COPY 2

S S219534

IN THE SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,
Respondent,

SUPREME COURT
FILED
JUN 25 2014
Frank A. McGuire Clerk
Deputy

PNEUMO ABEX, LLC,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NO. A136378 (CONSOLIDATED W/ A136416)

PETITION FOR REVIEW

HORVITZ & LEVY LLP
*LISA PERROCHET (BAR NO. 132858)
ROBERT H. WRIGHT (BAR NO. 155489)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
rwright@horvitzlevy.com

BRYDON HUGO & PARKER
EDWARD R. HUGO (BAR NO. 124839)
*JAMES C. PARKER (BAR NO. 106149)
JEFFREY KAUFMAN (BAR NO. 48095)
135 MAIN STREET, 20TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 808-0300 • FAX: (415) 808-0333
ehugo@bhplaw.com
jparker@bhplaw.com
jkaufman@bhplaw.com

ATTORNEYS FOR REAL PARTY IN INTEREST
PNEUMO ABEX, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED 2

STATEMENT OF FACTS 6

STATEMENT OF THE CASE 8

A. The pleadings 8

B. The court proceedings 9

LEGAL ARGUMENT 10

A. *Kesner* breaks new ground in holding that employers owe a duty of care to unknown third persons who may come into contact with asbestos toxins that employees carry away from the worksite on their clothing 10

B. Contrary to *Kesner*, several California appellate cases have held there is no duty for property owners or employers to people secondarily exposed 12

1. *Oddone v. Superior Court* (2009) 12

2. *Campbell v. Ford Motor Co.* (2012) 13

3. *Elsheref v. Applied Materials, Inc.* (2014) 18

4. *Haver v. BNSF Railway Co.* (2014) 19

C. Most foreign courts reject any duty in secondary exposure cases 22

D. *Kesner's* legal analysis deepens the confusion and conflict among California courts regarding the scope of duties owed to plaintiffs who allege take-home exposures 26

CONCLUSION 29

CERTIFICATE OF WORD COUNT 31

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Owens-Illinois, Inc.
(1998) 119 Md.App. 395 [705 A.2d 58] 22

Bily v. Arthur Young & Co.
(1992) 3 Cal.4th 370 14

Boley v. Goodyear Tire & Rubber Co.
(2010) 125 Ohio St.3d 510 [929 N.E.2d 448] 24

Cabral v. Ralphs Grocery Co.
(2011) 51 Cal.4th 764 28

Campbell v. Ford Motor Co.
(2012) 206 Cal.App.4th 15 .... *passim*

Chaisson v. Avondale Industries, Inc.
(La. 2007) 947 So.2d 171 25

CSX Transp., Inc. v. Williams
(2005) 278 Ga. 888 [608 S.E. 208] 22

Doe v. Pharmacia & Upjohn Co., Inc.
(2005) 388 Md. 407 [879 A.2d 1088] 22

Elsheref v. Applied Materials, Inc.
(2014) 223 Cal.App.4th 451 .... 3, 18, 19, 21, 29

Haver v. BNSF Railway Co. (June 3, 2014, B246527)
__ Cal.App.4th __ [2014 WL 2466570] .... *passim*

In re Certified Question from Fourteenth Dist. Court of Appeals of Texas
(2007) 479 Mich. 498 [740 N.W.2d 206] 22, 24

Martin v. Cincinnati Gas and Elec. Co.
(6th Cir. 2009) 561 F.3d 439 24

Matter of New York City Asbestos Litig.
(2005) 5 N.Y.3d 486 [840 N.E.2d 115] 23

Nelson v. Aurora Equipment Co.
(2009) 391 Ill.App.3d 1036 [909 N.E.2d 931] 22

Oddone v. Superior Court
(2009) 179 Cal.App.4th 813 .... *passim*

Olivo v. Owens-Illinois, Inc.
(2006) 186 N.J. 394 [895 A.2d 1143] 25

O'Neil v. Crane Co.
(2012) 53 Cal.4th 335 19

Price v. E.I. DuPont de Nemours & Co.
(Del. 2011) 26 A.3d 162, 170 24

Riedel v. ICI Americas Inc.
(Del. 2009) 968 A.2d 17 24

Rochon v. Saberhagen Holdings, Inc.
(2007) 140 Wash.App. 1008 25

Rowland v. Christian
(1968) 69 Cal.2d 108 .... 12, 14, 18, 27, 28

Simpkins v. CSX Corp.
(2010) 401 Ill.App.3d 1109 [929 N.E.2d 1257] 25

Simpkins v. CSX Transp., Inc.
(2012) 358 Ill.Dec. 613 [965 N.E.2d 1092] 25

Van Fossen v. MidAmerican Energy Co.
(Iowa 2009) 777 N.W.2d 689 23

Vasquez v. Residential Investments, Inc.
(2004) 118 Cal.App.4th 269 16

Zimko v. American Cyanamid
(La. 2005) 905 So.2d 465 25

Rules of Court

Cal. Rules of Court, 8.500(b)(1) 5

Miscellaneous

4 Cetrulo, Toxic Torts Litigation Guide (2013) § 33:6 11

Landin et al., *Lesson Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation* (2008) 16 J.L. & Pol'y 589 .... 10, 29

Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation* (2011) 86 Wash. L.Rev. 359 24

Note, *Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Exposure* (2014) 71 Wash. & Lee L.Rev. 707 11

IN THE SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,
Respondent,

PNEUMO ABEX, LLC,
Real Party in Interest.

PETITION FOR REVIEW

ISSUES PRESENTED

1. Does an employer owe a duty of care to persons claiming injury from exposure to asbestos solely through off-site contact with employees who carry asbestos fibers on their work clothing, tools, vehicles or persons?

2. If an employer owes such a duty, is it limited to immediate family members living full-time in the home, or does a duty extend to visitors, guests, or others the employee may come into contact with?

INTRODUCTION:
WHY REVIEW SHOULD BE GRANTED

This case presents a major issue of compelling interest, one that has now divided the courts of appeal: does an employer owe a duty to nonemployees secondarily exposed to toxins taken off premises on the persons, clothing, tools or vehicles of employees? Hundreds of "take-home" exposure cases have been filed in recent years in California, with the number only increasing. Litigants and lower courts need clear guidance regarding the scope of any duty in such cases.

In *Kesner v. Pneumo Abex LLC* (*Kesner*), the First District held, for the first time in a California published opinion, that employers owe a duty in take-home cases, and that this duty exists in favor of anyone (friend, acquaintance, colleague or extended family member) who had "recurring and non-incidental contact with the employer's employee." (Typed opn. 2.) The duty of care extended to plaintiff Johnny Blaine Kesner even though he never once visited defendant Pneumo Abex LLC's plant, and was never a member of an Abex employee's household, but rather was at most a regular visitor to the home of his uncle, one of Abex's employees, who lived 40 miles from the plant. (Typed opn. 3 & fn. 2; see 4 AA 911, 913.)

The extension of a duty of care to nonemployees cannot be reconciled with recently published opinions from different divisions of the Court of Appeal, which themselves take divergent views of the issue:

Oddone v. Superior Court (2009) 179 Cal.App.4th 813, 822-823 (*Oddone*) held that an employer was *not* liable for take-home exposures, on public policy grounds ("imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope").

Campbell v. Ford Motor Co. (2012) 206 Cal.App.4th 15, 34 (*Campbell*) held that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business" (opinion modified by Court of Appeal on denial of rehearing to delete references to whether an employer would have such a duty).

