S219919

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

PETITIONERS' OPENING BRIEF ON THE MERITS

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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

Lynne Haver ("Ms. Haver") was exposed to asbestos carried home on the clothing and body of 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"), for whom he worked from July 1972 to 1974. She was diagnosed with mesothelioma, an asbestos-related disease, in March 2008 and died in April 2009.

Following her death, Ms. Haver's children, Plaintiffs, Appellants and Petitioners Joshua Haver, Christopher Haver, Kyle Haver, and Jennifer Morris (collectively, "Plaintiffs"), filed this wrongful death action against BNSF. The complaint alleges that BNSF used asbestos-containing products in the workplace, that it was negligent in its use of those products, and that as a result of its negligence, Ms. Haver's husband was exposed to and unknowingly carried asbestos home from the workplace on his clothing and body, where Ms. Haver was exposed through contact with him,

resulting in her development of mesothelioma and subsequent death.

Relying on *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, BNSF demurred to the complaint. *Campbell* held that a property owner did not have a duty to protect a family member of employees of an independent contractor from exposure to asbestos resulting from the independent contractor's work with asbestos insulation on the property owner's premises. (*Id.* at pp. 26-34.) Based on *Campbell*, BNSF argued that it did not owe a duty of care to Ms. Haver. The trial court agreed and sustained the demurrer without leave to amend.

The resulting judgment was affirmed by a divided panel of Division Five of the Second Appellate District. Concluding that there was no basis to distinguish or disagree with *Campbell*, the two-justice majority held that the trial court's ruling was correct because BNSF did not owe a duty of care to Ms. Haver. (Typed maj. opn. at pp. 2, 4-8.) The dissenting justice disagreed, finding that BNSF did have a duty to protect Ms. Haver from asbestos exposure resulting from its negligent use of asbestos. (Typed dis. opn. at pp. 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 for determining whether a duty exception should be created, as specified in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113, did not support a departure from this fundamental rule. (Typed dis. opn. at pp. 2-3.)

After oral argument in this case, but before the court issued its decision, Division Three of the First Appellate District issued its decision in *Kesner v. Superior Court* (2014) 171 Cal.Rptr.3d 811 (previously published at 226 Cal.App.4th 251). As in this case, the issue in *Kesner* was whether an employer had a duty to protect a family member of its employee from asbestos exposure arising out of the employer's use of asbestos. (*Id.* at pp. 812-813.) Contrary to the majority's decision here, *Kesner* unanimously 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 p. 813.) The *Kesner* court distinguished *Campbell* because the claim in *Campbell* "was based on Ford's passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation," as opposed to any direct negligence arising out of the defendant's own use of asbestos, (*id.* at p. 816), and it found that the *Rowland* factors balanced differently under the circumstances in *Kesner* and did not support a duty exception. (*Id.* at pp. 814-819.)[1]

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[1] On the same day review in this case was ordered (August 20, 2014), the court also granted the defendant's petition for review in *Kesner*. (*Kesner v. Superior Court* (2014) 175 Cal.Rptr.3d 810 [No. S219534].) In its description of both cases, the court states that "*Haver* and *Kesner*

After its filing and publication, Plaintiffs informed the Court of Appeal of the decision in *Kesner*, but the majority declined to follow it. The majority held that *Kesner* was distinguishable because "the cause of action in *Kesner* [wa]s for products liability" and did not involve a premises liability claim, 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 maj. opn. at pp. 2, 7-8, original italics.) The dissent disagreed, finding that *Kesner* was indistinguishable and that its analysis of the *Rowland* factors was correct and supported a duty of care by BNSF. (Typed dis. opn. at pp. 1-2.)

The majority's decision was erroneous because, as the dissent correctly concluded, the *Rowland* factors, as applied under the circumstances of this case, do not support an exception to the fundamental duty of care of Civil Code § 1714(a).[2] As explained by this court in *Cabral*

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present the following issue: If an employer's business involves either the use or the manufacture of asbestos-containing products, does the employer owe a duty of care to members of an employee's household who could be affected by asbestos brought home on the employee's clothing?" (Issues Pending Before The California Supreme Court In Civil Cases, p. 9 at <http://www.courts.ca.gov/documents/OCT1714civpend.pdf> [as of Oct. 20, 2014].)

[2] Unless stated otherwise, all further statutory references are to the Civil Code.

v. Ralphs Grocery Co. (2011) 51 Cal.4th 764, "[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," (*id.* at p. 783), and an exception is warranted "*only* when foreseeability *and* policy considerations justify a categorical no-duty rule." (*Id.* at p. 772, italics added.) As shown below, "foreseeability and policy considerations" do *not* "justify a categorical no-duty rule" in this case.

Moreover, contrary to the majority's conclusion, this case *is* distinguishable from *Campbell*, where the defendant merely owned the property where the independent contractor's work was performed and did not itself perform or control that work or otherwise create the asbestos hazard. In contrast to *Campbell*, the complaint here alleges that BNSF itself used asbestos in the operation of its business, 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 when the asbestos was carried home from the workplace by her husband. Thus, unlike the defendant in *Campbell*, BNSF itself created the asbestos hazard through its own use of asbestos and, under these circumstances, the *Rowland* factors balance differently and do not support a duty exception. However, even if this case is considered to be indistinguishable from *Campbell*, *Campbell* was wrongly decided and should be disapproved.

Ultimately, the majority's no-duty determination appears to be

grounded in its view that recognition of a duty of a care would "'extend[] employers' liability too far'" and force companies into bankruptcy. (Typed maj. opn. at pp. 6-7.) However, as the dissent recognized, there is no factual support in the record for this conclusion, (typed dis. opn. at p. 2), and the only support cited by the majority for this point were articles in law journals and litigation guides. (Typed maj. opn. at pp. 6-7.) Additionally, the dissent correctly observed that "stronger public policy considerations counsel" in favor of a duty of care, as "[s]ociety 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." (Typed dis. opn. at p. 2.)

The duty of care under consideration here is not unique or novel, nor would its recognition turn California into an "outlier". Courts in other jurisdictions that follow a *Rowland*-type analysis for determining issues of duty, where foreseeability, as the primary consideration, is considered along with policy factors, have recognized a duty of care in "take-home" asbestos injury cases under circumstances analogous to this case. (E.g., *Olivo v. Owens-Illinois, Inc.* (N.J. 2006) 186 N.J. 394, 398-405 [895 A.2d 1143, 1146-1150]; *Satterfield v. Breeding Insulation Co.* (Tenn. 2008) 266 S.W.3d 347, 351-354, 364-375.) In doing so, these courts have rejected defense arguments that recognition of a duty would cause a deluge of further asbestos litigation and result in limitless liability, job losses and

company bankruptcies. (*Satterfield, supra*, 266 S.W.3d at pp. 369-371; see also *Olivo, supra*, 895 A.2d at p. 1150.) These courts have found that "such fears are overstated," (*Olivo, supra*, 895 A.2d at p. 1150), and that there is no policy reason to favor the companies whose negligence caused the exposures over the individuals who were exposed and injured. (*Satterfield, supra*, 266 S.W.3d at p. 371.)

Accordingly, the judgment of the Court of Appeal should be reversed because there was and is no justification for creating a duty exception under the circumstances of this case.

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 maj. opn. at p. 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 insulation, to be installed, maintained and used on the premises, including by its employees, resulting in the release of dangerous quantities of asbestos fibers into the air; that Mr. Haver was exposed to asbestos fibers

on the premises during the course of his employment, including from asbestos insulation; that Ms. Haver was exposed to those asbestos fibers through household exposure from direct and indirect contact with her husband, including contact with his body, clothes, tools and vehicles, "which were contaminated with great quantities of asbestos fibers"; and that her exposure to those asbestos fibers resulted in her development of 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 maj. opn. at pp. 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 injury to Ms. Haver and other persons. (1 AA 9 [¶ 27]; typed maj. opn. at pp. 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 maj. opn. at pp. 2-3.)

In their opposition to BNSF's demurrer, Plaintiffs stated that if further facts were necessary to plead that BNSF owed a duty of care to Ms. Haver, they could amend the complaint to allege detailed facts 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";

- the risk of exposure to asbestos carried 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;

- as early as the 1930s and 1940s, government and private organizations recognized the need for changing rooms, showers and isolation of dusty clothes to prevent workers from taking home toxic dust;

- by the time of the exposures in this case (July 1972 to 1974), the scientific and medical literature had specifically demonstrated that take-home asbestos exposures could cause mesothelioma; and

- 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 [proposed allegations in detail]; see also typed maj. opn. at p. 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 this 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 maj. opn. at p. 3.) Relying on *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 pp. 210-218; typed maj. opn. at p. 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 pp. 254-255, 260-262.) In *Campbell*, the issue was whether a property owner owed a duty of care to a family member of employees of an independent subcontractor hired to install asbestos insulation on the property owner's premises in the 1940s. (*Ibid.*) In contrast, the issue here was whether an employer has a duty to protect an immediate family member (a spouse) of its own employee from exposure to asbestos carried home by the employee as a result of the employer's own

use of asbestos, where the employer had direct control over the asbestos and its use. (*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* occurred. (*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 premises. (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 shown that *Campbell* was inapplicable, Plaintiffs argued that, based on the allegations, including the proposed allegations, there was no basis to create an exception to the general duty of care that BNSF owed Ms. Haver under section 1714(a). (2 AA 262-265.) Plaintiffs argued that BNSF, as the party claiming the absence of a duty, had failed to demonstrate that a duty exception was warranted under the *Rowland* factors. (*Id.* at pp. 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 pp. 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, pp. 1-5.) The court disagreed with Plaintiffs 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 decision filed on June 3, 2014, a divided panel of Division Five of the Second Appellate District affirmed the judgment in favor of Defendant BNSF. The two-justice majority (Justice Kriegler joined by Presiding Justice Turner) held that there was no basis to distinguish this case from *Campbell*, that *Campbell* was correctly decided,

and that BNSF did not owe a duty of care to Ms. Haver. (Typed maj. opn. at pp. 2, 4-8.) The majority did not follow *Kesner v. Superior Court*, *supra*, 171 Cal.Rptr.3d 811, 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 maj. opn. at 2, 7-8, original italics.)

The dissenting justice (Justice Mink) disagreed, concluding that BNSF had a duty to protect Ms. Haver from exposure to asbestos carried home from the workplace by her husband. (Typed dis. opn. at pp. 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 pp. 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 pp. 1-2.)

LEGAL DISCUSSION

I. STANDARD OF REVIEW.

"Duty is a question of law for the court, to be reviewed de novo on appeal." (*Cabral, supra*, 51 Cal.4th at pp. 770-771.)

The standard of review for an appeal after an order sustaining a demurrer without leave to amend is well settled:

> When reviewing a judgment dismissing a complaint after the granting of a demurrer without leave to amend, courts must assume the truth of the complaint's properly pleaded or implied factual allegations. [Citation.] Courts must also consider judicially noticed matters. [Citation.] In addition, we give the complaint a reasonable interpretation, and read it in context. [Citation.] If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]

(*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

II. DUTY ANALYSIS UNDER CALIFORNIA LAW.

As long recognized by this court, based on section 1714(a), "[t]he general rule in California is that '[e]veryone is responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person ....'" (*Cabral, supra*, 51 Cal.4th at p. 771, quoting Civ. Code § 1714(a); accord, *Rowland, supra*, 69

Cal.2d at p. 112.) "In other words, 'each person has a duty to use ordinary care and "is liable for injuries caused by his failure to exercise reasonable care in the circumstances ...."'" (*Cabral*, *supra*, 51 Cal.4th at p. 771, quoting *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.)

"In the *Rowland* decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714 ...." (*Cabral*, *supra*, 51 Cal.4th at p. 771.) These considerations 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 pp. 112-113; accord, *Cabral*, *supra*, 51 Cal.4th at p. 771.)

Importantly, the general duty of care established by section 1714(a) should not be unduly limited and judicially created exceptions are proper "only where '*clearly* supported by public policy.'" (*Cabral*, *supra*, 51 Cal.4th at p. 771, quoting *Rowland*, *supra*, 69 Cal.2d at p. 112, italics added; accord, *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1191.)

Additionally, "an important feature of the [*Rowland* duty] analysis" is that "the *Rowland* factors are evaluated at a relatively broad level of

factual generality." (*Cabral, supra*, 51 Cal.4th at p. 772.) "Thus, as to foreseeability, ... the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed ....'" (*Ibid*, quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6.) Likewise, "[i]n applying the other *Rowland* factors," the court does not "ask[] ... whether they support an exception to the general duty of reasonable care on the facts of the particular case before [it], but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." (*Ibid.*)

Accordingly, "the legal decision that an exception to Civil Code section 1714 is warranted, so that the defendant *owed no duty* to the plaintiff, or owed only a limited duty, is to be made on a more general basis suitable to the formulation of a legal rule, in most cases preserving for the jury the fact-specific question of whether or not the defendant acted reasonably under the circumstances." (*Cabral, supra*, 51 Cal.4th at p. 773, fn. omitted.) "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, [the court] preserve[s] the crucial distinction between a determination that the defendant owed the plaintiff no

duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make." (*Id.* at p. 772.)

III. THE CATEGORICAL DUTY EXCEPTION CREATED BY THE COURT OF APPEAL IS NOT JUSTIFIED UNDER THE *ROWLAND* FACTORS.

A. Foreseeability And Related Factors.

The first three factors in the *Rowland* analysis – "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, [and] the closeness of the connection between the defendant's conduct and the injury suffered" – are "related considerations," none which supports an exception to the general duty of care of section 1714(a) under the circumstances of this case. (*Cabral, supra*, 51 Cal.4th at p. 774.)

1. The foreseeability of harm to the plaintiff.

As recognized by this court "[f]oreseeability of harm is a 'crucial factor' in determining the existence and scope of [a] duty," (*John B., supra*, 38 Cal.4th at p. 1189), and is "'[t]he most important of these [*Rowland*] considerations in establishing duty.'" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237, fn. 15, quoting *Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 434; accord, *Pedeferri v. Seidner Enters.* (2013) 216 Cal.App.4th 359, 366.) In this context, "'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful

[person] would take account of it in guiding practical conduct.' [Citation.] One may be held accountable for creating even 'the risk of a slight possibility of injury if a reasonably prudent [person] would not do so.'" (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57; accord, *Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1272.) Indeed, "'as the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.'" (*John B.*, *supra*, 38 Cal.4th at p. 1195, quoting *Prosser & Keeton on Torts* (5th ed. 1984) § 31, p. 171.) Moreover, as just discussed, foreseeability is "evaluated at a relatively broad level of factual generality," with the inquiry focusing "'generally [on] whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed ....'" (*Cabral*, *supra*, 51 Cal.4th at p. 772, quoting *Ballard*, *supra*, 41 Cal.3d at p. 573, fn. 6; accord *Bigbee*, *supra*, 34 Cal.3d at pp. 57-58; *Laabs*, *supra*, 175 Cal.App.4th at p. 1272.)

