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IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOSHUA HAVER, individually and as successor-in-interest to LYNNE HAVER, deceased, *et al.*,

Plaintiffs, Appellants and Petitioners,

vs.

BNSF RAILWAY COMPANY,

Defendant and Respondent.

After A Decision By The Court Of Appeal,
Second Appellate District, Case No. B246527;
Los Angeles County Superior Court, Case No. BC435551

PETITION FOR REVIEW

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TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Plaintiffs, Appellants and Petitioners Joshua Haver, Christopher Haver, Kyle Haver, and Jennifer Morris (collectively, "Plaintiffs") respectfully petition this Court for review of the decision of the Court of Appeal for the Second Appellate District in the above-entitled matter. A true and correct copy of the Court of Appeal's opinion, filed on June 3, 2014, certified for publication, and the order modifying its opinion, filed on June 23, 2014, are included in the attached appendix. No party filed a petition for rehearing in the Court of Appeal.

ISSUE FOR REVIEW

Does an employer who uses a toxin, such as asbestos, in the workplace have a duty of care to protect an immediate family member of its employee – in this case, the employee's spouse – from exposure to the toxin when it is foreseeably carried home from the workplace on the employee's body and clothing?

INTRODUCTION

Plaintiffs' decedent, Lynne Haver ("Ms. Haver"), was exposed to asbestos carried home by her husband from his employment with The Atchison, Topeka and Santa Fe Railway Company, a predecessor of Defendant and Respondent BNSF Railway Company ("Defendant BNSF"

or "BNSF"), from July 1972 to 1974. Ms. Haver was diagnosed with mesothelioma, an asbestos-related disease, in March 2008 and passed away in April 2009.

Plaintiffs filed a wrongful death action against BNSF, alleging that it was negligent in its use of asbestos-containing products and that, because of its negligence, Ms. Haver was exposed to asbestos carried home by her husband from the workplace, resulting in her subsequent development and death from mesothelioma. In *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, Division Seven of the Second Appellate District held that a property owner did not owe a duty of care to protect a family member of an employee of an independent contractor from exposure to asbestos resulting from the contractor's work with asbestos insulation on the owner's property. (*Id.* at 26-34.) Relying on *Campbell*, BNSF demurred to the complaint, arguing that it did not have a duty to protect Ms. Haver from exposure to asbestos used in the operation of its business. The trial court agreed and sustained the demurrer without leave to amend.

In a published decision, a divided panel of Division Five of the Second Appellate District affirmed the resulting judgment. Finding no basis to distinguish or disagree with *Campbell*, the majority held that BNSF did not owe a duty of care to Ms. Haver. (Typed opn. at 2, 4-8.) The dissent disagreed, finding that BNSF had a duty to protect Ms. Haver from asbestos exposures resulting from its negligent use of asbestos in its

business. (Dissent at 1-3.) The dissent found that "BNSF's duty arises from Civil Code section 1714, subsection (a), which makes everyone responsible for injuries caused by his or her negligence," and that the factors in *Rowland v. Christian* (1968) 69 Cal.2d 108 did not support a departure from this fundamental duty of care.[1] (*Id.* at 2-3.)

A few weeks before the decision in this case, Division Three of the First Appellate District issued its published decision in *Kesner v. Superior Court* (2014) 226 Cal.App.4th 251. As here, the issue in *Kesner* was whether an employer owed a duty to protect a family member of its employee from exposure to asbestos arising out of the employer's use of asbestos in its business. (*Id.* at 253-254.) Contrary to the majority's conclusion in this case, the *Kesner* court held that while "[t]he duty of care undoubtedly does not extend to every person who comes into contact with an employer's workers, ... 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." (*Id.* at 254.) The court distinguished *Campbell* because the claim in that case "was based on

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[1] The *Rowland* factors include: "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 prevalence of insurance for the risk involved." (*Rowland, supra*, 69 Cal.2d at 112-113; accord, *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771.)

Ford's passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation," as opposed to any negligence arising out of Ford's own, direct use of asbestos, (*id.* at p. 258), and that under the circumstances in *Kesner*, the *Rowland* factors balanced differently and did not support a duty exception. (*Id.* at 256-261.)[2]

The majority in this case declined to follow *Kesner*, finding it distinguishable because "the cause of action in *Kesner* [wa]s for products liability" and did not involve a claim for premises liability, and because "*Campbell* made clear that its no duty rule encompassed *all* plaintiffs who suffered secondary exposure to asbestos off the landowner's property, regardless of the frequency of their contact with the worker who was exposed on the premises, or the worker's employment relationship with the landowner." (Typed opn. at 2, 7-8 [italics in original].) The dissent disagreed, finding that *Kesner* was indistinguishable from this case and that its *Rowland* analysis was correct and supported the existence of a duty of care by BNSF. (Dissent at 1-2.)

California Rules of Court, rule 8.500(b)(1)[3] provides that "[t]he Supreme Court may order review of a Court of Appeal decision ... [w]hen

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[2] A petition for review by this Court was filed by the defendant in *Kesner* on June 25, 2014 (No. S219534) and remains pending as of the filing of this petition.

[3] Unless stated otherwise, all further rules references are to the California Rules of Court.

necessary to secure uniformity of decision or to settle an important question of law." Both grounds are implicated by the Court of Appeal's decision in this case, as the majority's no-duty finding is contrary to the *Kesner* court's recognition of a duty of care under substantially similar circumstances, and because the duty issue in this case presents an important question of law that should be resolved by this Court.

Like *Kesner*, this case is distinguishable from *Campbell*, where Ford merely owned the premises where the independent contractor's asbestos-related work was performed and did not itself perform or control that work. In contrast to *Campbell,* the complaint here alleges that BNSF itself used asbestos in the operation of its business, that it did so through the work of its own employees under its direct control, and that its negligence in using the asbestos resulted in Ms. Haver's exposure to asbestos carried home by her husband from the workplace, causing her development and death from mesothelioma. Thus, unlike the defendant in *Campbell*, BNSF itself created the asbestos hazard through its own, direct use of asbestos and, under these circumstances, the *Rowland* duty factors balance differently and do not support a categorical duty exception. However, even if this case is considered to be factually and legally indistinguishable from *Campbell*, *Campbell* was wrongly decided and should be disapproved by this Court.

Accordingly, for these reasons, as discussed further below, review in this case is warranted and should be granted.

STATEMENT OF THE CASE

I. THE ALLEGATIONS OF THE COMPLAINT.

The complaint alleges that Mike Haver, Ms. Haver's former husband, was employed by The Atchison, Topeka and Santa Fe Railway Company, a predecessor of Defendant BNSF, at its railroad premises in Barstow, California from July 1972 to 1974. (1 Appellants' Appendix ["AA"] 2-3, 5, 7-8, 17 [¶¶ 3-4, 10-11, 22-24 and Ex. A]; typed opn. at 2.) The complaint alleges that the premises where Mr. Haver worked were owned, maintained, managed and controlled by BNSF; that BNSF caused asbestos and asbestos-containing products, including asbestos-containing insulation, to be installed, maintained and used on the premises, including by its employees, and that dangerous quantities of asbestos fibers were released into the air; that Mr. Haver was exposed to asbestos fibers on the premises during the course of his employment, including from asbestos-containing insulation; that Ms. Haver was exposed to those asbestos fibers through direct and indirect contact with her former husband, including contact with his person, clothes, tools and vehicles; and that her exposure to those asbestos fibers resulted in her development of malignant pleural mesothelioma and subsequent death. (1 AA 5-10, 13, 17-18 [¶¶ 10-13, 22-24, 26, 28, 30, 33-34, 44 and Exs. A and B]; typed opn. at 2-3.)