Elsheref v. Applied Materials, Inc. (2014) 223 Cal.App.4th 451, 453-454 (*Elsheref*), followed *Campbell* to find a lack of duty with respect to take-home exposures where a minor asserted a claim against his father's former employer for negligence, after the minor was born with birth defects alleged to have been caused by *in utero* exposures through his father's contact with his mother. But the court held the minor *could* assert a *product liability* claim because the court believed "duty" is not a concept that has any bearing in product cases.

Just one month after *Kesner* found a broad duty to third parties *was* owed by an employer in a take-home situation, *Haver v. BNSF Railway Co.* (June 3, 2014, B246527) __ Cal.App.4th __ [2014 WL 2466570, at pp. *3-*4] (*Haver*) held, in a divided opinion, that "*Campbell*'s conclusion [finding no duty] is consistent with the majority view on the issue of premises liability to third parties based on off-site exposure to asbestos," adding, "We conclude that

BSNF owed no duty of care to [the spouse of defendant's employee]." As noted in *Haver*, the majority view in the United States is *not* to impose a duty on either premises owners *or* employers for take-home exposures. And, even as to those courts that have imposed such a duty, no published decision has ever involved a guest in the employee's home.

The foregoing line of recent opinions reflects no coherent unifying legal principle on the question of duty. If review is not granted in *Kesner*, not only will there remain a split among the courts of appeal, there will rise wave after wave of nonemployees suing employers for alleged exposures to asbestos. Under *Kesner*, anyone with "recurring and non-incidental" contact with an employee may assert a claim; "a long-term guest" in an employee's home has a cause of action, but "persons whose contact with an employer's worker is only casual or incidental" do not. (Typed opn. 2, 11.) Between those extremes lie any number of claimants, the winnowing of which is a task the First District was careful to "not address" but rather leave to the trial courts, and later the appellate courts, who no doubt will now feel the full brunt of the very type of claims that most jurisdictions have ruled inappropriate and potentially overwhelming.

The risk and harm to our society of excessive and uncontrolled litigation should not be underestimated. The fact that so many take-home cases for asbestos exposure alone have resulted in published opinions in just two years speaks volumes. Kesner's own Court of Appeal briefing in this case asserted that the issue was important because of the "many other cases based on similar facts,"

that asbestos litigation "is prevalent," and " 'take-home exposure' cases constitute a significant portion of asbestos civil suits." (PWM 1, 18.) If *Kesner* stands, the door is open for any person with mesothelioma to seek redress from the employer of any friend or relative that the person regularly visited—even though the consensus among defense and plaintiffs' experts alike is that mesothelioma can and does occur spontaneously in a significant number of people without any occupational asbestos exposure, so any claimed link to minute take-home exposures is tenuous at best. Vigorous and creative plaintiffs' attorneys have been extending asbestos litigation in such fashion for decades now, and there is no reason to think limits will ever be self-imposed.

Moreover, there is no reason to think the *Kesner* holding will be available only to mesothelioma victims. It will no doubt extend to plaintiffs claiming lung cancer and other diseases. The *Kesner* opinion itself noted that chemicals, fumes and toxins other than asbestos will be implicated by the ruling. (Typed opn. 9.) And not just California employers could be subject to the *Kesner* rule, but any employer anywhere hailed into a California court, such as Abex here, even if their plant or worksite sits in a jurisdiction where that employer legally has no duty, or a limited duty, for take-home exposures.

The First District has immeasurably expanded the scope of an employer's duty, in direct conflict with prior California law and that of other jurisdictions. These issues more than satisfy the requirements of California Rules of Court, rule 8.500(b)(1)—"to

secure uniformity of decision," and "to settle an important question of law." Respectfully, Abex requests that this Court accept review.

STATEMENT OF FACTS

In 1972, at age 10, Kesner and his mother moved to Romney, West Virginia, where Kesner's aunt and uncle, Francis and George, lived. (4 AA 911-912.) As a child, Kesner visited his uncle George's home once or twice a week, and as a teenager three or four times a week; after he joined the Navy in 1979, he would visit on furloughs. (4 AA 1066, 1070-1071.) "[E]very once in a while" Kesner would sleep over. (4 AA 915.) His uncle was not always present. He would typically see his uncle in the mornings before heading out to school. They would occasionally hunt, ride motorcycles, play football and softball, roughhouse, take rides in George's car, and have breakfast. (4 AA 914-915, 1071, 1073.) He rode in his uncle's car once a week. (4 AA 915.) He did not launder his uncle's clothes. (4 AA 1069.)

Beginning in 1973, George worked at Abex's Winchester, Virginia plant. (4 AA 1058.) Kesner, however, was never employed by Abex and never once visited the Winchester plant, located over 40 miles from Romney across the state line. (4 AA 911, 913.) Kesner never worked with or around any Abex brake linings or other product made at that plant.

The Winchester plant manufactured automotive brake linings, some of which incorporated chrysotile asbestos. (4 AA 932, 1058.) Beginning in the early to mid-1970's, shortly after the

advent of the Occupational Safety and Health Administration (OSHA) and following the increasing concerns about potential health hazards of asbestos, Abex placed caution labels concerning asbestos on the packaging of its brake lining products. (4 AA 932-933, 937, 955-956.)

Shortly after he began working at Abex, George came to understand that exposure to asbestos could be a health hazard. (4 AA 1075.) At some point in the 1970's, Abex provided George and all other Winchester employees a written booklet describing in detail the potential health hazards of asbestos. (*Ibid.*) George recalled his foreman at the time handing him the booklet but George refused to sign the signature flap acknowledging receipt. (*Ibid.*) Later, Abex again handed out the booklet but George again refused to sign a receipt acknowledging it had been provided. (4 AA 1075-1076.) George nonetheless kept the booklet until he left Abex's employment in 2007. (4 AA 1076.)

George agreed the Winchester plant had showers available for employees to use; he also understood he could change clothes before going home. (4 AA 1065, 1078.) Though he rarely did change his clothes before going home, he always dusted himself off as best he could and upon arriving home he always removed his shoes before entering the home. (4 AA 1065-1066.) His clothes would be "a little bit" dusty. (4 AA 1066.) George's wife, Francis, laundered George's work clothes. (4 AA 1069.)

Abex regularly swept and dusted the plant using manual and automated equipment. (4 AA 1079-1080.) George was aware air samples were taken regularly, OSHA inspected the plant, and Abex

was never cited for any excessive dust violations. (4 AA 1080.) Abex maintained an industrial hygienist department and conducted its own regular air samplings of the Winchester plant looking for any excessive levels of asbestos. (4 AA 1094-1095.) Dust levels were generally below those mandated by federal regulations and Abex took numerous dust suppression steps starting well before George's employment began. (4 AA 1099.) Overall, George liked Abex and spent four decades working at the Winchester plant. (4 AA 1081.)

In early 2011, Kesner was diagnosed with peritoneal mesothelioma.

STATEMENT OF THE CASE

A. The pleadings

Kesner filed his complaint in 2011, against 19 defendants, including Abex. (5 AA 1218-1219, 1230.) The list of defendants included manufacturers of pumps, turbines, oil purifiers, generators, and other industrial and shipboard machinery or supplies, as well as a ship builder, suppliers of raw asbestos fiber, repair and decking contractors, and insulation suppliers and contractors. (5 AA 1218-1219.)

The complaint asserted that Kesner himself handled or used the defendants' asbestos-containing products, the products were defective, had not been tested or researched, defendants "knew or should have known that the asbestos dust would be generated and

released from their asbestos-containing products during the regular and intended uses of such asbestos products," and had not warned Kesner. (5 AA 1220-1225.) The complaint contained no allegations concerning Abex's plant or secondary "take-home" exposures.

