower inhaled dose of amphibole asbestos fibers than chrysotile asbestos fibers. The experts for both plaintiffs and Ford all agree Mr. Cannard inhaled a sufficient quantity of amphibole fibers during his time in the Navy to conclude his naval exposure alone was a proximate cause of his disease. In other words, if he had never worked at Lomac, they would attribute the development of his mesothelioma solely to his naval service.

Not all Ford head gaskets contained asbestos. If they did, it was chrysotile asbestos encapsulated in gasket material and encased in either a steel or other metal jacket or embedded in a steel mesh. No witness will be able to testify either that Mr. Cannard removed any Ford brand head gaskets from any engine or, even if he did, whether those gaskets contained asbestos.

III. LEGAL ISSUES

A. The Proximate Cause Standard Applies

Mesothelioma is typically discovered when a patient exhibits symptoms. For Mr. Cannard, that was in May 2014—49 years after his first exposure to amphibole asbestos. According to plaintiffs' own experts, the process of inhaling amphibole asbestos fibers, damaging cells and causing cellular mutations that ultimately lead to symptoms, started for Mr. Cannard in May 1965, when he joined the Navy and was first

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exposed to amphibole asbestos. No witness can say whether Mr. Cannard's defense mechanisms against the disease were overwhelmed his first day in the Navy or at some later date. But once they were overwhelmed and the disease process began, all experts agree any additional asbestos exposure—whether amphibole or chrysotile—could not have caused Mr. Cannard's mesothelioma. The ten year gap between Mr. Cannard's first inhalation of amphibole asbestos fibers and his work at the cylinder head department at Lomac, and the six year period from 1969 and 1975 when Mr. Cannard has no "identified" or "biologically significant" exposures to asbestos of any kind compel this Court to apply a proximate cause standard to plaintiffs' claims against Ford. The reasoning flows directly from the same appellate decisions plaintiffs will rely on to argue that a relaxed causation standard—"substantial factor"—applies. Those decisions begin as early as 1991, when the Washington Court of Appeals settled the question when a plaintiff's asbestos injury arises.

Washington law is now settled that a plaintiff's asbestos injury (and claim) arises at the time he or she inhales asbestos fibers. The Court of Appeals decisions that first analyzed this issue dealt with plaintiffs who worked in shipyards and did not claim any other asbestos exposures. The lawsuits were brought against defendants that have since exited the tort system via bankruptcy. In reaching the decisions, the appellate courts stressed that because the asbestos exposures occurred at a single worksite, on a continuous basis, the "injury-producing events could be deemed to have occurred before the effective date of tort reform.

> "Because the harm here results from exposure (**continuous in nature**), it appears that substantially all of the events which can be termed "injury producing" occurred prior to the adoption of the [1981 tort reform] Act." *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 472, 804 P.2d 659 (1991) (emphasis added).

> "Because the harm results from **continuous exposure,** it appears that the injury-producing events occurred before the effective date of the Act."

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> *Krivaneck v. Fibreboard Corp.*, 72 Wn. App. 632, 635 (1993) (emphasis added). *See also Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 34, 935 P.2d 684 (1997) (both asbestos exposure and "tissue changes" that ultimately manifested as mesothelioma occurred prior to effective date of the tort reform act).

None of the cases involve, as this one does, a lapse of at least six years during which there was **no asbestos exposure** attributed as a cause of plaintiff's disease and a lag of a decade between plaintiff's first exposure to amphibole asbestos in the Navy and his first (alleged) exposure to chrysotile asbestos at Lomac.[1] But the issue is the same: when did Mr. Cannard's "injury-producing events" occur? The parties agree they occurred between 1965 and 1969, but Ford disputes that any "injury-producing events" occurred after 1969. And, the facts of this case alter the causation standard applied by Washington courts in asbestos cases involving a single worksite with continuous asbestos exposure.