The complaint alleges that BNSF knew or should have known that the presence and use of asbestos and asbestos-containing products on its

premises created an unsafe condition and an unreasonable risk of harm and personal injury to Ms. Haver and other persons. (1 AA 9 [¶ 27]; typed opn. at 2-3.) The complaint alleges that Ms. Haver had no knowledge of the hazardous condition on BNSF's premises; that BNSF knew that its premises would be used without knowledge or inspection for dangerous conditions, and that persons on the premises would not be aware of the hazardous conditions created by the presence and use of asbestos and asbestos-containing products; that BNSF owed a duty of care to avoid exposing Ms. Haver to an unreasonable risk of harm from its premises; and that it breached its duty by negligently failing to maintain, manage, inspect, survey, or control its premises, and by negligently failing to abate, correct or warn her of the dangerous condition created by the presence and use of asbestos and asbestos-containing products on its premises. (1 AA 9-10 [¶¶ 26-33]; typed opn. at 2-3.)

In their opposition to BNSF's demurrer, Plaintiffs stated that they could amend the complaint to allege the following additional facts: (1) that "Defendant BNSF's predecessor, The Atchison, Topeka and Santa Fe Railway Company, who employed Ms. Haver's former husband, Mike Haver, from July 1972 until 1974, had actual knowledge that exposure to asbestos could cause fatal lung disease in human beings no later than 1937"; (2) that the risk of exposure to asbestos brought home on the clothing of workers was known or knowable as early as the 1930s and was

well established by the early-to-mid 1970s, when the exposures in this case took place; (3) that as early as the 1930s and 1940s, government and private organizations recognized the need for changing rooms, showers and isolation of dusty clothes in order to prevent workers from taking home toxic dust; (4) that by the time of the exposures in this case (June 1972 to 1974), the scientific and medical literature had specifically demonstrated that take-home asbestos exposures could cause mesothelioma; and (5) that employers were required, pursuant to federal OSHA asbestos regulations enacted in 1972, to use warnings, protective equipment, and other methods to protect against exposure to asbestos. (2 AA 256-258; see also typed opn. at 3 [describing complaint as alleging that "BNSF knew at all times of the danger of asbestos exposure, including secondary exposure to the spouses of its employees, but failed to abate the dangerous conditions on its premises or warn Lynn of their existence"].)

II. PROCEDURAL SUMMARY.

A. Proceedings In The Trial Court.

The complaint in underlying action was filed on April 12, 2010. (1 AA 1-18.) It alleges claims for wrongful death against Defendant BNSF based on theories of negligence and premises liability. (*Ibid.*)

Following an earlier appeal, BNSF filed a demurrer to the complaint on the ground that it did not owe a duty of care to Ms. Haver. (1 AA 210-244; typed opn. at 3.) Specifically, relying on the decision in *Campbell v.*

Ford Motor Co., supra, 206 Cal.App.4th 15, BNSF argued that it did not owe a duty to protect Ms. Haver from exposure to asbestos arising out its use of asbestos in the conduct of its business on its premises. (*Id.* at 210-218; typed opn. at 3.)

Plaintiffs' opposed the demurrer, (2 AA 249-322), arguing that *Campbell* was distinguishable and was not authority for the absence of a duty of care in this case. (*Id.* at 254-255, 260-262.) In *Campbell*, the issue was whether a property owner owed a duty of care to a family member of an employee of an independent subcontractor hired to install asbestos insulation on the owner's property in the 1940s. (*Ibid.*) In contrast, the issue in this case was whether an employer has a duty to protect an immediate family member (a spouse) of its employee from exposure to asbestos carried home by the employee as a result of the employer's own use of asbestos in the operation of its business, where the employer had direct control over the use of the asbestos. (*Ibid.*) In addition, Plaintiffs argued that the exposures in this case occurred much later than the exposures in *Campbell*. (*Ibid.*) The exposures here occurred in the early-to-mid 1970s, when knowledge of asbestos as a deadly take-home hazard was far greater than what was known or knowable in the 1940s, when the exposures in *Campbell* took place. (*Ibid.*)

Plaintiffs argued that the duty analysis in *Campbell* was limited to the facts that were before the court in that case, which were limited to take-

home exposures to asbestos from work by an independent contractor on the defendant's property. (2 AA 261-262.) In contrast, Plaintiffs argued that this case involved exposure to asbestos from BNSF's own use of asbestos on its property, by its own employees under its direct control. (*Ibid.*) Plaintiffs argued that *Campbell* was inapplicable to this case because these were not the facts or issue before the *Campbell* court.

Having demonstrated that *Campbell* was inapplicable, Plaintiffs argued next that, based on the allegations of the complaint, as well as the allegations proposed by Plaintiffs in their demurrer opposition, there was no basis upon which to create an exception to the general duty of care that BNSF owed Ms. Haver under *Civil Code* § 1714(a). (2 AA 262-265.) Plaintiffs argued that BNSF, as the party claiming the absence of a duty, had failed to demonstrate that an exception was warranted under the *Rowland* factors. (*Id.* at 262-264.) In addition, Plaintiffs argued that persuasive authority from other jurisdictions had found a duty of care under circumstances analogous to this case. (*Id.* at 264-265.)

In its reply, (2 AA 323-327), BNSF argued that "[t]he issue [of duty] in *Campbell*" was identical to the duty issue in this case and that, based on *Campbell*, it did not owe Ms. Haver a duty of care. (*Id.* at pp. 324-325.)

The trial court sustained the demurrer, without leave to amend, ruling that *Campbell* was controlling and that BNSF did not owe a duty of care to Ms. Haver. (2 AA 328-335; Reporter's Transcript on Appeal, Oct.

24, 2012 ["RT"] at 1-5.) The court disagreed with Plaintiffs' contention that *Campbell* was distinguishable because it did not consider the facts and issue presented in this case. (2 AA 329-330.) The court stated that "the Campbell court's holding that a property owner has no duty to protect family members of any worker on the defendant's premises from secondary exposure from asbestos encompasses the situation here where the defendant is the premises owner and the decedent was a family member of the defendant's employee." (*Ibid.*)

B. The Court Of Appeal's Decision.

In a published opinion filed on June 3, 2014, a divided panel of Division Five of the Second Appellate District affirmed the resulting judgment in favor of BNSF. The majority held that there was no basis upon which to distinguish this case from *Campbell*, that *Campbell* was correctly decided, and that BNSF did not owe a duty to protect Ms. Haver from exposure to asbestos carried home by her husband from the workplace. (Typed opn. at 2, 4-8.) The majority declined to follow *Kesner v. Superior Court*, *supra*, 226 Cal.App.4th 251, which was decided and published a few weeks earlier, finding that it was distinguishable because "the cause of action in *Kesner* [wa]s for products liability" and did not involve a claim for premises liability, and because "*Campbell* made clear that its no duty rule encompassed *all* plaintiffs who suffered secondary exposure to asbestos off the landowner's property, regardless of the

frequency of their contact with the worker who was exposed on the premises, or the worker's employment relationship with the landowner." (Typed opn. at 2, 7-8 [italics in original].)

