S219534

IN THE

SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER,

Plaintiff, Petitioner, and Respondent,

vs.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ALAMEDA,

Respondent.

PNEUMO ABEX, LLC,

Real Party in Interest.

AFTER DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE, NO. A136378/A136416; ON APPEAL FROM THE SUPERIOR COURT, COUNTY OF ALAMEDA, NO. RG11578906, HON. JOHN M. TRUE III, JUDGE

ANSWER BRIEF ON THE MERITS

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ATTORNEYS FOR PLAINTIFF, PETITIONER, AND RESPONDENT

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ATTORNEYS FOR PLAINTIFF, PETITIONER, AND RESPONDENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

The Foundation of California Safety Policy

For over 50 years, California has led the nation in promoting policies that protect innocent victims from injuries that arise in our modern world of mass commerce and heavy industry. This leadership has manifested in pioneering decisions by this Court: from the development of strict-product-liability law (in *Escola*, *Greenman*, and *Barker*) to the modern evolution of negligence law (in *Rowland* and *Cabral*). These policies to protect people from the hazards of an industrial world reflect our "increasing regard for human safety." [*Rowland v. Christian* (1968) 69 Cal.2d 108, 114.]

To that end, this Court in *Rowland* abolished the archaic classifications of people – invitee, licensee, trespasser – that had determined a person's entitlement to protection, and thus an actor's corresponding duty of "care" in negligence. Recognizing that a "man's life or limb does not become less worthy of protection by the law" based on his relationship with the defendant, this Court "stripped away" those "ancient concepts." [*Id.* at 119.] Instead, this Court recognized that Civil Code section §1714 dictates that we all have the duty to take reasonable care to protect each other from harm – a duty properly negated by the courts *only* when, in a well-defined category of cases, that result is *clearly* supported by sound public-policy concerns. [*Id.* at 188-119.]

Here, defendant Pneumo Abex, LLC ("Abex") asks this Court to turn back the clock, advocating a "duty" rule for asbestos take-home cases that would hinge once again on the "relationship" between the parties, contorting the *Rowland* analysis into a shield that protects

not the innocent injured but the industrial actors who hurt them. This proposed rule would simply sweep away all responsibility for a landowner or employer whose negligent conduct on its premises caused harm to innocent persons off the premises, however egregious: no matter how foreseeable or even foreseen the harm; nor how basic the protection that was not implemented; nor how severe the resulting injury – here a certain, painful death.

The Irony of Abex

Ironically, the inequity of Abex's proposed rule shines brightest in this very case, on how it would immunize Abex's misconduct that contributed to killing plaintiff Johnny Kesner ("Johnny") at age 53. The evidence proffered below shows that, throughout the 1970s, Johnny spent his teenage years in the regular company and home of his father figure, Uncle Peachy, who worked at Abex's brake-manufacturing plant. This work involved mixing asbestos powders, which permeated the plant and coated the workers in dust. Uncle Peachy brought this dust home, where Johnny regularly breathed it for years. Peachy did not realize the hazard – but Abex did, to Peachy and Johnny. In the 1970s, Abex was repeatedly warned that the asbestos dust generated in its plant was hazardous to Abex workers, those who laundered their clothing, and their families at home. But Abex ignored these warnings, failing to protect or warn Uncle Peachy, who thus unwittingly exposed Johnny.

If Abex had poisoned Johnny offsite by releasing toxins onsite but into the wind, or dumping them into a stream, no legitimate "duty" questions would arise. Nor should they here.

But Abex asks this Court to immunize it from liability for "policy" reasons – to not "extend" existing liability by "imposing" the "duty to protect against take-home exposures" to asbestos. [Opening Brief ("OB") at 9, 21, 25, 28.]

Abex frames the issue inaccurately. The duty of care exists (by statute); Abex seeks a broad duty *exception* (based on *clear* policy concerns). [*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.]

Whether such an exception is clearly warranted is governed by existing California law – the *Rowland* duty analysis that balances three "foreseeability" factors against four "policy" factors. [*Id.* at 774, 781.] As shown below, this analysis most certainly does not warrant a duty exception here, let alone "clearly" so. [*See* Argument Part A.2 below.]

Accordingly, Abex's brief asks this Court to do *everything but* apply the *Rowland* analysis: to follow blindly a supposed "majority" rule from other jurisdictions that in truth does not track California law; and to approve of several California appellate decisions that violate *Rowland* and *Cabral*. Not until page 28 of its brief, in Argument section "E," does Abex even confront the governing *Rowland* analysis.

But even that belated discussion is not faithful to this Court's teachings or our record. Indisputably, the key *Rowland* factors are "foreseeability" and the "burden" that applying the duty places on defendants. [*E.g.*, *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.] But on both factors, Abex's presentation is inaccurate.

On foreseeability, Abex pretends that this case involves mere "allegations" that "Abex was aware (in some undefined way)" of a mere "remote *possibility* of harm." [OB at 28-29, 31 (emphasis in original).] Nowhere does Abex acknowledge the evidence, proffered on nonsuit, that it not only should have known but *actually knew* the specific hazard that its conduct posed to offsite people like Johnny. Ignoring this evidence allows Abex to posit this issue in a false light, as if the "take home" asbestos hazard has never been well recognized – so that Abex's proposed rule will not negate liability in cases where, like here, the hazard was foreseen, the harm is severe, and the misconduct is thus egregious.