By the time of trial, Abex was the sole remaining defendant. (Typed opn. 3.) Kesner had originally alleged three causes of action: negligence, breach of warranties, and strict liability. (5 AA 1215, 1220, 1226, 1227.) The latter two causes of action were summarily adjudicated in favor of Abex because Kesner did not claim, and had no evidence of, any exposure to any product placed in the stream of commerce by Abex. Kesner has not challenged the grant of summary adjudication, nor does he dispute that his only cause of action against Abex is the one that had evolved by the time of trial to assert negligence based on a claim of take-home exposure from his uncle's work at Abex.

B. The court proceedings

Shortly before trial was to commence, the Court of Appeal issued its opinion in *Campbell, supra,* 206 Cal.App.4th at page 34, holding that a duty of care did not extend from premises owners to family members of workers. Whether *Campbell* precluded imposing a duty of care on Abex for take-home exposures came to the trial court in the form of a nonsuit motion. (6/27/12 RT 4-8.) On June 28, 2012, the trial court granted Abex's motion, ruling that "Abex owed no duty to Kesner for any exposure to asbestos through contact with an employee of the Abex plant in Winchester,

Virginia." (5 AA 1269-1270.) A judgment on the nonsuit was entered. (5 AA 1273.)

Kesner timely filed a notice of appeal and a petition for writ of mandamus. (5 AA 1274-1280.) The Court of Appeal, Division Three, consolidated the appeal with the writ proceedings.

On May 15, 2014, the Court of Appeal issued its opinion, reversing the judgment.

LEGAL ARGUMENT

A. *Kesner* breaks new ground in holding that employers owe a duty of care to unknown third persons who may come into contact with asbestos toxins that employees carry away from the worksite on their clothing.

More than a dozen jurisdictions across the country have addressed whether employers and landowners owe a duty to persons secondarily exposed to asbestos or other toxins that were carried off premises by employees. The courts in a majority of those jurisdictions have found no duty should be imposed for such take-home or secondary exposures. (See Landin et al., *Lesson Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation* (2008) 16 J.L. & Pol'y 589, 624-625.)

The majority view includes employers or property owners, though most cases have involved employers. As noted in *Haver*, " 'Under the emerging majority view, the court dismisses the suit,

holding that an employer can have no legal duty to an employee's spouse who never stepped foot inside the employer's facility.' " (*Haver, supra,* __ Cal.App.4th __ [2014 WL 2466570, at p. *3], quoting 4 Cetrulo, Toxic Torts Litigation Guide (2013) § 33:6, fn. omitted).

"[T]he courts are also wary of the consequences of extending employers' liability too far, especially when asbestos litigation has already rendered almost one hundred corporations bankrupt." (Note, *Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Exposure* (2014) 71 Wash. & Lee L.Rev. 707, 710, fns. omitted.)

Kesner is the first published opinion in California to impose a duty on an employer for secondary exposures, and the only appellate court in the country to have extended a duty in favor of a guest in an employee's home. As we discuss below, California law is now in conflict as to whether the burdens of imposing a duty for third parties' alleged off-site exposures are too great, especially in comparison to any minimal foreseeability of latent harm to those third parties, to justify imposition of a duty of care.

B. Contrary to *Kesner*, several California appellate cases have held there is no duty for property owners or employers to people secondarily exposed.

1. *Oddone v. Superior Court* (2009)

In *Oddone*, the plaintiff claimed employer-defendant Technicolor was liable for take-home exposures from toxic vapors and chemicals her employee-husband absorbed on his work clothes and continually brought home from his employment starting decades earlier. The trial court sustained Technicolor's demurrer without leave to amend.

On appeal, the court noted that no prior reported California decision had extended liability for take-home or secondary exposures. (*Oddone, supra*, 179 Cal.App.4th at p. 820.) The court applied the factors outlined in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) to determine if there was any duty owed by Technicolor to its employee's spouse. The court recognized the endlessly expansive burden such a new duty would place on employers:

> [I]t is hard to draw the line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed. Including "all family members" into the former category would be too broad, as not all family members will be in constant and personal contact with the employee. Limiting the class to spouses would be at once too narrow and too broad, as others may be in contact with the employee and spouses may not invariably be in contact with the

> employee. Limiting the class to those persons who have frequent and personal contact with employees leaves at large the question what "frequent" and "personal" really means. This is only a sampling of the problem.

(*Oddone, supra*, 179 Cal.App.4th at p. 822.)

The court concluded that imposing a duty towards non-employee persons would saddle the defendant employer with an uncertain but potentially very large burden, with untoward consequences to the community in paying for the costs of insuring against such "potentially massive" liability. "[I]n a less than perfect world it appears to make more sense to look to the nonemployee person's insurance to cover the risk. In the normal course of events, such insurance will be already in place and its cost is not likely to be influenced by the risk created by the employer's conduct." (*Oddone, supra*, 179 Cal.App.4th at p. 823.)

2. *Campbell v. Ford Motor Co.* (2012)

Two years ago, in *Campbell,* the court followed *Oddone* in refusing to impose a duty based on claimed take-home exposures. In *Campbell,* plaintiff Eileen Honer developed plural mesothelioma in part, she claimed, from take-home exposures to asbestos over a seven-year period starting in the mid-1940's, when she was 11 or 12, from her father and brother, who both worked with and around asbestos-containing products. Between 1947 and 1948, Honer's father and brother worked as insulators for an independent contractor hired by Ford Motor Company in the construction of a Ford Motor Company Lincoln-Mercury plant in New Jersey, and

"were exposed to asbestos-containing products which caused their clothing, bodies, vehicles and tools to be contaminated with great quantities of respirable asbestos fibers." (*Campbell, supra,* 206 Cal.App.4th at p. 20.) Plaintiff was in turn exposed to the fibers through contact with her father and brother "as well as their clothing and other belongings." (*Ibid.*)

The Court of Appeal addressed "whether a premises owner has a duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business." As in *Oddone,* the answer was no: "Our examination of the *Rowland* factors leads us to the conclusion Ford owed Honer no duty of care." (*Campbell, supra,* 206 Cal.App.4th at p. 29, referring to *Rowland.*)

A fundamental element of any cause of action for negligence is the existence of a legal duty of care running from the defendant to the plaintiff. The existence and scope of any such duty are legal questions for the court. "[D]uty is not an immutable fact of nature but only an expression of the sum total of those *considerations of policy* which lead the law to say that the particular plaintiff is entitled to protection." (*Campbell, supra,* 206 Cal.App.4th at p. 26, internal quotation marks omitted.) "The element of a legal duty of care generally acts to limit the otherwise potentially infinite liability' that would otherwise flow from every negligent act." (*Id.* at p. 31, quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397, internal citations and quotation marks omitted.)

Campbell quoted with approval the rationale expressed by the court in *Oddone,* which rationale applies equally to premises and

employer defendants: " 'The gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope. One of the consequences to the community of such an extension is the cost of insuring against liability of unknown but potentially massive dimension. Ultimately, such costs are borne by the consumer. In short, the burden on the defendant is substantial and the costs to the community may be considerable.' " (*Campbell, supra,* 206 Cal.App.4th at p. 33, quoting *Oddone, supra,* 179 Cal.App.4th at p. 822.)

In cataloging foreign authorities, the court treated alike cases dealing with premises owners and employers. It stated:

> We note that, in recent years, a number of other jurisdictions have confronted the issue of liability in secondary or "take-home" exposure cases, and their rulings are generally split into two categories: (1) those focusing on the foreseeability of the harm to the plaintiff resulting from the premises owner's or employer's failure to take protective measures (and finding a duty), and (2) those that focus on the (absence of a) relationship between the premises owner/employer and household member among other policy concerns.

