Williams v. J-M Mfg. Co.

Court of Appeal of California, First Appellate District, Division Two

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Reporter
2024 Cal. App. LEXIS 331 *

NATHAN K. WILLIAMS, Plaintiff and Respondent, v. J-M MANUFACTURING COMPANY, INC., Defendant and Appellant.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: **[*1]** Superior Court of Alameda County, No. RG19032329, Frank Roesch, Judge.

Core Terms

strict liability, manufacturer, pipe, foreseeable, warning, strict liability cause, secondary, ***asbestos***-cement, exposure to ***asbestos***, bystander, defects, trial court, misused, argues, household member, potential risk, ***asbestos***, cases, costs, negligence cause of action, defective product, negligence claim, liability claim, design defect, duty of care, household, consumer, exposure, products, users

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Judges: Opinion by Miller, J., with Stewart, P. J., and Richman, J., concurring.

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* Pursuant to California Rules of Court, rules 8.1105 and 8.1110, this opinion is certified for publication with the exception of parts II and III of the Discussion.

Opinion by: Miller, J.

Opinion

MILLER, J.—Before he died from mesothelioma during the pendency of this appeal, Cornelius Williams filed a complaint for personal injury based on his secondary exposure to ***asbestos*** from his brother Nathan's work with ***asbestos***-cement pipe over more than 20 years. Cornelius and Nathan did not live together, but had regular close contact during Nathan's employment. One of the entities Cornelius sued was J-M Manufacturing Company, Inc. (JMM), a supplier of **[*2]** ***asbestos***-cement pipe to Nathan's workplaces.

Cornelius's strict liability cause of action, based on theories of design defect and failure to warn, went to verdict. The jury found liability under both theories, concluding that Cornelius had proven he was exposed to ***asbestos***, and that the pipe sold by J-MM was a substantial factor in increasing his risk of developing cancer.

J-MM raises three arguments in this appeal. First, J-MM argues it was entitled to judgment because, as a matter of law, strict liability does not apply in favor of Cornelius, a non-household member of his brother, under our Supreme Court's decision in *Kesner v. Superior Court (2016) 1 Cal.5th 1132 (Kesner)*. *Kesner*, a negligence case, held that employers and premises owners owe a duty of care to prevent secondary exposure to ***asbestos*** carried by the bodies and clothing of on-site workers, but that the duty extends only to members of a worker's household. (*Id. at p. 1140*.) J-MM argues that *Kesner's* limitation on the duty of care for claims based on negligence should be applied to strict liability claims against suppliers or sellers of ***asbestos*** products. Second, J-MM argues the judgment must be reversed because there was no substantial evidence that Cornelius was exposed to ***asbestos*** from pipe **[*3]**

supplied by J-MM (rather than another supplier). Third, J-MM argues in the alternative that even if it is not entitled to a defense judgment, it is entitled to a new trial because the court abused its discretion in excluding certain exhibits from trial. We affirm.

BACKGROUND

Cornelius filed a complaint for personal injury against J-MM and several other defendants. Among other things, Cornelius asserted causes of action for negligence and strict liability, alleging he had been exposed to ***asbestos*** because Nathan "frequently and regularly worked with" ***asbestos***-cement pipe manufactured, sold, supplied, and distributed by defendants while he was working for the East Bay Municipal Utilities District (EBMUD) from 1978 to 1988, and for Daly City from 1989 to 2011.

The negligence and strict liability causes of action proceeded to trial against only two defendants: J-MM and A.H. Voss Company (Voss). Voss sold ***asbestos***-cement pipe manufactured by Kubota from 1962 to 1975. J-MM sold ***asbestos***-cement pipe from 1983 to 1988, after acquiring the assets of Johns-Manville's domestic ***asbestos***-cement pipe business.[1]

At the close of presentation of evidence, J-MM and Voss filed motions for directed verdict. **[*4]** J-MM asked the trial court to grant a directed verdict on the issue of duty, relying on *Kesner*, where the California Supreme Court had limited an employer or property owner's duty of care for negligence causes of action premised on secondary exposure to ***asbestos*** to members of an employee's household. J-MM argued that the trial court should "similarly find that J-MM owes no legal duty" to Cornelius, because he was not a member of Nathan's household during the alleged secondary exposure to ***asbestos***.