The dissent disagreed, concluding that BNSF had a duty to protect Ms. Haver from exposure to asbestos carried home from the workplace by her husband. (Dissent at 1-3.) The dissent found that "BNSF's duty arises from Civil Code section 1714, subsection (a), which makes everyone responsible for injuries caused by his or her negligence," and that the *Rowland* factors did not support an exception to this fundamental duty of care under the circumstances of this case. (*Id.* at 2-3.) The dissent also found that this case was indistinguishable from *Kesner* and that the *Kesner* court's *Rowland* analysis was correct and supported the existence of a duty of care by BNSF. (*Id.* at 1-2.)

No party filed a petition for rehearing in the Court of Appeal.

WHY REVIEW IS WARRANTED

I. REVIEW IS WARRANTED BECAUSE THE NO-DUTY FINDING BY THE MAJORITY IN THE COURT OF APPEAL IS CONTRARY TO THE KESNER COURT'S RECOGNITION OF A DUTY OF CARE UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES.

Rule 8.500(b)(1) provides that "[t]he Supreme Court may order review of a Court of Appeal decision ... [w]hen necessary to secure uniformity of decision." The no-duty finding by the majority in the Court of Appeal is contrary to the *Kesner* court's recognition of a duty of care

under substantially similar circumstances. Because of these divergent holdings, review in this case should be granted "to secure uniformity of decision."

A. Campbell v. Ford Motor Co.

In *Campbell v. Ford Motor Co. supra*, 206 Cal.App.4th 15, the court 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." (*Campbell*, *supra*, 206 Cal.App.4th at 34.) Although broadly stated, the court's holding was based on a narrow set of facts involving work by an independent contractor.

In *Campbell*, "[t]he plaintiff ... filed a premises liability action against Ford Motor Company, alleging she had been diagnosed with mesothelioma as a result of her exposure to asbestos from laundering her father's and brother's asbestos-covered clothing during the time they worked with asbestos as independent contractors hired by Ford to install asbestos insulation at its Metuchen, New Jersey plant." (*Campbell*, *supra*, 206 Cal.App.4th at 19; see also *id.* at 20.) The evidence showed that Ford hired a general contractor to construct "a new Lincoln-Mercury assembly plant in Metuchen, New Jersey," that this general contractor hired a subcontractor who, in turn, hired another subcontractor, and that it was the latter subcontractor for whom the plaintiff's father and brother worked. (*Id.* at 20, 31 n.6.) Thus, there were multiple layers of independent contractors

separating Ford from the independent contractor in question.

On appeal, Ford argued that it had no liability because there was no connection between its role as a hirer of independent contractors, the multiple layers of independent contractors who controlled their own methods and manner of work, and the plaintiff's exposure to asbestos from its property. (*Campbell, supra*, 206 Cal.App.4th at 23, 28-29.) Relying on *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny, Ford argued that "it owed [the plaintiff] no duty as a matter of law because a 'property owner is not responsible for injuries caused by the acts or omissions of an independent contractor unless the property owner controlled the work that allegedly caused the injury, or failed to warn of a known pre-existing concealed hazardous condition on the property.'" (*Id.* at 29.) Ford argued that because "it owed no duty to [the plaintiff's] father or brother," as employees of an independent contractor, it "therefore owed no duty to her." (*Ibid.*)

Accordingly, the issue in *Campbell* was whether Ford, as a mere property owner, had a duty to protect a family member of employees of an independent contractor from secondary or take-home exposure to asbestos resulting from the independent contractor's asbestos-related work on its property. The workers using the asbestos insulation were employees of the independent contractor, not Ford; the work that resulted in the exposures to the independent contractor's employees was performed by the independent

contractor, not Ford; and Ford had no control over the independent contractor's work. These were the circumstances under which the *Campbell* court analyzed the *Rowland* duty factors and found that Ford did not owe a duty of care to the plaintiff. (*Campbell*, *supra*, 206 Cal.App.4th at 26-34.)

Notably, in its original opinion, the *Campbell* court stated that "the issue before us is whether an employer has a duty to protect family members of employees from secondary exposure to asbestos used during the course of the employer's business." (2 AA 293 [original *Campbell* as-filed opn. at 14].) Additionally, elsewhere in its original opinion, the court discussed the issue in terms of whether an employer owes a duty of care to a family member of its employee. (*Id.* at 295-296, 299 [original *Campbell* as-filed opn. at 16-17, 20].) The *Campbell* court, however, subsequently modified its opinion, upon denial of a petition for rehearing, to make clear that the issue before it was *not* whether an employer has a duty to protect family members of its employees from exposure to asbestos carried home from the workplace, but, rather, whether a property owner has a duty to protect family members of workers on its premises. (2 AA 302-304 [Order Modifying Opinion at 1-3]; see also *Campbell*, *supra*, 206 Cal.App.4th at 29, 34 [final opinion as modified on denial of rehearing].) And, as seen, the workers in question in *Campbell* were employees of *an independent contractor*, not Ford, with multiple additional independent contractors

separating that contractor from Ford. (*Campbell, supra*, 206 Cal.App.4th at 20, 31 n.6; see also 2 AA 260-262 [discussion of modification of original *Campbell* opinion in Plaintiffs' demurrer opposition].)

The distinction between work by an independent contractor and work by an employer, through its own employees, is no small matter. (See *Varisco v. Gateway Sci. and Eng'g Co.* (2008) 166 Cal.App.4th 1099, 1103 [independent contractor controls manner and means of work it has been hired to perform, whereas employer controls manner and means of work by its employees]; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 983-984 [same].) It is a distinction that directly impacts core issues of duty, including the foreseeability of harm to the plaintiff, the closeness of the connection between the defendant's conduct and the plaintiff's injury, and the moral blameworthiness of the defendant's conduct. (*Cabral, supra*, 51 Cal.4th at 771; *Rowland, supra*, 69 Cal.2d at 112-113.) Indeed, the distinction is so important that, in *Campbell*, Ford itself acknowledged that it could have liability for the plaintiff's exposure to asbestos from its premises if she could prove that it had "controlled the work" – control that Ford necessarily would have exerted if the work was performed by its own employees, rather than by an independent contractor. (*Campbell, supra*, 206 Cal.App.4th at 23; see also *ibid* [jury instruction requested by Ford that, to establish liability, plaintiff had to prove that "'Ford affirmatively contributed to plaintiff's alleged injury'"].)

In a crucial passage of its opinion addressing the duty analysis under *Rowland*, the *Campbell* court concluded that the connection between Ford's conduct and the plaintiff's injury was too "attenuated" to support a duty of care. (*Campbell, supra*, 206 Cal.App.4th at 31.) Of course, that conclusion was made in the context of Ford's status as the ultimate hirer in a hierarchy of multiple independent contractors. There were *no facts* before the *Campbell* court that would have allowed it decide whether an employer's direct control over work with asbestos by its own employees, who subsequently carried the asbestos home on their clothing and bodies, was too "attenuated" to support a duty of care to an immediate family member of one of its employees who was exposed to the asbestos.

As explained by this Court, "'[i]t is axiomatic that cases are not authority for propositions not considered.' 'The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [citations omitted].) "[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts." (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1097 [italics added] [footnote omitted].)