Understanding the reasoning of *Koker* and *Krivaneck* is important because in *Mavroudis*, the appellate court took the analysis a step further and held that if all of the injury-producing events occur at a single job site, not only does plaintiff's claim arise then, but plaintiff's burden of proving causation is relaxed. *Mavroudis* involved a former member of the United States Navy who developed mesothelioma. 86 Wn. App. at 26-27. While in the Navy, Mr. Mavroudis worked on the "conversion" of the U.S.S. Wright from 1957 to 1963 at Puget Sound Naval Shipyard. *Id.* At trial, plaintiff's expert testified that all of plaintiff's exposure to amphibole asbestos at PSNS from 1957 to 1963 played a role in causing the mesothelioma and, he could not say which asbestos exposures at PSNS actually caused the disease. *Id.* Given that the disease was caused by amphibole asbestos exposure, and in light of the inability to fix which particular asbestos exposure caused mesothelioma, the trial court gave a substantial factor rather than "but

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[1] Neither did the cases involve chrysotile asbestos containing products.

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for" causation instruction. *Id.* at 27-28. The trial court also required, however, the jury to find that the quantity of exposure to any particular defendant's asbestos containing product could have been a sufficient cause of the mesothelioma, standing alone, even if the injury would have occurred without that exposure. *Id.* at 30.

In affirming, The Court of Appeals noted that the causation standard in Washington is normally "but for." *Id.* at 31. And, a change from the but-for to the substantial factor test is "justified only when a plaintiff is unable to show that one event alone was a cause of the injury[.]" *Id.* at 31 (emphasis added) *citing Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985) (declining to apply substantial factor test to attorney malpractice claim). Plaintiff could only show that any one of multiple events could have caused his injury, and it was impossible to show which one event alone caused the injury. Thus, the Court of Appeals agreed with the trial court that the substantial factor standard should be used where any one of several exposures to different asbestos products at plaintiff's worksite could have produced the disease. *Id.* at 31-33. *See also Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 238, 245 n.6 (1987) (Plaintiff who was "employed continuously" for 20 years at same shipyard entitled to the following jury instruction: "If you find two or more causes combine to produce a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about harm, each is charged with responsibility for the harm.")

The *Mavroudis* panel draws heavily upon the Washington Supreme Court's decision in *Hue v. Farmboy Spray, Inc.*, 127 Wn.2d 67, 896 P.2d 682 (1995). In *Hue*, plaintiffs claimed their crops and property were damaged by pesticides applied on other property by wheat farmers, which drifted into Badger Canyon where plaintiffs farmed. Plaintiffs' theory was that the pesticides formed one homogeneous "toxic cloud" that

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caused injury to plaintiffs. The Supreme Court held the trial court correctly instructed the jury that plaintiffs had to prove:

> "that a particular defendant applied the pesticides at issue, a portion of an application drifted and entered Badger Canyon and 'the target drift of *the pesticides* was a **proximate cause** of damage to an individual . . . plaintiff's property or crops within a particular year." *Hue v. Farmboy*, 127 Wn.2d at 91-92 (*quoting* Jury Instructions)(bold added; italics in original).

So too here, and in *Mavroudis*, before plaintiffs are entitled to rely on the substantial factor test, plaintiffs bear the burden of proving that a given "toxic cloud" including asbestos from both the Navy and Lomac was the proximate cause of his injury. Plaintiffs cannot meet that obligation. Lomac was a different worksite than the Navy, and Mr. Cannard worked at the two places years apart—from 1969 to 1975—there was a complete break in Mr. Cannard's exposure to any type of asbestos. Under these circumstances, plaintiffs cannot rely on the substantial factor test to attempt to establish proximate causation based on undifferentiated naval exposures to amphibole asbestos and the Lomac exposures to chrysotile asbestos, if plaintiffs can even prove there were any.

As with the analysis of *Koker, Krivaneck* and *Mavroudis* above, a review of Washington and Ninth Circuit decisions outside the asbestos realm confirms a proximate cause standard applies. The Comment to WPI 15.01 on proximate cause notes that "but for" causation is the general standard in Washington:

> "Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. . . Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." WPI 15.01 (Citations omitted.)

The Washington Supreme Court's definition of proximate cause is:

> "A proximate cause of an injury is defined as a cause which, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred." *Stoneman v. Wick Constr. Co.*. 55 Wn.2d 639, 643, 349 P.2d 215 (1960).