Here, based on the existing and proposed allegations, it was generally foreseeable – indeed, highly foreseeable – that in the early-to-mid 1970s, an employee exposed to asbestos from his employer's use of asbestos-containing products in the workplace could carry the asbestos home on his clothing and body, where family members who regularly came into close and prolonged contact with the employee, such as a spouse, could

be exposed to the asbestos, resulting in injury to that person. In this regard, Plaintiffs' proposed allegations establish that the risk of exposure to asbestos carried 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. (2 AA 256-259.) The proposed allegations detail early knowledge of the dangers of asbestos, specifically citing to the seminal report by Merewether and Price, in 1930, discussing the fatal hazards of asbestos exposure. (*Id.* at p. 257.) This report explained that inhaling asbestos dust could cause fatal disease and that preventative measures should be undertaken to minimize the risk. (*Ibid.*) In addition, the proposed allegations establish 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." (*Ibid.*)

Plaintiffs' proposed allegations establish knowledge and accepted industrial hygiene practices to prevent toxic dusts from being carried from the workplace into the homes of workers. (2 AA 257-258.) The proposed allegations demonstrate that government and private organizations in the 1930s and 1940s recognized the need for changing rooms, showers and isolation of dusty clothes to prevent workers from taking home toxic dust. (*Ibid.*) The proposed allegations further demonstrate that by the time of the

asbestos exposures in this case (July 1972 to 1974), the scientific and medical literature had specifically demonstrated that take-home exposures could cause mesothelioma, the disease from which Ms. Haver suffered and died, and that federal OSHA asbestos regulations applicable to employers, enacted in 1972, required the use of warnings, protective equipment and other methods to protect against exposure to asbestos. (*Id.* at p. 258.)

In its decision in this case, the majority in the Court of Appeal did not independently address the issue of foreseeability. Instead, it quoted a few excerpts from *Campbell* pertaining to that court's assessment of the *Rowland* factors, before concluding that "*Campbell* was correctly decided." (Typed maj. opn. at pp. 4-7.) However, even in *Campbell*, which involved relatively early exposures in the 1940s, the court did not question foreseeability and assumed that the risk of injury from take-home asbestos exposures was reasonably foreseeable to a property owner at that time. (*Campbell, supra*, 206 Cal.App.4th at pp. 20-21, 32.) Here, of course, the exposures occurred much later, in the early-to-mid 1970s, (1 AA 5, 7-10, 17 [¶¶ 10-12, 22, 24, 26, 28, 30, 33-34 and Ex. A]), when knowledge of asbestos as a deadly take-home hazard was far greater than what was known or knowable in the 1940s and included knowledge that take-home exposures could cause mesothelioma. (2 AA 256-259.)

Accordingly, because the risk of injury from take-home asbestos exposures was generally, indeed, highly foreseeable at the time of the

events in this case, foreseeability weighs strongly against creating a categorical exception to the general duty of care.

2. The degree of certainty that the plaintiff suffered injury.

"[T]he degree of certainty that the plaintiff suffered injury" weighs against creating a categorical duty exception because the allegations establish that Ms. Haver developed mesothelioma and died from exposure to asbestos carried home on the clothing and body of her husband from his employment with Defendant BNSF, as a result of BNSF's negligent use of asbestos-containing products. (1 AA 2-3, 5-10, 13, 17-18 [¶¶ 3-4, 10-13, 22-24, 26-34, 44 and Exs. A and B]; typed maj. opn. at pp. 2-3.) Based on Ms. Haver's death, it is obvious that she suffered serious injury and that Plaintiffs "undisputedly ha[ve] a remedy in wrongful death if h[er] death was negligently caused," thus satisfying this factor. (*Cabral, supra*, 51 Cal.4th at p. 781, fn. 9; Civ. Proc. Code § 377.60.)

3. The closeness of the connection between the defendant's conduct and the injury suffered.

"[T]he question of 'the closeness of the connection between the defendant's conduct and the injury suffered' [citation] is strongly related to the question of foreseeability itself." (*Cabral, supra*, 51 Cal.4th at p. 779.) A finding of foreseeability "establish[es] not only '"the foreseeability of harm to plaintiff,"' but also a sufficiently '"close[] connection between the defendant[s'] conduct and the injury suffered."'" (*Isaacs v. Huntington*

Mem'l Hosp. (1985) 38 Cal.3d 112, 131, quoting *Bigbee*, *supra*, 34 Cal.3d at pp. 59-60, fn. 14.) "Generally speaking, where the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be deemed unforeseeable. Conversely, a closely connected type of injury is likely to be deemed foreseeable." (*Cabral*, *supra*, 51 Cal.4th at p. 779.)

This factor weighs against a categorical duty exception because, as discussed above, the allegations establish both a high degree of foreseeability, (2 AA 256-258), and a close connection between the category of negligent conduct and the injury suffered. The complaint alleges that Ms. Haver was exposed to asbestos from Defendant BNSF's negligent use of asbestos-containing products in the workplace, whereby her husband was exposed to and carried the asbestos home from his employment with BNSF on his clothing and body, resulting in exposure to Ms. Haver and her development of mesothelioma and subsequent death. (1 AA 2-3, 5-10, 13, 17-18 [¶¶ 3-4, 10-13, 22-24, 26-34, 44 and Exs. A and B].) Ms. Haver's disease and death were not "connected only distantly and indirectly to the defendant's negligent act," (*Cabral*, *supra*, 51 Cal.4th at p. 779), but rather were direct results of BNSF's negligent use of asbestos. This negligent use directly resulted in her husband's exposure to asbestos, which he foreseeably carried home and which foreseeably resulted in Ms.

Haver's exposure when she came into regular, close and prolonged contact with him.

In *Campbell*, the court found that "the 'closeness of the connection' between Ford's conduct in having the work performed" on its premises by an independent contractor and injury to a family member of the contractor's employees was too "attenuated" to support a duty of care. (*Campbell, supra*, 206 Cal.App.4th at p. 31.) The situation here is different, however, because unlike the defendant in *Campbell*, who merely owned the premises where the independent contractor's work was performed and did not conduct or control the work that created the hazard, BNSF itself created the asbestos hazard through its own use of asbestos, resulting in exposure to its employees, including Mike Haver, who foreseeably carried the asbestos home where Ms. Haver was exposed. (1 AA 2-3, 5-10, 13, 17-18 [¶¶ 3-4, 10-13, 22-24, 26-34, 44 and Exs. A and B].) Thus, there was a direct and close connection between BNSF's conduct and Ms. Haver's injury, which weighs against a categorical duty exception.

B. Public Policy Factors.

The remaining factors in the *Rowland* analysis – "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" – are public policy considerations. (*Cabral, supra*, 51 Cal.4th at p. 774; *Rowland, supra*, 69 Cal.2d at pp. 112-113.) These factors do not "'clearly support[]'" an exception to the general duty of care of section 1714(a) under the circumstances of this case. (*Cabral, supra*, 51 Cal.4th at pp. 771, 781, quoting *Rowland, supra*, 69 Cal.2d at p. 112.)

1. The moral blame attached to the defendant's conduct.

The "moral blame" factor weighs against creating a categorical duty exception because moral blame attaches to negligent conduct that causes injury. (E.g., *Pedeferri, supra*, 216 Cal.App.4th at p. 368 ["Although a vendor in this context [of negligently loading a truck] is not engaged in intentional misconduct, 'moral blame' still attaches to any negligence on its part."]; *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 823 [acknowledging that if an employee's spouse was injured from take-home exposure to toxic chemicals used by the employer, "there is little doubt that the moral blame attached to that conduct is substantial"]; *Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1113 ["Thus, for purposes of duty analysis, moral blame attaches to the fact a defendant's conduct is negligent – i.e., to defendant's fault in creating an unreasonable risk of harming others – not to the motive underlying defendant's negligent conduct."]; *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal. App. 4th 1830, 1844 ["There can be no doubt that if Ryder was negligent as alleged [in failing to

maintain the electrical system of a truck], moral blame would attach to its negligence on these facts."].)

In *Campbell*, the court indicated that, where ordinary negligence is involved, "courts require a higher degree of moral culpability such as where the defendant ... had actual or constructive knowledge of the harmful consequences of their behavior ...." (*Campbell*, *supra*, 206 Cal.App.4th at p. 32.) However, as just shown, numerous cases have found "moral blame" based on ordinary negligence. (E.g., *Pedeferri*, *supra*, 216 Cal.App.4th at p. 368; *Oddone*, *supra*, 179 Cal.App.4th at p. 823; *Ludwig*, *supra*, 65 Cal.App.4th at p. 1113; *Jackson*, *supra*, 16 Cal.App.4th at p. 1844.) Nevertheless, even if "a higher degree of moral culpability" is required to establish "moral blame," Plaintiffs' proposed allegations satisfy this standard because they demonstrate that Defendant BNSF had actual or constructive knowledge of the health hazards posed by exposure to asbestos, including the hazards associated with take-home exposures. (2 AA 256-258.) Moreover, whereas the defendant's moral blame in *Campbell* was limited because it merely owned the premises where the independent contractor's work was performed and it did not conduct or control the work that created the asbestos hazard, (*Campbell*, *supra*, 206 Cal.App.4th at pp. 20-21, 31, fn.6), BNSF's moral blame is substantial because it directly created the hazard through its own use of asbestos with knowledge of the risks.

2. The policy of preventing future harm.

"The 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 p. 781.) Here, Defendant BNSF was responsible for Ms. Haver's mesothelioma and death, as she was exposed to asbestos as a direct result of its negligent use of asbestos-containing products, and it should therefore bear the costs of its negligence. Recognition of a duty of care in these circumstances is consistent with and will promote "the policy of preventing future harm." (*Ibid.*) Accordingly, this factor weighs against creating a categorical duty exception.

3. 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.

The next two factors – "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" – are the considerations that some courts, including the majority in the Court of Appeal in this case, have used to justify a categorical duty exception in take-home asbestos injury cases. Although the majority did not specifically address these factors by name, it clearly had them in mind when, quoting a law review article, it wrote that while courts "'want to allow recovery to … victims'" of asbestos exposure, they "are also wary of the consequences of extending employers' liability too far, especially when asbestos litigation has already rendered almost one

hundred corporations bankrupt.'" (Typed maj. opn. at pp. 6-7, quoting 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.)

In *Campbell*, the court concluded that these factors justified a categorical duty exception because "'it is hard to draw the line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed,'" (*Campbell*, *supra*, 206 Cal.App.4th at p. 32, quoting *Oddone v. Superior Court*, *supra*, 179 Cal.App.4th at p. 822), and because "where the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs" can "include[] fellow commuters, those performing laundry services and more." (*Id.* at p. 33.) Additionally, the court felt that "'that imposing a duty toward nonemployee persons [would] saddle[] the defendant employer with a burden of uncertain but potentially very large scope.'" (*Ibid*, quoting *Oddone*, *supra*, 179 Cal.App.4th at p. 822.)

Plaintiffs do not dispute that, "[e]ven when foreseeability [i]s present," the prospect of indeterminate, uncertain or unlimited liability is a consideration that, in a particular case, may counsel against recognition of a duty of care or call for a limited duty. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 398.) However, as this court's decisions demonstrate, this

circumstance is generally limited to situations "when damage awards threaten[] to impose liability out of proportion to fault or to promote virtually unlimited responsibility for intangible injury." (*Id.* at p. 398.) Thus, in *Bily*, despite the foreseeability of "economic injury to lenders, investors, and others who may read and rely on audit reports," this court did not allow a third-party negligence claim against an accounting firm because "[a]n award of damages for pure economic loss suffered by third parties raises the spectre of vast numbers of suits and limitless financial exposure" out of proportion to an auditor's fault. (*Id.* at pp. 398, 400.)

Other instances where this court has limited the scope of a defendant's liability, despite the presence of foreseeability, include claims for emotional distress based on injuries to others. For example, in *Elden v. Sheldon* (1988) 46 Cal.3d 267, this court noted "the need to limit the number of persons to whom a negligent defendant owes a duty of care" because "'[e]very injury has ramifying consequences, like the ripplings of the waters, without end.'" (*Id.* at p. 276, quoting *Tobin v. Grossman* (N.Y. 1969) 24 N.Y.2d 609, 619 [301 N.Y.S.2d 554, 561, 249 N.E.2d 419, 424].) Accordingly, this court held that for an emotional distress claim based on witnessing an injury to another person, an unmarried cohabitant could not recover because it would be an "unreasonable extension of the scope of liability of a negligent actor" to allow such recovery by a person outside "the immediate family of the injured person." (*Id.* at pp. 276-277.)

Similarly, in *Thing v. LaChusa* (1989) 48 Cal.3d 644, this court held that the mother of an accident victim could not recover for emotional distress she suffered when she arrived at the accident scene because she did not witness the accident. (*Id.* at p. 669.) Although the mother's emotional distress was foreseeable, this court observed that "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury," and that "to avoid limitless liability out of all proportion to the degree of a defendant's negligence, ... the right to recover for negligently caused emotional distress must be limited." (*Id.* at pp. 663-664.) Accordingly, this court held that to "recover damages for emotional distress caused by observing the negligently inflicted injury of a third person," the plaintiff must, inter alia, be "present at the scene of the injury producing event at the time it occurs and ... then [be] aware that it is causing injury to the victim." (*Id.* at p. 668, fn. omitted.)

The concerns underpinning the decisions in *Elden*, *Thing* and *Bily*, i.e., the potential for unlimited liability for intangible injuries or liability for such injuries out of proportion to fault, are *not* present in this case because, unlike the intangible injuries in those cases (emotional distress in *Elden* and *Thing* and indirect financial loss in *Bily*), the injury in this case – mesothelioma – is physical, tangible and "inevitably fatal." (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1135-1136; see also *Buttram*

v. Owens-Corning Fiberglas Corp. (1996) 16 Cal.4th 520, 529.) Moreover, there is no potential for unlimited liability because the pool of potential plaintiffs is finite and small. "[M]alignant mesothelioma is a very rare cancer, even among persons exposed to asbestos." (*Hamilton, supra*, 22 Cal.4th at pp. 1135-1136.) Each year there about 3,000 cases of mesothelioma in the United States, (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1228),[3] of which, on average, about 264 are

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[3] The United States Centers for Disease Control and Prevention ("CDC") has reported that the number of annual mesothelioma cases involving men peaked at more than 2000 during the period from 2000 to 2004 and that the number involving women was 560 in 2003 and was projected to increase slightly. (CDC, *Malignant Mesothelioma Mortality - United States, 1999 - 2005*, Apr. 24, 2009, Morbidity and Mortality Weekly Report, Vol. 58, No. 15, pp. 393-396, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5815a3.htm [as of Oct. 20, 2014].)

Statistics published by the CDC in September 2014, through the National Institute for Occupational Safety and Health ("NIOSH"), demonstrate that for the 10-year period from 2001 through 2010, there was an average of 2,647 mesothelioma deaths per year in the United States, with a low of 2,509 in 2001 and a high of 2,753 in 2009. (NIOSH, *Malignant Mesothelioma (All Sites): Number of Deaths by State, U.S. Residents Age 15 and Over, 2001-2010* ["*Malignant Mesothelioma Deaths, 2001-2010*"], Sept. 2014, Work Related Lung Disease Surveillance System (eWoRLD), Work-Related Respiratory Diseases, Malignant Mesothelioma Mortality Data, at <http://wwwn.cdc.gov/eworld/ Data/Malignant_mesothelioma_all_sites_Number_of_deaths_by_state_US_residents_age_15_and_over_20012010/803> [as of Oct. 20, 2014].)