Accordingly, the *Campbell* decision is necessarily limited to the facts that were before the court in that case, and those facts were limited to

asbestos carried home by employees of an independent contractor from work by that contractor on the defendant's property. The defendant in *Campbell* did not conduct or control the independent contractor's work and it did not create the asbestos hazard; the defendant merely owned the property where the work was occurred.

B. Kesner v. Superior Court.

In *Kesner v. Superior Court*, *supra*, 226 Cal.App.4th 251, the plaintiff developed mesothelioma as a result of exposure to asbestos carried home by his uncle from his uncle's employment with the defendant, where the defendant used asbestos in the manufacture of brake linings. (*Id.* at 253-256, 258.) The plaintiff was a frequent guest in his uncle's home between 1973 and 1979, spending the night there as much as three or four times per week, and he was exposed to asbestos from contact with his uncle, who came home in "work clothes covered in asbestos dust." (*Id.* at 253-255.) Relying on *Campbell*, the trial court granted a nonsuit in favor of the defendant, ruling that the defendant did not owe a duty of care to the plaintiff. (*Id.* at 254-255.)

On appeal, the defendant argued that the trial court's ruling was correct because "'no duty is owed [by an employer] to family members of workers for take-home exposures.'" (*Kesner*, *supra*, 226 Cal.App.4th at 254 [bracketed language in original].) The Court of Appeal disagreed, stating that it did "not believe that such a broad and unqualified limitation

on an employer's duty accurately states the law." (*Ibid.*) The court acknowledged "that the prospect of 'indeterminate liability' places a limitation on those to whom the duty of exercising reasonable care may extend," and it "recognize[d] 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." (*Ibid.*) Taking these considerations into account, the court held that while "the duty of care ... does not extend to every person who comes into contact with an employer's workers, ... 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." (*Ibid.*)

As to the plaintiff, the court noted that "[w]hile [he] 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." (*Kesner*, *supra*, 226 Cal.App.4th at p. 254.) Considering these circumstances in its analysis of the *Rowland* factors, the court "conclude[d] that the likelihood of causing harm to a person with such recurring and non-incidental contact with the employer's employee, in this case [the plaintiff's] uncle, is sufficient to bring [the plaintiff] within the scope of those to whom the employer ... owes the duty to take reasonable measures to avoid causing harm." (*Ibid.*)

In reaching its decision, the court discussed *Campbell*, finding that it

was distinguishable because *Campbell* involved a claim for premises liability "based on Ford's passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation," whereas the negligence claim in *Kesner* was based on take-home asbestos exposures arising out the defendant's own use of asbestos in its manufacturing operations. (*Kesner*, *supra*, 226 Cal.App.4th at 258.) The court noted that "[w]hile the same *Rowland* factors are pertinent to the analysis of a negligence claim," the factors balanced differently under the circumstances in *Kesner*, compared to *Campbell*, and that the balance in *Kesner* did "not lead to the conclusion that an employer responsible for exposing its employees to a toxin 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." (*Id.* at 258-259 [italics in original].)

In its examination of the *Rowland* factors, the *Kesner* court held that the "[t]he first three factors" – the foreseeability of harm to the plaintiff, the certainty of injury, and closeness of the connection between the defendant's conduct and the injury – "are related and tend to support extension of the employer's duty of care beyond its employees." (*Kesner*, *supra*, 226 Cal. App.4th at 256, 259.) The court observed that "harm to others resulting from secondary exposure to asbestos dust is not unpredictable" and that "[t]he 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." (*Id.* at 259.) The court also noted that "[t]here is often no doubt that a plaintiff ... suffering from malignant mesothelioma, has suffered injury due to friable asbestos." (*Ibid.*)

The court held that the fourth *Rowland* factor – the moral blame attributable to the defendant's conduct – "tends to support extension of an employer's responsibility to more than its employees" because, where a defendant "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." (*Kesner*, *supra*, 226 Cal.App.4th at 256, 259.) As to the fifth *Rowland* factor, i.e., the policy of preventing future harm, the court held that it supported a duty of care because, even though asbestos is heavily regulated and the injurious exposures had already taken place, "asbestos is not the only toxin to which an employer's obligations apply" and "[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." (*Id.* at 256, 259-260.) Moreover, as this Court explained in *Cabral*, "[t]he overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Cabral*, *supra*, 51 Cal.4th at 781.)

As to the next two *Rowland* factors, i.e., the extent of the burden on the defendant and the consequences to the community if a duty is imposed, the *Kesner* court noted that these are the considerations that "have led California courts to limit the reach of liability even for injuries that are foreseeable." (*Kesner*, *supra*, 226 Cal.App.4th at 256, 260.) The court also noted that these factors, along with the final *Rowland* factor addressing insurance, were the controlling factors for the no-duty finding in *Campbell*.[4] (*Id.* at 260.) However, "[i]n weighing these competing considerations" under the circumstances presented in *Kesner*, the court concluded that "the balance falls far short of terminating liability at the

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[4] The court also noted that these factors were addressed in *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813. (*Kesner*, *supra*, 226 Cal.App. 4th at pp. 258, 260.) In *Oddone*, the plaintiff alleged that she was exposed to toxic chemicals brought home from the workplace on the clothing of her husband. (*Oddone*, *supra*, 179 Cal.App.4th at 815-817.) The appellate court held that the complaint was insufficient to state a cause of action for secondary exposure to toxic chemicals because it did not allege facts sufficient to satisfy the first three *Rowland* factors: foreseeability of the harm; certainty of the injury; and closeness of the connection between the defendant's conduct and the injury. (*Id.* at 820-822.) Importantly, in reaching its decision, the court made clear that it was not announcing a categorical rule against a duty to prevent toxic secondary exposures. Rather, the court emphasized the limited nature of its holding:

> We do not hold that a plaintiff cannot state a cause of action for secondary exposure to toxic chemicals. Given appropriately specific allegations, this may be quite possible. But in this case, petitioner's allegations simply do not establish any connection, much less a close connection, between the defendant's conduct and her alleged (and unspecified) injuries.

(*Id.* at 822.)

door of the employer's premises." (*Id.* at 261.) As explained by court:

> 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* [*v. Arthur Young & Co.* (1992) 3 Cal.4th 370] and *Elden* [*v. Sheldon* (1988) 46 Cal.3d 267], 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.

(*Ibid.*)

The court was careful to point out that its holding was "based on the assumption, required by the standard for reviewing the sufficiency of the allegations of a complaint, that [the plaintiff's] contact with his uncle was extensive." (*Kesner*, *supra*, 226 Cal.App.4th at 261.) "As to such persons, the foreseeability of harm is substantial," the court explained. (*Ibid.*) However, "[a]s to persons whose contact with an employer's worker is only casual or incidental, the foreseeability 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." (*Ibid.*)

Finally, the court observed that "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." (*Kesner, supra*, 226 Cal.App.4th at 261; see also *Pedeferri v. Seidner Enters.* (2013) 216 Cal.App.4th 359, 369 ["The existence of a duty is but the first of many elements of a tort claim. An injured plaintiff must also prove that the vendor breached the duty of care and proximately caused his or her injury."] [citation omitted].)