(*Campbell, supra,* 206 Cal.App.4th at p. 33.)

Campbell concluded that, under California law, a property owner owes no duty to third parties for take-home exposures.

In *Kesner*, the First District generally agreed with *Campbell's* assessment that "foreseeability" and "extent of burden" to the defendant "have evolved to become the primary factors" in California whether to create a duty. (Typed opn. 7; *Campbell,*

supra, 206 Cal.App.4th at p. 33, citing *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 280, fn. 5.) The *Kesner* court also agreed with "the conclusion in *Campbell* that . . . a *landowner* owes no duty of care to those coming into contact with persons whose clothing carries asbestos dust from the landowner's premises." (Typed opn. 7, emphasis added.) But the *Kesner* court sought to distinguish *Campbell* on the ground that the premises liability claim asserted in *Campbell* "was based on Ford's *passive* involvement as owner of the plant in which an independent contractor was installing asbestos insulation." (Typed opn. 7, emphasis added.)

However, Ford was hardly passive. "Ford took possession of the property during the last three or four months Honer's brother worked there. Ford's own construction contracts called for the use of asbestos insulation and a Ford employee regularly checked on the progress of the insulation work." (*Campbell, supra,* 206 Cal.App.4th at p. 21.) The jurors were instructed to consider all of Ford's conduct, including an instruction explaining that plaintiff's claim was that Ford "*managed* this property"; that Ford "*was negligent in the use or maintenance of the property.*" The court further instructed the jury that "[a] person that owns property must use reasonable care *to discover[ ] any unsafe conditions and to repair, replace or give adequate warning of anything that could be reasonably expected to harm others,*" and that liability could be found if Ford knew or should have known about an unreasonable risk of harm, yet "failed to repair the condition, protect against the harm from the condition, or give adequate warning of the

condition." (*Id.* at p. 22, emphasis added.) The claim was thus based on Ford's active role in investigating, managing and maintaining its property.

In any event, the passive or active nature of Ford's involvement in the construction of its plant was neither characterized nor considered by the *Campbell* court. Rather, what weighed most heavily against imposing a duty were the extent of the burden to the defendant and the consequences to the community. As noted by *Campbell*, the principal difficulty with these factors is trying to draw a line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed. The relationship of third persons to the employee may have no bearing on the likelihood of being secondarily exposed. The categories of people potentially exposed could be enormous, including not only spouses and family members, but also fellow commuters, people performing laundry services, and more. Even among family members there is no rational line that can be drawn. (*Campbell, supra,* 206 Cal.App.4th at pp. 32-33.)

Notably, the *Kesner* court made no attempt to distinguish *Oddone,* which involved an employer defendant. Instead, *Kesner* simply reached the opposite conclusion as to the weighing of competing policies—setting up a direct conflict in the law. (See typed opn. 10.)

3. *Elsheref v. Applied Materials, Inc.* (2014)

In January of this year, the Sixth District Court of Appeal decided *Elsheref*. In that case, a minor and his mother sued his father's former employer for negligence after the minor was born with birth defects. (*Elsheref, supra,* 223 Cal.App.4th at pp. 453-454.) Plaintiffs alleged the defects were caused by the father's exposure to toxic chemicals at work.

Because the defendant allegedly had knowledge of the potential harmful consequences of secondary exposures due to its conduct, several of the *Rowland* factors (including the moral blame factor and the protection against future harm factor) weighed in favor of imposing a duty. The "remaining factors[,]" however, "weigh[ed] more strongly against a finding of duty." (*Elsheref, supra,* 223 Cal.App.4th at pp. 460-461.) The Court of Appeal found it compelling that there "was not a 'close' connection between [the defendant's] conduct and [the plaintiff's] injuries." (*Id.* at p. 460.) Rather, all of the defendant's "allegedly culpable conduct . . . relate[d] to its treatment of [the plaintiff's] *father* . . . ." (*Ibid.*, emphasis added.) After considering all of the *Rowland* factors, and relying in part on *Oddone,* the court concluded *"a common law duty of care should not be imposed on [the defendant]."* (*Id.* at p. 461, emphasis added.)[1]

---

[1] Oddly, the Court of Appeal did allow plaintiffs' strict liability claim to proceed on the ground that "Duty Is Not an Element of Plaintiffs' Strict Products Liability Claim." (*Elsheref, supra,* 223 Cal.App.4th at p. 463, emphasis omitted.) Of course, this court,

(continued...)

Kesner bypassed the *Elsheref* holding entirely, not citing to the opinion at all.

4. *Haver v. BNSF Railway Co.* (2014)

Shortly after *Kesner* was decided in May of this year, Division Five of the Second District issued its divided opinion in *Haver*. *Haver* involved a wrongful death action in which the complaint alleged that Lynn Haver contracted mesothelioma as a result of coming into contact with her husband Mike's clothing, tools, vehicles and general surroundings in the 1970's while Mike was employed by defendant's predecessor, the Santa Fe Railroad. The trial court sustained the demurrer without leave to amend, based on *Campbell*.

On appeal, plaintiff argued *Campbell* was factually distinguishable and/or wrongly decided. Whereas in *Campbell* the

---

(...continued)
along with numerous others, have recognized that duty *is* an element of a strict liability claim. (E.g., *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 348, 362 ["in strict liability as in negligence," duty must be evaluated based on public policy factors beyond foreseeability; holding "defendants had no duty to warn of risks arising from *other manufacturers'* products"].) And *Elsheref* was not, in any event, a case arising out of a manufacturer's sale or distribution of a product, because the alleged exposures occurred during the manufacturing process, and not during use of a product sold in the stream of commerce. *Elsheref*'s duty analysis as to strict liability is not in play here, because as noted, no claims of product liability remain against Abex in this case. But the opinion reveals yet further confusion about the scope of any duty that may be owed in take-home cases.

plaintiff's father and brother insulators had worked for an independent contractor in the construction of a Ford plant, Mike Haver was a direct employee of the Santa Fe Railroad. The *Haver* court's majority opinion did not find that distinction of any moment, noting that *Campbell* framed the issue as " 'whether a premises owner has a duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business.' " (*Haver, supra,* __ Cal.App.4th __ [2014 WL 2466570, at p. *2], quoting *Campbell, supra,* 206 Cal.App.4th at p. 29.) In the view of the *Haver* majority, the term "workers" as used in *Campbell* "includes those employed by the property owner, as well as those employed by independent contractors to work on the premises of the owner." (*Haver*, at p. *2.) The majority correctly characterized *Campbell* as "consistent with the majority view on the issue of premises liability to third parties based on off-site exposure to asbestos." (*Id.* at p. *3.) In fact, the majority view is that employers, not just premises owners, owe no such duty.

Haver's discussion of *Kesner* further complicates the picture, demonstrating the lack of a unifying principle underlying California duty law in the take-home exposure context as it now stands. *Haver* sought to harmonize its holding with *Kesner*'s on the understanding—which is incorrect—that "the cause of action in *Kesner* is for products liability."[2] (Typed opn. 1.) In fact, *Kesner* is

---

[2] Even if that had been true, it would provide merely another reason for this Court to grant review—to consider whether the rule allowing or excluding a duty to prevent injury from alleged take-
(continued...)

not a strict products liability case, or even a negligent products liability case: all product liability claims were summarily adjudicated and dismissed as against Abex. Kesner himself has never contended that he was exposed to any product sold by Abex. Kesner is, in fact, proceeding solely on a negligence claim arising out of Abex's management of the working environment at its plant, the same scenario as in *Oddone, Campbell, Elsheref* and *Haver*.

