S219534

IN THE SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER,
Petitioner,

v.

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

PNEUMO ABEX, LLC,
Real Party in Interest.

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

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DISCUSSION

This court now has pending before it not one, but two petitions for review raising questions concerning the scope of any duty owed by a defendant to a plaintiff who claims secondary, "take-home" exposure to toxic substances. (See *Haver v. BNSF Railway Co.*, case no. S219919, petition filed July 15, 2014 (*Haver*).) There can be no dispute that these questions are at the heart of innumerable pending cases at the trial court level; that they have not resulted in a coherent consensus among the appellate courts that have addressed the issue to date; and that they must be

resolved by this Court based on a weighing of competing public policies.

In his brief to the Court of Appeal, Kesner agreed that the issue of duty in take-home exposure cases was important because of the "many other cases based on similar facts," because asbestos litigation "is prevalent," and because " 'take-home exposure' cases constitute a significant portion of asbestos civil suits." (PWM 1, 18.) Kesner's answer to petition for review (answer) confirms the importance of the duty issues presented by the Court of Appeal opinion, acknowledging that some 250 mesothelioma cases—which comprise just one subset of the toxic exposure claims affected by the duty questions raised in the petition for review—are diagnosed annually in California, resulting in numerous lawsuits, and hundreds more diagnosed annually across the country, many of which result in lawsuits filed in California – such as Kesner's. (APFR 12.)

The presence of numerous mesothelioma cases in the judicial system at any one time—each involving a plaintiff claiming substantial damages from having developed a fatal cancer—by itself demonstrates the importance of the *Kesner* opinion. Moreover, the reach of the opinion's expansive and unprecedented duty analysis will be debated in cases involving other diseases such as lung cancer, where exposure to asbestos, especially in cigarette smokers, is typically alleged as a cause of the disease, not to mention tort cases involving alleged ailments attributed to toxins, chemicals, dusts and other carcinogens. (Typed opn. 9; see also, *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813 (*Oddone*) [chemicals];

Elsheref v. Applied Materials, Inc. (2014) 223 Cal.App.4th 451 (*Elsheref*) [chemicals].)[1]

With no serious answer to the point that the duty question here is an important and recurring one, for which no consistent legal test can be gleaned from the several recent appellate decisions on the topic, Kesner seeks to avoid review by defending on the merits the decision's unworkable analysis. Kesner does not suggest any line where the duty would end, and does not dispute that under the *Kesner* opinion, anyone with "recurring and non-incidental" contact with an employee may assert a claim. (Typed opn. 2, 11.) Hence, with no limit on the category of plaintiff other than those "regularly in contact" with the defendant's employee, the *Kesner* opinion allows cases to be filed on behalf of anyone who regularly visited the employee's household, such as neighbors, babysitters and friends. Co-workers who ride share (which Kesner's uncle often did to get to the Abex plant) could make a claim. Suits could be brought by total strangers to the employee, such as regular fellow passengers on public transportation, or workers and patrons at restaurants frequented by employees.

Kesner suggests that the burden of proof will naturally limit the number of take-home exposure claims. (APFR 13.) Over four decades of asbestos cases belies that prediction, as does the collective wisdom of court rulings across the country. Thus, the

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[1] The petitioners in *Haver* agree that the issue "will necessarily apply to any take-home exposure injury, regardless of toxin involved." (Petition for Review, *Haver v. BNSF Railway Co.* (July 15, 2014, S219919) at p. 32 (*Haver* PFR).

Michigan Supreme Court refused to recognize a limitless duty for litigation that already burdens the judicial system:

> Asbestos claims have given rise to one of the most costly products-liability crises ever . . . . [¶] . . . [L]iability for 'take home' exposure injuries represents the latest frontier . . . . These actions clearly involve highly sympathetic plaintiffs. Yet . . . [b]roader public policy impacts must be considered, including the very real possibility that imposition of an expansive new duty on premises owners for off-site exposures would exacerbate the current 'asbestos-litigation crisis.' Plaintiffs' attorneys could begin naming countless employers . . . in . . . actions brought by remotely exposed persons[.]