C. The Majority's No-Duty Finding Conflicts With The Recognition Of A Duty Of Care in Kesner.

The circumstances in this case are substantially similar to *Kesner* and, thus, like *Kesner* it is distinguishable from *Campbell.* As seen, in *Campbell*, Ford merely owned the property where the independent contractor's asbestos-related work was performed and did not itself perform or control the work. (*Campbell, supra*, 206 Cal.App.4th at 19-21, 23, 28-29.) Here, in contrast, the complaint alleges that BNSF itself used asbestos in the operation of its business, that it did so through the work of its own employees under its direct control, and that its negligence in using the asbestos resulted in Ms. Haver's exposure to asbestos carried home by her husband from the workplace, causing her development and death from mesothelioma. (1 AA 5-10, 13, 17-18 [¶¶ 10-13, 22-24, 26-34, 44 and Exs.

A and B]; typed opn. at 2-3; see also, *ante*, at 6-7.) Thus, like the defendant in *Kesner*, but unlike the defendant in *Campbell*, BNSF itself created the asbestos hazard through its own, direct use of asbestos, and under these circumstances the *Rowland* factors balance in favor of a duty of care and against a categorical duty exception, as the court in *Kesner* concluded.

The majority in the Court of Appeal found that *Kesner* was distinguishable from this case because "the cause of action in *Kesner* [wa]s for products liability" and did not, like this case or *Campbell*, involve a claim for premises liability. (Typed opn. at 2, 7-8.) This distinction is not well-taken. The complaint in *Kesner* alleged multiple causes of action, including one for "strict products liability arising from [the plaintiff's] contact with asbestos manufactured or supplied to his him as a worker or end user." (*Kesner*, *supra*, 226 Cal.App.4th at 255.) However, the cause of action at issue in the appeal did *not* involve a products liability claim. Rather, it was a claim for negligence arising out of the plaintiffs' exposure to asbestos carried home by his uncle from his uncle's employment with the defendant. (*Id.* at 253-255.) While the asbestos carried home on the uncle's work clothing came from the defendant's use of asbestos in its manufacturing operations, (*id.* at pp. 255, 258), this did not transform the plaintiff's cause of action against the defendant into a products liability claim.

Moreover, that the claim under consideration in *Kesner* was labeled

as one for negligence, rather than premises liability, which was the label given to one of the claims in this case,[5] is immaterial. For as the dissent pointed out, "[w]hatever label is attached to the take-home exposure cases, they are all based on the alleged negligence of the employer." (Dissent at 2.) And while the court in *Kesner* distinguished *Campbell* because it was "based on a theory of premises liability," it made clear that what it meant was that "[t]he 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," whereas the negligence claim in *Kesner* was based on exposures arising out the defendant's own use of asbestos in its manufacturing operations. (*Kesner*, *supra*, 226 Cal.App.4th at 258.)

The majority also declined to follow *Kesner* because "*Campbell* made clear that its no duty rule encompassed *all* plaintiffs who suffered secondary exposure to asbestos off the landowner's property, regardless of the frequency of their contact with the worker who was exposed on the premises, or the worker's employment relationship with the landowner." (Typed opn. at 8 [italics in original].) However, as discussed above, notwithstanding the broad language used by the *Campbell* court in stating its holding, *Campbell* did not consider the issue of duty under the

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[5] The complaint alleges claims for wrongful death against BNSF based on theories of negligence and premises liability. (1 AA 2-14.)

circumstances presented in this case. *Kesner*, on the other hand, did consider the issue under substantially similar circumstances, concluding that a duty of care was owed. The dissent in this case agreed, finding that *Kesner* was indistinguishable and that its analysis of the duty issue was correct and supported a duty of care by BNSF. (Dissent at 1-2.)

Accordingly, because the majority's no-duty finding conflicts with the *Kesner* court's recognition of a duty of care under circumstances substantially similar to this case, review should be granted "to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

II. REVIEW IS WARRANTED BECAUSE THE NO-DUTY FINDING BY THE MAJORITY IN THE COURT OF APPEAL PRESENTS AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT.

Rule 8.500(b)(1) provides that "[t]he Supreme Court may order review of a Court of Appeal decision ... to settle an important question of law." This ground provides an additional basis upon which to grant review in this case.

As recognized by the dissent in this case, "[w]hile courts throughout the country are divided on the issue of liability for take-home asbestos exposure, the majority of courts which find no liability are in states which, unlike California, focus on the relationship between the parties as the primary factor in determining duty. The majority of courts which find liability are in states which share California's view of foreseeability as the

primary factor in determining duty." (Dissent at 2 [citing Note, *The Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure* (2014) 71 Wash. & Lee L. Rev. 707].)

Indeed, even in *Campbell*, the court recognized that the dividing line between those jurisdictions that recognize a duty of care in take-home exposure cases, and those that do not, is whether the inquiry focuses on foreseeability of the harm or the relationship of the parties:

> 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 33; see also *Satterfield v. Breeding Insulation Co.* (Tenn. 2008) 266 S.W.3d 347, 361-363 [concluding that courts finding a duty in take-home exposure cases focus on foreseeability, whereas courts finding no duty focus on the parties' relationship].)

In California, the duty analysis focuses primarily on foreseeability of the harm and does not look to whether there is (or is not) a relationship between the parties. (*Cabral*, *supra*, 51 Cal.4th at 771; *Rowland*, *supra*, 69 Cal.2d at 112-113.) Indeed, as stated by this Court, "[f]oreseeability of

harm is a 'crucial factor' in determining the existence and scope of [a] duty," (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1189), and is "[t]he most important of these [*Rowland*] considerations in establishing duty." (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 434; see also *Pedeferri*, *supra*, 216 Cal.App.4th at 366 ["Foreseeability is the '... chief factor in [the] duty analysis.'"].)

Despite California's primary emphasis on foreseeability, the majority in this case, like the court in *Campbell*, relied on public policy considerations – namely, concerns about limitless liability, negative consequences on the availability of insurance, and forcing companies into bankruptcy – to justify a categorical no-duty rule in take-home exposure cases. (Typed opn. at 6-7; *Campbell*, *supra*, 206 Cal.App.4th at 32-34.) However, as the dissent in this case stated:

> I question the factual basis for these concerns, but more importantly, I find stronger public policy considerations counsel imposing such a duty. Society does not benefit by allowing tortfeasors to avoid responsibility for their tortious conduct, particularly in cases such as the present one where the injury is a physical one and its cause undisputed.

(Dissent at 2.)

Likewise, in *Kesner*, the court acknowledged "these competing [public policy] considerations," but concluded that in weighing them along with the other *Rowland* factors, particularly the high degree of foreseeability of harm associated with take-home asbestos exposures and

the attendant moral blame, "the balance falls *far short* of terminating liability at the door of the employer's premises." (*Kesner*, *supra*, 226 Cal.App.4th at p. 261 [italics added].) The court found that "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," since "[u]nlike indirect financial loss or mental anguish ..., mesothelioma (in particular, and other toxic-related diseases in general) can hardly be claimed by everyone." (*Ibid.*) In addition, the court found there was no "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." (*Ibid.*)

Similarly, in *Satterfield*, the Tennessee Supreme Court, in recognizing a duty of care in a take-home exposure case, rejected several policy arguments made by the defendant, including "that the current asbestos litigation crisis in the United States will be worsened if employers that have utilized asbestos in manufacturing are exposed to additional costly litigation," "that manufacturers could face bankruptcy and a substantial loss of jobs could result if they are exposed to the burden of additional liability," and "that finding that it has a duty to persons like [the plaintiff] will expose premises owners to a host of similar claims by other

plaintiffs." (*Satterfield, supra*, 266 S.W.3d at 369-371.)