Thus, all of these cases together present the following critical question: if a *property owner/employer* does not owe a duty for off-premises secondary exposures, why would a *property owner/employer* who also happens to be a manufacturer (as in *Kesner*) owe a duty, especially in a case that does not include a product liability claim? The cases reveal no sound basis for a distinction. The dissent in *Haver* confusingly said that the majority "attempts to distinguish *Kesner* on the basis that *Kesner* is not a premises liability case but a negligence case." (*Haver, supra*, __ Cal.App.4th __ [2014 WL 2466570, at p. *4] (dis. opn. of Mink, J.).) The significance of any such distinction is unclear. The highly unusual depth of confusion concerning this growing trend of take-home cases warrants review by this Court.

(...continued)
home exposures should be framed in terms that apply equally to manufacturers as well as to premises owners and employers.

C. Most foreign courts reject any duty in secondary exposure cases.

Courts and commentators across the country have found that extending an employer's liability to an employee's family would necessarily create "a potentially limitless pool of plaintiffs." (*In re Certified Question from Fourteenth Dist. Court of Appeals of Texas* (2007) 479 Mich. 498 [740 N.W.2d 206, 220] (*In re Certified Question*).) Representative cases include:

- *Adams v. Owens-Illinois, Inc.* (1998) 119 Md.App. 395 [705 A.2d 58, 66] [no duty owed to others who come into contact with employee, thus no duty to wife who handled husband's clothes];
- *CSX Transp., Inc. v. Williams* (2005) 278 Ga. 888 [608 S.E. 208, 210] [refusing to extend "employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace"];
- *Doe v. Pharmacia & Upjohn Co., Inc.* (2005) 388 Md. 407 [879 A.2d 1088, 1096] [imposition of duty "would create an indeterminate class of potential plaintiffs"; plaintiff suggested limiting duty to spouses, but court refused to find even that limited duty];
- *Nelson v. Aurora Equipment Co.* (2009) 391 Ill.App.3d 1036 [909 N.E.2d 931, 934] [noting concern that imposition of duty "would create a limitless number of potential

plaintiffs, as literally anyone who came in contact with [the] work clothes could be exposed"];

- *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 699 [power plant owed no general duty of reasonable care to wife of independent contractor's employee; expansion of duty to spouses of employees would "justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a Laundromat. We conclude such a dramatic expansion of liability would be incompatible with public policy, and therefore reject it."];
- *Matter of New York City Asbestos Litig.* (2005) 5 N.Y.3d 486 [840 N.E.2d 115, 122] [holding an employer's duty to provide a safe workplace is limited to employees, and defendant's duty did not extend to an employee's wife; rejecting plaintiffs' argument that any new take-home duty may be confined to members of the employee's household because that "line is not so easy to draw," given that people who are not residents in the home (such as child care workers and those at establishments charged with laundering the employee's clothes) may have at least as great a potential for secondary exposure as some immediate family members];

- *In re Certified Question*, *supra*, 740 N.W.2d at p. 220 [imposition of a duty to nonworkers could lead to lawsuits against " 'countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes' "; holding a property owner did not owe deceased, who was never on or near the property, a duty to protect her from asbestos fibers carried home on the clothing of a family member].[3]

To counter the widespread concern about liability that reaches far beyond any employer's or premises owner's expectations about claims by plaintiffs with whom they have no business or other relationship, some commentators have suggested limiting any duty of care to plaintiffs who were the employee's immediate family members, living full-time in the same household. (See Levine,

---

[3] See also *Riedel v. ICI Americas Inc.* (Del. 2009) 968 A.2d 17, 27 [employer has no duty to wife of employee exposed to husband's clothes]; *Price v. E.I. DuPont de Nemours & Co.* (Del. 2011) 26 A.3d 162, 170 [wife could not state a claim in negligence against her husband's employer for disease allegedly resulting from exposure to husband's clothes]; *Boley v. Goodyear Tire & Rubber Co.* (2010) 125 Ohio St.3d 510 [929 N.E.2d 448, 453] [premises owner not liable in tort for claims arising from asbestos exposure originating from the owner's property unless exposure occurred at the owner's property; decision based on statute]; *Martin v. Cincinnati Gas and Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 447 [premises owner owed no duty to employee's son because injury from take-home exposure was not reasonably foreseeable].

Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation (2011) 86 Wash. L.Rev. 359, 392.) A few courts have adopted that approach. (E.g., *Zimko v. American Cyanamid* (La. 2005) 905 So.2d 465, 482-483 [where plaintiff claimed take home exposures through his father, the court imposed a duty of care on the employer, but in light of the lack of precedent and "the novelty of the duty" it created, the court limited the duty to "household members" of the defendant's employees]; *Simpkins v. CSX Corp.* (2010) 401 Ill.App.3d 1109 [929 N.E.2d 1257, 1266] ["we decide today only that employers owe the immediate families of their employees a duty to protect against take-home asbestos exposure"], appeal allowed (Ill. 2010) 238 Ill.2d 675 and aff'd but criticized *sub nom. Simpkins v. CSX Transp., Inc.* (2012) 358 Ill.Dec. 613 [965 N.E.2d 1092]; *Olivo v. Owens-Illinois, Inc.* (2006) 186 N.J. 394 [895 A.2d 1143, 1149] [imposing a duty limited narrowly to "spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing"]; *Chaisson v. Avondale Industries, Inc.* (La. 2007) 947 So.2d 171, 200 [finding employer owed duty to employee's wife for take home asbestos exposures, but clarifying that the duty was based on "the facts and circumstances of this case," was not "a categorical duty rule," and was limited to a spouse exposed "from laundering her husband's work clothes"]; *Rochon v. Saberhagen Holdings, Inc.* (2007) 140 Wash.App. 1008 [wife of employee could attempt to state a claim based on general negligence for take-home exposure from laundering husband's clothes].)

This survey of cases nationwide further demonstrates that review should be granted to decide whether California should decline to recognize any take-home duty at all (as the majority of courts to consider the issue have done), or to recognize a limited duty that would nonetheless require dismissal of the plaintiff's action here (as a minority of courts have done), or to recognize a broad duty to anyone who had not-inconsequential contact with someone in direct contact with asbestos or other toxins (as only *Kesner* has done).

D. *Kesner*'s legal analysis deepens the confusion and conflict among California courts regarding the scope of duties owed to plaintiffs who allege take-home exposures.

The reasons given by the Court of Appeal for distinguishing this case from *Campbell* do not withstand analysis, and demonstrate the need for guidance from this court. In particular, *Kesner*'s active-passive distinction—imposing a duty on a defendant as to unknown third parties so long as the defendant is accused of "active" negligence—sets up an unworkable test for liability. *Kesner* says that Ford, as the premises owner responsible for maintaining a safe environment on its property, was "passive" (and owed no duty), while Abex, as the premises owner responsible for maintaining a safe environment in the workplace was "active" (and owed a duty). Both had the duty to use reasonable care in the use of their premises, and both allegedly had knowledge during the relevant

time frame that exceedingly low-dose chrysotile exposures could pose a potential risk of harm (a debatable scientific proposition at best). Further, the *Campbell* court specifically said its "analysis does not turn on" the distinction between Ford hiring the workers or an independent contractor doing so. (*Campbell, supra,* 206 Cal.App.4th at p. 31, fn. 6.) Indeed, no other case in the country has drawn a distinction between employers and landowners in deciding duty, regardless of which way it was decided.