The trial court dismissed the negligence cause of action, but not the strict liability cause of action. It explained: "With regard to the application of the *Kesner* case, to this case, the argument does have merit. But only part of the way home. [¶] The *Kesner* case neither says that it does not apply to product liability cases or to strict liability cases, nor does it say that it does apply to strict liability cases."

The jury found in favor of Cornelius on his remaining strict liability cause of action, awarding him $556,700 in economic damages and $2.14 million in non-economic damages. It apportioned 50 percent responsibility to J-MM, 20 percent to Voss, 10 percent to Johns-Manville, and 20 percent to other **[*5]** manufacturers.

J-MM moved for judgment notwithstanding the verdict (JNOV) and, in the alternative, for a new trial, arguing that the trial court erred in its interpretation and application of *Kesner* to preclude only the negligence cause of action. The motion was denied. J-MM also moved to tax costs claimed by Cornelius.

J-MM appealed from the judgment and order denying its motion for JNOV, as well as the order on its motion to tax costs. The appeals were consolidated.[2] Voss also appealed, but subsequently notified this court that the parties were settling the matter and abandoned the appeal. After Cornelius's death, Nathan was substituted as his successor-in-interest.

DISCUSSION

J-MM challenges the judgment on Cornelius's strict liability cause of action in three respects. J-MM argues that (1) judgment must be entered in its favor because, under *Kesner*, strict liability does not apply to Cornelius; (2) the judgment must be reversed for lack of substantial evidence; or (3) a new trial is necessary because the trial court abused its discretion on certain evidentiary rulings. We address, and reject, each argument in turn.

I. Strict Liability

A. *Framework and Standard of Review*

We begin with the general framework **[*6]** for

[1] Johns-Manville was a global leader in the manufacturing of ***asbestos***-containing products. After Johns-Manville declared bankruptcy in 1982, its ***asbestos***-cement pipe business was purchased by two companies that began operations on January 1, 1983: J-M A/C Pipe Corporation (J-M A/C), which manufactured ***asbestos***-cement pipe, and J-MM, which sold ***asbestos***-cement pipe that J-M A/C manufactured.

[2] The court ordered that J-MM was severally liable for $166,465.52 of Cornelius's expert costs and fees, and jointly and severally liable with Voss for the $139,079.34 remainder of Cornelius's costs. J-MM appears to have abandoned its appeal from the order on its motion to tax costs, and we do not address the issue further.

understanding Cornelius's strict liability cause of action and the legal question presented in this appeal. California law recognizes strict liability as a theory under which plaintiffs may claim they were harmed by a defective product. (*Webb v. Superior Court (2016) 63 Cal.4th 167, 181*.) Strict liability can be asserted not only against the manufacturer of defective products, but also against distributors or sellers of defective products. (*O'Neil v. Crane Co. (2012) 53 Cal.4th 335, 342* ["California law has long provided that manufacturers, distributors, and retailers have a duty to ensure the safety of their products and will be held strictly liable for injuries caused by a defect in their products"].) Here, Cornelius asserted a strict liability cause of action against J-MM for selling ***asbestos***-cement pipe.

Strict liability may be invoked to allege three types of product defects: (1) manufacturing defects, (2) design defects, and (3) warning defects. (*Webb, supra, 63 Cal.4th at p. 180*.) "Manufacturing defects can arise, for example, when a flaw in the manufacturing process creates a product that differs from what the manufacturer intended." (*Ibid.*) "Design defects appear in products that, although properly manufactured, are dangerous because they lack a critical feature needed to ensure safe use." (*Ibid.* ***[*7]***) Warning defects render a product "'dangerous because it lacks adequate warnings or instructions.'" (*Ibid.*) Plaintiffs alleging product liability claims "often allege both design and warning defects." (*Id. at p. 181*.) That is what happened in this case; Cornelius alleged that ***asbestos***-cement pipe sold by J-MM had *both* design and warning defects.