Accordingly, the Court should grant review in this case to address whether, under the *Rowland* factors, there is justification for a categorical exception to the fundamental duty of care established by *Civil Code* § 1714(a) in take-home exposure cases under the circumstances involved here. As explained by this Court in *Cabral*, "[t]he question is not whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714's duty of exercising ordinary care in one's activities ... should be created." (*Cabral, supra*, 51 Cal.4th at 783 [italics in original].) An exception to the general duty of care under *Civil Code* § 1714(a) is proper "*only* when foreseeability *and* policy considerations justify a categorical no-duty rule." (*Id.* at 772 [italics added].) "[I]n absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.'" (*Id.* at 771.) As demonstrated by Plaintiffs in their briefing in the Court of Appeal, foreseeability and public policy considerations do *not* "clearly support[]" or "justify a categorical no-duty rule" under the circumstances of this case. (Appellants' Opening Brief at 23-41; Appellants' Reply Brief at 11-42.) The majority in the Court of Appeal concluded otherwise, however, and by doing so it created an unwarranted duty exception.

As discussed, the *Rowland* duty factors balance differently in this

case, compared to *Campbell*, because of the different circumstances involved here. *Campbell*, therefore, is distinguishable and a duty of care can be recognized in this case without conflicting with *Campbell*. If, however, this case is be deemed to be indistinguishable from *Campbell*, then this Court should grant review and disapprove *Campbell* because its analysis of the duty issue under *Rowland* was flawed and it was wrongly decided.

Finally, California law has long recognized that a property owner's duty of care is not limited to injuries on the property, but extends to persons injured off the property by the owner's negligent use, control and/or maintenance of the property. (*Garcia v. Paramount Citrus Ass'n, Inc.* (2008) 164 Cal.App.4th 1448, 1453; *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478-1479; *A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 663; *Davert v. Larson* (1985) 163 Cal.App.3d 407, 409-410.) The categorical no-duty rule created by the majority in this case is contrary to this well-established principle and will have far reaching negative consequences if allowed to stand, as employers will now have no legal responsibility for foreseeable injuries suffered by family members of employees who are exposed to toxins carried home from the workplace as a result of the employer's negligence. The majority's no-duty rule cannot be limited to asbestos or asbestos-related injuries, but will necessarily apply to any take-home exposure injury, regardless of toxin involved. Such a rule is

simply wrong.

Moreover, the majority's no-duty rule is troubling because there is no principled basis for creating a duty exception for take-home toxic exposure cases compared to other cases where a duty of care would undoubtedly exist. For example, what is the difference between this case – where the toxin was carried home from the workplace by an employee as a result of the employer's negligence – and a case involving exposure to a toxin negligently emitted from an employer's factory and carried by the wind into a nearby neighborhood, where it sickens and injures residents? There is no doubt that in the latter case, the employer would be under a duty of care and could be held liable for the injuries resulting from its negligence. Why should it be any different in the take-home exposure context, where, instead of the wind, the toxin is carried home on the clothing and bodies of the employer's employees? If anything, the exposure in the take-home context is far more predictable, as it is not based on the vagaries of which way the wind is blowing.

Changing the facts, what if, instead of a toxin, a fire negligently breaks out at an employer's factory and spreads to a nearby neighborhood, causing injury to residents and property damage. Again, there is no doubt that the employer would be subject to liability for its negligence. (E.g., *Wilson v. Sespe Ranch* (1962) 207 Cal.App.2d 10, 13-18.) Why should the rule be any different when the injury is caused by an employer's negligence

in allowing a toxin it uses in the workplace to be carried home on the bodies and clothing of its employees, where family members can be exposed and injured? It should not be different.

Accordingly, review should be granted because the majority's no-duty finding presents "an important question of law" that should be settled by this Court. (Cal. Rules of Court, rule 8.500(b)(1).)

CONCLUSION

For the reasons set forth above, this Court should grant review in this case to (1) "secure uniformity of decision" and/or (2) "to settle an important question of law" pertaining to whether, and under what circumstances, an employer owes a duty of care to protect family members of its employees from exposure to a toxin used in the workplace that is carried home on the employees' bodies and clothing.

Dated: July 14, 2014.

Respectfully submitted,

WATERS, KRAUS & PAUL

By: _____

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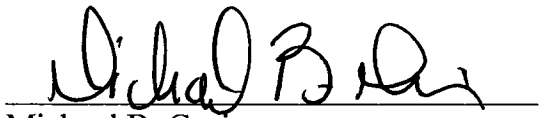
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.504(d)(1), the undersigned hereby certifies that this Petition for Review contains 8,344 words, exclusive of the caption, tables, the signature block, this certification, and the attached opinion of the Court of Appeal, as counted by the Mircrosoft Word word-processing program used to generate it.



Michael B. Gurien
State Bar No. 180538

APPENDIX

OPINION OF THE COURT OF APPEAL, INCLUDING THE COURT'S MODIFICATION ORDER

Filed 6/23/14 (unmodified opinion attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSHUA HAVER et al., Plaintiffs and Appellants, v. BNSF RAILWAY CO., Defendant and Respondent.	B246527 (Los Angeles County Super. Ct. No. BC435551) **ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]**

It is ordered that the opinion filed herein on June 3, 2014, and certified for publication, be modified in the following particulars:

On page 5, the heading "*Defendant's Challenges to Campbell*" should be replaced with "*Plaintiffs' Challenges to Campbell.*"

On page 5, in the above referenced heading, the first sentence reads: "Defendant initially made two contentions to support his position that the trial court erred in sustaining the demurrer in reliance on *Campbell—Campbell* is factually distinguishable, but if not, it was incorrectly decided." The sentence should be replaced with "Plaintiffs initially made two contentions to support their position that the trial court erred in sustaining the demurrer in reliance on *Campbell—Campbell* is factually distinguishable, but if not, it was incorrectly decided."

There is no change in the judgment.

TURNER, P. J. KRIEGLER, J.

Filed 6/3/14 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOSHUA HAVER et al., Plaintiffs and Appellants, v. BNSF RAILWAY CO., Defendant and Respondent.	B246527 (Los Angeles County Super. Ct. No. BC435551)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Affirmed.

Waters Kraus & Paul, Paul C. Cook, Michael B. Gurien for Plaintiffs and Appellants.

Sims Law Firm and Selim Mounedji for Defendant and Respondent.

Relying on the holding in *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 (*Campbell*), the trial court sustained a demurrer without leave to amend in a wrongful death action based on premises liability brought by the survivors of a woman who died of mesothelioma as a result of exposure to asbestos from her husband's work clothes. The survivors argue that *Campbell* is distinguishable on its facts, or in the alternative, it was incorrectly decided. They also contend that *Kesner v. Superior Court* (May 15, 2014, No. A136378) __ Cal.App.4th __ (*Kesner*), a case decided after oral argument in this appeal, compels a finding of error.

We reject the argument that *Campbell, supra*, 206 Cal.App.4th 15, is distinguishable on its facts. We also conclude that *Campbell's* holding, which is consistent with the majority view in the nation on the issue, correctly applies California law. The opinion in *Kesner* expressly declined to question the holding in *Campbell*, and the cause of action in *Kesner* is for products liability, not premises liability, as in *Campbell* and the instant case. Therefore, we affirm.