With the "foreseeability" factor falsely minimized, Abex then balances against it a "policy" concern that is equally dubious: that recognizing the take-home duty will impose the "burden" of creating "boundless" liability to a "limitless pool of plaintiffs." [OB at 3, 16.] Quite simply, this concern does not exist. As shown below, the pool of asbestos take-home victims is small and fixed; refusing to immunize defendants like Abex will not change it; and those defendants will still have significant factual defenses to assert. [*See* Argument Part A.2.b.(i) below).]

The Trouble With Campbell

Abex's request for a categorical no-duty rule is not written on a blank slate. It rests squarely on *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, an improper decision whose *Rowland*-violative effect Abex seeks now to expand, from significant to severe.

Just a year before *Campbell*, this Court in *Cabral* reiterated the limits on carving duty exceptions under *Rowland*. Writing for a

unanimous Court, Justice Werdegar reminded the lower courts that *Rowland* duty exceptions should be carved only in very rare circumstances: when public policy "clearly" demands an exception that can be applied generally to a clearly defined, discrete "category" of cases. [*Cabral*, 51 Cal.4th at 772.] By contrast, whether a *specific* defendant acted reasonably in the circumstances is a *breach* question for the jury. [*Id.*] This Court thus instructed the lower courts *not* to make case-specific breach rulings under "duty" analysis. [*Id.* at 772-773.]

Campbell promptly violated this instruction. *Campbell* presented facts showing minimal culpability: the defendant (Ford) merely owned a premises under construction, where others installed asbestos insulation; Ford did not control the work or the workers' protection; at the time (the 1940s), the general knowledge of the "take home" asbestos hazard was still developing, and Ford's knowledge of it was shown there to be only constructive. Two insulation workers – not Ford employees – took asbestos home and exposed their family member, Ms. Honer. On a claim alleging Ford's negligence in the maintenance of its premises, Ford had a good case to argue "no breach" – *i.e.*, that, in light of its limited knowledge and remote connection to the exposures, its failure to protect Honer was *reasonable* under the circumstances.

But *Campbell* treated this breach issue as a "duty" question, holding that Ford simply owed no duty of care to Honer. Under *Cabral*, this rule would have been inappropriate if applied just to Honer. But *Campbell* did much more, announcing a general no-duty rule for *all* premises owners, in every case:

> [W]e conclude 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*, 206 Cal.App.4th at 34 (emphasis added).] Although the court's policy-based ruling sprung from the *specific* facts before it, the court purported to declare a *general* rule applicable to *every* defendant who owned a premises on which the initial asbestos exposure occurred, no matter the circumstances. No matter whether the defendant itself created the exposure hazard; nor whether it was specifically warned that its asbestos was hazardous to offsite family members; nor whether protecting them would have been as simple as protecting its own onsite employees.

This is not a proper duty ruling under *Cabral* – a fact that was apparently not lost on *Cabral*'s author, Justice Werdegar, who voted to review *Campbell* (on this Court's own power).

But the *Campbell* ruling has wreaked havoc in the trial courts, many of which have felt constrained to apply the ruling to every premises owner – no matter how unfair the result.

The Post-Campbell Decisions

One of the first courts to interpret *Campbell* was our trial court, which saw the factual differences but felt that *Campbell*'s broad "rule" simply governs. Other trial courts have followed suit, as did the Second District in *Haver*, our companion case, ruling without analysis that *Campbell* applies and mandates a duty exception.

The appellate court below, however, understood that this case's differences from *Campbell* dictate a different result – that the *Rowland* policy factors balance much differently here. The court

declined to disagree with *Campbell*'s ruling as to Ford in the 1940s. [Op. at 7.] But the court appropriately limited *Campbell* to its facts, holding that here the *Rowland* factors do *not* clearly warrant a duty exception. [*Id.*]

To avoid this truth, Abex seeks refuge in *Campbell*'s note that it is "hard to draw the line" between those take-home exposure victims "to whom a duty is owed" and not "owed." [OB at 36; *Campbell*, 206 Cal.App.4th at 32-33.] And Abex's proposed solution to this difficulty is to throw out *all* take-home cases – to be "over-inclusive" and simply "rejec[t] liability for take-home exposures" *in toto*. [OB at 36.]

But that solution has it backwards. As *Cabral* dictates, a duty exception is proper only when "clear considerations of policy" justify "carving out an entire category of cases." [*Cabral*, 51 Cal.4th at 772.] Hence, if a clear, policy-based line cannot be drawn between categories of cases where the duty does and does not apply, then *no line* may properly be drawn – the duty continues to apply in *all* cases.

The Correct Rule to Be Adopted

This Court is now tasked with announcing a duty-of-care rule governing all California asbestos take-home cases. We respectfully submit that this issue is governed by existing California duty law,[1] under which this Court should affirm the Opinion below with a

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[1] Because this issue is governed by *California* duty law, the out-of-state authorities on which Abex's arguments largely rest (OB at 12-20) are of little relevance. Nevertheless, we show in Argument Part A.3 below that out-of-state law supports affirmance here: in states that (like California) balance foreseeability and policy factors, the take-home duty is generally upheld; in states negating duty, the states' law focuses on the parties' *relationship* – what *Rowland* abolished in California almost 50 years ago.

decision that either disapproves of *Campbell* or limits its application as follows:

1. The correct rule is that the duty of care continues to exist in *all* take-home cases. Public policy does not clearly demand that *any* category of cases be carved out for a duty exception. Even within the category of take-home cases involving premises owners, the facts vary widely – no blanket duty exception can be justified. Instead, the *Rowland* factors, properly applied at a broad, general level, balance firmly against carving any duty exception. Accordingly, *Campbell* was wrongly decided and should be disapproved. [*See* Argument Part A below.]