As this court has explained, "[i]n determining de novo what the law is," including whether a duty of care exists, "appellate courts routinely consider materials that were not introduced at the trial, including publications containing expressions of viewpoints and generalized statements about the state of the world. These are considered not as a substitute for evidence but as an aid to the court's work of interpreting,

in California.[4] Of these 264 cases, no more than 7 percent are attributable to take-home asbestos exposures.[5] Thus, on average, there are no more than 16 take-home mesothelioma cases per year in California. This number hardly implicates a "virtually limitless" class of potential plaintiffs that will result in "a flood of lawsuits," as Defendant BNSF argued in the Court of Appeal, (BNSF's Respondent's Brief ["RB"] at pp. 27-28), nor does it "raise[] the spectre of ... limitless financial exposure." (*Bily*, *supra*, 3 Cal.4th at p. 400.)

As noted, the majority in the Court of Appeal expressed concern that recognition of a duty of care would "'extend[] employers' liability too far'"

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explaining and forming the law." (*Cabral*, *supra*, 51 Cal. 4th at p. 775, fn. 5 [considering content of CalTrans Traffic Manual].) Although "not improper," a request for judicial notice of such materials is "unnecessary." (*Ibid.*) Accordingly, the mesothelioma-related statistics published by the CDC may properly be considered in determining the duty issue in this case.

[4] Statistics published by the CDC in September 2014, through NIOSH, demonstrate that for the 10-year period from 2001 through 2010, there was an average of 264 mesothelioma deaths per year in California, with a low of 235 in 2001 and a high of 298 in 2009. (*Malignant Mesothelioma Deaths, 2001-2010*, *supra*.)

[5] The CDC, through NIOSH, has reported that of 541 mesothelioma deaths in 1999, 37, or 6.8 percent, involved victims with identified occupations of "housewife" or "homemaker." (NIOSH, *Malignant Mesothelioma: Most Frequently Recorded Occupations on Death Certificate, U.S. Residents Age 15 and Over, Selected States, 1999*, June 2008, Work Related Lung Disease Surveillance System (eWoRLD), Work-Related Respiratory Diseases, Malignant Mesothelioma Mortality Data, at <http://wwwn.cdc.gov/eworld/Data/Malignant_mesothelioma_Most_frequently_recorded_occupations_on_death_certificate_US_residents_age_15_and_over_selected_states_1999/508 [as of Oct. 20, 2014]; 2 AA 259 [¶ 18].)

and force companies into bankruptcy. (Typed maj. opn. at pp. 6-7.) BNSF made similar arguments during the petitioning process in this case, claiming that recognition of a duty "would trigger an onslaught of questionable asbestos claims" that "would be devastating for businesses" and force them to "inevitably go bankrupt." (BNSF's Answer to Pet. for Review ["Pet. Answer"] at pp. 2, 13-14.) However, as the dissent in the Court of Appeal observed, there is no factual support in the record for these assertions, (typed dis. opn. at p. 2), and the only support cited by the majority were articles in law journals and litigation guides. (Typed maj. opn. at pp. 6-7.) Additionally, it is important to understand that before *Campbell* created a categorical duty exception two years ago, take-home mesothelioma cases, when they occurred, were filed and litigated without incident. There was no "flood" or "onslaught" of such cases then and there will not be any now if a duty is recognized. There are simply not enough take-home mesothelioma victims for there to be a "flood" or "onslaught" of litigation, which is certainly good, but for those few unfortunate individuals who do develop mesothelioma from take-home asbestos exposures, they should be allowed to seek redress for their injuries from all responsible parties, just as other victims did prior to *Campbell*.

As to the arguments regarding bankruptcy, Plaintiffs do not dispute that some companies responsible for asbestos-related injuries have sought and obtained bankruptcy protection. However, that a tortfeasor may seek

bankruptcy protection to avoid or limit its tort liability is not justification for a categorical duty exception that precludes liability, as a matter of law, in the first instance. Indeed, if that were true, many tortfeasors would not be subject to a duty of care, since bankruptcy protection is available for any liability arising out of a non-intentional tort. (11 U.S.C. § 523(a)(6); *Kawaauhau v. Geiger* (1998) 523 U.S. 57, 60-64 [118 S.Ct. 974, 976-978, 140 L.Ed.2d 90].) Additionally, as the dissent in the Court of Appeal recognized, there are "stronger public policy considerations [that] counsel" in favor of a duty of care, as "[s]ociety 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." (Typed dis. opn. at p. 2.)

Moreover, it cannot be forgotten that the existence of a duty of care does not automatically equal liability. "[D]uty is but the first of many elements of a tort claim." (*Pedeferri, supra*, 216 Cal.App.4th at p. 369.) To recover in negligence, "[a]n injured plaintiff must also prove that the [defendant] breached the duty of care and proximately caused his or her injury." (*Ibid.*) Indeed, a plaintiff in an asbestos injury case must prove "threshold exposure" to asbestos from the defendant's product or activity and must further prove "in reasonable medical probability that a particular exposure or series of exposures [from the defendant's product or activity] was a 'legal cause' of his injury, i.e., a substantial factor in bringing about

the injury." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982, italics omitted, fn. omitted.) In its answer to Plaintiffs' petition for review, BNSF questioned the ability of plaintiffs to prove exposure and causation in take-home asbestos injury cases and even went so far as to label these claims as "meritless." (BNSF's Pet. Answer at pp. 14-15.) While Plaintiffs strongly disagree with these statements, they demonstrate that there are numerous factual defenses available to defendants in these cases and that liability is far from established by the mere existence of a duty. In addition, as in any tort case, the defendant will be entitled to apportion fault among the "'"universe of tortfeasors" including nonjoined defendants,'" thus permitting the defendant to proportionally limit its liability for non-economic damages, which are generally the largest component of damages in asbestos injury cases. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1156, quoting *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603; accord, Civ. Code § 1431.2(a).)

As noted, in *Campbell*, the court based its no-duty rule, in part, on its view as to the perceived difficulty of "'draw[ing] the line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed.'" (*Campbell, supra*, 206 Cal.App.4th at p. 32, quoting *Oddone, supra*, 179 Cal.App.4th at p. 822.) This concern breaks down, however, when it is understood that the injured individuals in these case are persons who had regular, close and prolonged contact with

the defendant's employee, such as a spouse. As to these persons, a duty of care is supported by the high degree of foreseeability of harm and the close connection between the defendant's conduct and the plaintiff's injury. The suggestion that if a duty is recognized, persons who had only trivial or remote contact with the employee will file lawsuits against the employer claiming mesothelioma (or some other asbestos injury) is simply unfounded, and even if such a lawsuit were filed, the difficulty of proving causation in such a case (i.e., exposure and substantial factor causation), let alone breach based on such minimal exposures, would virtually foreclose liability. The truth, however, is that take-home mesothelioma victims are not persons who had only trivial or remote contact with the exposed employee. Rather, they are individuals like Ms. Haver, who had regular, close and prolonged contact with her husband, resulting in substantial asbestos exposures, and this is precisely the type of person to whom a duty of care should be owed and who should be allowed to seek recovery. Moreover, as discussed above, the number of take-home mesothelioma victims is finite and small, which itself places a limit on the persons to whom a duty is owed.

Finally, as to "the burden to the defendant" if a duty of care is imposed, Plaintiffs note that employers are already obligated to protect the safety and health of their employees, which was certainly true at the time of the events in this case. (E.g., Labor Code §§ 6400, 6401, 6401.7, 6402,

6403, 6404.) Accordingly, recognition of a duty would not impose a new burden on BNSF, or any other similarly-situated employer, as BNSF was already duty-bound to protect its employees from exposure to asbestos, including Mike Haver, and if it had complied with that existing duty it would have also protected Ms. Haver by eliminating any chance of exposure to asbestos carried home by him.

Accordingly, under the circumstances of this case, "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" do not trump or outweigh the other *Rowland* factors and they do not justify a categorical duty exception.

4. The availability, cost and prevalence of insurance for the risk involved.

"[T]he availability, cost, and prevalence of insurance for the risk involved" weighs against creating a categorical duty exception because the breach of a duty of care by an employer-premises owner sounds in negligence and is an insurable risk. (*Ins. Code* § 533.) "[T]here is no reason to believe [the] cost or prevalence [of insurance] will be significantly affected by declining to create [a] duty exception" for the type of negligent conduct at issue here. (*Cabral, supra*, 51 Cal.4th at p. 784, n.12; *see also Pedeferri, supra*, 216 Cal.App.4th at p. 369 [defendant has burden of demonstrating unavailability of insurance].)

In *Campbell*, the court stated that because the cost of insuring against the risk of injury will "'[u]ltimately ... [be] borne by the consumer[,] ... it appears to make more sense to look to the nonemployee person's insurance to cover the risk.'" (*Campbell*, *supra*, 206 Cal.App.4th at p. 33, quoting *Oddone*, *supra*, 179 Cal.App.4th at p. 823.) The court stated that "'[i]n the normal course of events, such insurance will be already in place and its cost is not likely to be influenced by the risk created by the employer's conduct.'" (*Ibid.*) This argument, if accepted, could be made in almost any case, leading to categorical no-duty rules in many instances where there is currently tort liability. Moreover, why should an injured plaintiff be expected to bear the cost of a defendant's negligence? What if the plaintiff has no health insurance or has only minimal coverage? What if the plaintiff does not have insurance to cover loss of earnings or earning capacity? What about pain and suffering? What type of insurance will cover those damages?

It has long been the policy of this state that "a [d]efendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10; accord, *Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, 9-10.) Moreover, requiring a plaintiff to look to his or her own insurance to cover any portion of the injuries caused by a defendant's negligence is contrary to

"the policy of preventing future harm," which "is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Cabral*, *supra*, 51 Cal.4th at p. 781.)

C. The *Rowland* Factors Do Not Support a Categorical Duty Exception.

As noted, "[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 p. 783.) An exception to that duty is proper "*only* when foreseeability *and* policy considerations justify a categorical no-duty rule." (*Id.* at p. 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 p. 771, quoting *Rowland*, *supra*, 69 Cal.2d at p. 112, italics added; accord, *John B.*, *supra*, 38 Cal.4th at p. 1191.)

Here, foreseeability and policy considerations do *not* "'clearly support[]'" or "justify a categorical no-duty rule." Balancing the *Rowland* factors in their totality, with an emphasis on foreseeability as the "'[t]he most important of these considerations,'" (*Delgado*, *supra*, 36 Cal.4th 224 at p. 237, fn. 15, quoting *Tarasoff*, *supra*, 17 Cal.3d at p. 434; accord, *John B.*, *supra*, 38 Cal.4th at p. 1189), the factors counsel strongly against an exception to the general duty of care. "Even if ... there are some

countervailing policy reasons to immunize [employers for injuries caused by asbestos carried home by employees as a result of the employer's negligent use of asbestos], those reasons fall short of what is required to override the general rule in favor of imposing a duty for foreseeable injuries. California courts have given controlling weight to considerations of public policy only where the potential for tort liability directly leads to undesirable incentives or policy outcomes," and, "[h]ere, the potential for tort liability does not directly lead to undesirable incentives or policy outcomes," as the party responsible for causing the injury will be held accountable for its negligence. (*Pedeferri, supra*, 216 Cal.App.4th at pp. 369-370.)

IV. IT IS WELL-ESTABLISHED THAT A PROPERTY OWNER MAY BE HELD LIABLE FOR AN OFF-PREMISES INJURY.

California law has long recognized that a property owner's duty of care is not limited to persons injured on the premises, but extends to persons injured off the premises by the owner's negligent use, control and/or maintenance of the premises. (*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.)

> A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises

> owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. [Citations.] The *Rowland* factors determine the scope of a duty of care whether the risk of harm is situated on site or off site.

(*Barnes*, *supra*, 71 Cal.App.4th at pp. 1478-1479; accord, *A. Teichert & Son, Inc.*, *supra*, 179 Cal.App.3d at p. 663.)

The no-duty rule created by the majority in the Court of Appeal is contrary to this well-established principle. Additionally, it is problematic because there is no principled basis for creating a duty exception for take-home asbestos injury cases compared to other cases involving off-premises injuries where a duty of care would undoubtedly exist. For example, what is the difference between this case – where the asbestos 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 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 asbestos injury 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 asbestos, a fire negligently breaks out at an employer's factory and spreads to a nearby neighborhood, causing injury to residents. 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 asbestos it uses in the workplace to be carried home on the clothing and bodies of its employees, where family members are exposed and injured? It should not be different.

V. COURTS IN OTHER JURISDICTIONS THAT FOLLOW A *ROWLAND*-TYPE DUTY ANALYSIS HAVE RECOGNIZED A DUTY OF CARE IN TAKE-HOME ASBESTOS INJURY CASES.

Courts in other jurisdictions that follow a *Rowland*-type analysis for determining issues of duty have recognized a duty of care in take-home asbestos injury cases. In *Satterfield v. Breeding Insulation Co.*, *supra*, 266 S.W.3d 347, the Tennessee Supreme Court held that the defendant owed a duty of care to the plaintiff, where the plaintiff's father was employed by the defendant and the plaintiff was exposed to asbestos from contact with her father's work clothes, resulting in her development of mesothelioma. (*Id.* at pp. 351-354, 364-375.) As in California under the *Rowland* analysis, Tennessee focuses on foreseeability of harm as the "paramount" factor in

determining whether a defendant owes a duty of care, but also considers several policy factors in a balancing approach.[6] (*Id.* at pp. 365-366.) Thus, in Tennessee, "[a] duty arises when the degree of foreseeability of the risk and the gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm." (*Id.* at p. 365.)

Utilizing this approach, the Tennessee Supreme Court held that the harm from take-home asbestos exposures was foreseeable and that the policy factors supported recognition of a duty of care. (*Satterfield*, *supra*, 266 S.W.3d at pp. 364-375.) As the court explained:

> Recognizing the existence of a duty to exercise reasonable care to avoid the risk of harm to another involves considerations of fairness and public policy. Under Tennessee law, Alcoa has a duty to prevent foreseeable injury from an unreasonable risk of harm that it had itself created. Under the facts alleged in Ms. Satterfield's complaint, Alcoa failed to inform its employees, including Mr. Satterfield, of the risks associated with asbestos and failed to provide them with meaningful alternatives to wearing home their contaminated work clothes. Based on these allegations,

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[6] The factors considered in the Tennessee duty analysis include:

> (1) the foreseeable probability of the harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct.

(*Satterfield*, *supra*, 266 S.W.3d at p. 365.)

> Alcoa created a risk that persons who came into close and regular contact over an extended period of time with its employees' work clothes would be exposed to the asbestos fibers on the clothes. The fair and proportional duty we recognize today is neither limitless nor impractical.

(*Id.* at pp. 374-375.)

In *Olivo v. Owens-Illinois, Inc.*, *supra*, 895 A.2d 1143, the New Jersey Supreme Court addressed the take-home duty issue in the same context as *Campbell*, i.e., asbestos carried home by an employee of an independent contractor working on the defendant's premises. (*Id.* at p. 1146.) The court there explained that, "in respect of a landowner's liability, whether a duty of care can be owed to the one who is injured from a dangerous condition on the premises, to which the victim is exposed off-premises, devolves to a question of foreseeability of the risk of harm to that individual or identifiable class of individuals." (*Id.* at p. 1148.) Thus, as in the *Rowland* analysis, New Jersey's duty approach focuses primarily on foreseeability; however, like California, foreseeability is not the only consideration, as "[o]nce the ability to foresee harm to a particular individual has been established, ... considerations of fairness and policy govern whether the imposition of a duty is warranted." (*Id.* at pp. 1148-1149; *id.* at p. 1147 ["The inquiry has been summarized succinctly as one that 'turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'"].)