In re Certified Question From the Fourteenth Dist. Court of Appeals of Texas (2007) 479 Mich. 498, 519-520 [740 N.W.2d 206, 219] (finding that such suits could be brought by "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker").

The Georgia Supreme Court likewise has held that recognition of the duty adopted in *Kesner* would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." (*CSX Transp., Inc. v. Williams* (2005) 278 Ga. 888, 890 [608 S.E.2d 208, 209]; see also, *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 699 [potential for "a large universe" of plaintiffs who had come into contact with employee "in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat"]; *Adams v. Owens-Illinois, Inc.* (1998) 119 Md. App. 395 [705 A.2d 587] [duty would expand to include co-workers and automobile passengers]; *Nelson v. Aurora Equipment Co.* (2009) 391 Ill.App.3d

1036, 1038 [909 N.E.2d 931, 934] [a take-home duty "would create a limitless number of potential plaintiffs" and could include "literally anyone who came in contact with [the] work clothes."].)

The *Kesner* opinion provides an opportunity for this Court to address the public policy questions inherent in defining the contours of a duty that, if drawn too widely, threatens the limitless liability foreseen and rejected by courts in other states. Complaints in asbestos and other toxic tort cases routinely name dozens of defendants, with the result that hundreds of employers, premises owners and manufacturers who are swept up in this litigation wave anxiously await a definitive answer regarding how the duty line is to be drawn.[2] At one end of the spectrum will be the unborn child to whom no duty in negligence is owed (*Elsheref*), and at the other end will be any family member with any kind of regular contact with the employee (*Kesner*). In between lie the numerous potential plaintiffs to whom a duty will now be owed by employers who have no relationship with those plaintiffs. As noted in *Oddone,* the line is " 'hard to draw' " and could either be over-inclusive or under-inclusive. (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 32-33 (*Campbell*); *Matter of New York City Asbestos Litig.* (2005) 5 N.Y.3d 486, 498 [840 N.E.2d 115, 122] [refusing to adopt a take-home duty, because "line is not so easy to draw" at just family members].)

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[2] Kesner's pedantic argument that a duty already exists and the question is whether an exception applies is incorrect. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 [whether a duty exists " 'is a question of law to be determined on a case-by-case basis' "].)

Neither the court below nor Kesner addresses the nature of the duty. How does an employer issue warnings to the family, neighbors, friends, and regular contacts of its employees? How does it police its employees to prevent take-home exposures? These and countless other questions are the topics that will vex and tax the California judicial system until this Court steps in and reviews this now-emergent area of law.

To analogize his take-home claim to a traditional tort liability standard that requires no searching duty analysis, Kesner in his answer states that his theory is that Abex mismanaged its manufacturing facility by allowing excessive asbestos dust in the plant where Kesner's uncle worked. (APFR 2, 16.) Yet, when viewed from the "relatively broad level of factual generality" required in a *Rowland* analysis, how is mismanaging the running of a plant using asbestos materials different from the claim rejected on duty grounds in *Campbell,* where the plaintiff (whose father and brother worked at a Ford facility) alleged that Ford mismanaged a construction project that used asbestos materials? (*Campbell, supra,* 206 Cal.App.4th at pp. 22, 27.) The same theory of mismanaging an operation could be asserted against Technicolor, Inc. for processing motion picture film (*Oddone*) or against Applied Materials, Inc. for the advanced semiconductors, flat panel displays and solar photovoltaic products it helped manufacture (*Elsheref*). And yet, a negligence claim based on take-home exposures was *not* allowed to proceed in those cases.