2. If this Court believes that *Campbell* was correct that *some* category of cases (to which *Campbell* belongs) warrants a duty exception, this Court should announce a rule that greatly limits the category – far fewer than "all cases involving premises owners." This category, properly defined and constrained, would at most consist of cases involving defendants meeting two criteria:

(a) Passive (nonfeasant) premises owners: The defendants are sued only as "*mere* premises owners" – *i.e.*, their only connection to the plaintiff's exposure was that they owned a premises on which someone *else* created an asbestos-exposure hazard. This categorization distinguishes such passive *nonfeasance* from the active *misfeasance* of other defendants who actively created the asbestos hazard.

(b) Constructive knowledge: The defendants' knowledge of the asbestos take-home hazard was only constructive, not actual.

Only in the "category" of cases meeting these criteria do the *Rowland* factors even arguably support a duty exception. [*See* Argument Part B below.]

A Plaintiff-Based Duty Line?

No duty line based on the plaintiff's status is warranted or principled under *Rowland*. But if this Court wants to draw a plaintiff-based line, we submit the following:

1. Abex suggests limiting the take-home duty of care to the exposed worker's "immediate family members." [OB at 36-39.] But such a line is not principled. Family-based duty lines have been drawn by this Court in cases where the familial status affects the legitimacy and severity of the plaintiff's injury, *e.g.*, derivative emotional-distress claims. [*E.g.*, *Thing v. LaChusa* (1989) 48 Cal.3d 644 (witnessing another's injury); *Christensen v. Superior Ct. (Pasadena Crem. of Altadena)* (1991) 54 Cal.3d 868 (learning of desecration of human remains).] But in asbestos take-home cases, *every* plaintiff is certainly and severely injured, dying of cancer – whether a worker's wife, his live-in nanny, or his regular-visitor nephew like Johnny here. No family-based duty line makes policy sense.

2. Instead, any plaintiff-based duty line should hinge on the regularity of the plaintiff's contact with the exposed worker. The Opinion below suggests such a line: "recurring and non-incidental contact" with the worker. [Op. at 2.] This classification still does not satisfy *Rowland* fully, asking courts to make factual determinations about the "regularity" of exposure that should be left to the jury (*e.g.*, in determining causation). But if this Court feels compelled by

"policy" reasons to draw a plaintiff-based line somewhere, this is the one most *Rowland*-compliant.

In the end, the Opinion below gets it right: "In weighing [*Rowland*'s] competing considerations, the balance falls far short of terminating liability at the door of the employer's premises" (as Abex proposes). [Op. at 10.] The Opinion thus correctly holds that no general duty exception nullifies Abex's duty of care to Johnny.

This Court should affirm.

II. FACTUAL AND PROCEDURAL HISTORY.

A. Johnny was exposed to asbestos brought home from the Abex plant by his Uncle Peachy.

Plaintiff Johnny B. Kesner, born March 1961, moved in about 1972 with his divorced mother to Romney, WV, home of Johnny's "Uncle Peachy." [1 AA 98; 4 AA 912 (Depo. 18:11-25.)] Johnny then "grew up in Romney" until he "joined the service" in 1979. [4 AA 911-912 (Depo. 17:12-17, 19:6-15).]

Growing up, Johnny "hung out a lot with" Uncle Peachy, his "father figure." [4 AA 912 (Depo. 18:15-17).] Throughout the 1970s, Johnny was a "frequent guest in his uncle's home, and often spent the night there." [Op. at 3.]

During this time, Uncle Peachy worked at the Abex plant in Winchester, VA, where Abex manufactured brake shoes that contained asbestos. [4 AA 1058 (Depo. 25:4-12).] The process involved mixing dry powders, including "asbestos." [*Id.* at 1060 (Depo. 30:1-31:10).] This made the plant "dusty" and "dirty": "working with dry powder, it's dusty" and "there's no way you're going to get away from the dust. It don't matter where you're at." [*Id.* at 1060 (Depo. 32:6-14), 1065 (Depo. 50:4-8).] Peachy returned home from work "covered in asbestos dust." [Opinion at 3; 4 AA 1066 (Depo. 54:4-8).]

Back home, covered in dust, Uncle Peachy exposed Johnny to asbestos. Peachy worked the graveyard shift, returning home about 8:00 a.m. [4 AA 913 (Depo. 28:8-15).] He did not wear a work "uniform" but his "own clothes," usually "jeans" and a "flannel shirt." [*Id.* (Depo. 27:10-19).] When he arrived home, these clothes were

still "[d]irty, dusty"; if you "hit" him, "dust would come up." [4 AA 913-914 (Depo. 29:19-30:11).]

While "still in his work clothes," Peachy would "often play" with Johnny: "football"; "rough-housing" like "wrestling." [Op. at 3; 4 AA 914 (Depo. 12-16), 915 (Depo. 34:35:13).]

Johnny also spent the night at Uncle Peachy's house "[a] lot." [4 AA 915 (Depo. 35:14-16).] He slept in the basement – right where Peachy often slept after work (on the carpeted floor). [*Id.* (Depo. 35:23-37:15).] Peachy estimates that, "on average," Johnny stayed over about three days per week – some weeks "one time," others the "whole week." [Op. at 3 n.2.]