The *Kesner* opinion recognized that the " '*Rowland* factors are evaluated at a relatively broad level of factual generality. . . . [T]he court's task in determining duty "is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct . . . ." ' " (Typed opn. 5, emphasis omitted.) Review is essential to determine whether and how a test based on distinguishing active from passive conduct can be applied without delving into a high degree of factual specificity.

That question arises not only with employers making asbestos-containing products, or employers using toxic chemicals; it will arise with all employers and all landowners. Anything that can be conveyed off the property and cause harm to others could be a basis for suing the employer or landowner. For example, if a worker takes his tools home and, while not in the course of his employment, he or someone he knows "foreseeably" uses the tools and is injured, does the employer owe a duty to the injured person? A finding of duty here will open the door to an effort to tie back many injuries to a "deep pocket" employer or landowner. The issue thus must be viewed from a higher level than *Kesner* uses.

Finally, *Kesner* evaluates the element of foreseeability based on fact-specific (and highly contested) *assumptions* about the state of employers' understanding in the 1970's and 1980's as to low-dose chrysotile exposures that were not at the time linked to any increased risk to occupationally exposed bystanders, much less family members with no occupational exposure. The court expressed its belief that, "[a]s a general matter, harm to others resulting from secondary exposure to asbestos dust is not unpredictable."[4] (Typed opn. 8.) The court further suggested that the *Rowland* factors must be applied to each individual claim, based on "inconsequential" or "not inconsequential" contact with the employee, to see if there is a "different balance" to be found. (Typed opn. 11.) This is precisely the kind of fact-specific analysis that this Court has held should not be undertaken. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772-773 (*Cabral*).)[5]

In contrast, examining the question from a more appropriate level of factual generality, the *Campbell* opinion observed that "the

---

[4] The court should have evaluated predictability and foreseeability at the time of the alleged exposures. But even today, the court's unqualified assumption about non-occupational exposure risk is flawed: the weight of the scientific evidence is that full-time automotive mechanics are *not* at an increased health risk from working with automotive friction products, such as the brake linings Abex manufactured—which further demonstrates the shaky foundation for the approach adopted by the court in *Kesner*.

[5] This court in *Cabral* also said, "Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed *unforeseeable*." (*Cabral*, *supra*, 51 Cal.4th at p. 779.)

'closeness of connection' between Ford's conduct in having the work performed and the injury suffered *by a worker's family member* off the premises" is attenuated. (*Campbell, supra,* 206 Cal.App.4th at p. 31.) That is particularly true if one looks at the issue without considering the fact-specific element of knowledge, which not all types of employers (or landowners) will have in all time periods and all scenarios in which the issue can arise.

Review is necessary to evaluate the interplay between the parties' respective arguments about foreseeability on one hand, and the comparative burden on employers as a class, and on society on the other hand, should liability for alleged take-home exposures be imposed.

CONCLUSION

Five years ago *Oddone* became the first reported California decision to address the duty of an employer to nonemployees in take-home exposure cases. Two years ago, *Campbell* held that " 'tort law must draw a line between the competing policy considerations of providing a remedy to everyone who is injured and of extending tort liability almost without limit.' " (*Campbell, supra,* 206 Cal.App.4th at p. 34, quoting Landin, *supra,* 16 J.L. & Pol'y at pp. 624, 626.) This year, *Elsheref, Kesner* and *Haver* drew the duty line at different points for similarly situated defendants, using a variety of rationales. In light of the divergent analyses among the cases addressing take-home exposure liability, the state of the law

in California is in dire need of clarification. This Court should grant review.

June 24, 2014

HORVITZ & LEVY LLP
LISA PERROCHET
ROBERT H. WRIGHT
BRYDON HUGO & PARKER
EDWARD R. HUGO
JAMES C. PARKER
JEFFREY KAUFMAN

Attorneys for Real Party In Interest
PNEUMO ABEX, LLC

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 7,031 words as counted by the word processing program used to generate the petition.

Dated: June 24, 2014

Robert H. Wright

Filed 5/15/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JOHNNY BLAINE KESNER, JR., Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; PNEUMO ABEX LLC, Real Party in Interest.	A136378 (Alameda County Super. Ct. No. RG11578906)
JOHNNY BLAINE KESNER, JR., Plaintiff and Appellant, v. PNEUMO ABEX, LLC, Defendant and Respondent.	A136416

Johnny Blaine Kesner, Jr., appeals following the grant of a motion for nonsuit in favor of Pneumo Abex, LLC (Abex). Kesner's uncle was employed by Abex from 1973 to 2007. Kesner seeks to hold Abex liable for mesothelioma he contracted, allegedly due in part to his exposure, while present in his uncle's home, to friable asbestos that his uncle brought home from work on his clothing. In granting nonsuit in Abex's favor, the trial court, relying on the decision in *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 (*Campbell*), concluded that "Abex owed no duty to Kesner for any exposure to asbestos through contact with an employee of the Abex plant, . . . none of which exposures took place at or inside Abex's plant."

In defending the ruling, Abex contends that "no duty is owed [by an employer] to family members of workers for take-home exposures." We do not believe that such a broad and unqualified limitation on an employer's duty accurately states the law. We accept the premise that the prospect of "indeterminate liability" places a limitation on those to whom the duty of exercising reasonable care may extend. (E.g., *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 392.) We also recognize the difficulty in articulating the limits of that duty and the different conclusions that courts throughout the country have reached when considering claims for secondary exposure to toxics, particularly asbestos, emanating from the workplace.[1] The duty of care undoubtedly does not extend to every person who comes into contact with an employer's workers, but we conclude that the duty runs at least to members of an employee's household who are likely to be affected by toxic materials brought home on the worker's clothing. While Kesner was not a member of his uncle's household in the normal sense, he was a frequent visitor, spending several nights a week in the home. After consideration of the factors specified in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*), as instructed by our Supreme Court in *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 (*Cabral*), we conclude that the likelihood of causing harm to a person with such recurring and non-incidental contact with the employer's employee, in this case Kesner's uncle, is sufficient to bring Kesner within the scope of those to whom the employer, in this case Abex, owes the duty to take reasonable measures to avoid causing harm.

BACKGROUND

Kesner was diagnosed with perotineal mesothelioma in February 2011. He filed suit against a number of defendants, including Abex, to recover damages for his injuries. His complaint alleges causes of action for negligence, breach of express and implied

---

[1] See Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation* (2011) 86 Wash. L.Rev. 359, 360, and the cases cited therein; see also, more recently, *Clair v. Monsanto Co.* (Mo.App. 2013) 412 S.W.3d 295.

warranties, and strict products liability arising from his contact with asbestos manufactured or supplied to him as a worker or end user.

Kesner's claims were resolved against all other defendants, all of which apparently were companies (or their successors) for which Kesner was himself employed and exposed to asbestos at their premises. Kesner's remaining claim against Abex is based on the fact that Kesner's uncle was an Abex employee who allegedly was exposed to harmful levels of asbestos in his job. Between 1973 and 1979 Kesner was a frequent guest in his uncle's home, and often spent the night there.[2] The uncle allegedly came home in his work clothes covered in asbestos dust. While he was still in his work clothes, Kesner's uncle would often play with Kesner and sometimes sleep near him. Kesner alleges that his exposure to the asbestos dust on his uncle's clothing contributed to his contracting mesothelioma.

At the beginning of trial, Abex moved for a nonsuit. Abex argued that it had no legal duty to prevent asbestos exposure to Kesner under the rule announced in *Campbell, supra,* 206 Cal.App.4th 15. The superior court granted Abex's motion for nonsuit and entered a final judgment in its favor, holding that Abex owed Kesner no duty for his exposure to asbestos resulting from Kesner's contact with its employee.