Following this approach, the New Jersey Supreme Court held that the defendant owed a duty to the plaintiff's decedent to protect her from exposure to asbestos from its property:

> We hold that to the extent Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to friable asbestos and asbestos dust, similarly, Exxon Mobil owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing. We agree with the Appellate Division's assessment of the fairness and justness of imposing on Exxon Mobil such a duty to plaintiff's wife.

(*Olivo, supra*, 895 A.2d at p. 1149.)

In addition to *Satterfield* and *Olivo*, cases from several other jurisdictions that, like California, consider foreseeability and policy factors in determining issues of duty, have recognized a duty of care in take-home asbestos injury cases. (E.g., *Bobo v. Tennessee Valley Authority* (N.D. Ala., Aug. 25, 2014, No. CV 12-S-1930-NE) Memorandum Opinion and Order, pp. 8-15; *Simpkins v. CSX Corp.* (Ill. App. Ct. 2010) 401 Ill.App.3d 1109, 1113-1120 [929 N.E.2d 1257, 1261-1266]; *Chaisson v. Avondale Indus., Inc.* (La. Ct. App. 2006) 947 So.2d 171, 180-184; *Zimko v. American Cyanamid* (La. Ct. App. 2005) 905 So.2d 465, 482-484; *Rochon v. Saberhagen Holdings, Inc.* (Wash. Ct. App. 2007) 2007 WL 2325214, pp. *1-*4; see also *Anchor Packing Co. v. Grimshaw* (Md. Ct. Spec. App. 1997) 115 Md.App. 134, 191 [692 A.2d 5, 34], vacated on other grounds *sub nom., Porter Hayden Co. v. Bullinger* (Md. 1998) 350 Md. 452 [713

A.2d 962].)[7]

Moreover, several of the above decisions addressed and rejected defense arguments that allowing liability for take-home asbestos injuries would open the proverbial litigation floodgates, resulting in limitless liability and company bankruptcies. In *Satterfield*, for example, the Tennessee Supreme Court explained that imposition of a duty of care was appropriate because it was based on "the employer's own misfeasance – its injurious affirmative act of operating its facility in such an unsafe manner that dangerous asbestos fibers were transmitted outside the facility to others who came in regular and extended close contact with the asbestos-contaminated work clothes of its employees." (*Satterfield*, *supra*, 266 S.W.3d at 364, 374-375.) Because the duty it recognized was owed only to a person who had close, regular and extended contact with the employee, the court held that the duty was "fair and proportional" and was "neither limitless nor impractical." (*Id.* at pp. 374-375.)

Satterfield also rejected arguments made by the defendant "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

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[7] Pursuant to California Rules of Court, rule 8.1115(c), copies of the opinions in *Bobo* and *Rochon* are attached hereto under Tabs 1 and 2, respectively.

additional liability," and "that finding that it has a duty to persons like Ms. Satterfield will expose premises owners to a host of similar claims by other plaintiffs." (*Satterfield, supra*, 266 S.W.3d at pp. 369-371.) The court observed that while these arguments "might have resonance with regard to recognizing a duty to unimpaired claimants," "who stand at the center of the asbestos litigation crisis," they "ring[] hollow with regard to a claimant, like Ms. Satterfield, who has died of mesothelioma." (*Id.* at pp. 369-370.) As the court explained:

> The various efforts to reform asbestos litigation have been directed toward stemming the tide of lawsuits in large part to ensure that seriously ill claimants are able to recover and are not drowned out by unimpaired claimants. Victims of mesothelioma are regularly identified as precisely the type of claimants whose claims should be protected. It is not surprising that individuals with mesothelioma are put in such a category because mesothelioma is a serious and fatal illness that rarely occurs in the general population and that is closely associated with exposure to asbestos. Ms. Satterfield is precisely the type of claimant whose claims should be permitted rather than inhibited.

(*Ibid*, fns. omitted.) Additionally, the court recognized that "[i]f the financial burden of compensating these injuries is lifted from the employers' shoulders, it does not vanish into the ether," but instead will be placed on the injured victims, and it saw no policy reason to favor the companies whose negligence caused the exposures over the individuals who were exposed and injured. (*Id.* at pp. 370-371.)

Similar defense arguments were also raised and addressed, to

varying degrees, in *Simpkins*, *Chaisson*, *Olivo*, and *Rochon*, with the courts there concluding that they did not justify a no-duty finding. (*Simpkins*, *supra*, 929 N.E.2d at pp. 1264-1266; *Chaisson*, *supra*, 947 So.2d 171 at pp. 183-184; *Olivo*, *supra*, 895 A.2d at p. 1150 ["such fears [of limitless liability] are overstated"]; *Rochon*, *supra*, 2007 WL 2325214 at p. *4.)

In *Satterfield*, the Tennessee Supreme Court looked at the divergent decisions on the take-home duty issue and concluded that the dividing line between those jurisdictions that recognize a duty of care, and those that do not, is whether the inquiry focuses on foreseeability of the harm or the relationship between the parties. Jurisdictions that focus on foreseeability as the primary factor in the duty analysis have found that a duty exists, whereas jurisdictions that focus on whether there is a relationship between the parties have found no duty. (*Satterfield*, *supra*, 266 S.W.3d at pp. 361-363.) This same observation was made by the dissent in the Court of Appeal in this case and, indeed, by court in *Campbell*. (Typed dis. opn. at p. 2; *Campbell*, *supra*, 206 Cal.App.4th at p. 33.) Of course, the duty analysis in California, under *Rowland*, focuses primarily on foreseeability and does not look to whether there is (or is not) a relationship between the parties. (*Cabral*, *supra*, 51 Cal.4th at p. 771; *Rowland*, *supra*, 69 Cal.2d at pp. 112-113.) As previously noted, this court has observed that "[f]oreseeability of harm is a 'crucial factor' in determining the existence and scope of [a] duty," (*John B.*, *supra*, 38 Cal.4th at p. 1189), and is

"'[t]he most important of these [*Rowland*] considerations in establishing duty.'" (*Delgado, supra*, 36 Cal.4th at p. 237, fn. 15, quoting *Tarasoff, supra*, 17 Cal.3d at p. 434.)

The majority in the Court of Appeal stated its no-duty determination "was consistent with the majority view in the nation on the issue." (Typed maj. opn. at pp. 2, 6.) However, as noted in *Satterfield*, there is no "'emerging weight of authority'" on this issue, but rather "a pronounced split of authority." (*Satterfield, supra*, 266 S.W.3d at pp. 371-372.) Indeed, even the *Campbell* court observed the existence of this split of authority. (*Campbell, supra*, 206 Cal.App.4th at p. 33.) In *Satterfield*, the court observed that as to those courts "that have declined to recognize [a] duty" in take-home asbestos injury cases, "their decisions rest on negligence principles that are not consistent with ours." This statement applies with equal force here, as the decisions finding no duty are contrary to California's negligence principles, which are fully consistent with those in Tennessee. Nevertheless, even if it could be said that recognition of a duty of care in these cases is somehow the minority position, this court has not hesitated to follow the minority view when it is consistent with California law. (E.g., *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 566, fn. 10 [adopting "minority view" that a negotiated rate differential is not recoverable as a collateral source payment because consistent with California law].)

Accordingly, the duty of care under consideration here is not unique or novel and its recognition will not turn California into an "outlier". Rather, its recognition will bring California in line with other jurisdictions that follow a *Rowland*-type analysis for determining issues of duty, where foreseeability is considered along with policy factors.

VI. *CAMPBELL* IS DISTINGUISHABLE AND, IF NOT, IT WAS WRONGLY DECIDED AND SHOULD BE DISAPPROVED.

The majority in the Court of Appeal held that *Campbell* was indistinguishable from this case and that it "was correctly decided." (Typed maj. opn. at pp. 2, 4-8.) This holding was erroneous because *Campbell* is distinguishable and, even if it is not, it was wrongly decided and should be disapproved.

In *Campbell*, 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 p. 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 pp. 19-20.) 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 pp. 20, 31 & fn. 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 the independent contractor's work on its premises. (*Campbell*, *supra*, 206 Cal.App.4th at pp. 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 p. 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 take-home exposure to asbestos resulting from the independent contractor's work on its premises. 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. (*Campbell, supra*, 206 Cal.App.4th at 20-21, 31 & fn. 6.) These were the circumstances under which the *Campbell* court analyzed the *Rowland* factors and found that Ford did not owe a duty of care to the plaintiff. (*Id.* at pp. 26-34.)

This case is different, as the issue here is whether an employer who itself uses asbestos in its business has a duty of care to protect an immediate family member of its own employee, in this case a spouse, from exposure to asbestos carried home by the employee on his clothing and body. In contrast to *Campbell*, where Ford merely owned the premises where the independent contractor's work was performed and did not itself perform or control that work or otherwise create the asbestos hazard, the complaint here alleges that Defendant BNSF itself used asbestos in the operation of its

business, through the work of its own employees under its direct control, and that its direct negligence in using the asbestos resulted in Ms. Haver's exposure when the asbestos was carried home from the workplace by her husband on his clothing and body. (1 AA 2-3, 5-10, 13, 17-18 [¶¶ 3-4, 10-13, 22-24, 26-34, 44 and Exs. A and B].) Thus, unlike the defendant in *Campbell*, BNSF itself created the asbestos hazard through its own, direct use of asbestos. Moreover, in contrast to *Campbell*, where the asbestos exposures occurred in the 1940s, when knowledge of the dangers of take-home exposures was more limited, (*Campbell*, *supra*, 206 Cal.App.4th at pp. 21-22), the exposures in this case took place from July 1972 to 1974, (1 AA 5, 7-10, 17 [¶¶ 10-11, 22-24, 26, 30, 34 and Ex. A), when such knowledge was far more developed and extensive. (2 AA 256-259 [proposed allegations detailing knowledge of asbestos hazards and dangers of take-home exposures].)

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 p. 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 pp. 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 pp. 1-3]; *Campbell*, *supra*, 206 Cal.App.4th at pp. 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 pp. 20, 31 & fn.6; see also 2 AA 260-262 [discussion of modification of original *Campbell* opinion].)

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 blame attached to the defendant's conduct. (*Cabral*, *supra*,

51 Cal.4th at p. 771; *Rowland, supra*, 69 Cal.2d at pp. 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 an independent contractor. (*Campbell, supra*, 206 Cal.App.4th at p. 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 in having an independent contractor perform work on its premises and injury to a family member of the independent contractor's employees was too "attenuated" to support a duty of care. (*Campbell, supra*, 206 Cal.App.4th at p. 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.

No matter how broadly worded, an appellate decision, including the court's specification of the issue, its reasoning and its holding, cannot be viewed in isolation, divorced from facts of the case, and a court cannot expand its holding beyond the facts presented. As explained by this court, "'[i]t is axiomatic that cases are not authority for propositions not considered.' [Citation.] '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.) "[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, fn. omitted.)

Campbell, therefore, is 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 premises. 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 performed. In this case, Ms. Haver's former husband was an employee of BNSF and the complaint alleges that asbestos fibers were released and carried home by him, resulting in exposure to Ms. Haver, as a direct result of BNSF's *own use* of asbestos in its business, through the work of its own

employees under its direct control. (1 AA 2-3, 5-10, 13, 17-18 [¶¶ 3-4, 10-13, 22-24, 26-34, 44 and Exs. A and B].) Thus, in this case, BNSF itself created the asbestos hazard by its own conduct. These were not the facts and issue in *Campbell*.

Accordingly, *Campbell* is distinguishable because it did not address the question of duty under the circumstances presented in this case and because, under the circumstances here, the *Rowland* factors balance differently and do not support a categorical duty exception. However, even if this case is viewed as being indistinguishable from *Campbell*, *Campbell* was wrongly decided and should be disapproved because its *Rowland* analysis was flawed. As set forth by Plaintiffs above, in their detailed discussion of the *Rowland* factors as applied in this case, foreseeability and policy considerations do not "clearly support[]" or "justify a categorical no-duty rule." (*Cabral, supra*, 51 Cal.4th at pp. 771-772.)

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeal should be reversed because there was and is no justification for creating a duty exception under the circumstances of this case.

Dated: October 20, 2014

Respectfully submitted,

WATERS, KRAUS & PAUL

By: _____

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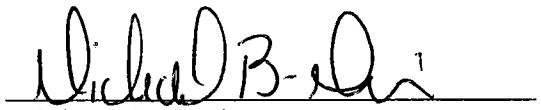
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), the undersigned hereby certifies that this Petitioners' Opening Brief on the Merits contains 13,943 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Microsoft Word word-processing program used to generate it.



Michael B. Gurien
State Bar No. 180538

OPINIONS ATTACHED PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.115(c)

FILED
2014 Aug-25 AM 11:07
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

MELISSA ANN BOBO and SHARON JEAN COX, as Co-Personal Representatives of the Estate of Barbara Bobo, deceased,	)	
Plaintiffs,	)	
vs.	)	**Civil Action No. CV 12-S-1930-NE**
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Barbara Bobo, now deceased, commenced this action against nine defendants,[1] eight of whom were dismissed pursuant to stipulations for dismissal,[2] leaving only her

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[1] *See* doc. no. 1 (Complaint), asserting claims against: (*i*) Agco Corporation, *formerly known as* Allis Calmers Company, *sued as successor to* Massey Ferguson Limited ("Agco"); (*ii*) CBS Corporation, *formerly known as* Viacom, Inc., *sued as successor-by-merger to* CBS Corporation, *formerly known as* Westinghouse Electric Corporation ("CBS"); (*iii*) Conopco, Inc., *doing business as* Unilever United States, Inc., *sued individually and as successor-by-merger* to Helene Curtis Industries, Inc. ("Conopco"); (*iv*) Consolidated Aluminum Corporation, *also known as* Conlaco, Inc. ("Consolidated Aluminum"); (*v*) Dana Companies LLC, *sued individually and as successor-in-interest to* Victor Gasket Manufacturing Company ("Dana"); (*vi*) Ford Motor Company ("Ford"); (*vii*) Metropolitan Life Insurance Company ("MetLife"); (*viii*) TVA; and (*ix*) Unilever United States, Inc., *sued individually and as successor-by-merger to* Helene Curtis Industries, Inc. ("Unilever").

[2] The following claims were dismissed in accordance with stipulations of dismissal filed by Mrs. Bobo and the defendants noted: doc. no. 18 (Ford); doc. no. 19 (Order Dismissing Ford); doc. no. 44 (AGCO); doc. no. 45 (Order Dismissing AGCO); doc. no. 47 (Conopco and Unilever); doc. no. 48 (Order Dismissing Conopco and Unilever); doc. no. 53 (Consolidated Aluminum); doc. no. 56 (Order Dismissing Consolidated Aluminum); doc. no. 60 (CBS); doc. no. 61 (Order Dismissing CBS); doc. no. 62 (Dana Companies); doc. no. 64 (Order Dismissing Dana Companies); doc. no. 78 (MetLife); doc. no. 79 (Order Dismissing MetLife).

claims against the Tennessee Valley Authority ("TVA"). Plaintiffs, who are the co-personal representatives of the estate of Mrs. Bobo,[3] maintain a variety of claims against TVA, including a premises liability claim (Count Seven).[4] The action is presently before the court on TVA's motion for summary judgment.[5] For the reasons stated below, that motion is due to be denied.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).[6] "[T]he

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[3] *See* doc. no. 179 (Order substituting parties).