Johnny also rode in Uncle Peachy's car about "once a week." [4 AA 915 (Depo. 34:15-20).] Peachy "wore his work clothes" in the car "[e]very day." [4 AA 914 (Depo. 31:16-20).] The car had "cloth seats" and was "[a]lways a little dirty" and "dusty." [*Id.* (Depo. 31:11-15, 33:8-10).] When Johnny would "sit down," he could "see the dust" that was "floating in the air." [4 AA 914-915 (Depo. 33:20-34:11).] "Every time" Johnny "sat in" the car, he would "breathe in that dust." [*Id.* at 915 (Depo. 34:12-14).]

Decades later, Johnny was diagnosed with mesothelioma caused by asbestos exposure – just before his 50th birthday. [1 AA 119:22-23.] He died in December 2014, at age 53.

B. Johnny filed suit.

Johnny filed his complaint in June 2011, alleging against numerous defendants (including Abex) causes of action for negligence, breach of warranty, and strict liability. [1 AA 1-16.]

C. Summary adjudication of Johnny's product claims left only negligence.

Before trial, the court summarily adjudicated Johnny's product-based claims (warranty and strict liability) because the Abex asbestos to which Johnny was exposed was not a product "in the stream of commerce." [2 AA 496:27-28.] This ruling is not challenged on appeal.

Johnny proceeded to trial against Abex on negligence.

D. Just before trial, the Second District decided *Campbell*, announcing a broad "no duty" rule.

On May 21, 2012, the eve of trial, the Second District Court of Appeal decided *Campbell*. [2 AA 314.]

Campbell applied the *Rowland* factors to the case's specific facts. For example, on foreseeability, the court noted that Ford had constructive knowledge in the 1940s of published "industrial hygiene" information. [*E.g.*, *Campbell*, 206 Cal.App.4th at 21-22 ("Ford had industrial hygienists on staff" who were "responsible for worker safety").] Implying that foreseeability was relatively low ("Even if it was foreseeable to Ford . . ."), *Campbell* found it outweighed by "policy" factors. [*See id.* at 32.]

Campbell also noted that its analysis involved only one narrow subset of the general duty of care in negligence: a "property owner's duty to maintain its premises in a reasonably safe condition." [*Id.* at 30.] The court stressed that this duty is tethered to the premises itself:

it "extends to all areas visitors are expressly or impliedly invited to use" but not to "injuries that occur" off the property. [*Id.*] *Campbell* thus stressed repeatedly that the plaintiff "never set foot on the premises." [*Id.* at 30, 31.]

But despite the limited scope of its analysis, the court announced a broad rule for all "premises" owners, no matter the factual circumstances nor the nature of the cause of action: "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*, 206 Cal.App.4th at 34.]

E. Based on *Campbell*, the trial court granted nonsuit to Abex.

1. Abex argued that *Campbell* bars all take-home liability.

Abex promptly moved for nonsuit, arguing that *Campbell* is "dispositive" that Abex owed no duty of care to Johnny. [2 AA 491, 494-495.]

Although Johnny sued Abex not for passively owning a premises (on which someone else created a hazard, as in *Campbell*) but for actively creating the hazard in its brake-manufacturing business, Abex asserted that *Campbell* holds broadly "that as a matter of law an employer/premises owner owes no legal duty to family members of employees who suffer take-home exposure to asbestos." [2 AA 494:22-25.]

2. Johnny distinguished *Campbell*, presenting evidence that Abex itself *created* the take-home hazard – with *actual knowledge* of it.

Johnny's opposition showed that *Campbell* is not dispositive. [*See* 4 AA 885.]

First, *Campbell* is "limited to premises liability actions," but "Abex's duty" arises not from its "ownership of the premises" but rather its negligence "in the manufacture" of its "products." [*Id.* at 887:13-18.]

Second, this case is factually very different from *Campbell.* There, Ford (in the 1940s) had at most constructive knowledge (via general "industrial hygiene" publications) that a subcontractor's insulation work might pose a hazard to workers on Ford's premises, let alone later to people off of its premises. [*See Campbell*, 206 Cal.App.4th at 21-22.] Here, by contrast, Johnny presented evidence that Abex (in the 1970s) had *actual* knowledge of the specific hazard that its manufacturing processes posed to not only workers like Uncle Peachy but their *family members* like Johnny:

1. In 1972, an industrial-hygiene survey of Abex's Winchester plant (where Uncle Peachy worked) found hazardous levels of asbestos dust and *cautioned* Abex specifically to protect not just onsite workers but those who "laundered" their clothing: "*must inform launderer* of the hazard." [4 AA 890-891, 1103, 1109 (emphasis added) (also requiring "special clothing," "change rooms," and "double lockers," and warning about "contaminated clothing").]

2. In April 1977, the plant received 1,200 copies of a booklet called "What You Should Know About Asbestos and Health."

[4 AA 891; 5 AA 1123, 1125.] This booklet specifically cautioned any reader to "prevent taking asbestos home on any work clothes" in order to "protect members of your family," who "should not be needlessly exposed to asbestos dust." [4 AA 891; 5 AA 1133 ("Never take loose fiber home.").] Unfortunately, Abex apparently never gave this booklet to its workers, including Uncle Peachy. [4 AA 891-892.] Instead, Peachy later received a different booklet that omitted any reference to the hazard from "taking asbestos home." [4 AA 892, 1075-1076 (Depo. at 270-274); 5 AA 1145, 1149-1154.]