Kesner initiated proceedings in this court with a petition for a writ of mandate. The same day he also filed a notice of appeal in the superior court. This court determined that the writ review process is appropriate in this situation to expedite consideration of this issue to the extent possible due to Kesner's declining health.

---

[2] When asked at his deposition how often he would see his uncle, Kesner testified, "In my childhood, once or twice a week. As I got later into my teens, three to four times a week. I mean, once I got my driver's license, it seemed like I was up there all the time."When asked how often he stayed at his uncle's house, he answered, "During my teen years, every once in a while. Once I joined the service, I would come home, and that's . . . where I stayed when I came home."When the uncle was asked how often he saw Kesner when the uncle was employed at Abex, the uncle testified "he probably stayed at my house on average of three days a week. Sometimes it might only [have] been one time. Sometimes it might have been a whole week. But I'd say on average of three days a week."

Abex moved to stay the appeal pending outcome of the writ proceeding. On December 21, 2012, this court stated that if no objections were filed within 10 days, it would consolidate the appeal, *Kesner v. Pneumo Abex, LLC,* A136416, with the writ proceeding, *Kesner v. Superior Court,* A136378, deem the return and traverse filed in the writ proceeding to be the respondent's brief and appellant's reply brief in the appeal, and consider the appeal to be fully briefed. No objections were filed, and the cases are now consolidated with the briefing in the writ proceeding serving to complete briefing in the appeal.

We granted requests of the Association of Defense Counsel of Northern California and Nevada and the Association of Southern California Defense Counsel to file an amicus brief and allowed petitioner an opportunity to respond, which he did not do.

DISCUSSION

We independently review an order granting a nonsuit and will not affirm the judgment unless, after interpreting the evidence most favorably in favor of the plaintiff and against the defendant, a judgment for the defendant was required as a matter of law. (*Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635, 639.) Such is not the case here.

This case involves the asserted liability of a negligent manufacturer to a plaintiff for injuries arising as a result of the plaintiff's exposure to a harmful substance through contact with the manufacturer's employee away from the manufacturer's premises. Cases commonly refer to this situation as presenting a claim of secondary, para-occupational, or take-home exposure to a harmful substance. (See *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 821; *Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1107.)

"The general rule in California is that '[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person. . . .' (Civ. Code, § 1714, subd. (a).) In other words, 'each person has a duty to use ordinary care and "is liable for injuries caused by his failure to

exercise reasonable care in the circumstances." ' " (*Cabral, supra,* 51 Cal.4th at p. 771.) But departures from the general rule favoring liability are warranted when clearly supported by public policy. (*Rowland, supra,* 69 Cal.2d at p. 112.)

"A departure from this fundamental principle involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and the prevalence of insurance for the risk involved." (*Rowland, supra,* 69 Cal.2d at pp. 112-113.) Application of the factors identified in *Rowland* is the starting point for analysis of whether to impose a duty of care in a secondary exposure case like this one. (*Oddone v. Superior Court, supra,* 179 Cal.App.4th at p. 819.)

There is "an important feature of the analysis" that must be taken into account when we apply *Rowland.* (*Cabral, supra,* 51 Cal.4th at p. 772.) "[T]he *Rowland* factors are evaluated at a relatively broad level of factual generality. Thus, as to foreseeability, [our Supreme Court has] explained that the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed. . . .' [Citations.] [¶] . . . [¶] By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Cabral,* p. 772.)

In *Campbell,* the court weighed the various *Rowland* factors and concluded that "a *property owner* has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business." (*Campbell, supra,* 206 Cal.App.4th at p. 34; italics added.) The court correctly noted that "In California, '[f]orseeability *and extent of burden to the defendant* . . . have evolved to become the primary [*Rowland*] factors' to be considered on the question of legal duty." (*Campbell,* p. 33.) Focusing on the obligations of a premises owner, the court noted that " 'Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed unforeseeable.' " (*id.* at pp. 29-30, quoting *Cabral, supra,* 51 Cal.4th at p. 779) and that "while [the plaintiff in that case] seeks to hold Ford liable for its management of its premises, it is undisputed that [the plaintiff] never set foot on those premises . . . . A property owner's duty to maintain its premises in a reasonably safe condition extends to all areas visitors are expressly or impliedly invited to use and over which the owner exercise actual or apparent control . . . a property owner is 'not ordinarily liable for injuries that occur on property not in his ownership, possession, or control unless he created the condition or had a right to control activities at the site.' " (*Campbell, supra,* at p. 30.)

The court in *Campbell* deemed "the extent of the burden to the defendant and the consequences to the community if the court imposes on a particular defendant a duty of care toward the plaintiff [to] weigh heavily against [the plaintiff]." (*Campbell, supra,* 206 Cal.App.4th at p. 32.) The court quoted approvingly from *Oddone v. Superior Court, supra,* 179 Cal.App.4th at pp. 822-823: " 'The gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope. One of the consequences to the community of such an extension is the cost of insuring against liability of unknown but potentially massive dimension. Ultimately, such costs are borne by the consumer. In short, the burden on the defendant is substantial and the costs to the community may be considerable.' "

(*Campbell*, p. 33.) The court also quoted from a Michigan decision concluding that " 'imposing a duty on a landowner to anybody who comes in contact with somebody who has been on the landowner's property' (and secondarily exposed to asbestos as a result) ' "would create a potentially limitless pool of plaintiffs." ' " (*Id.* at p. 34, quoting *Miller v. Ford Motor Co.* (*In re Certified Question*) (2007) 479 Mich. 498, 521 [740 N.W.2d 206, 220].)[3]

We need not question the conclusion in *Campbell* that under *Rowland* and *Cabral*, a landowner owes no duty of care to those coming into contact with persons whose clothing carries asbestos dust from the landowner's premises. The claim against Ford Motor Company asserted in *Campbell* was based on Ford's passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation. Plaintiff's claim in the present case is not based on a theory of premises liability but on a claim of negligence in the manufacture of asbestos-containing brake linings. While the same *Rowland* factors are pertinent to the analysis of a negligence claim, the balance that must be struck is not necessarily the same as under a claim of premises liability. The norm in considering negligence claims is the general duty to use reasonable care to avoid injuring others. When considering the scope of an employer's obligations under the concept of respondeat superior for harm to others caused by an employee, the focus is on whether "the employee's act was an 'outgrowth' of his employment, ' " 'inherent in the working environment,' " ' ' " 'typical of or broadly incidental to" ' "the employer's business, or, in a general way, foreseeable from his duties." (*Yamaguchi v. Harnsmut* (2003) 106 Cal.App.4th 472, 482.) The same questions are pertinent to the scope of an employer's duty of care to others injured by interaction with the employer's workers.

Consideration of the *Rowland* factors as they bear on a negligence claim does not lead to the conclusion that an employer responsible for exposing its employees to a toxin

[3] The court also quoted other out-of-state authority reaching the same conclusion with respect to negligence claims. It also recognized the split of authority on this issue among the states. (*Campbell, supra,* 206 Cal.App.4th at pp. 33-34.)

such as asbestos, or for failing to warn or take reasonable protective measures, bears no responsibility to *any* nonemployee foreseeably affected by exposure to the toxin. Without discussion, the contrary has been assumed in prior reported cases (e.g., *Bettencourt v. Hennessy Industries Inc.*, *supra*, 205 Cal.App.4th 1103) and in numerous cases resolved in our trial courts without appeals having been taken. This is so for good reason. The first three factors identified in *Rowland* are related and tend to support extension of the employer's duty beyond its employees. As a general matter, harm to others resulting from secondary exposure to asbestos dust is not unpredictable. The harm to third parties that can arise from a lack of precautions to control friable asbestos that may accumulate on employees' work clothing is generally foreseeable. There often is no doubt that a plaintiff, like Kesner, suffering from malignant mesothelioma, has suffered injury due to exposure to friable asbestos. Whether exposure from any particular source was a substantial factor in causing a plaintiff's injury may often be questionable (see *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977), but that uncertainty exists with respect to many exposure claims, whether direct or secondary.