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In 2008, the appellate court reviewed causation standards in a food contamination case: *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn. App. 675, 183 P.3d 1118 (2008). There, plaintiff contended that salmonella poisoning caused her to contract Reiter's syndrome or "reactive arthritis", which is sometimes linked to salmonella poisoning. The hotel defendant conceded that it had served plaintiff fried ice cream that was tied to a salmonella outbreak. It argued, however, that plaintiff could not prove that "but for" the salmonella poisoning, she would not have contracted Reiter's syndrome. Plaintiff argued she should only be required to prove that salmonella was a substantial factor in the development of her condition.

The Fabrique court began its review by noting that the Washington Supreme Court in 1954 rejected the substantial factor test in favor of "but for" causation as the general standard for causation. Fabrique, 144 Wn. App. at 684 (*quoting Blasick v. City of Yakima*, 45 Wn.2d 309, 315, 274 P.2d 122 (1954). Citing the "Note on Use" to WPI 15.02, the Court of Appeals further observed that the substantial factor test has been permitted "only in the narrow class of cases where the 'but for' test of causation is inapplicable." Id. It did not accept plaintiff's argument and affirmed the trial court's grant of summary judgment on causation.

The narrowness of the substantial factor exception to proximate cause is illustrated by the Washington Supreme Court decision in *Mohr v. Grantham*, 172 Wn.2d 844, 852-54, 262 P.3d 490 (2011). There, plaintiff was permanently disabled by a stroke and alleged that negligent treatment by her health care providers diminished her chances of avoiding, or minimizing, the disability. The Court grappled with the "lost chance" doctrine it had first recognized, without the benefit of a majority opinion, in *Herskovits v. Group Health Cooperative of Puget Sound*, 99 Wn.2d 609, 664P.2d 474 (1983). The lead opinion in *Herskovits* would have applied the "substantial factor" test

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to a case involving undiagnosed lung cancer, eliminating the requirement that plaintiff establish "but for" causation that she lost the chance of a cure because of the missed diagnosis. The plurality opinion, to the contrary, simply determined that plaintiff's injury was the lost chance itself. Once plaintiff proved that "but for" the care giver's negligence she lost her chance to avoid injury, the remainder of the inquiry was resolved applying traditional tort concepts, without need to resort to the substantial factor test.

In *Mohr* the Supreme Court specifically rejected the "substantial factor" test in lost chance cases. As had the plurality in *Herskovits*, the Court held that a plaintiff who can show that a medical provider's negligence proximately caused plaintiff to lose his or her chance at avoiding injury, can sustain a cause of action against that provider. The Court reached this conclusion, at least in part, to avoid the "'pressure to manipulate and distort other rules affecting causation and damages in an attempt to mitigate perceived injustices.'" *Mohr*, 172 Wn.2d at 853 *quoting Herskovits*, 99 Wn.2d at 634 (Peason, J., plurality opinion). The *Mohr* Court concluded that the plurality opinion in *Herskovits* avoided the distortion caused by the substantial factor test and was "more analytically sound" than the lead opinion. *Id.*

The Court also noted that Washington Courts generally decline to extend the "substantial factor" exception to other tort claims. *Id.* at 854. As part of this discussion, the Court commented favorably on *Fabrique*, as well as *Daugert v. Pappas*, 104 Wn.2d 254, 704 P.2d 600 (1985), where the Supreme Court refused to apply the substantial factor test to legal malpractice claims. The Court also noted that the Court of Appeals did not extend the "substantial factor" formulation to an "asbestos exposure claim that the plaintiff's risk of cancer was increased." *Id. citing Sorenson v. Raymark Industries, Inc.*, 51 Wn.App. 954, 756 P.2d 740 (1988).

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In *Sorenson* a plaintiff who had asbestosis (caused by asbestos exposure) and pulmonary disease (caused by smoking) argued that he was entitled to present evidence that asbestos exposure was a "substantial factor" in his increased risk of developing lung cancer. The Court determined that the substantial factor test "applies only where the defendant's negligence caused a 'separate and distinguishable harm.'" *Sorenson*, 51 Wn.App. at 957 *quoting Daugert*, 104 Wn.2d at 261-62. Increased risk of developing lung cancer was not such a separate and distinguishable harm.