In light of these glaring factual distinctions, Johnny argued that "*Campbell* is inapposite," and the *Rowland* factors balance very differently, so that here public policy does not "clearly" warrant an "exception" to Abex's duty of care. [4 AA 887, 893-902.]

3. The trial court granted nonsuit, holding that *Campbell* governs.

After a somewhat convoluted process,[2] the trial court granted nonsuit for Abex.

After plaintiffs filed their nonsuit opposition (June 4), *Campbell* was modified to apply only to "premises owners" (not "employers" as originally drafted). [5 AA 1247; *see Campbell*, 206 Cal.App.4th at 15.] Plaintiffs promptly filed a supplemental opposition, noting that

[2] Abex moved initially for nonsuit (denied as premature) [2 AA 491]; then *in limine* to exclude all "take home" evidence (granted) [2 AA 276]; then for judgment on the pleadings [5 AA 1254], a motion ultimately treated as a timely nonsuit motion and granted [5 AA 1269.] The propriety of these procedures is not at issue.

the modification bolstered their showing that *Campbell* applies only to claims for "premises liability." [5 AA 1236, 1237:20-24.]

The court granted nonsuit anyway (June 28), ruling that "Abex owed no duty to [Johnny] for any exposure to asbestos through contact with an employee of the Abex plant," Uncle Peachy, "none of which exposures took place at or inside Abex's plant." [5 AA 1269-1270.]

The trial court entered judgment for Abex. [5 AA 1273.]

F. The Court of Appeal reversed, distinguishing this case from *Campbell*.

Johnny both petitioned for writ relief and noticed an appeal from the judgment. [Op. at 3; 5 AA 1274.] The appellate court consolidated the proceedings. [Op. at 4.]

The court unanimously reversed, holding that the "broad and unqualified limitation on an employer's duty" asserted by Abex does not "accurately stat[e] the law." [Op. at 2.] The court declined to "question" *Campbell*'s holding as to "passive" premises owners, instead distinguishing this case because it asserts not mere "premises liability" but Abex's active "negligence in the manufacture of asbestos-containing brake linings." [Op. at 7.] The court indicated that a duty "line" may exist somewhere – but this case rests firmly on the side of the line where the duty exists. [Op. at 2.]

III. LEGAL ARGUMENT.

A. This Court should disapprove *Campbell* and hold that no category of asbestos take-home cases warrants a duty exception.

The correct duty rule to be adopted for asbestos take-home cases arises inexorably from existing California duty law: there simply is *no* duty exception for any category of cases. No other rule complies with *Rowland* and *Cabral* – nor is clearly warranted by policy considerations.

1. Governing legal standards.

(a) Standard of review: *De novo*, with factual deference on nonsuit.

The existence of a duty of care "is a question of law for the court, to be reviewed *de novo*." [*Cabral*, 51 Cal.4th at 770-771.] This Court stands in place of the courts below, reviewing the same record to determine whether, under the governing standards, public policy clearly demands a broad duty exception.

Here, the trial court's duty ruling arose on nonsuit, on a developed evidentiary record regarding the facts of Johnny's exposure and Abex's knowledge of the take-home hazard – facts that inform the overall *Rowland* analysis. This Court must presume the truth of those facts, construed most favorably to Johnny. [*See Castaneda*, 41 Cal.4th at 1214 ("Although duty is a legal question, the factual background against which we decide it is a function of a particular case's procedural posture. On review of a judgment of nonsuit, as

here, we must view the facts in the light most favorable to the plaintiff.").]

(b) Duty of care: The duty applies unless policy considerations, applied generally, clearly demand an exception for a clear category of cases.

(i) 1872: Civil Code section 1714 dictates the statutory duty of reasonable care.

The first element of a negligence claim is a "duty of care," which is codified in Civil Code section 1714:

> Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . .

[Civ. Code § 1714, subd. (a); *see Rowland*, 69 Cal.2d at 112 (The "principle embodied in [section 1714] serves as the foundation of our negligence law.").]

Enacted in 1872, the quoted language has since remained "unchanged." [*Rowland*, 69 Cal.2d at 111-112.] It dictates that "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*, 51 Cal.4th at 771 (*quoting Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472).]

(ii) 1968: *Rowland* abolished the ancient plaintiff classifications, announcing duty factors.

Despite section 1714's clear statutory mandate, before 1968 California courts had "departed from" the "fundamental rule of

liability for negligence" in cases involving a hazard on the defendant's premises (the "management" of "property"). [*Rowland*, 69 Cal.2d at 113.] Following old common-law classifications, the scope of the defendant's duty had hinged on the injured plaintiff's status: invitee, licensee, or trespasser. [*Id.*]

Rowland "stripped away" those "ancient concepts," holding that the "continued adherence" to classifying plaintiffs by their pre-existing relationship to the defendant "can only lead to injustice." [*Id.* at 119.] Instead, the "general principle" of California duty law – applicable regardless of the injured plaintiff's status – is "that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances." [*Id.* at 112.]

This Court made clear that no "exception should be made" to section 1714's "fundamental principle" unless "clearly supported by public policy." [*Id.*]

The search for any such clear support "involves the balancing of a number of considerations" now known commonly as the seven "*Rowland* factors": "[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] 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 [7] the availability, cost, and prevalence of insurance for the risk involved."[3] [*Id.* at 112-113.]