Kesner further attempts to harmonize the divergent approaches in the published cases by arguing that duties can be

owed to a vast array of take-home plaintiffs so long as foreseeability is great enough. For example, Kesner suggests that *Campbell* can be distinguished because (Kesner infers) the defendant there, Ford, had a lesser understanding about take-home risks compared to the defendant here, Abex. (APFR 8, 15-16.) Kesner admits, however, that "*Campbell* did not expressly analyze *just how foreseeable* the harm was to Ford," (APFR 15, emphasis added); in fact, Kesner's hazy concept of duty based on degrees of knowledge is nowhere expressed in *Campbell* or any other published opinion. Kesner's argument highlights the need for review by demonstrating the type of argument the lower courts can expect if *Kesner* is not reviewed and California law clarified.[3]

Kesner suggests that if *Kesner* is reversed, then so would be the rule that an employer or property owner is liable for the release of toxic clouds or run-away farm animals. (*Davert v. Larson* (1985) 163 Cal.App.3d 407, 410.) Again, the confusion demonstrated by Kesner's conflating of such primary-exposure fact patterns with the circumstances presented in secondary exposure take-home cases further demonstrates the need for review. Until now, we are aware of no one who has suggested that the no-liability holdings in

[3] Kesner's effort to harmonize *Elsheref* with the *Kesner* opinion is equally unavailing. (See APFR 19.) Contrary to Kesner's description of the case, the plaintiffs there were only the secondarily exposed mother and child, *not* the primarily exposed father, except in his capacity as guardian ad litem for the child, and there was no claim for physical injuries to the father. (*Elsheref, supra,* 223 Cal.App.4th at pp. 453-454.)

Oddone, Campbell, or *Haver* defeat liability in a case involving run-away farm animals.

Kesner also argues that review is unnecessary because when courts have limited a tort duty, they have usually done so in claims of "derivative liability," such as emotional distress of family members witnessing catastrophic physical harm to immediate loved ones (*Thing v. La Chusa* (1989) 48 Cal.3d 644; *Elden v. Sheldon* (1988) 46 Cal.3d 267), or third party economic loss from professional malpractice (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370.) If it were true that duty should be limited only for indirect claims, there would be no need for *Rowland* factors as to whether to impose a duty. In any event, this argument is further proof of the need for clarification of the law in California.

Finally, Kesner proposes that if the Court is inclined to review the issue of a duty in take-home cases, it leave *Kesner* on the books and accept review only of *Haver*. (APFR 3, 24-25.) In that event, Kesner also reserves the option to argue that *Campbell* is wrongly decided. (APFR 17, fn 7.) Although the plaintiffs in *Haver* agree with Abex that review of the duty issue in a take-home case is important and necessary to secure uniformity of decisions (*Haver* PFR at pp. 4-5, 13, 27, 31), there are several problems with Kesner's proposal. First, *Haver* simply followed *Campbell,* and involves the claim of a spouse, whereas *Kesner* attempts to distinguish *Campbell* and gives this Court the clear opportunity to determine the scope of any duty arising from exposures initially occurring in a manufacturing plant, and allegedly transported to a plaintiff who was not a full-time member of the household. Second,

leaving *Kesner* in place, even de-publishing it, will open the doors to an untold amount of litigation before the scope of the duty is determined, and will place the trial courts and litigants in the position of litigating and trying cases in a legal vacuum.

CONCLUSION

Kesner states that the rule of no-duty adopted in *Oddone, Campbell* and *Haver,* and by courts across the country, makes for "terrible" policy. But what he proposes would be disastrous for employers, premises owners and others, just as most jurisdictions have recognized. The Courts of Appeal are undeniably at odds over the scope of duty in take-home exposure cases. The issue is important and cuts across a broad swath of tort cases. This Court should grant review.

July 25, 2014

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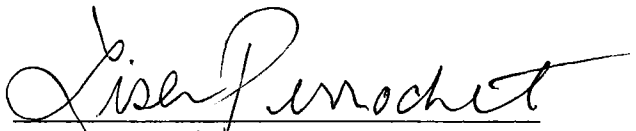
CERTIFICATE OF WORD COUNT

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

The text of this petition consists of 2,115 words as counted by the word processing program used to generate the petition.

Dated: July 25, 2014



Lisa Perrochet

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

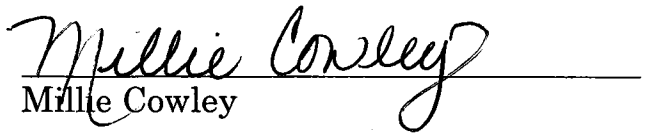
On July 25, 2014, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

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

Executed on July 25, 2014, at Encino, California.



Millie Cowley

SERVICE LIST

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

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