For an alleged design defect, there are two alternative tests to prove liability: the consumer expectations test and the risk-benefit test. (*Webb, supra, 63 Cal.4th at p. 180*.) Here, Cornelius sought liability on his design defect claim under the consumer expectations test. To satisfy this test, Cornelius was required to prove that J-MM's ***asbestos***-cement pipe "fail[ed] to perform as safely as an ordinary consumer would expect" when used or misused in an intended or foreseeable way, and that the failure of the pipe to perform safely was a substantial factor in causing Cornelius's harm. (*Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413, 418*; see also *CACI No. 1203*.)

To establish his alleged warning defect claim, Cornelius was required to prove that J-MM's ***asbestos***-cement pipe had potential risks known or "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution," **[*8]** that those potential risks presented substantial danger when the pipe was used or misused in an intended or reasonably foreseeable way, that ordinary consumers would not have recognized those potential risks, that J-MM failed to adequately warn of those potential risks, and that the lack of sufficient warning was a substantial factor in causing Cornelius's harm. (*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal.3d 987, 1002, 993, fn. 5*; see also CACI No. 1203.)

The judgment on special verdict makes clear that the jury concluded Cornelius had proven both that ***asbestos***-cement pipe sold by J-MM had a design defect (under the consumer expectations test) and a warning defect to support his strict liability cause of action.

J-MM's subsequent motion for JNOV raised the same question of law presented in its motion for directed verdict: whether *Kesner* precluded Cornelius's strict liability cause of action. Our review is de novo. (*Sweatman v. Department of Veterans Affairs (2001) 25 Cal.4th 62, 68* [sole question of law on denial of motion for JNOV subject to de novo review].) Neither party has cited any authority that directly answers the question.

B. *Kesner*

In *Kesner*, our Supreme Court granted review and consolidated two cases involving liability for secondary exposure to ***asbestos***. (*Kesner, supra, 1 Cal.5th at p. 1140*.) The plaintiff in the first case (Kesner) claimed negligence **[*9]** through his alleged secondary exposure from his uncle's work at a manufacturing plant. (*Id. at pp. 1141-1142*.) The trial court granted a motion for non-suit on the ground that the manufacturing plant (Abex) had no duty to protect family members of its workers from secondary exposure to ***asbestos***. The appellate court reversed. (*Id. at p. 1142*.) The plaintiffs in the second case (the Havers) claimed premises liability against BNSF Railway Company (BNSF), alleging secondary exposure from an employee to his wife. (*Id. at p. 1141*.) The trial court sustained BNSF's demurrer based on lack of duty to household members who suffer secondary exposure to ***asbestos***, and the appellate court affirmed. (*Id. at p. 1142*.) The nonsuit motion filed by Kesner and the demurrer filed by the Havers were both based on the then-leading case on whether defendants owed a duty of care to prevent take-home or secondary ***asbestos*** exposure under California law, *Campbell v. Ford Motor Co. (2012) 206*

Cal.App.4th 15. (4 Cetrulo, Toxic Torts Litigation Guide (2023) § 42-A.) In *Campbell*, the Second District reversed a judgment for a plaintiff, diagnosed with mesothelioma, who had asserted a premises liability claim from secondary exposure to ***asbestos*** through laundering her father and brother's clothing. (*Campbell* at p. 19.) *Campbell* held that "a property owner has no duty to protect family members of workers on its premises **[*10]** from secondary exposure to ***asbestos*** used during the course of the property owner's business." (*Id.* at p. 34.)

Describing the different conclusions as to liability reached by the lower courts for Kesner and the Havers, our Supreme Court granted review "to determine whether an employer has a duty to members of an employee's household to prevent take-home ***asbestos*** exposure on a premises liability or negligence theory." (Kesner, supra, 1 Cal.5th at p. 1142.) Kesner explained that both theories of liability—negligence (based on the employer's alleged failure to prevent employees from exposing others) and premises liability (based on the employer's alleged failure to prevent exposure as owner of the property where employees work)—require the element of duty. (Id. at p. 1158.) Accordingly, the scope of review in Kesner was clear: "Here we are tasked solely with deciding whether [defendants] had a legal duty to prevent the injuries alleged by [plaintiffs]." (Id. at p. 1142.) As we describe below, the court reached a conclusion about the scope of this duty and explicitly disapproved *Campbell*. (Kesner, at p. 1156.)