(iii) 2011: *Cabral* reiterated the *Rowland* analysis's limits and proper application.

In 2011, this Court reiterated the limits of the *Rowland* duty analysis. [*Cabral*, 51 Cal.4th at 764].

Despite *Rowland*, lower courts were still carving duty exceptions too broadly, based on case-specific facts that really just tended to show no *breach* – *i.e.*, reasonable care under the circumstances.

Cabral presented such a case. The defendant truck driver stopped his rig on the shoulder of an interstate highway; the plaintiff motorist veered off the highway, struck the rig, and was killed. [*Cabral*, 51 Cal.4th at 768.] The jury found each negligent, allocating fault 90% to plaintiff and 10% to defendant. [*Id.*] On those facts, the defendant could legitimately argue that his conduct was reasonable – *i.e.*, no breach. But the appellate court held that the defendant "owed no legal duty to avoid [the] collision." [*Id.*]

This Court unanimously reversed, reminding the lower courts that fact-specific breach questions should not be decided by carving general "duty" exceptions. The duty presumptively applies, unless an "exception" is "*clearly* supported by public policy." [*Cabral*, 51 Cal.4th at 771 (emphasis added); *Rowland*, 69 Cal.2d at 112.]

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[3] Abex is wrong to claim that the "relationship (or lack thereof) between the parties" is "one of the factors this Court identified in *Rowland*." [OB at 23.] It is not. To the contrary, this Court created the factors in *abolishing* any consideration of the parties' pre-existing "relationship." [*See Rowland*, 69 Cal.2d at 117-118.]

This Court reiterated that the existence of a duty is a general question unrelated to case-specific facts:

> [T]he *Rowland* factors are evaluated at a relatively broad level of generality. Thus, as to foreseeability, we have explained that the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.

[*Cabral*, 51 Cal.4th at 772 (quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 573 n.6) (italics in original).]

Thus, the *Rowland* analysis asks "whether *carving out an entire category of cases* from [the] general duty rule is justified by clear considerations of policy." [*Cabral*, 51 Cal.4th at 772 (emphasis added).] This strict limitation "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.* (emphasis in original).]

Cabral reminded also that courts may still assess "breach" as a typical factual question: "On the facts of a particular case, a trial or appellate court may hold that no reasonable jury could find the defendant failed to act with reasonable prudence under the circumstances. Such a holding is simply to say that as a matter of law the defendant *did not breach* his or her duty of care . . . ." [*Cabral*, 51 Cal.4th at 773 (emphasis in original).] But a *duty* exception is proper

only when public policy clearly dictates the exception in *all* cases involving the same "general" type of defendant, conduct, and harm.

The problem with using a broad no-duty rule to negate case-specific liability is illustrated by the *Cabral* facts. On the defendant's specific contention that *he* acted reasonably in parking his truck 16 feet off the highway to have a quick "snack," the appellate court announced a general duty rule – a "categorical exemption," for anyone parking alongside a roadway, from the duty to take reasonable care to avoid a collision with another motorist. [*Id.* at 768, 769.] This was problematic. Although "no liability" might have seemed appropriate as to *that* defendant, an no-duty rule would not apply equitably to the entire *category* of exempted cases, particularly the most egregious ones:

> Were we to recognize the categorical exemption from the duty of ordinary care [defendant] seeks, no liability could be imposed even when a driver unjustifiably stops his or her vehicle alongside the freeway in *particularly dangerous* circumstances. For example, parking a tractor-trailer for the night immediately next to the freeway traffic lanes on the outside of a poorly lit downhill curve, merely in order to save the cost of a spot in a truck stop, could well be considered negligent. Yet the parking truck driver in that scenario would as a matter of law bear no responsibility . . . [if] no duty exists . . . .

[*Id.* at 768.] Accordingly, this Court "decline[d] to create a categorical rule exempting those parking alongside freeways from the duty of drivers to exercise ordinary care for others in their use of streets and highways." [*Id.*] Whether the defendant Ralphs driver acted reasonably was a question of *breach.*

These same principles apply similarly here, as we now show.

2. Under *Rowland* and *Cabral*, public policy does not clearly demand that *any* category of asbestos take-home cases warrants a duty exception.

Public policy concerns do not support (let alone clearly demand) any general duty exception for all premises owners or employers whose on-premises negligence exposed an innocent person to asbestos off the premises.

The *Cabral* hypothetical discussed in the previous section reflects the problem with the *Campbell* no-duty rule (that spurred the nonsuit below). *Campbell* thought it proper to negate liability for a premises owner whose specific culpability was at least arguably minimal. But *Campbell* announced a general rule for *all* premises owners that simply does not apply equitably to the entire category of asbestos take-home defendants, many of whose misconduct is far more egregious than Ford's was (*e.g.*, Abex here). Abex's proposed rule – no take-home liability for anyone, premises owner or employer – similarly violates *Cabral*.

Cabral teaches that the seven *Rowland* factors are properly divided into two groups: (1) three foreseeability-related factors (foreseeability, certainty of injury, and closeness of connection); and (2) four policy-related factors (moral blame, preventing future harm, burden on the defendant, and insurance). [*Cabral*, 51 Cal.4th at 774, 781.] These factors are all "evaluated at a relatively broad level of factual generality," asking how the factor applies as to *all* cases in the prescribed "category." [*Cabral*, 51 Cal.4th at 772.]