Here, as in *Sorenson*, plaintiffs' expert on causation, Dr. Brodkin, will testify only that Mr. Cannard's exposure to chrysotile asbestos at Lomac increased his risk of developing the disease. He will not say that the work at Lomac proximately caused Mr. Cannard's disease because he agrees Mr. Cannard's amphibole exposure in the Navy was sufficient to cause the disease, and he cannot conclude that Mr. Cannard's exposure at Lomac was independently sufficient to cause the disease.

In the decision most directly on point, the Ninth Circuit Federal Court of Appeals construed Washington causation law in a case involving exposure to nuclear radiation from the Hanford Nuclear Reservation. *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1010-11 (9th Cir. 2007). There, six bellwether plaintiffs out of a total class of more than 2,000 tried their injury claims to juries, contending that their various injuries were caused by exposure to radiation from Hanford. Two plaintiffs, with thyroid cancer, prevailed at trial and four, who did not have thyroid cancer, did not prevail. Those four appealed. Three of the four non-prevailing plaintiffs had hypothyroidism. The fourth had lung cancer. Among other rulings, plaintiffs appealed the jury instruction requiring plaintiffs to establish "but for" causation as a matter of Washington law. Plaintiffs argued that because other factors, such as smoking and genetics, could also

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have caused their illnesses, the trial court should have given a substantial factor instruction. Id. at 1010.

The Ninth Circuit concluded there are three exceptions to the "but for" standard: "(1) the plaintiff was excusably ignorant of the identity of the tortfeasor who caused his injury; (2) the plaintiff probably would have been injured anyway, but lost a significant chance of avoiding the injury; or (3) the plaintiff has been injured by multiple independent causes, each of which would have been sufficient to cause the injury." *In re Hanford*, 534 F.3d at 1010 (emphasis added and citations omitted).

It is the third exception—injury by multiple independent causes—plaintiffs argued applied. But, to fall under that exception, plaintiffs must satisfy two requirements: First, there must have been multiple causes of the injury; and, second, any one cause alone must have been sufficient to cause the injury. Because plaintiffs could not meet their burden of showing that nuclear radiation alone was sufficient to cause their injuries, their claims failed. The Ninth Circuit refused

> "to expand the substantial factor doctrine and apply the test when there are potentially multiple causes of each plaintiff's injury, such as radiation, smoking, genetics or pregnancy, even though Plaintiffs cannot show that Hanford radiation alone would have been sufficient to cause the injury. [This] reading of Washington law would allow the substantial factor test to supplant but-for causation in virtually all toxic tort cases. Such a result is inconsistent with existing Washington law." *Id.* at 1010-11 (emphasis added).

The Washington appellate decisions all caution that the "substantial factor" exception is a narrow one. Here, as in *In re Hanford*, allowing plaintiffs to proceed on a "substantial factor" theory of causation without also requiring them to prove that "but for" his work at Lomac, Mr. Cannard would not have developed mesothelioma, would allow the substantial factor test to supplant "but for" causation in virtually all toxic tort cases, in direct contrast to the pronouncements of the Washington appellate courts.

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Although plaintiffs' experts will opine that all Mr. Cannard's asbestos exposures were "substantial factors" contributing to the development of his mesothelioma,[2] they will admit that they do not know when the disease began to develop and that it could have begun developing before 1975. Because of the circumstances of Mr. Cannard's two periods of alleged exposure, under the reasoning of *Hue*, there are two distinct possible causes. There is no dispute that the naval exposure could "in a direct sequence, unbroken by any new, independent cause, produce[ ] the injury." *Stoneman,* 55 Wn.2d at 643. Plaintiffs therefore cannot hold Ford responsible for Mr. Cannard's disease without also establishing that the additional exposure at Lomac Motors was **required** for Mr. Cannard to develop mesothelioma. Simply put, plaintiffs should not be permitted to rely on the "substantial factor" test to lump together plaintiff's exposures at different worksites and therefore avoid proving that exposures to particular products were among the injury-producing events that actually caused Mr. Cannard's disease.