Moral blame, the fourth of the factors identified in *Rowland,* also tends to support extension of an employer's responsibility to more than its employees. Assuming, as we must, the truth of Kesner's allegation that Abex was aware of the risks to those exposed directly or indirectly to the asbestos dust generated in its facility and took no steps to avoid those risks, certainly such indifference would be morally blameworthy. What Abex actually knew and the sufficiency of steps it may have taken to prevent harmful exposure goes to the question of whether Abex was in fact negligent as Kesner alleges, but Abex's denials do not bear on the "relatively broad level of factual generality" (*Cabral, supra,* 51 Cal.4th at p. 772) that bears on the existence of a duty.

Rowland also instructs that we are to consider whether imposing a duty of care will advance a policy of preventing future harm. It may be true, as the court observed in *Campbell, supra,* 206 Cal.App.4th at page 33, that asbestos is already the subject of strict regulation under both federal and California law. And in *Taylor v. Elliott*

Turbomachinery Co. Inc. (2009) 171 Cal.App.4th 564, 595, the court observed that "exposures have already taken place, and in light of the heavily regulated nature of asbestos today, it is most unlikely that holding [the supplier of non-asbestos products] liable for failing to warn of the danger [of asbestos contained in products manufactured and supplied by others] will do anything to prevent future asbestos-related injuries." (Fn. omitted.) Yet, asbestos is not the only toxin to which an employer's obligations apply. A rule of law that holds an employer responsible to avoid injury to nonemployees who may foreseeably be harmed by exposure to toxins disseminated in its manufacturing process can be expected to prevent harm to others in the future. As the Missouri Court of Appeals stated in applying California law to a claim of indirect injury against a chemical manufacturer, "the imposition of a duty serves as a warning for manufacturers creating potentially dangerous products to be cautious." (*Clair v. Monsanto Co., supra,* 412 S.W.3d at p. 309.)

It is the next two *Rowland* factors—the extent of the burden to the defendant and the consequences to the community if the court imposes too broad a duty—that have led California courts to limit the reach of liability even for injuries that are foreseeable. The leading authority for such a limitation, in a very different context, undoubtedly is *Bily v. Arthur Young & Co., supra,* 3 Cal.4th 370. There, our Supreme Court pointed out that "[e]ven when foreseeability was present" it had previously "declined to allow recovery on a negligence theory when damage awards threatened to impose liability out of proportion to fault or to promote virtually unlimited responsibility for intangible injury." (*Id.* at p. 398.) In that case, the court refused to impose third party liability on financial auditors because of "the spectre of vast numbers of suits and limitless financial exposure" out of proportion to their potential fault. (*Id.* at p. 400.) Similarly, in refusing to permit an unmarried cohabitant to recover damages for emotional distress caused by the negligence of another in his immediate presence, the court quoted from Prosser, Law of Torts: " '[I]f recovery [for mental distress] is to be permitted, there must be some limitation. It would be an entirely unreasonable burden on all human activity if the defendant who has

endangered one man were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as his friends." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 276, quoting Prosser, Law of Torts (3d ed. 1964) § 55, pp. 353-354; see also, e.g., *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668.)

The need to place a limit on those to whom the duty of reasonable care extends in contexts much closer to the situation in the present case was the determinative factor in both *Campbell* and *Oddone.* Those cases also relied on the final *Rowland* factor, the relative cost and availability of insurance covering the particular risk. The threat of unlimited liability, those courts felt, could restrict the ability of employers to obtain insurance, while individuals may obtain insurance covering medical expenses incurred as a result of illness arising from toxic exposure.

In weighing these competing considerations, the balance falls far short of terminating liability at the door of the employer's premises. While foreseeability of harm is not in California the exclusive consideration, it is among the most significant, if not the single most significant, factor. And there is a high degree of foreseeability of harm from secondary, or take-home, exposure to those whose contact with an employer's workers is not merely incidental, such as members of their household or long-term occupants of the residence. The weight of this factor is strengthened by consideration of the moral blame attributable to disregarding a known risk to others and the important public policy of preventing future harm. On the other hand, extending the employer's duty of care to such persons does not threaten employers with potential liability for an intangible injury that can be claimed by an unlimited number of persons. Unlike indirect financial loss or mental anguish that were of concern in *Bily* and *Elden*, mesothelioma (in particular, and other toxic-related diseases in general) can hardly be claimed by everyone. Nor is there reason to believe that manufacturers cannot obtain insurance coverage to protect against their liability, while individuals cannot purchase insurance covering loss of income or their own pain and suffering resulting from a toxic-induced illness such as mesothelioma.

In concluding that Abex's duty of care extends to Kesner, a long-term guest in the home of Abex's employee, we emphasize that our ruling is based on the assumption, required by the standard for reviewing the sufficiency of the allegations of a complaint, that Kesner's contact with his uncle was extensive. As to such persons, the forseeability of harm is substantial. As to persons whose contact with an employer's worker is only casual or incidental, the forseeability of harm and the closeness of the connection between the defendant's conduct and the plaintiff's injury may be so minimal as to produce a different balance of the *Rowland* factors. We hold that there is a duty under the circumstances alleged in the present case, but we do not address other circumstances that are not before us.

Finally, in holding that a duty exists in this case, we emphasize the obvious — that the existence of the duty is not the same as a finding of negligence. Abex apparently disputes many of the facts alleged in plaintiff's complaint, including the extent of its knowledge at the time in question, the reasonableness of the measures it took to prevent asbestos from being carried home on the clothing of its employees, and the extent to which asbestos from its plant played any role in causing Kesner's mesothelioma. Needless to say, these are factual questions left for future determination, as to which we express no opinion.

DISPOSITION

The judgment is reversed.

____
Pollak, Acting P.J.

We concur:

____
Siggins, J.

____
Jenkins, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On June 24, 2014, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 24, 2014, at Encino, California.

Millie Cowley

SERVICE LIST

Kesner v. The Superior Court of Alameda County
Court of Appeal Case No. A136378 consolidated w/ A136416

Edward R. Hugo James C. Parker Jeffrey Kaufman Brydon Hugo & Parker 135 Main Street, 20th Floor San Francisco, CA 94105	Attorneys for Real Party in Interest ***Pneumo Abex, LLC***
Cindy Saxey Benno Ashrafi Josiah Parker Weitz & Luxenberg, P.C. 1880 Century Park East, Suite 700 Los Angeles, CA 90067	Attorneys for Petitioner ***Johnny Blaine Kesner, Jr.***
Ted W. Pelletier Kazan, McClain Satterley & Greenwood Jack London Market 55 Harrison Street, Suite 400 Oakland, CA 94607	Attorneys for Petitioner ***Johnny Blaine Kesner, Jr.***
California Court of Appeal First Appellate District, Div. Three 350 McAllister Street San Francisco, CA 94102-7421	Case No. A136378 (consolidated w/ A136416) ***electronically submitted***
Hon. John M. True, III Alameda County Superior Court Administration Building 1221 Oak Street, Rm. 260, Dept. 23 Oakland, CA 94612	Case No. RG11578906