[4] *See* doc. no. 171 (Amended Complaint). Plaintiffs also assert claims against "all Defendants" under the Alabama Extended Manufacturer's Liability Doctrine (Count One), negligence (Count Two), strict liability (Count Three), breach of warranty (Count Four), breach of the implied warranty of fitness for a particular purpose (Count Five), and breach of the implied warranty of merchantability (Count Six). *Id.* However the Amended Complaint only mentions TVA specifically regarding a premises liability claim. *Id.* at 17. Moreover, in the paragraph identifying TVA, the Amended Complaint alleges that TVA "owned the premises where [Barbara Bobo's] deceased husband worked with asbestos-containing equipment and/or products and thereby exposed [Mrs. Bobo] to asbestos dust." *Id.* at 2. Although TVA asserts that "[p]laintiff's claim sounds in negligence and does not arise under a theory of products liability or strict liability," doc. no. 163 at 2, it does not move for summary judgment on those issues except to the extent plaintiffs cannot prove causation or duty. The court will only address the issues TVA has placed before it.

[5] Doc. no. 122.

[6] Rule 56 was recently amended in conjunction with a general overhaul of the Federal Rules of Civil Procedure. The Advisory Committee was careful to note, however, that the changes "are intended to be *stylistic only*." Adv. Comm. Notes to Fed. R. Civ. P. 56 (2007 Amends.) (emphasis supplied). Consequently, cases interpreting the previous version of Rule 56 are equally applicable to the revised version.

plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

> In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment.
>
> The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable [factfinder] to return a verdict in its favor.

Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*) (internal quotations and citation omitted) (bracketed text suppled).

II. SUMMARY OF FACTS[7]

[7] The following statements are the "facts" for summary judgment purposes only, and may not be the actual facts. *See Cox v. Adm'r U.S. Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1400 (11th Cir. 1994). The court has gleaned these statements from the parties' submissions of facts claimed to be undisputed, their respective responses to those submissions, and the court's own examination of the evidentiary record. This summary is also partly borrowed from the court's published memorandum opinion entered on October 29, 2013, in connection with TVA's motion for summary judgment on discretionary function grounds. Doc. no. 174 (Memorandum Opinion and Order). All reasonable doubts about the facts have been resolved in favor of the nonmoving party. *See Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002).

Barbara Bobo never worked for TVA as an employee, a contractor, or sub-contractor. Moreover, she was never permitted to enter the Authority's "Browns Ferry Nuclear Plant" located on the North shore of the Tennessee River near Athens, in Limestone County, Alabama.[8] Instead, the claims that she asserted in this action are derivative: that is, they grow out of the exposure of her late husband, James Bobo, to asbestos and asbestos-containing products while he worked in that facility.[9]

A. James Bobo's Exposure to Asbestos

James Bobo was employed by TVA as a laborer at its Browns Ferry Nuclear Plant for more than twenty-two years, from April 15, 1975 until September 7, 1997.[10] During that time, TVA used thermal pipe coverings, insulation, roofing cement, packing materials, and gasket packing materials containing asbestos.[11] Laborers such

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[8] Doc. no. 70 (Defendant's Brief in Support of Summary Judgment on Discretionary Function Grounds), at 3. The Browns Ferry plant was TVA's first nuclear power plant, and the largest in the world when it began operation in 1974. It was the first nuclear plant in the world to generate more than 1 billion watts of power. The three operating units at Browns Ferry are boiling water nuclear reactors. They produce electricity by splitting uranium atoms: *i.e.*, the heat from that process boils water, thereby producing steam that is piped to turbines, which spin a generator to produce electricity. *See, e.g.*, http://www.tva.gov/sites/brownsferry.htm (last visited Oct. 17, 2013).

[9] Doc. no. 83-3 (Deposition of Priscilla Carthen), at 16, 38; doc. no. 74 (Defendant's Brief in Opposition to Plaintiffs' Motion to Amend Complaint), at 8.

[10] Doc. no. 83-3 (Deposition of Priscilla Carthen), at 15, 20, 38.

[11] TVA's answers to interrogatories indicate that it purchased insulation containing asbestos for the Browns Ferry Nuclear Plant until at least 1980. Doc. no. 150-4 at 7-10. Steve Brown, a TVA employee, testified that there was still insulation containing asbestos at the Browns Ferry Nuclear Plant when he left in 1991. Doc. no. 150-7 at 16. Frank Mecke, another TVA employee, testified that he installed thermal insulation containing asbestos at the Browns Ferry Nuclear Plant. Doc. no. 150-5 at 11-12, 15, 17, 20, 44, & 53.

as James Bobo worked all over the nuclear facility, primarily performing clean-up duties, such as sweeping up insulation that had fallen on the floor.[12] Occasionally, he would assist the insulators in such work; but, more often than not, Mr. Bobo was directed to clean up after the insulators had completed their duties by sweeping the insulation that had fallen on the floor.[13] The act of sweeping generated airborne dust containing asbestos.[14] Significantly, Mr. Bobo did not change clothing at the end of each work day. Instead, he drove to his home wearing the same clothes that he had worked in during the day.[15]

B. Barbara Bobo's Exposure to Asbestos

Although Barbara Bobo, like many Americans above the age of fifty, probably was exposed to products containing some amount of asbestos at various times throughout her life, she alleged that she was involuntarily subjected to an excessive quantity of asbestos while laundering her husband's dusty work clothes at least twice each week throughout the years he worked for TVA at Browns Ferry.[16] The

[12] Doc. no. 83-4 (Deposition of Jimmy Myhan), at 25-27.

[13] *Id.* at 60. The laborers would clean up the insulation using brooms, rags, and mops. *Id.*

[14] *Id.* at 61. Most of the insulation James Bobo worked with was white, doc. 83-4 at 46, the same color as the thermal insulation containing asbestos installed by Frank Mecke, doc. 150-5 at 18. Indeed, Dr. Martin Barrie, TVA's expert witness, testified that the insulation James Bobo swept up "probably was asbestos." Doc. 150-8 at 44.

[15] Doc. no. 83-4 (Deposition of Jimmy Myhan), at 72.

[16] Doc. no. 171 (Amended Complaint) ¶ 64. Barbara Bobo states in her complaint that she experienced exposure to asbestos-containing friction products, as well as other asbestos products, from approximately the 1940s to the late 1950s as a result of her father, a farmer, performing

washroom in the couple's home was small. The floor dimensions were only approximately four feet by five feet (20 square feet).[17] Mrs. Bobo's practice was to pick-up the dirty clothing that her husband removed at the end of a work day, carry those clothes into the washroom, shut the door, empty the pockets, shake the articles, and then place them into the washing machine.[18] She recalled inhaling "dust" while laundering her husband's clothes.[19] She described the air of the laundry room as "[f]oggy. I just thought it was dust."[20] She also said that the air became dusty when she dry-swept and mopped the washroom floor.[21] However, Mrs. Bobo did not have personal knowledge that the dust in her husband's work clothes contained asbestos fibers, and she never tested for the presence of asbestos at her residence.[22]

A physician diagnosed Mrs. Bobo as suffering from "pleural mesothelioma" in November of 2011.[23] "Mesothelioma" is defined as "a tumor derived from

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maintenance on his tractors. *Id.* ¶ 12. She was also alleges that she experienced non-occupational exposures because her husband worked daily with asbestos containing materials during his employment at Alabama Wire Plant in Florence, Alabama, from 1964 to 1975. *Id.* Additionally, she "used asbestos-containing stationary hair dryers during her career as a beautician" from 1976 through the decade of the 1990s. *Id.* *See also* doc. no. 83-1 (Deposition of Barbara Bobo), at 19.

[17] Doc. no. 83-1 (Deposition of Barbara Bobo), at 18.

[18] *Id.* at 19.

[19] *Id.* at 20.

[20] *Id.* at 19 (alteration supplied).

[21] *Id.* at 20.

[22] *Id.* at 41.

[23] Doc. no. 83-1 (Deposition of Barbara Bobo), at 40-41.

mesothelial tissue . . . . Malignant varieties [*e.g.*, *pleural* mesothelioma] are often the result of excessive exposure to asbestos." *Dorland's Illustrated Medical Dictionary* 1134 (30th ed. 2003) (alteration supplied). "Pleural mesothelioma" is characterized by the same, generally-accepted treatise as "a malignant mesothelioma of the pleural space, often spreading widely and invading other thoracic structures; . . . It is usually fatal within one year." *Id.* at 1135. Mrs. Bobo doubled that prognosis: she died two years after her condition was diagnosed.[24]

III. DISCUSSION

TVA moved for summary judgment on the grounds that it did not owe Barbara Bobo a duty of care under Alabama tort law,[25] and that the personal representatives of her estate have not produced sufficient evidence to create a genuine issue of material fact as to the issue of whether Mrs. Bobo's exposures to asbestos originating from the Browns Ferry Nuclear Plant caused her mesothelioma.[26]

"In [a] premises-liability case, the elements of negligence are the same as those in any tort litigation: duty, breach of duty, cause in fact, proximate or legal cause, and damages." *Lingefelt, et al. v. International Paper Co., et al.*, 57 So. 3d 118, 122

[24] Doc. no. 179 (Order substituting parties).

[25] In a diversity case, a federal district court is bound to apply state substantive law and federal procedural rules. *See, e.g., Erie Railroad Co. v. Tompkins*, 304 U.S. 64, (1938); *National Distillers and Chemical Corp. v. Brad's Machine Products, Inc.*, 666 F.2d 492, 494-95 (11th Cir. 1982).

[26] Doc. no. 122 (TVA's motion for summary judgment).

(Ala. Civ. App. 2010) (alteration in original) (internal quotations omitted); *see also Sessions v. Nonnenmann*, 842 So. 2d 649, 651 (Ala. 2002). The outcome of this case hinges on the elements of duty, causation in fact, and proximate causation, which the court addresses below.

A. Duty

TVA first contends that it owed no duty of care to Mrs. Bobo under Alabama law.[27]

It is black letter Alabama law "'that for one to maintain a negligence action the defendant must have been subject to a legal duty,' because 'where there is no duty, there can be no negligence.'" *DiBiasi v. Joe Wheeler Electric Membership Corp.*, 988 So. 2d 454, 460 (Ala. 2008) (quoting *Thompson v. Mindis Metals, Inc.*, 692 So. 2d 805, 807 (Ala. 1997) (in turn quoting *Morton v. Prescott*, 564 So. 2d 913, 915 (Ala. 1990)); *City of Bessemer v. Brantley*, 65 So. 2d 160, 165 (Ala. 1953)).

Further, the determination of whether a duty exists is "'strictly a legal question to be determined by the court.'" *DiBiasi*, 988 So. 2d at 460 (quoting *Pritchett v. ICN Medical Alliance, Inc.*, 938 So. 2d 933, 937 (Ala. 2006) (in turn quoting *Taylor v. Smith*, 892 So. 2d 887, 891-92 (Ala. 2004))).

Upon review of the relevant case law, TVA appears correct in its assertion that

[27] Doc. no. 128 (TVA's Brief in Support of Summary Judgment), at 1.

"no Alabama appellate court has issued an opinion regarding the availability of take-home claims under Alabama law."[28] Thus, this court is tasked with determining whether Alabama would recognize a duty owed by premises-owners to non-employees in take-home exposure cases.

> "'In determining whether a duty exists in a given situation . . . courts should consider a number of factors, including public policy, social considerations, and foreseeability. *The key factor is whether the injury was foreseeable by the defendant.*'" *Patrick v. Union State Bank*, 681 So. 2d 1364, 1368 (Ala. 1996) (quoting *Smitherman v. McCafferty*, 622 So. 2d 322, 324 (Ala. 1993)). In addition to foreseeability, Alabama courts look to a number of factors to determine whether a duty exists, including "'(1) the nature of the defendant's activity; (2) the relationship between the parties; and (3) the type of injury or harm threatened.'" *Taylor*, 892 So. 2d at 892 (quoting *Morgan v. South Central Bell Telephone Co.*, 466 So. 2d 107, 114 (Ala. 1985)).

DiBiasi, 988 So. 2d at 461 (alterations and emphasis supplied).

Plaintiffs assert that, because the foreseeability of an injury is the "key factor" in determining whether a duty exists under Alabama law, *see Taylor*, 892 So. 2d at 892, *Patrick*, 681 So. 2d at 1368, Alabama would join a number of other state courts

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[28]Doc. no. 128 (TVA's Brief in Support of Motion for Summary Judgment), at 20. Plaintiffs contend that Alabama recognized a duty of care owed by premises-owners to non-employees in a take-home exposure case in which a wife sued asbestos manufacturers for injuries caused by her bystander exposure from laundering her husband's work clothes. *Galloway v. Keene Corp.*, 621 So. 2d 982, 982 (Ala. 1993). Contrary to plaintiffs' contention, the Supreme Court of Alabama made no holding regarding the viability of take-home exposure claims because that issue was not before the court. *See id.* (jury verdict was entered against the wife, and she appealed the denial of her motion for a new trial); *see also Ex parte James*, 836 So. 2d 813, 818 (Ala. 2007) ("Arguments based on what courts do not say, logically speaking, are generally unreliable and should not be favored by the judiciary . . . .").

finding a duty owed to non-employees in take-home exposure cases based on the foreseeability of the injury. *See, e.g., Simpkins v. CSX Corp.*, 929 N.E.2d 1257, 1263-64 (Ill. App. Ct. 2010) ("[W]e believe that it takes little imagination to presume that when an employee who is exposed to asbestos brings home his work clothes, members of his family are likely to be exposed as well. Thus, the general character of the harm to be prevented was reasonably foreseeable.") (alteration supplied); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008) (holding that the harm to the plaintiff was foreseeable, because she was regularly in contact with asbestos-contaminated work clothes for extended periods of time); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (holding that a premises owner owed a duty to spouses handling the asbestos-contaminated work clothing based on the foreseeable risk of harm arising from such exposures); *Zimko v. American Cyanamid*, 905 So. 2d 465, 483 (La. App. 2005) (same).