"The 'general rule' of duty in California is established by statute." (Kuciemba v. Victory Woodworks, Inc. (2023) 14 Cal.5th 993, 1016 (Kuciemba).) Civil Code section 1714, subdivision (a) "'establishes the default rule that each person has a duty "to exercise, in his or her activities, reasonable care for **[*11]** the safety of others."'" (Kuciemba, at p. 1016.) While section 1714 states the general default rule, exceptions can be created by statute or by courts "'only where "clearly supported by public policy."'" (Kesner, supra, 1 Cal.5th at p. 1143.) These policy considerations must be clear in order to justify "'carving out an entire category of cases from that general duty rule.'" (Id. at pp. 1143-1144.)

To determine whether public policy supports such an exception, courts look to the seven factors set forth in Rowland v. Christian (1968) 69 Cal.2d 108 (Rowland): foreseeability of injury, certainty that plaintiff suffered injury, connection between injury and defendant's conduct, moral blame, preventing future harm, burden to defendant and the community, and availability of insurance. (Kesner, supra, 1 Cal.5th at p. 1143.) The Rowland factors fall into two categories: the first three consider "the foreseeability of the relevant injury," and the others "take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." (Kesner, at p. 1145.) The court in Kesner explained that foreseeability of injury was "[t]he most important factor," measured by what a "'"reasonably thoughtful [person] would take account of . . . in guiding practical conduct."'" (Id. at p. 1145.)

Kesner thus analyzed the seven Rowland factors to decide whether an employer owes a duty of care **[*12]** to protect an employee's household members from secondary exposure to ***asbestos***. (Kesner, supra, 1 Cal.5th at pp. 1145-1152.) It determined that the first three factors weighed in favor of finding a duty because "it was foreseeable that people who work with or around ***asbestos*** may carry ***asbestos*** fibers home with them and expose members of their household," it was certain that the plaintiffs had suffered injury because they had died of mesothelioma, and the purported intervening conduct (workers returning home without adequate precautions and bringing in ***asbestos*** dust) was "predictive and derivative of the alleged misconduct" and thus "entirely foreseeable." (Id. at pp. 1145, 1148-1149.)

The court then turned to the consideration of the remaining Rowland factors. It had little difficulty finding that "[n]egligence in [commercial users] use of ***asbestos*** is morally blameworthy," legislatures and agencies had "readily adopted the premise" that imposing liability for ***asbestos*** exposure would prevent future harm, protection of household members would not impose a greater burden than the protection of workers themselves, and that the relevant framework for availability of insurance looks to the time of exposure. (Kesner, supra, 1 Cal.5th at p. 1151.)

But Kesner also described defendants' argument on burden **[*13]** as their "most forceful contention." (Kesner, supra, 1 Cal.5th at p. 1153.) Defendants' "legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus . . . point to the need for a limitation on the scope of the duty here." (Id. at p. 1154.) Kesner thus held that "an employer's or property owner's duty to prevent take-home exposure extends only to members of a worker's household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a

significant period of time." (*Id. at pp. 1154-1155*.)

The court explained that this limitation was consistent with its analysis under the *Rowland* factors: "Our finding of foreseeability turned on the fact that a worker can be expected to return home each workday and to have close contact with household members on a regular basis over many years. Persons whose contact with the worker is more incidental, sporadic, or transitory do not, as a class, share the same characteristics as household members and are therefore not within the scope of the duty we identify here. This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from **[*14]** the costs associated with litigation of disproportionately meritless claims." (*Kesner, supra, 1 Cal.5th at p. 1155*.) Accordingly, *Kesner* held that "defendants owed the members of their employees' households a duty of ordinary care to prevent take-home exposure and that this duty extends no further." (*Id. at p. 1156*.)