ALLEGATIONS OF THE COMPLAINT

Lynn Haver (Lynn)[1] contracted mesothelioma as a result of her secondary exposure to asbestos. Haver's former husband, Mike Haver (Mike), was employed by the Santa Fe Railway, the predecessor to defendant BNSF Railway Company in the 1970's. Mike was exposed to products and equipment containing asbestos on BNSF's premises on numerous occasions during the course of his employment. The asbestos adhered to his clothing and was transferred to the couple's home, where Lynn was exposed.

Lynn was at all times unaware of the hazardous conditions or the risk of personal injury and death to those working in the vicinity of products and materials containing

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[1] Because of common surnames in the complaint, we refer to the Havers by their first name for clarity.

asbestos, and was not aware of the effects of secondary exposure to her own well-being. BNSF knew at all times of the danger of asbestos exposure, including secondary exposure to the spouses of its employees, but failed to abate the dangerous conditions on its premises or warn Lynn of their existence.

Lynn inhaled asbestos fibers as a result of her direct and indirect contact with Mike, his clothing, tools, vehicles, and general surroundings. As a proximate result of her exposure to asbestos, Lynn suffered severe and permanent injuries including throat cancer and progressive lung disease, from which she died.

DEMURRER AND RULING OF THE TRIAL COURT

BNSF demurred, relying on *Campbell, supra*, 206 Cal.App.4th 15, in support of its contention that BNSF had no duty to Lynn as a matter of law in an action based on premises liability. The trial court sustained the demurrer without leave to amend. Plaintiffs timely appealed the judgment.

DISCUSSION

Standard of Review

"'On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows

there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citation.]" (*McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1206.)

Elements of Premises Liability Cause of Action

"The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918.) The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; see Civ.[]Code, 1714, subd. (a).)" (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.)

The Decision in Campbell

In *Campbell, supra*, 206 Cal.App.4th at p. 19, the plaintiff filed a premises liability action against Ford Motor Company, alleging that she contracted mesothelioma as a result of her secondary exposure to asbestos, which occurred when she shook out and laundered her father's and brother's work clothes. The evidence showed that Ford hired a general contractor in the 1940's to construct a plant; the contractor hired a subcontractor; and that subcontractor hired another subcontractor, which employed the plaintiff's father and brother, who were exposed to asbestos on the job. (*Id.* at p. 31, fn. 6.) Following a jury verdict, the trial court entered judgment in favor of the plaintiff. (*Id.* at p. 23.)

Ford argued on appeal that "it owed [the plaintiff] no duty as a matter of law because a 'property owner is not responsible for injuries caused by the acts or omissions of an independent contractor unless the property owner controlled the work that allegedly caused the injury, or failed to warn of a known pre-existing concealed hazardous

condition on the property.'" (*Campbell, supra*, 206 Cal.App.4th at p. 29.) The *Campbell* court reversed, but not on the narrow ground assert by Ford.

The *Campbell* court rephrased the issue as follows: "In our view, the issue before us is 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. Our examination of the *Rowland* [*v. Christian* (1968) 69 Cal.2d 108, 113] factors leads us to the conclusion Ford owed [the plaintiff] no duty of care." (*Campbell, supra,* 206 Cal.App.4th at p. 29, fn. omitted.) "Here, even assuming a property owner can reasonably be expected to foresee the risk of latent disease to a worker's family members secondarily exposed to asbestos used on its premises, we must conclude strong public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure. (See *O'Neil v. Crane Co.* [(2012)] 53 Cal.4th [335,] 364-365 ['strong policy considerations counsel against imposing a duty of care on pump and valve manufacturers to prevent asbestos-related disease'].) The *Rowland* factors do not support a finding of duty in this case." (*Campbell, supra*, at p. 32.)

Defendant's Challenges to Campbell

Defendant initially made two contentions to support his position that the trial court erred in sustaining the demurrer in reliance on *Campbell—Campbell* is factually distinguishable, but if not, it was incorrectly decided. A third issue is now presented, based on the holding of *Kesner, supra,* __ Cal.App.4th __, that a plaintiff can state a cause of action for secondary exposure to asbestos in the context of an action for products liability. We discuss the contentions in order.

Attempt to Limit Campbell to its Facts

Plaintiffs seek to distinguish C*ampbell* on the basis that Mike was a direct employee of the railroad, unlike the situation in *Campbell*, where the employees exposed to asbestos did not work for Ford, but instead were employed by a subcontractor who was several levels removed from the premises owner. They argue that the no duty holding of

Campbell, properly understood, is limited to a plaintiff who was the relative of workers employed by an *independent contractor*, where those workers were not controlled by the property owner. This is simply incorrect.

The *Campbell* court expressly states that the issue "is 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." (*Campbell, supra,* 206 Cal.App.4th at p. 29, fn. omitted.) "Workers" includes those employed by the property owner, as well as those employed by independent contractors to work on the premises of the owner. Most significantly, the *Campbell* court acknowledged that the relationship between Ford and the injured plaintiff was attenuated "inasmuch as Ford hired a general contractor to perform the work, that general contractor hired a subcontractor, that subcontractor hired another subcontractor, and that subcontractor employed [the plaintiff's] father and brother." (*Id.* at p. 31, fn 6.) However, the court made it unequivocally clear that "our analysis does not turn on this distinction . . . ." (*Ibid.*) Nothing in the analysis of the *Campbell* decision indicates the court waivered from this approach.

Contention that Campbell was Incorrectly Decided

We reject the contention that *Campbell* was incorrectly decided. *Campbell's* conclusion is consistent with the majority view on the issue of premises liability to third parties based on off-site exposure to asbestos. "Most states have rejected liability on these facts, however, for a variety of reasons." (Dobbs et al., The Law of Torts (2d ed. 2011) § 272, p. 63, fn. 4.) "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." (4 Cetrulo, Toxic Torts Litigation Guide (2013) § 33:6, fn. omitted) "While the hazardous nature of asbestos troubles [courts] such that they want to allow recovery to its victims, the 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 Asbestos Exposure* (2014) 71 Wash. & Lee L. Rev. 707, 711, fns. omitted.) "In Georgia and New York, the high courts held that such plaintiffs did not have a cause of action against the premises owners because the plaintiffs could not satisfy the necessary element of duty of care. The courts concluded that finding such a duty would upset traditional tort law, be unworkable in practice, and result in unsound public policy. A mid-level appellate court in Texas and a Tennessee trial court have concurred. The Supreme Court of New Jersey, perhaps swayed by compassion for the plaintiff, tried to stake a compromise position by holding that defendants can owe such a duty, but only when a duty is owed to the worker and the risk to the nonworker is foreseeable. [¶] The Georgia and New York rulings are more in line with traditional tort law." (Schwartz et al., *A Letter to the Nation's Trial Judges: Serious Asbestos Cases—How to Protect Cancer Claimants and Wisely Manage Assets* (2006) 30 Am. J. Trial Advoc. 295, 305-306, fns. omitted.)

We are satisfied, after reviewing the decision in *Campbell* and the views of courts in other jurisdictions, that *Campbell* was correctly decided.