On the other hand, TVA contends that Alabama courts would not impose a duty on the basis of the forseeability of an injury alone, but would, instead, consider additional relevant factors including public policy, social considerations, the nature of the defendant's activity, the relationship between the parties, and the type of injury threatened. *See DiBiasi*, 988 So. 2d at 461. Thus, TVA argues that Alabama would follow the jurisdictions that have found no legal duty is owed to non-employees in

take-home exposure cases, based upon considerations of public policy. *See, e.g.*, *Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390 (Cal. Ct. App. 2012) (concluding 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"); Kan. Stat. Ann. § 60-4905(a) (2012) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property."); *Price v. E.I. DuPont De Nemours & Co.*, 26 A.3d 162, 170 (Del. 2011) (holding that there was no legal duty because the plaintiff did not have a "special relationship" with the premises owner); *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448, 453 (Ohio 2010) ("Pursuant to [an Ohio statute], a premises owner is not liable in tort for claims arising from asbestos exposure originating from asbestos on the owner's property, unless the exposure occurred at the owner's property.") (alteration supplied); *In re Certified Question from Fourteenth District Court of Appeals of Texas*, 740 N.W.2d 206, 222 (Mich. 2007) ("[W]e hold that, under Michigan law, defendant, as owner of the property . . . did not owe to the deceased, who was never on or near that property, a legal duty to protect her from exposure to any asbestos fibers carried home on the clothing of a member of her household . . . .") (alteration supplied); *In re Eighth Judicial District Asbestos*

Litigation, 815 N.Y.S.2d 815, 817 (N.Y. Sup. Ct. 2006) (holding that employer did not owe duty of care to spouse of employee who contracted mesothelioma as a result of laundering her husband's asbestos-laden clothes); *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) ("[W]e decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace.") (alteration supplied); *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (holding that a steel company did not owe a duty of care to an employee's wife to maintain a safe workplace for its employees).

According to TVA, the cases decided under the laws of New York, Georgia, and California are especially persuasive because the laws of those jurisdictions are similar to those of Alabama regarding issues of duty.[29] This court disagrees. There are several reasons for doing so. First, in deciding that no duty was owed to non-employees in a take-home exposure claim similar to the one asserted by Barbara Bobo, the Supreme Court of Erie County, New York, specifically stated that "[d]uty in negligence cases *is not defined by foreseeability of injury*." *In re Eighth Judicial District Asbestos Litigation*, 815 N.Y.S.2d at 939 ("Rather, foreseeability determines merely "the scope of the duty once it is determined to exist.'") (quoting *Holdampf v.*

[29]Doc. no. 128 (TVA's Brief in Support of Motion for Summary Judgment), at 21.

A.C. & S., Inc., 5 N.Y.3d 486, 493 (N.Y. 2005); *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (N.Y. 2002)). Second, while the Supreme Court of Georgia declined to extend an employer's duty to provide a safe workplace beyond its employees based on policy considerations, the court did not place the same emphasis on foreseeability that an Alabama court would. *See CSX Transportation, Inc.*, 608 S.E.2d at 210 ("[W]e decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."). Finally, even though the California Court of Appeals considered the foreseeability of an injury when determining "duty" in a take-home exposure claim, it stated that, "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 workers for such secondary exposure . . . ." *Campbell*, 141 Cal. Rptr. 3d at 402-03. Notably, the court did not address foreseeability as the "key factor" in its determination.

In contrast to TVA's position, plaintiffs cite cases that are *actually* persuasive, because the courts cited by them placed an emphasis on the foreseeability of an injury, while also considering public policy. *See Satterfield*, 266 S.W.3d at 373-75

(noting that "Tennessee's courts rely heavily on forseeability when determining the existence and scope of a duty," and that "the existence of a duty to exercise reasonable care to avoid the risk of harm to another involves considerations of fairness and public policy"); *Olivio*, 895 A.2d at 1148 ("Foreseeability is significant in the assessment of a duty of care to another," and "[o]nce the ability to foresee harm to a particular individual has been established . . . considerations of fairness and policy govern whether the imposition of a duty is warranted.") (alterations supplied).

Still, TVA contends that Alabama would adopt the reasoning of courts in California and Georgia in holding that policy concerns weigh against the imposition of a duty under the circumstances present in this action, because the policy considerations surrounding the establishment of a new duty are substantial and have potentially far-reaching implications for individual litigants, the business community, and the courts. This court does not find TVA's reasoning persuasive. As the Supreme Court of Tennessee recognized, there is no danger to the business community in finding that "a sophisticated [employer] that was aware of, or should have been aware of, the risk to others that could result from exposure to asbestos fibers, . . . knew its employees' work clothes contained significant quantities of asbestos fibers, and [] understood the danger of transmitting these asbestos fibers to others," owes a duty to family members in take-home exposure claims. *Satterfield*, 266 S.W.3d at 371; *see*

also Olivo, 895 A.2d at 1150 ("Although Exxon Mobil fears limitless exposure to liability based on a theory of foreseeability built on contact with Anthony's asbestos-contaminated clothing, such fears are overstated. The duty we recognize in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife, who ordinarily would perform typical household chores that would include laundering the work clothes worn by her husband."); *Simpkins*, 929 N.E.2d at 1266 (dismissing policy concerns of "limitless liability to 'the entire world'" because "the scope of liability will be inherently limited by the foreseeability of the harm").

Thus, the policy considerations in recognizing a duty to family members of employees in take-home asbestos exposure cases does not outweigh the foreseeability of the injury in a jurisdiction like Alabama that relies heavily on foreseeability in its duty analysis. Accordingly, TVA owed a duty of care to Mrs. Bobo.

B. Causation in fact

TVA next contends that its purported breach of duty was not the cause of Barbara Bobo's mesothelioma, because there purportedly is no evidence that her husband, James Bobo, was exposed to asbestos while working at the Plant.[30] *See Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1481 (11th Cir. 1985)

[30] Doc. no. 128 (TVA's Brief in Support of Motion for Summary Judgment), at 4.

("Regardless of the theory of liability in [asbestos-related injury tort] cases, the threshold for every theory is proof that an injured plaintiff was exposed to asbestos-containing products for which the defendant is responsible."). In support, TVA asserts that James Bobo's testimony in a related Texas asbestos lawsuit is not admissible, and that Jimmy Myhan's testimony is insufficient to prove that James Bobo was exposed to asbestos at the Browns Ferry Nuclear Power Plant. The court addresses both assertions below.

1. James Bobo's testimony

TVA asserts that James Bobo's deposition testimony from an earlier Texas asbestos lawsuit styled *Holcomb, et al. v. Owens-Corning Fiberglas Corp., et al.*, No. 94-09-5179-A (District Court Cameron County, Texas Sept. 30, 1994), is not admissible because "TVA was not a party to the earlier lawsuit and no asbestos product defendant in the earlier lawsuit had a similar motive to TVA to develop testimony with respect to the premises liability claims asserted" in this action.[31] As plaintiffs correctly note in response, James Bobo's deposition testimony does not satisfy Federal Rule of Civil Procedure 32(a)(1)(A), which allows a deposition to be used against a party when "the party was present or represented at the taking of the deposition or had reasonable notice of it." Fed. R. Civ. P. 32(a)(1)(A). Plaintiffs

[31] Doc. no. 128 (Brief in Support of Motion for Summary Judgment), at 8.

contend, nevertheless, that at the summary judgment stage, depositions, "even those taken without notice to or the presence of the [] moving party on summary judgment," are admissible "to the extent that the deponent's testimony was competent, based on personal knowledge, and set out facts admissible at trial." *Vondriska v. Cugno*, 368 F. App'x 7, 9 (11th Cir. 2010) (citing *Bozeman v. Orum*, 422 F.3d 1265, 1267 n.1 (11th Cir. 2005) (holding that sworn statements before a court reporter where non-moving party was neither noticed nor present satisfied requirements of Rule 56(c)); 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2142 (2d ed. 1994) (stating that deposition testimony is "at least as good as an affidavit and should be usable whenever an affidavit would be permissible")).

Unfortunately for plaintiffs, while James Bobo's deposition testimony appears to be competent and based upon personal knowledge, it constitutes hearsay, *see* Fed. R. Evid. 801(c),[32] which "is not admissible unless any of the following provides otherwise: a federal statute; [the Federal Rules of Evidence]; or other rules prescribed by the Supreme Court." Fed. R. Evid. 802. Federal Rule of Evidence 804(b)(1)(B) provides that the former testimony of a "declarant [that] is unavailable as a witness" is admissible, so long as the testimony:

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[32]"'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c).

> (A) was given as a witness at a trial, hearing, or *lawful deposition*, whether given during the current proceeding or a different one; and
>
> (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—*an opportunity and similar motive to develop it by direct, cross-, or redirect exam.*

Fed. R. Evid. 804(b)(1)(B) (alteration and emphasis supplied).

Here, plaintiffs have not shown that the products defendants in the Texas lawsuit had a similar motive to develop James Bobo's testimony regarding TVA's liability. Indeed, as TVA notes, the products defendants in the Texas action did not question James Bobo regarding the following topics that are certainly relevant to plaintiffs' claims in this action: (1) the amount of dust that would collect on his work clothing; (2) whether any procedures existed to remove the dust from his work clothing; (3) what he did with his work clothes at the end of a workday; (4) potential other sources of dust that might have accumulated on his work clothes; (5) working conditions and environmental control measures present at Browns Ferry during his employment; and (6) specific locations within Browns Ferry where he allegedly was exposed to asbestos-contaminated insulation.[33] Thus, James Bobo's deposition testimony constitutes inadmissible hearsay.

Even so, it has long been the rule in the Eleventh Circuit that "a district court

[33] Doc. no. 128 (Brief in Support of Motion for Summary Judgment), at 10-11 n.4.

may consider a hearsay statement in passing on a motion for summary judgment if the statement could be 'reduced to admissible evidence at trial' or 'reduced to admissible form.'" *Macuba v. Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999) (collecting cases). However, James Bobo is now deceased, and plaintiffs have produced no evidence demonstrating that his deposition testimony could be reduced to admissible form at trial. Accordingly, the court will not consider James Bobo's deposition testimony in ruling on TVA's motion for summary judgment.

2. Jimmy Myhan's testimony

TVA also asserts that Jimmy Myhan's testimony cannot prove that James Bobo was exposed to asbestos, because Myhan could not identify the manufacturer of the insulation products that James Bobo worked with, nor was Myhan aware of the presence of asbestos at the Browns Ferry Nuclear Plant at the time he worked for TVA.[34] Indeed, Myhan admits that he doesn't know whether James Bobo worked with insulation that contained asbestos, only that he *believes* the insulation *may* have contained asbestos.[35] It is clear that Myhan's testimony regarding the asbestos content of the insulation products James Bobo worked with is mere speculation, and cannot support plaintiffs' contention that James Bobo was exposed to asbestos while

[34] Doc. no. 128 (Brief in Support of Motion for Summary Judgment), at 11-12.

[35] Doc. no. 83-4 (Deposition of Jimmy Myhan), at 90-91.

working at the Browns Ferry Nuclear Plant. *See* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Accordingly, the court will not consider his testimony regarding whether the insulation contained asbestos in ruling on TVA's motion for summary judgment.

Even so, the court may consider Myhan's testimony that a majority of the insulation James Bobo worked with at the Browns Ferry Nuclear Plant was white in color, because that testimony is based on Myhan's personal knowledge.

3. Other Evidence

Regardless of whether James Bobo's testimony or Myhan's testimony regarding asbestos is admissible, plaintiffs still have produced sufficient evidence showing that James Bobo was exposed to asbestos dust while working at the Browns Ferry Nuclear Plant. For example, TVA admitted that it "purchased asbestos-containing thermal insulation for use at the Browns Ferry Nuclear Plant in Athens, Alabama when the Plant was constructed in approximately 1966," and every subsequent year until at least 1980.[36] Indeed, TVA's own 1967 "Safety Manual" acknowledged that asbestos was "[a] component of many thermal insulation

[36] Doc. no. 150-4 (TVA Answers to Second Set of Discovery), at 7-10. The interrogatories only asked TVA whether it purchased asbestos-containing thermal insulation for use at the Browns Ferry Nuclear Plant up until 1980. *Id.*

materials" used at the plant, and that "[e]xposures occur during application and removal of insulation."[37] Steve Brown, another TVA employee, testified that there was still asbestos insulation at the Browns Ferry Nuclear Plant when he left in 1991.[38] Frank Mecke, who installed thermal insulation at the Browns Ferry Nuclear Plant, testified that the insulation he installed contained asbestos, and most of it was white in color.[39] Myhan testified that "some" of the insulation James Bobo worked with was brown, but "a lot of it was white."[40] Moreover, TVA's own expert, Dr. Martin Barrie, testified that the insulation James Bobo swept up "probably was asbestos."[41] From this evidence, a reasonable jury could conclude that James Bobo was exposed to asbestos while working at the Browns Ferry Nuclear Plant. Accordingly, plaintiffs can prove that TVA's breach of duty was the cause in fact of Barbara Bobo's

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[37] Doc. no. 145-3 (TVA 1967 Safety Manual), at ECF 5. "ECF" is the acronym for "Electronic Case Filing," a system that allows parties to file and serve documents electronically. *See Atterbury v. Foulk*, No. C-07-6256 MHP, 2009 WL 4723547, *6 n.6 (N.D. Cal. Dec. 8, 2009). Bluebook Rule 7.1.4 *permits* citations to the "page numbers generated by the ECF header." *Wilson v. Fullwood*, 772 F. Supp. 2d 246, 257 n.5 (D.D.C. 2011) (citing *The Bluebook: A Uniform System of Citation* R. B. 7.1.4, at 21 (Columbia Law Review Ass'n *et al.*, 19th ed. 2010)). Even so, the Bluebook recommends "against citation to ECF pagination in lieu of original pagination." *Wilson*, 772 F. Supp. 2d at 257 n.5. Thus, unless stated otherwise, this court will cite the original pagination in the parties' pleadings. When the court cites to pagination generated by the ECF header, it will, as here, precede the page number with the letters "ECF."

[38] Doc. no. 150-7 (Deposition of Steve Brown), at 16.

[39] Doc. no. 150-5 (Deposition of Frank Mecke), at 11-12, 15, 17, 20, 44, & 53.

[40] Doc. no. 83-4 (Deposition of Jimmy Myhan), at 46.

[41] Doc. no. 150-8 (Deposition of Dr. Martin Barrie), at 44.

mesothelioma.[42]

C. Proximate causation

Finally, TVA contends that its purported breach of duty was not the proximate cause of Mrs. Bobo's mesothelioma.[43] For negligent conduct to be actionable, plaintiffs must generally establish proximate causation by showing that "(1) [defendant's] conduct naturally and probably brought about the harm and (2) the harm would not have happened without the conduct." 2 *Alabama Pattern Jury Instructions — Civil* § 33.00 (3d ed. 2013) (alteration supplied). *Accord Lingefelt*, 57 So. 3d at 122-23 ("Proximate cause is an act or omission that in a natural and continuous sequence, unbroken by any new independent causes, produces the injury and without which the injury would not have occurred.") (quoting *Martin v. Arnold*, 643 So. 2d 564, 567 (Ala. 1994)); *Vines v. Plantation Motor Lodge*, 336 So. 2d 1338, 1339 (Ala. 1976) ("Liability will be imposed only when negligence is the proximate cause of injury; injury must be a natural and probable consequence of the negligent act or omission which an ordinarily prudent person ought reasonably to foresee would result in injury."); *City of Mobile v. Havard*, 268 So. 2d 805, 810 (Ala. 1972) ("For an act to constitute actionable negligence, there must be not only some causal connection

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[42] TVA does not challenge plaintiffs' contention that she laundered her husbands work clothes and was exposed to any asbestos contained therein.

[43] Doc. no. 128 (TVA's Brief in Support of Summary Judgment), at 16.

between the negligent act complained of and the injury suffered, but also the connection must be by a natural and unbroken sequence, without intervening, efficient causes, so that, but for the negligence of the defendant, the injury would not have occurred.").