Here, J-MM argues that this holding in *Kesner* foreclosed Cornelius's strict liability cause of action as a matter of law because he was not a household member of his brother Nathan. We disagree. The plaintiffs in *Kesner* alleged negligence and premises liability claims, both of which include the element of duty. (*Kesner, supra, 1 Cal.5th at p. 1158*.) Our Supreme Court made clear that it was deciding the scope of that duty owed under these legal theories. (*Id. at p. 1142*.) Unlike the claims in *Kesner*, Cornelius's strict liability cause of action did not require him to prove any element of duty. "[S]trict products liability causes of action need not be pled in terms of classic negligence elements (duty, breach, causation and damages)." (*Elsheref v. Applied Materials, Inc. (2014) 223 Cal.App.4th 451, 464*.) "Unlike a negligence theory of liability, a strict products liability theory does not focus on the defendant's duty to use due care; the defendant's behavior is irrelevant." (*Jenkins v. T&N PLC (1996) 45 Cal.App.4th 1224, 1231*.)

J-MM relies on *Kesner* and other decisions that have "followed *Kesner's* bright line," but **[*15]** tiptoes around the reality that these are all *negligence* cases. There is no doubt that *Kesner* has been followed by courts to determine the scope of duty for negligence claims. (E.g., *Kuciemba, supra, 14 Cal.5th at p. 1004* [employer did not owe duty of care to prevent spread of COVID-19 to employee's household members given "intolerable burden on employers and society in contravention of public policy"]; *Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261, 276* [oil company did not have duty to non-household member to prevent alleged secondary ***asbestos*** exposure].) Indeed, the trial court here correctly dismissed Cornelius's negligence claim on this basis (an issue not challenged on appeal). J-MM, however, does not present any authority concluding that the limitation on duty in *Kesner* summarily precludes a strict liability cause of action asserted by a non-household member alleging secondary exposure to ***asbestos*** like Cornelius.

C. *Strict Liability vs. Negligence*

J-MM argues next that, even if *Kesner* did not address strict liability, it should still apply to foreclose Cornelius's claim as a matter of law because strict liability and negligence are shaped by the same elements and underlying policy considerations.

As for the elements of the two causes of action, J-MM relies heavily on *Romito v. Red Plastic Co. (1995) 38 Cal.App.4th 59 (Romito)*. In that case, **[*16]** family members of an electrician brought negligence and strict liability claims against a manufacturer of plastic skylights. (*Id. at p. 63*.) The electrician suffered a fatal injury after stumbling and falling through a skylight to the concrete floor below while removing cable and wires on a roof without wearing a safety line. (*Ibid.*) The appellate court affirmed summary judgment on the negligence claim upon concluding that the skylight manufacturer had no duty to protect the electrician against his unforeseeable and accidental misuse of the skylight. (*Id. at p. 69*.) It then affirmed summary judgment on the strict liability claim because plaintiffs could not show the defect element: failure to perform when the skylight was used or misused in an intended or foreseeable way. (*Id. at p. 70*.)

The appellate court's analysis thus concerned whether the *use or misuse* of the skylight was foreseeable. (*Romito, supra, 38 Cal.App.4th at pp. 69-70*.) We agree that this concept of foreseeability is involved in strict liability. (*Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 560* ["A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way"]; *Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal.App.4th 547, 558* ["Even if an injured plaintiff's acts constituted **[*17]** misuse of a product, if those acts were foreseeable, strict liability may still apply"].) For his design defect

claim under the consumer expectations test,[3] Cornelius had to prove that the J-MM pipe did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way. (*Barker v. Lull Engineering Co., supra*, 20 Cal.3d at p. 418.) And for his warning defect claim, Cornelius had to prove the J-MM pipe had potential risks that ordinary consumers would not have recognized and that presented substantial danger when the pipe was used or misused in an intended or reasonably foreseeable way. (*Anderson v. Owens-Corning Fiberglas Corp., supra*, 53 Cal.3d at p. 993, fn. 5.)