Consistent with these standards, we now walk through the *Rowland* factors, showing each's proper application to the general category of cases (defendants whose on-premises negligence regarding asbestos contributed to exposing a person off-premises) and how *Campbell* and/or Abex misapplies it.[4]

(a) The three foreseeability factors.

The first *Rowland* step is to examine the "first three related considerations": 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." [*Cabral*, 51 Cal.4th at 774 (*quoting Rowland*, 69 Cal.2d at 113).]

All three factors support the duty here.

(i) Foreseeability.

On duty, "foreseeability" is assessed in a "general sense": not the defendant's "particular" foreseeability but rather "more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may

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[4] Besides *Campbell*, Abex cites two other California cases (*Oddone* and *Elsheref*) as supposedly "reject[ing]" a "duty in take-home cases." [OB at 20.] Neither case announces any such rule. *Oddone* was pointedly case-specific: it did "not hold" that a "plaintiff cannot state a cause of action for secondary exposure to toxic chemicals." [*Oddone v. Superior Ct. (Technicolor, Inc.)* (2009) 179 Cal.App.4th 813, 822-823 (plaintiff alleged neither a specific toxin nor injury).] And *Elsheref* was not a "take home" case (instead involving toxic injury to a father that caused reproductive defects in his later-born child), and the court likewise issued a case-specific ruling. [*Elsheref v. Applied Materials Inc.* (2014) 223 Cal.App.4th 451, 455, 460-461.]

appropriately be imposed." [*Id.* at 772, 775.] Moreover, foreseeability is tethered to the severity of the caused injury: "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. v. Superior Ct. (Bridget B.)* (2006) 38 Cal.4th 1177, 1194.]

Cabral assessed this factor properly, asking not whether the specific highway-shoulder collision was foreseeable to that defendant but rather generally whether "a vehicle parked by the side of a freeway may be struck by another vehicle leaving the freeway, resulting in injury to either vehicle's occupants." [*Id.* at 775.] This general type of injury is "clearly foreseeable." [*Id.*]

So too here. Our inquiry is not whether the asbestos take-home hazard was specifically foreseeable in the 1970s *to Abex* (although the evidence shows Abex's actual knowledge). Nor was the proper inquiry in *Campbell* whether the asbestos take-home hazard was specifically foreseeable in the 1940s *to Ford* (although the evidence showed Ford's constructive knowledge).

Instead, the inquiry is broad, as to the "category" of cases: whether an asbestos hazard created on a defendant's premises, allowed to be carried away, may injure someone off the premises. As in *Cabral*, this general hazard is "clearly foreseeable." [*See id.* at 775.]

Indeed, the hazard is generally foreseeable no matter what agent transports the toxin off the premises. If a toxin is released into the wind and blows offsite, or dumped into a stream and flows offsite, the general hazard posed to people offsite is clearly foreseeable. So too

when a toxin is released onto the clothing of workers who then leave the premises.

Campbell failed to analyze this factor in the correct, "generalized" sense, never even identifying the "category" of conduct at issue. [*Campbell*, 206 Cal.App.4th at 30-31.] Instead, *Campbell* discussed facts that minimized *Ford's* specific knowledge of the hazard, then just assumed some limited, specific foreseeability: "Even if it was foreseeable *to Ford* that workers on its premises could be exposed . . . ." [*Id.* at 31 (emphasis added).]

Abex's brief is similarly deficient. Abex pays lip service to the "broad level of factual generality" standard but then calls the take-home hazard, at all times, a mere "remote possibility of harm." [OB at 29.] Abex then goes further astray, suggesting that no "consensus existed that harm to someone like [Johnny] Kesner was predictable in the 1970s or 1980s." [*Id.* at 28.] On a general duty inquiry, this fact-specific assertion would be immaterial even if it was accurate. But it is not accurate, as shown by our factual record that Abex in the 1970s was specifically and repeatedly warned of the precise hazard to "someone like" Johnny.[5]

By contrast, the Opinion below properly analyzes foreseeability in the general sense: "As a general matter, harm to others resulting from secondary exposure to asbestos dust is not unpredictable. The

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[5] Abex is also wrong to demand a "heightened" level of foreseeability [OB at 29], which has been required only where the burden of protecting people was "onerous" because the defendant did not itself create the hazard: *e.g.*, preventing onsite third-party crimes [*Castaneda*, 41 Cal.4th at 1218]; or providing defibrillators to treat any onsite cardiac arrest [*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 341].

harm to third parties that can arise from a lack of precautions to friable asbestos that may accumulate on employees' work clothing is generally foreseeable." [Op. at 8.]

Although the degree of specific foreseeability of that take-home hazard can vary from case to case, that affects only the *reasonableness* of the defendant's conduct – a *breach* question. On the general duty question, like in *Cabral*, the hazard here is "clearly foreseeable." [*See Cabral*, 51 Cal.4th at 775.]

(ii) Certainty of injury.

The next factor, the "degree of certainty that the plaintiff suffered injury" [*Cabral*, 51 Cal.4th 771], bears little discussion here – or at least it should. Indisputably, Johnny suffered injury: mesothelioma that caused his death. This satisfies the "certainty" element. [*See id.* at 781 n.9 (finding "certainty" because "[Mr.] Cabral was killed in the accident").] The Opinion below thus treated this factor summarily, noting "no doubt" that one with "malignant mesothelioma" has "suffered injury." [Op. at 8.]