Although the parties appear to agree that the foregoing standards for proximate cause are appropriate in most negligence actions, they disagree regarding whether Alabama would apply traditional "but-for" causation, or "substantial factor" causation, where multiple exposures to a toxic agent, such as asbestos, combine to produce the plaintiffs' injuries. No Alabama courts have addressed this issue. *See Holland v. Armstrong Intern., Inc.*, 2012 WL 7761438, at *1 (E.D. Pa. Nov. 28, 2012). Thus, the court must determine which causation standard an Alabama court would apply to determine proximate causation.

Plaintiffs assert that the substantial factor causation standard should govern asbestos cases involving multiple exposures. This standard is set forth in § 431 of the Restatement (Second) of Torts as follows: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a *substantial factor* in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Restatement (Second) of Torts § 431 (emphasis added). The Supreme Court of Alabama applied the

substantial factor standard as set forth in § 431 in *Sheffield v. Owens-Corning Fiberglass*, 595 So. 2d 443, 450 (Ala. 1992). In *Sheffield*, former seamen sued shipowners and manufacturers of asbestos-containing products for exposure to those products while serving on board their respective ships. *Id.* at 446. However, this case was governed by principles of maritime law, which are "'[d]rawn from state and federal sources' and represent an 'amalgam of traditional common-law rules, modifications of those rules, and newly created rules.'" *Id.* at 450 (quoting *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986)) (alteration in original). Therefore, the Supreme Court of Alabama followed other admiralty courts by relying on the Restatement (Second) of Torts for general standards of proof of causation. *Id.* (collecting cases).

Although plaintiffs acknowledge that *Sheffield* was decided under maritime law, they argue that the Supreme Court of Alabama relied on *Sheffield* in the case of *Owens-Corning Fiberglass Corp. v. Gant*, 662 So. 2d 255, 256 (Ala. 1995). Indeed, in rejecting the argument that the plaintiffs failed to prove sufficient exposure to the defendant's asbestos-containing product, the court cited approvingly to the *Sheffield* opinion regarding the issue of proximate causation. Unfortunately, the court in *Gant* never expressly stated that *Sheffield's* causation analysis had been adopted as the appropriate standard under Alabama law. Although *Gant* is indicative that Alabama

would adopt the substantial factor test, it does not settle the issue.[44]

TVA, on the other hand, contends that there is no reason to deviate from Alabama's traditional but-for causation standard in an asbestos case in which plaintiffs allege that a premises owner acted negligently, and TVA asserts that Alabama would adopt the following adaptation of the but-for standard in a multiple exposure source toxic tort case: "(1) that the illness would not have occurred without exposure to the defendant's asbestos or (2) that exposure to the defendant's asbestos was independently sufficient to cause the illness."[45] *See, e.g., Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013); *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1169 (10th Cir. 2010) (applying New Mexico but-for causation standard to a toxic tort case involving radiation exposure). However, that appears to be the minority position in asbestos cases. *See, e.g., Lindstrom v. A-C Product Liability*

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[44]Plaintiffs also note that the Court of Appeals of Texas relied on the *Sheffield* opinion to apply the substantial factor test as the appropriate causation standard under Alabama law. *North American Refractory Co. v. Easter*, 988 S.W.2d 904, 908, 911 (Tex. App. 1999). However, the Texas court failed to take note of the fact that the *Sheffield* opinion was decided under federal maritime law. Plaintiffs also note that the Supreme Court of Alabama applied a "contributing cause" standard in a workers' compensation case involving toxic exposure not exclusively occurring in the workplace in *Ex parte Valdez*, 636 So. 2d 401, 403 (Ala. 1994). However, while the Alabama Workers' Compensation Act requires plaintiffs to establish that the workplace was the "proximate cause" of an injury, "it is well established that [Alabama] courts have historically rejected a 'but-for' test in workers' compensation cases in favor of a 'causal-connection' test." *Ex parte Patton*, 77 So. 3d 591, 594 (Ala. 2011). Thus, the Supreme Court of Alabama's rejection of the but-for test in a Workers' Compensation case involving toxic exposure in no indication that the court would apply the substantial factor causation standard to a negligence action involving toxic exposure.

[45] Doc. no. 128 (TVA's Brief in Support of Motion for Summary Judgment), at 17.

Trust, 424 F.3d 488, 492 (6th Cir. 2005) (applying substantial factor test under maritime law); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986) (upholding substantial factor test in a Maryland asbestos case); *Rando v. Anco Insulations, Inc.*, 16 So. 3d 1065, 1088 (La. 2009); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773-74 (Tex. 2007); *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997); *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 455 (Ill. 1992). Further, TVA's position does not "recognize the proof difficulties accompanying asbestos claims. The long latency period for asbestos-related diseases, coupled with the inability to trace precisely which fibers caused disease and from whose product they emanated, make this process inexact." *Flores*, 232 S.W.3d at 772. As one court has noted:

> Courts throughout the country . . . have struggled with how a plaintiff in an asbestos case can fairly meet the burden of production with regard to causation. Several factors complicate the analysis . . . . First, because asbestos fibers are friable and may float in the air, it is possible that even those who do not come into direct physical contact with asbestos products may suffer from asbestos poisoning. Second, due to the microscopic size of asbestos fibers, asbestos cannot always be seen drifting in the air or entering a plaintiff's body. The small size of these fibers also means that asbestos fibers from different sources are generally indistinguishable from one another, even when removed from a plaintiff's body and examined through a microscope. Third, asbestos injury takes an extended time period to manifest itself. Evidence presented to the jury showed that the time between when asbestos fibers are first inhaled and when scarring in the lungs becomes symptomatic is commonly between 25 and 30 years. This means that a plaintiff

> injured by asbestos fibers often does not know exactly when or where he was injured and therefore is unable to describe the details of how such injury occurred. In addition, we note that even when a plaintiff is able to narrow the circumstances of exposure to a single event or circumstance, the extended passage of time between exposure and illness often means that witnesses are no longer readily available or that the memories of those who are available have become unreliable.

Thacker, 603 N.E.2d at 455-56.

In light of these issues, as well as Alabama's apparent extension of *Sheffield* into multiple-exposure asbestos cases decided under Alabama law, the court presumes that Alabama would apply the substantial factor causation analysis in this case. Nonetheless, TVA argues that it is entitled to summary judgment under this standard because plaintiffs purportedly "failed to quantify [Barbara Bobo's] non-occupational exposures to asbestos originating from the Browns Ferry Nuclear Plant necessary to quantify her increased risk of developing mesothelioma from those exposures in comparison to her risk of developing mesothelioma from her other exposures to asbestos including, for example, her non-occupational exposures to asbestos through laundering her husband's work clothing during the 1964-1975 period that he worked at the Alabama Wire Plant."[46] In other words, TVA contends that plaintiffs have provided no evidence that could help the finder of fact to decide whether the "relative risk" of mesothelioma from Mrs. Bobo's exposure to asbestos from the Browns Ferry

[46] Doc. no. 128 (TVA's Brief in Support of Summary Judgment), at 16-17 n.6.

Nuclear Plant was "substantial."

Contrary to TVA's contention, an exposure can be a "substantial contributing factor" to mesothelioma regardless of its "relative risk" to other exposures. As the Supreme Court of Alabama held:

> evidence that [a plaintiff] was "close" to those who worked with [asbestos-containing] insulation . . . coupled with expert testimony that "each and every exposure to asbestos contributes in a causally significant and substantial manner to asbestos-related lung impairment," creates a triable issue as to whether airborne asbestos fibers from [the defendant's] product was a substantial factor in producing the disease from which [the plaintiff] claims to suffer.

Sheffield, 595 So. 2d at 456. Here, Dr. Eugene Mark, plaintiffs' expert, considered whether Barbara Bobo was exposed to asbestos at a level where diseases, such as mesothelioma, have previously occurred.[47] In making that determination, he examined whether Barbara Bobo's exposures were similar to "exposures that have been documented to cause diffuse malignant mesothelioma in others . . . ."[48] Based on more than thirty different studies and documents, Dr. Mark concluded that there is no known threshold or safe level of asbestos exposure, and that "a documented history of brief or low level exposure is sufficient to consider a mesothelioma as

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[47] Doc. no. 125 (Expert Report and Declaration of Eugene Mark, M.D.), at 10-21.

[48] *Id.* at 10 (internal citation omitted). Dr. Mark defined "significant" exposures as the type of exposures which have been proven by science to cause mesothelioma, including those rising to the level of occupational or para-occupational exposures.

asbestos induced."[49] Therefore, Dr. Mark opined that "it is the totality of significant exposures to asbestos that is the cause of the disease."[50] In applying this rationale to Barbara Bobo's case, Dr. Mark concluded that she had a cumulative asbestos exposure that was substantial and in the range of exposures shown in the cited literature to cause diffuse malignant mesothelioma.[51] Therefore, Dr. Mark ultimately found "with a reasonable degree of medical certainty that Mrs. Bobo's exposure to asbestos fibers brought home on her husband's clothing while he worked at TVA was a substantial contributing factor and a medical cause in the development of her diffuse malignant mesothelioma of the pleura."[52] Based on Dr. Mark's findings, plaintiffs have presented sufficient evidence to establish that Barbara Bobo's exposure to asbestos from the Browns Ferry Nuclear Plant was a substantial factor in bringing about her mesothelioma and, consequently, the proximate cause of her injury.

IV. CONCLUSION

Accordingly, for the reasons discussed in this opinion, TVA's motion for summary judgment is DENIED. This case will be scheduled for pretrial conference

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[49] *Id.* at 15.

[50] *Id.* at 26.

[51] *Id.* at 15-20

[52] *Id.* at 27.

by a separate written order.

DONE and **ORDERED** this 25th day of August, 2014.

United States District Judge

Not Reported in P.3d, 140 Wash.App. 1008, 2007 WL 2325214 (Wash.App. Div. 1)
(Cite as: 2007 WL 2325214 (Wash.App. Div. 1))

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.
Adeline ROCHON and Lawrence Rochon, wife and husband, Appellants,
v.
SABERHAGEN HOLDINGS, INC., as successor to Tacoma Asbestos Company and The Brower Company; Buffalo Pumps, Inc., individually and as successor-in-interest to Buffalo Forge Company; Kimberly–Clark Worldwide, Inc.; Kimberly–Clark Global Sales, Inc.; Kimberly–Clark Corporation, individually and as successor to Scott Paper Company; Scott Paper Company, Inc.; Kelly–Moore Paint Company, Inc.; Crown Cork & Seal Company, Inc.; Crown Cork & Seal USA, Inc.; Owens–Illinois, Inc.; Garlock, Inc.; Garlock Sealing Technologies, LLC (individually and as successor-in-interest to Garlock, Inc.); Crane Co.; Goulds Pumps (IPG), Inc.; Ingersoll–Rand Company; and Warren Pumps, Inc., individually and as successor-in-interest to Quimby Pump Company, Respondents.

No. 58579–7–I.
Aug. 13, 2007.

Matthew Phineas Bergman, David S. Frockt, Ari Y. Brown, Bergman & Frockt PLLC, Seattle, WA, for Appellants.

John Michael Mattingly, Attorney at Law, Portland, OR, for Respondents.

William Joel Rutzick, Schroeter Goldmark & Bender, Seattle, WA, Amicus Curiae on behalf of Goldmark & Bender Schroeter.

UNPUBLISHED

COX, J.

***1** An essential element of an action for common law negligence is the existence of a duty of care.[FN1] Whether one owes a duty of care is a question of law and "generally includes a determination of whether the incident that occurred was foreseeable." [FN2]

FN1. *Keller v. City of Spokane,* 146 Wash.2d 237, 243, 44 P.3d 845 (2002).

FN2. *Id.* (citing Dan B. Dobbs, The Law of Torts § 229, at 582–83 (2000); *King v. City of Seattle,* 84 Wash.2d 239, 248, 525 P.2d 228 (1974), *overruled on other grounds by City of Seattle v. Blume,* 134 Wash.2d 243, 947 P.2d 223 (1997); *Berglund v. Spokane County,* 4 Wash.2d 309, 321, 103 P.2d 355 (1940)).

Here, the trial court dismissed the claims of Adeline Rochon on summary judgment. The decision was based, in part, on its conclusion that "foreseeability does not independently create a duty of care ... [and] only when a duty has been found to exist, foreseeability ... serves to limit the scope of that duty of care." [FN3] To the extent that this decision excludes foreseeability from the determination of whether a duty exists, we disagree. Thus, the trial court erred in dismissing Mrs. Rochon's claim under a general negligence theory. However, we agree that under the facts of this case, Mrs. Rochon fails to establish liability under the alternative negligence theories based on Kimberly–Clark's duties as an employer or landowner. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

FN3. Clerk's Papers at 17.

Mrs. Rochon's husband, Lawrence Rochon, was employed by Scott Paper Company, the predecessor in interest to Kimberly–Clark Worldwide, Inc., Kimberly Clark Global Sales, Inc., and Kim-

berly–Clark Corporation (collectively, Kimberly–Clark), from 1956 to 1966. Mrs. Rochon alleges that during Mr. Rochon's employment, he was exposed to asbestos in the workplace and that he brought asbestos fibers into their home on his clothing. Their home was not located on Kimberly–Clark's property. Mrs. Rochon allegedly inhaled those fibers while laundering his clothing and eventually developed mesothelioma, a fatal lung disease caused by asbestos exposure.

The Rochons sued Kimberly–Clark. The company moved for summary judgment on the theory that it owed no duty of care to Mrs. Rochon. The trial court granted the motion.

The Rochons appeal.

DUTY OF CARE

Summary judgment is appropriate if, viewing all facts in the light most favorable to the nonmoving party, there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law.[FN4] A factual dispute is material if the outcome of the case depends upon it.[FN5]

FN4. *Herron v. Tribune Pub. Co.,* 108 Wash.2d 162, 170, 736 P.2d 249 (1987); CR 56(c).

FN5. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.,* 110 Wash.2d 912, 915, 757 P.2d 507 (1988).

If the moving party is a defendant who makes an initial showing of the absence of a material fact, the plaintiff must offer prima facie evidence to support each essential element of its claim.[FN6] All inferences from the facts are to be interpreted in favor of the non-moving party.[FN7] We review de novo a trial court's summary judgment determination.[FN8]

FN6. *Bruns v. PACCAR, Inc.,* 77 Wash.App. 201, 208, 890 P.2d 469 (1995).

FN7. *Wilson v. Steinbach,* 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

FN8. *Herron,* 108 Wash.2d at 169, 736 P.2d 249.

A common law negligence claim requires proof of four elements: (1) the existence of a legal duty owed to the complainant, (2) a breach of that duty, (3) resulting injury, and (4) proximate causation.[FN9] The existence of a legal duty is an issue of law to be decided by the court.[FN10]

FN9. *Folsom v. Burger King,* 135 Wash.2d 658, 671, 958 P.2d 301 (1998).

FN10. *Id.*

A duty is an "obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks."[FN11] Whether an affirmative duty to act exists depends upon many factors, including "mixed considerations of logic, common sense, justice, policy, and precedent."[FN12] Whether harm is foreseeable is part of the duty inquiry.[FN13] To be foreseeable, "the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant."[FN14]

FN11. *Daly v. Lynch,* 24 Wash.App. 69, 76, 600 P.2d 592 (1979) (quoting W. Prosser, *The Law of Torts* § 30, at 143 (4th ed.1971)).