This focus on the foreseeability of use is consistent with the broader objectives of strict liability to create incentives that "achieve optimal levels of safety in designing and marketing products." (*Rest.3d Torts, § 2, com. (a)*; *Daly v. General Motors Corp. (1978) 20 Cal.3d 725, 746 (Daly)* [explaining "products must incorporate and balance safety, utility, competitive merit, and practicality *under a multitude of intended and foreseeable uses*"].) "[C]onsumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm." (*Rest.3d Torts, § 2, com. (g)*.) We see nothing in these elements **[*18]** that categorically excludes a plaintiff like Cornelius from seeking to prove his claims that J-MM's ***asbestos***-cement pipe defied consumer expectations and failed to provide adequate warnings when used in a foreseeable way.

Romito's reliance on the same underlying premise (unforeseeable and accidental misuse) in its analysis of both (1) the duty element in negligence and (2) the defect element in strict liability, however, does not support JMM's position these two causes of action "meld" together. Indeed, *Gilead Tenofovir Cases (2024) 98 Cal.App.5th 911*, review granted May 1, 2024, S283862 (*Gilead*) recently rejected this position. The issue in *Gilead* was whether the plaintiffs were foreclosed from a negligence claim by alleging that the manufacturer negligently deferred development of a new medication with lower risk of adverse effects, and not attempting to prove that the older medication was itself defective. (*Id. at pp. 916-917*.) The appellate court determined the plaintiffs were not so foreclosed, explaining that the requirement to prove a product defect is "necessary to constrain the reach of strict liability" but for negligence claims, "the requirement of a duty of care imposes its own limits on the potential scope of liability, governed by an array of policy considerations **[*19]** as they bear on a particular context." (*Id. at p. 924*.) The court noted that the limitations of negligence claims prompted the development of the strict liability doctrine. (*Id. at p. 923*.) *Gilead* concluded: "In our view, neither logic nor jurisprudential history compels the conclusion that the two concepts must be coextensive in every case in which a plaintiff is injured by a product." (*Id. at p. 924*.)

J-MM also relies on *Lambert v. General Motors (1998) 67 Cal.App.4th 1179* to argue that Cornelius's strict liability and negligence causes of action "merged." In *Lambert*, a plaintiff injured in a car accident asserted product liability claims based on theories of strict liability (defects in roof and seatbelt design of car) and negligence (manufacturer was negligent in design of car). (*Id. at pp. 1181-1182*.) The jury concluded there was no defect, but that the car manufacturer was negligent in the design of the car. (*Id. at p. 1182*.) The appellate court determined that the verdict was inconsistent and remanded for a new trial. (*Id. at p. 1186*.) It reasoned that the manufacturer could not be negligent for design if there was no design defect. (*Ibid.*) It explained that, because both product liability claims depended on proof of the defect, the claims "merge." (*Id. at p. 1185*.) But nothing in *Lambert* suggests that the element of *duty* in any negligence cause **[*20]** of action merges or is coextensive with the defect element in a strict liability cause of action.

As for the policy considerations underlying the two causes of action, we again acknowledge the general premise that both doctrines balance the costs and benefits of liability. (*Kesner, supra, 1 Cal.5th at p. 1143*; *Daly, supra, 20 Cal.3d at p. 746*.) But these policy considerations are not identical, and in any event do not support the inexorable extension of *Kesner* that J-MM advances here as a matter of law.

Strict liability was developed to ensure that costs from defective products are borne by manufacturers, retailers, and distributors who put the products into the stream of commerce (and who can then adjust for those associated costs in the course of their business), not individuals '"who are powerless to protect themselves"'

[3] Given it does not appear that Cornelius sought to prove liability at trial under the alternative risk-benefit test and the two design defect tests "do not serve as defenses to one another" (*Chavez v. Glock, Inc. (2012) 207 Cal.App.4th 1283, 1303*), we do not address the foreseeability element of the risk-benefit test.

from those defects. (*Elmore v. American Motors Corp. (1969) 70 Cal.2d 578, 585 (Elmore)*.) As described above, the foreseeability element of Cornelius's strict liability claims informs this balancing. Individuals appropriately bear the costs when the product is being used in an *unforeseeable* way. (See, e.g., *Daly, supra*, 20 Cal.3d at p. 733 ["[T]he manufacturer is not deemed responsible when injury results from an unforeseeable use of its product"].) Individuals also appropriately bear the costs for failures or potential risks that **[*21]** are reasonably expected even with foreseeable use. If a product is inherently or obviously dangerous, for example, a reasonable consumer would have related expectations about performance and potential risks. But protecting individuals from unexpected defects arising from foreseeable use of a protect is consistent with that goal.