The Decision in Kesner

After oral argument in this case, a panel of the First Appellate District decided *Kesner, supra*, __ Cal.App.4th __, a decision plaintiffs brought to our attention pursuant to rule 8.254 of the California Rules of Court. *Kesner* does not change our analysis. In *Kesner*, the plaintiff sought to hold Pneumo Abex, LLC (Abex) liable for mesothelioma that he contracted through secondary exposure to asbestos. The plaintiff spent time with his uncle at his uncle's home on a regular basis, and was exposed to respirable asbestos fibers transferred onto his uncle's work clothing during the time that the uncle worked for Abex. *Kesner* was not a premises liability case; the complaint alleged *negligence in Abex's manufacture* of brake linings that contained asbestos. The trial court granted

Abex's motion for nonsuit relying on *Campbell*, concluding 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.'"

The *Kesner* court reversed. In doing so, it stated that it "need not question 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. . . . 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." The *Kesner* court went on to conclude that manufacturers of products containing toxins have a duty of care to persons who have extensive contact with employees exposed to those toxins, and who suffer secondary exposure and injury as a consequence.

The only cause of action before us is for premises liability. *Kesner* expressly does not question the holding in *Campbell* in the context of a premises liability cause of action. As discussed above, *Campbell* made clear that its no duty rule encompassed *all* plaintiffs who suffered secondary exposure to asbestos off the landowner's property, regardless of the frequency of their contact with the worker who was exposed on the premises, or the worker's employment relationship with the landowner.

Conclusion

We conclude that BNSF owed no duty of care to Lynn, and affirm the trial court's judgment. We further conclude that the trial court acted within its discretion in sustaining the demurrer without leave to amend, because absent a duty of care, there is no reasonable possibility that the defect can be cured by amendment.

DISPOSITION

The judgment is affirmed. Plaintiffs shall bear BNSF's costs on appeal.

KRIEGLER, J.

I concur:

TURNER, P. J.

MINK, J., Dissenting
Haver v. BNSF Rail
B246527

I dissent.

I would reverse the order of the trial court sustaining the demurrer to appellant's complaint without leave to amend. I believe respondent BNSF had a duty to protect decedent Lynn Haver from the effects of take-home exposure to asbestos, a substance which was allegedly used in the workplace of her former husband, a former BNSF employee.

There are two published California Court of Appeal cases dealing with the issue of take-home exposure to asbestos, and they reach differing conclusions. (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 ("*Campbell*") [a property owner has no duty to protect family members of workers on its premises from take-home exposure to asbestos used during the course of the business conducted on the owner's premises]; *Kesner v. Superior Court* (May 15, 2014, No. A136378) ___ Cal.App.4th ___ ("*Kesner*") [an employer owes a duty of care to protect employees' family members from take-home exposure to asbestos].)

BNSF's duty arises from Civil Code section 1714, subsection (a), which makes everyone responsible for injuries caused by his or her negligence. As our Supreme Court has explained: "A departure from this fundamental principle involves the balancing of a number of considerations. . . ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113.) I believe that application of the *Rowland* factors, as fully discussed in *Kesner*, requires a finding that BNSF did owe a duty to Mrs. Haver, who died as a result of illnesses caused by take-home exposure to asbestos.

A review of many out of state cases on this topic reinforces my belief. While courts throughout the country are divided on the issue of liability for take-home asbestos exposure, the majority of courts which find no liability are in states which, unlike California, focus on the relationship between the parties as the primary factor in determining duty. The majority of courts which find liability are in states which share California's view of foreseeability as the primary factor in determining duty. (Note, *The Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure* (2014) 71 Wash. & Lee L.Rev. 707.)

The majority finds the reasoning of *Campbell* persuasive and attempts to distinguish *Kesner* on the basis that *Kesner* is not a premises liability case but a negligence case. This attempt is unpersuasive. Whatever label is attached to the take-home exposure cases, they are all based on the alleged negligence of the employer.

The majority agrees with the court in *Campbell* that strong public policy considerations counsel against imposing a duty of care for take-home exposure to asbestos. They raise the specter of a flood of lawsuits inundating the court to the point that they can no longer function and of companies being forced out of business. I question the factual basis for these concerns, but more importantly, I find stronger public policy considerations counsel imposing such a duty. Society does not benefit by allowing tortfeasors to avoid responsibility for their tortious conduct, particularly in cases such as the present one where the injury is a physical one and its cause undisputed.

I agree with Michigan Supreme Court Justice Michael Cavanaugh, who wrote in dissent: "[T]he majority's conclusion that the social costs of imposing a duty outweigh the social benefits requires elevating corporate vitality over the health and well-being of humanity. The majority's statements regarding the social burden [to corporations] abound with tales of corporate bankruptcy, litigation crises, and the costs in dollars that have stemmed from exposing workers to asbestos. But the majority is strangely silent with respect to the toll that asbestos exposure has taken on human life. By focusing solely on the losses suffered by businesses, the majority fails to account for the social

benefits that would ensue from ensuring that people who are exposed to detrimental substances [due to the negligence of a business] and who, consequently, suffer ruined health, life-altering and life-ending diseases, and the loss of family members, are compensated. When workers [and their families] are protected from deadly substances, society benefits. When corporations are held accountable for the consequences [of their negligence] . . . , society benefits. When our justice system fairly places the burden of responsibility for dangerous products on the offending party, rather than the one who suffers, society benefits." (*Miller v. Ford Motor Co.* (2007) 740 N.W.2d 206, 229 (dis. opn. of Cavanaugh, J.) [footnotes omitted].)

MINK, J.*

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

Joshua Haver, *et al.*, Plaintiffs, Appellants and Petitioners
vs.
BNSF Railway Company, Defendant and Respondent
Los Angeles Superior Court Case Number BC435551
Court of Appeal, Second Appellate District Case Number B246527
Supreme Court of California Case Number _____

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, PHILIP KWAN, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 222 North Sepulveda Boulevard, Suite 1900, El Segundo, California. I am employed in Los Angeles County, California.

On July 14, 2014, I served a copy of the following document(s):

- **PETITION FOR REVIEW**

in this action to be served by placing the true and correct copies thereof enclosed in sealed envelopes addressed as stated as follows:

☒ (By Overnite Express) (CCP §§1013(c), 2015.5) By placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by Overnite Express Courier Service as part of the ordinary business practices of Waters, Kraus & Paul, addressed to Defendant's counsel:

SEE ATTACHED SERVICE LIST

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 14, 2014, at El Segundo, California.

PHILIP KWAN

SERVICE LIST

Joshua Haver, *et al.*, Plaintiffs, Appellants and Petitioners

vs.

BNSF Railway Company, Defendant and Respondent

Los Angeles Superior Court Case Number BC435551

Court of Appeal, Second Appellate District Case Number B246527

Supreme Court of California Case Number _____

BNSF Railway Company Defendant and Respondent	Selim Mounedji Sims Law Firm 19762 MacArthur Boulevard, Suite 350 Irvine, California 92612
Court of Appeal Second Appellate District, Division Five Ronald Reagan State Building 300 South Spring Street 2nd Floor, North Tower Los Angeles, California 90013	(1 copy of Petition for Review)
Superior Court of California County of Los Angeles Honorable Richard E. Rico Judge Presiding, Department 17 111 North Hill Street Los Angeles, California 90012	(1 copy of Petition for Review)
Supreme Court of California 400 McAllister Street San Francisco, California 94111	(served electronically pursuant to California Rules of Court, Rule 8.44(a)(1)(B) and (c))