FN12. *Snyder v. Med. Serv. Corp.,* 145 Wash.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation omitted).

FN13. *Keller,* 146 Wash.2d at 243, 44 P.3d 845.

FN14. *Christen v. Lee,* 113 Wash.2d 479, 492, 780 P.2d 1307 (1989) (internal quotation omitted).

Existence of a Legal Duty/Foreseeability

***2** The parties dispute whether foreseeability should be considered in determining whether a leg-

al duty exists in a particular situation. State supreme court precedent establishes that foreseeability is relevant in defining Kimberly–Clark's general duty to prevent harm from any unreasonable risk it created.

The trial court incorrectly concluded that no legal duty could exist under the facts of this case. The court held that foreseeability is only relevant if a legal duty has first been identified, but that Kimberly–Clark, "in its status as an employer and landowner, did not owe a duty of care" to Mrs. Rochon. [FN15] To the extent that the trial court believed that Kimberly–Clark did not owe a duty to Mrs. Rochon under *any* negligence theory because its duties as a landowner and employer do not extend to her, the court was mistaken.

FN15. Clerk's Papers at 18.

Legal duties may arise in different ways. The most common and obvious example is when a party takes an affirmative action that results in an unreasonable risk of harm to others.[FN16] That party has a duty to act reasonably under the circumstances to prevent foreseeable injury from the risk he or she created. Put another way, a person has a duty to prevent unreasonable risk of harm to others from his or her own actions.[FN17]

FN16. *See* David K. DeWolf and Keller W. Allen, 16 *Washington Practice: Tort Law and Practice* § 1.13, at 23–24 (3d ed.2006) (concluding that affirmative conduct imposing a risk of harm to others creates a duty to use reasonable care to prevent resulting injury, and that this type of negligence is so common and simple that "no one gives a second thought to whether the defendant owed a duty to use reasonable care").

FN17. *Minahan v. W. Wash. Fair Ass'n,* 117 Wash.App. 881, 897, 73 P.3d 1019 (2003) (quoting Restatement (Second) of Torts § 321 (1965)).

The Restatement (Second) of Torts recognizes this basic principle in section 302:

> A *negligent act* or omission may be one which involves *an unreasonable risk of harm to another* through either (a) *the continuous operation of a force started or continued by the act* or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature.[FN18]

FN18. (Emphasis added.)

Comment a to this section clarifies:

> This section is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk. *In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.* The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. [FN19]

FN19. (Emphasis added.)

And comment c further clarifies that a "continuous operation" can qualify as an "affirmative act":

> The actor may be negligent in setting in motion a force the continuous operation of which, without the intervention of other forces or causes, results in harm to the other. He may likewise be negligent in failing to control a force already in operation from other causes, or to prevent harm to another resulting from it.

As stated above, foreseeability is relevant to this inquiry.[FN20] A risk is "unreasonable," and thus a party has a duty to prevent resulting harm, only if a reasonable person would have foreseen the

risk.[FN21] Conversely, if the risk is not foreseeable, the person who created the risk generally does not have a duty to prevent it.[FN22]

FN20. *Keller,* 146 Wash.2d at 243, 44 P.3d 845 (foreseeability is an element of the duty question); *accord King,* 84 Wash.2d at 248, 525 P.2d 228 (citing *Palsgraf v. Long Island R.R.,* 248 N.Y. 339, 162 N.E. 99 (1928)).

FN21. *Parrilla v. King County,* 138 Wash.App. 427, 157 P.3d 879, 884 (Wash.App.2007) (citing *Minahan,* 117 Wash.App. at 897, 73 P.3d 1019).

FN22. *Id.*

***3** Here, it is Kimberly–Clark's own affirmative acts—operating its own factory in an unsafe manner—that allegedly caused Mrs. Rochon's illness, not either a failure to act or the act of a third party.[FN23] Kimberly–Clark may have had no affirmative duty to act to protect Mrs. Rochon from outside forces, but it had a duty to prevent injury from an unreasonable risk of harm it had itself created. This assumes, of course, that the risk of harm to Mrs. Rochon was foreseeable.

FN23. Although Mrs. Rochon does so by citing to an out-of-state case, she correctly identifies that the distinction is one between misfeasance (an injurious, affirmative act) and nonfeasance (the failure to act). *See* Appellant's Reply Brief at 20–21 (citing *Satterfield v. Breeding Insulation Co.,* No. E2006–00903–COA–R3–CV, slip op., 2007 WL 1159416 (Tenn.Ct.App. Apr.19, 2007)). The Restatement also recognizes the importance of this distinction at § 314, comment c.

Kimberly–Clark ignores these basic negligence principles. It argues that Mrs. Rochon has not identified a legal duty because employer liability does not extend to employees' spouses and homes, and premises liability does not extend outside of the premises. Kimberly–Clark's argument misses the point. The general rule, to which there are numerous exceptions, is that one does not have an affirmative duty to act in a particular situation.[FN24] But if one chooses to act, one must do so reasonably.[FN25] The special duties imposed by one's status as an employer or landowner are exceptions to the general rule that one does not have an affirmative duty to act.[FN26] But Mrs. Rochon need not rely on employer or premises liability to establish liability in this case. Likewise, she need not argue that Kimberly–Clark had an affirmative duty to protect her from the acts of third parties. Rather, her position is that Kimberly–Clark's own unreasonably risky acts directly and proximately caused her injuries. Because Kimberly–Clark acted in this case, it had a duty to do prevent foreseeable injury from any of its unreasonably safe actions.

FN24. *See* Restatement (Second) of Torts §§ 314 & cmt. c, 315 (1965).

FN25. *See id.* at § 302.

FN26. *See id.* at §§ 314 & cmt. a, 314A, 314B, 315.

The cases on which Kimberly–Clark relies are not helpful. For example, Kimberly–Clark relies upon *Nivens v. 7–11 Hoagy's Corner.*[FN27] In that case, the court analyzed whether a corner store owed a duty of care to protect invitees on its property from the criminal acts of third parties. Notably, a third party, not the defendant property owner, had caused the injury in that case. The question before the court, then, was whether there was an applicable exception to the general rule that persons do not have an affirmative duty to act to protect others.[FN28] The court concluded that one such exception applied in that case, based on the special relationship between property owners and invitees.[FN29] Here, the defendant itself allegedly caused the harm by creating the risky situation. So we need not ask whether a special relationship created an affirmative duty in Kimberly–Clark to protect Mrs. Rochon

from outside dangers.

FN27. 133 Wash.2d 192, 943 P.2d 286 (1997).

FN28. *Id.* at 199, 201, 943 P.2d 286.

FN29. *Id.* at 202, 943 P.2d 286.

Next, we must inquire whether Kimberly–Clark indeed acted in a way that placed Mrs. Rochon at an unreasonable risk of harm. Taking Mrs. Rochon's allegations as true, there is a genuine issue of material fact whether Kimberly–Clark operated and maintained its factory in an unreasonably unsafe way that caused foreseeable and proximate harm to Mrs. Rochon. According to her allegations, Kimberly–Clark used asbestos in an unsafe manner and required Mr. Rochon to work with and around asbestos as part of his job. Whether Kimberly–Clark knew or should have known about the health risks of asbestos during the relevant time period, what precautions it should have taken to prevent any resulting harm, and whether Mrs. Rochon was a foreseeable victim are all questions that are at issue. Because Kimberly–Clark took affirmative acts that a reasonable person could find were unreasonably risky and caused her disease, the trial court erred in summarily dismissing her claim.

***4** Although the issue of foreseeability is relevant to defining Kimberly–Clark's duty, Mrs. Rochon did not support her summary judgment opposition with evidence that her injury was a foreseeable consequence of Kimberly–Clark's actions in this case. In its order, however, the trial court specifically declined to consider the issue of foreseeability, so that issue is not properly before us now. The trial court noted that Mrs. Rochon had requested further discovery on the issue. Such discovery may proceed on remand.

Our conclusion is consistent with *Lunsford v. Saberhagen Holdings, Inc.* [FN30] There, this court held that an asbestos manufacturer could be liable to a family member exposed to asbestos on clothing based on principles of foreseeability. Kimberly–Clark is correct that *Lunsford* was a product liability case, and therefore is not instructive on whether a negligence duty existed in the first place. But its conclusion that, as a factual matter, a family member who launders clothes could be a foreseeable victim of asbestos exposure is persuasive. At the very least, it shows that reasonable minds could differ regarding foreseeable victims of asbestos exposure, depending on the particular circumstances of the case. Whether and to what extent similar conditions exist in this case may be addressed on remand.

FN30. 125 Wash.App. 784, 106 P.3d 808 (2005).

Kimberly–Clark argues that extending a duty to Mrs. Rochon will expose employers to endless litigation. We disagree.

First, Kimberly–Clark's general duty to act reasonably if it created an unreasonable risk of harm will only extend to a victim if the victim proves that his or her injury was a foreseeable consequence of its actions. Second, as discussed above, the duty is only one to act reasonably to prevent injury from Kimberly–Clark's own risky acts, not to protect Mrs. Rochon from the acts of third parties or from circumstances it did not create. Third, both courts and juries, in their separate roles, may limit the extent of this duty when deciding whether Kimberly–Clark's actions were the legal cause and the cause-in-fact of Mrs. Rochon's injuries.[FN31]

FN31. *See Keller,* 146 Wash.2d at 252 n. 15, 44 P.3d 845 (courts exercise their gatekeeping function in determining whether liability *should* attach through the legal causation element, and juries must decide whether the negligence actually caused the injury before liability will attach).

In short, even in the absence of any special relationship between them, Kimberly–Clark had a duty to prevent Mrs. Rochon's injury if its use of

asbestos was unreasonably risky, and if Mrs. Rochon's injury was a foreseeable consequence of its risky actions. The trial court erred in dismissing the case as a matter of law.

Legal Duty as Employer

Alternatively, Kimberly–Clark argues that its duty of care as Mr. Rochon's employer does not extend to Mrs. Rochon. We agree.

Employers generally owe their employees a duty to provide a reasonably safe work environment.[FN32] This can even include the duty to protect employees from outside forces such as the criminal conduct of third parties.[FN33] Mrs. Rochon was not an employee of Kimberly–Clark, and she cites to no Washington case extending liability to family members of employees under this theory.

FN32. *Bartlett v. Hantover,* 9 Wash.App. 614, 620–21, 513 P.2d 844 (1973), *rev'd on other grounds,* 84 Wash.2d 426, 526 P.2d 1217 (1974).

FN33. *Id.* at 621, 513 P.2d 844.

For example, *Lunsford v. Saberhagen Holdings, Inc.*[FN34] is a product liability case, not a negligence case. While it does discuss whether it is foreseeable that asbestos would migrate to workers' homes on their clothing, that issue is not relevant to whether an employer has a legal duty to persons other than employees under a negligence theory.

FN34. 125 Wash.App. 784, 106 P.3d 808.

***5** In sum, Mrs. Rochon has not shown that the special employer-employee relationship created a duty to protect her in this case. Summary judgment on this theory was proper.

Legal Duty as Landowner

Kimberly–Clark argues that its duty of care as a landowner does not extend to Mrs. Rochon, who was never a licensee, invitee, or trespasser on its property. We agree.

Landowners have distinct duties of care to persons entering their land, depending on the status of the visitor.[FN35] But Mrs. Rochon cannot escape the fact that she has not alleged that she entered Kimberly–Clark's land. And she cites no Washington case extending liability under this theory to persons who were not at least adjacent to the real property in question.

FN35. *Iwai v. State,* 129 Wash.2d 84, 90–91, 915 P.2d 1089 (1996).

For example, Mrs. Rochon cites *Zuniga v. Pay Less Drug Stores, N.W.* [FN36] for the proposition that liability is not limited by the categories of invitee, licensee, and trespasser if the plaintiff never entered the defendant's premises. *Zuniga* merely held that the categories of invitee, licensee, and trespasser consider the location of the plaintiff, not the defendant, at the time of the accident.[FN37] Since Mrs. Rochon did not enter Kimberly–Clark's land, this doctrine and this case are inapplicable.

FN36. 82 Wash.App. 12, 917 P.2d 584 (1996).

FN37. *Id.* at 14–15, 917 P.2d 584.

Mrs. Rochon also cites *Stone v. City of Seattle,* in which the court reiterated that an abutting property owner must exercise reasonable care over an adjacent sidewalk used for the owner's own special purpose.[FN38] And *Bradley v. American Smelting and Refining Co.,* also cited by Mrs. Rochon, examined whether a landowner who emitted particulate matter into the air could be liable for nuisance, but did not examine negligence theories.[FN39]

FN38. 64 Wash.2d 166, 170, 391 P.2d 179 (1964); *see also Hutchins v. 1001 Fourth Ave. Assocs.,* 116 Wash.2d 217, 222, 802 P.2d 1360 (1991) (discussing sidewalks and highways that *abut* the property in question).

FN39. 104 Wash.2d 677, 684, 709 P.2d 782 (1985); *see also Hue v. Farmboy*

> *Spray Co.,* 127 Wash.2d 67, 86–87, 896 P.2d 682 (1995) (discussing strict product liability, not a premises owner's duty of care).

Indeed, Mrs. Rochon's position sounds more in nuisance, as argued in the amicus brief, because she argues that asbestos particles tortuously invaded her home based on Kimberly–Clark's use of its property. But Kimberly–Clark is correct that because she did not argue this theory before the trial court, it is not properly preserved for appeal, and we decline to consider it.

In conclusion, Kimberly–Clark did not owe a special duty to Mrs. Rochon as an invitee, licensee, or trespasser upon its land. Summary judgment on this theory was proper as well.

We affirm in part, reverse in part, and remand for further proceedings.

APPELWICK, C.J., and COLEMAN, J., concur.

Wash.App. Div. 1,2007.
Rochon v. Saberhagen Holdings, Inc.
Not Reported in P.3d, 140 Wash.App. 1008, 2007 WL 2325214 (Wash.App. Div. 1)

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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 S219919

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 October 20, 2014, I served a copy of the following document(s):

- **PETITIONERS' OPENING BRIEF ON THE MERITS**

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:

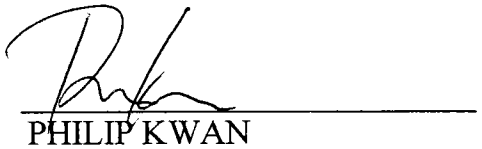
SEE ATTACHED SERVICE LIST

☒ (By Overnight Delivery) 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 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 October 20, 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 S219919

BNSF Railway Company Defendant and Respondent	Selim Mounedji Sims Law Firm 19762 MacArthur Boulevard, Suite 350 Irvine, California 92612 Theodore J. Boutrous, Jr. Joshua S. Lipshutz Alexander M. Fenner Gibson Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, California 90071 Veronica Lewis *Admitted Pro Hac Vice* Gibson Dunn & Crutcher LLP 2100 McKinney Avenue, Suite 1100 Dallas, Texas 75201
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 Petitioners' Opening Brief on the Merits)
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 Petitioners' Opening Brief on the Merits)
Supreme Court of California 350 McAllister Street San Francisco, California 94102	(Served electronically pursuant to California Rules of Court, Rule 8.44(a)(1)(B) and (c))