Nor are we persuaded by J-MM's other "policy" reasons to extend *Kesner*. First, J-MM suggests that declining to do so would improperly equate strict liability with "absolute liability." Not so. "[S]trict liability has never been, and is not now, *absolute* liability." (*Daly, supra*, 20 Cal.3d at p. 733.) "On the contrary, the plaintiff's injury must have been caused by a 'defect' in the product." (*Ibid.*) "Furthermore, we have recognized that though most forms of contributory negligence do not constitute a defense to a strict products liability action, plaintiff's negligence is a complete defense when it comprises assumption of risk." (*Ibid.*) As *Daly* makes clear, the elements for (and defenses to) a strict liability cause of action prevent it from imposing absolute liability. Cornelius was still required to prove the J-MM pipe did not perform as safely as an ordinary consumer would have expected it to perform **[*22]** and had failures or risks when used in a foreseeable way.

Second, J-MM argues that declining to extend *Kesner* to strict liability causes of action would be "perverse" because product defendants would "shoulder all the blame" with no means of warning individuals like Cornelius. But employers and premises owners are still potentially liable under negligence theories for ***asbestos*** exposure to workers and household members under *Kesner* and, as described above, non-household members alleging secondary exposure to ***asbestos*** must still *prove* the elements of strict liability to proceed under that theory against product defendants. Moreover, J-MM's argument assumes that it was found liable based on failure to warn *Cornelius*. The record does not support this assumption. It was Nathan who testified that he never saw any warnings on the ***asbestos***-cement pipe he worked on. The jury verdict found only that J-MM (and Voss) had "failed to adequately warn of the potential risks of ***asbestos***-cement pipe."

Third, J-MM warns that allowing non-household members to pursue strict liability causes of action for secondary exposure to ***asbestos*** would result in "virtually infinite litigation" and lead to consumers being "swamped **[*23]** with ineffectual warnings." But, as explained above, the elements of strict liability provide guardrails for such litigation. (*Daly, supra*, 20 Cal.3d at p. 734.) Nor does J-MM explain how correction of the warning defect alleged here (no warning on ***asbestos***-cement pipe) would diminish the efficacy of consumer warnings as a whole.

D. *Bystander Recovery*

Finally, J-MM argues that allowing a plaintiff like Cornelius to proceed with a strict liability cause of action would "ignore the limits" placed on bystander recovery by the California Supreme Court. For the reasons we described above in part I.B., we reject this argument to the extent it relies on expanding *Kesner's* holding on duty in negligence causes of action to foreclose strict liability causes of action, which require no element of duty.

J-MM also cites authority regarding bystander recovery on claims for negligent infliction of emotional distress (NIED) to support this argument, specifically *Fortman v. Förvaltningsbolaget Insulan AB (2013) 212 Cal.App.4th 830*. That case provides no support for J-MM. In *Fortman*, the plaintiff asserted a NIED claim after witnessing the death of her brother while they were scuba diving. (*Id. at p. 832*.) The plaintiff thought her brother had suffered a heart attack, but later learned his death was caused by a component **[*24]** of his scuba equipment that prevented him from getting enough air. (*Ibid.*) Citing *Thing v. La Chusa (1989) 48 Cal.3d 644*, the appellate court explained that the plaintiff did not have a viable bystander NIED claim because she could not meet one of the required elements: that she was "present and contemporaneously perceived the causal connection between the accident and the injuries suffered." (*Fortman, at p. 832*.) Plaintiff argued that this element should not apply to cases, such as hers, when a close relative sustains a "product-related injury where strict liability principles apply." (*Id. at p. 841*.) The court in *Fortman* rejected that argument, doing precisely what we do here: declining to apply elements and policy considerations underlying one type of action (negligence) to alter those in another type of action

(strict liability). (*Id. at pp. 844-845*.)