B. Plaintiffs Must Prove Dose Was Sufficient to Cause Mesothelioma

Even if the Court applies the substantial factor test, plaintiffs still must prove that Mr. Cannard's inhalation of chrysotile asbestos fibers from Ford head gaskets was sufficient, in and of itself, to cause his disease. Under the substantial factor test, although plaintiffs need not prove the inhalation of chrysotile fibers from Ford head gaskets actually caused Mr. Cannard's disease, they must prove that the inhalation was sufficient **to have caused** the disease. *Mavroudis*, 86 Wn. App. at 30-31; *In re Hanford*, 534 F.3d at 1010.

[2] Ford joined in Navistar's motion to exclude this testimony. As demonstrated by the present motion, the "every exposure" or "every identified exposure" theory of causation is not compatible with either the substantial factor or proximate cause standard for causation.

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C. No Joint and Several Liability

Under RCW 4.22.070(3) as interpreted by *Sofie v. Fireboard,* 112 Wash.2d 636, 771 P.2d 711 (1989), "asbestos" is a "hazardous substance" for purposes of imposing joint and several liability. However, like *Mavroudis* and the other asbestos decisions plaintiffs rely on, *Sofie* involved undifferentiated, continuous exposure to amphibole asbestos. Here, plaintiffs claim a distinct exposure to chrysotile asbestos. As Ford will demonstrate, chrysotile is not "hazardous" in the same way as the types of asbestos materials at issue in *Sofie*, and at the very least is not equally "hazardous" to the materials Mr. Cannard was exposed to during his naval service. *See Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 972, 941 P.2d 1203, 1216 (1997) ("Asbestos products ... have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.") Thus, *Sofie* is distinguishable and should not control whether fault should be apportioned in this case between the naval suppliers, on the one hand, and the Lomac products on the other. Here, the general rule of RCW 4.22.070(1), which reflects a public policy generally favoring proportional fault, should apply. *See generally United States v. Reliable Transfer Co*., 421 U.S. 397, 411 (1975) ("[W]orldwide experience has taught that that goal [of awarding "the 'just and equitable' allocation of damages"] can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible.")

D. Intervening Cause

"Failure to warn" claims in the products liability context apply when plaintiffs can show that the injury in question was proximately caused by a product that was not reasonably safe because adequate warnings or instructions were not provided. *See* RCW 7.72.030(1). In the negligence context, a manufacturer has a duty to warn of

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hazards which are known, or in the exercise of reasonable care should have been known. *Braaten v. Saberhagen Holdings*, 137 Wn. App. 32, 47, 151 P.3d 1010 (2007).

Under both circumstances, plaintiffs bear the burden of proving an employer's failure to warn employees and, where an employer fails to provide warning or safety equipment, that failure can be an intervening cause of the injury. *Little v. PPG Industries, Inc.*, 19 Wn. App. 812, 825, 579 P.2d 940 (1978). Not only does *Little* make the Navy's treatment of Mr. Cannard's work environment while serving in the Navy relevant, given that Mr. Cannard's exposure to Ford products came after implementation of OSHA, whether Lomac Motors failed in its separate duty to provide him a safe work environment is a question for the jury.

E. The Sophisticated User Defense

While working at Lomac, Mr. Cannard, by virtue of his training, employment or education reasonably could be expected to know if hazards (if any) associated with used head gaskets. *See, e.g. Mack v. Gen. Elec. Co.*, 896 F.Supp.2d 333, 335, 343 (E.D. Pa. 2012).

IV. CONCLUSION

For all of the reasons above, Ford Motor Company respectfully requests that the Court apply a proximate cause or but for causation standard to its analysis of causation and require plaintiffs to prove that "but for" his work at Lomac Motors, Mr. Cannard would not have developed mesothelioma. Ford also requests that the Court dismiss plaintiffs' claims against it, or in the alternative direct a verdict in Ford's favor.

Dated: September 4, 2015.

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Certificate of Service

Cannard v. CBS Corporation, et al.

I hereby certify under penalty of perjury of the laws of the state of Washington that I served the attached **FORD MOTOR COMPANY TRIAL BRIEF** on all counsel of record via the Court's ECF system.

Dated: September 4, 2015.

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