Instead, we find *Elmore* instructive on the scope of bystander recovery under California law. In that case, the drive shaft of a Rambler American station wagon became disconnected, causing the car to fishtail out of control, cross over to the other side of the road, and strike the vehicle of plaintiff/bystander Waters with such impact that the driver was hurled from the Rambler onto an embankment. (*Elmore, supra, 70 Cal.2d at pp. 580-581*.) In the subsequent consolidated **[*25]** personal injury and wrongful death actions, the trial court granted American Motors Corporation and the automobile dealer's motions for nonsuit. (*Id. at p. 580*.) Our Supreme Court reversed the judgment. (*Id. at p. 587*.)

The question presented in *Elmore* was "whether the doctrine of strict liability of the manufacturer and retailer for defects is applicable to third parties who are bystanders and who are not purchasers or users of the defective chattel." (*Elmore, supra, 70 Cal.2d at p. 585*.) At the time *Elmore* was decided, "no case had applied strict liability to a person who was not a user or consumer." (*Ibid.*) But other California Supreme Court cases had made clear that strict liability "may not be restricted on a theory of privity of contract." (*Id. at p. 586*.) Instead, "liability has been based upon the existence of a defective product which caused injury to a human being, and . . . we did not limit the rules stated to consumers and users but instead used language applicable to human beings generally." (*Ibid.*) *Elmore* concluded: "If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit **[*26]** their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders." (*Id. at p. 586*.)

Our conclusion is entirely consistent with the directive in *Elmore* to err on the side of greater protection for bystanders who are "'powerless to protect themselves'" from those defects.[4] (*Elmore, supra, 70 Cal.2d at p. 585*.) Moreover, the foreseeability element of Cornelius's design and warning defect claims captures the concept of foreseeability described in *Elmore*, as Cornelius was required to prove that J-MM's ***asbestos***-cement pipe failed in a manner that defied consumer expectations and lacked adequate warnings when used in a foreseeable way.

In sum, we decline to extend *Kesner*'s limitation on duty for negligence causes of action alleging secondary exposure to ***asbestos*** to Cornelius's strict liability cause of action here. The trial court did not err in denying J-MM's motion for **[*27]** JNOV.

II. *Substantial Evidence*

A. *Additional Background*

[NOT CERTIFIED FOR PUBLICATION]

B. *Framework and Standard of Review*

[NOT CERTIFIED FOR PUBLICATION]

C. *Analysis*

[NOT CERTIFIED FOR PUBLICATION]

III. *Evidentiary Rulings*

A. *Additional Background*

[NOT CERTIFIED FOR PUBLICATION]

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[4] Cases cited by J-MM and amici curiae on bystander recovery under other state laws are not binding on this court or our interpretation of California law. (See *Episcopal Church Cases (2009) 45 Cal.4th 467, 490*.) Nor do we find them persuasive. *Martin v. Cincinnati Gas and Elec. Co. (6th Cir. 2009) 561 F.3d 439*, for example, relies on Kentucky law that is contrary to the broader conception of bystander recovery set forth in *Elmore*. (*Id. at pp. 446-447*.) *Rohrbaugh v. Owens-Corning Fiberglas Corp. (10th Cir. 1992) 965 F.2d 844* involves concepts in negligence: specifically, the scope of a manufacturer's duty to warn under Oklahoma law. (*Id. at p. 846*.) *Magoffe v. JLG Industries, Inc. (10th Cir. 2010) 375 Fed.Appx. 848* is also inapposite; it explains that strict liability for product defects may be limited by unforeseeable *modification* of a product under New Mexico law. (*Id. at p. 850*.)

B. *Framework and Standard of Review*

[NOT CERTIFIED FOR PUBLICATION]

C. *Analysis*

[NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs on appeal. (*Cal. Rules of Court, rule 8.278(a)(2)*.)

Stewart, P. J., and Richman, J., concurred.