Campbell did not question that this factor is satisfied in an asbestos take-home case (nor even address the factor). [*Campbell*, 205 Cal.App.4th at 31.]

Nor did Abex challenge this factor in either court below. [*See* 2 AA 491-502 (nonsuit motion); Letter Brief in Opposition to Writ Petition (9/17/12); Opposition to Writ Petition (11/13/12).]

But in this Court, by new counsel, Abex now challenges the "certainty" factor by claiming, not that Johnny has not suffered injury, but that Abex (or asbestos generally) might not have *caused* his

injury. [OB at 30-31.] According to Abex, a "substantial percentage of mesotheliomas are not attributed to asbestos-containing products."[6] [OB at 30.] Abex also contends that, even if caused by asbestos, Johnny's disease might not have been caused by *Abex*'s asbestos [*id.*], ignoring that multiple asbestos-exposure sources contribute collectively to causing disease. [*See Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 976-977.]

However framed, Abex's arguments miss the mark. *Rowland* asks whether it is certain that the plaintiff has "*suffered injury*" – not certain that the defendant caused the injury. [*Rowland*, 69 Cal.2d at 113 (emphasis added).] This factor might come into play only in cases where the injury itself can be dubious or difficult to quantify. [*E.g.*, *Thing*, 48 Cal.3d at 666-667 (on emotional distress from witnessing an accident, limiting recovery to family members, whose severe emotional distress is most certain).] In mesothelioma cases, the injury is quite certain.

(iii) Closeness of connection between conduct and injury.

The third *Rowland* foreseeability factor is the "closeness of the connection between the defendant's conduct and the injury suffered." [*Cabral*, 51 Cal.4th at 771.]

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[6] Abex cites no evidence for this claim (having put none in the record), relying instead on snippets from several law-review articles and a New Jersey decision. [*Id.*] Nor did Abex make any record that mesothelioma has "highly disputed medical origins" or that the take-home hazard is "hotly debated." [OB at 1, 28.]

Again here, Abex misstates the factor, asserting no "close connection" between "Abex and [Johnny]," who "never set foot on Abex's facility or used an Abex product." [OB at 31.]

This factor does not look for a pre-existing "connection" between the *parties*. It seeks a connection between the defendant's *conduct* and the *injury* suffered.

That connection is found easily here. As with all *Rowland* factors, this "connection" factor is applied generally to the "category" of cases. [*Cabral*, 51 Cal.4th at 772.] In our category, there is a direct connection between (1) a defendant negligently allowing a toxin to leave its property, and (2) a person exposed to that toxin offsite being harmed by it. There is nothing attenuated about it.

Cabral illustrates the difference. The connection between a defendant's conduct and the plaintiff's injury may properly be found "attenuated" when the defendant is not the primary cause of the injury, which instead resulted from some intervening person or event. *Cabral* made the point with two "key-in-the-ignition cases," where, after the defendant's conduct, the injury was caused primarily by a subsequent actor's negligent conduct. [*Id.* at 778-780 (*citing Richards v. Stanley* (1954) 43 Cal.2d 60 (defendant left key in ignition; thief stole car and drove negligently); *Bryant v. Glastetter* (1995) 32 CalApp.4th 770 (defendant left car at scene after DUI arrest; tow-truck driver arrived and was hit by third driver)).] The same analysis applies when the intervening actor is a third-party criminal [*e.g.*, *Castaneda*, 41 Cal.4th at 1214 (no duty "not to rent" to known gang members who then commit crimes)], or a negligent driver [*Hoff v. Vacaville Unif. Sch. Dist.* (1998) 19 Cal.4th 925 (no duty to supervise

student who drove negligently off school premises)], or a horse [*Parsons*, 15 Cal.4th at 456 (no duty to avoid making noise that scared a nearby horse that then threw its rider)[7]], or an unpredictable event like a cardiac arrest [*Verdugo*, 59 Cal.4th at 312 (no duty to provide defibrillators)]. In all of these cases, the "connection" between the defendant's conduct and the plaintiff's injury – separated by intervening conduct or an event – is somewhat "attenuated."

Campbell applied this factor in favor of a no-duty ruling, holding that the connection "between Ford's conduct in having the work performed and the injury suffered *by a worker's family member* off of the premises" is "attenuated." [*Campbell*, 206 Cal.App.4th at 31 (emphasis in original).] But asbestos take-home cases are not comparable to the intervening-actor cases cited above. In those, the plaintiff's injury was caused most directly by conduct or an event beyond the defendant's control: a third-party's crime or negligent driving; a horse's agitation; or a cardiac arrest. Here, by contrast, the intervening action is involuntary – the transportation of asbestos dust by a person who is neither criminal nor negligent (but a second victim). The plaintiff is threatened directly because the *defendant* negligently put the asbestos on the unwitting worker – just as when a defendant puts a toxin into the wind or the water to be carried off site. Preventing the offsite transportation is within the defendant's control.

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[7] The seeds of Justice Werdegar's unanimous *Cabral* opinion are planted in her *Parsons* concurrence, approving summary judgment not based on a categorical no-duty rule but because the defendant acted reasonably as a matter of law – *i.e.*, no breach. [*Parsons*, 15 Cal.4th at 485-487 (Werdegar, J. concurring).]

In sum, each of the three foreseeability-related factors supports the continued recognition of the duty here.

(b) The four policy factors.

The second step of the *Rowland* analysis is to balance the three foreseeability factors against four "public policy factors." [*Cabral*, 51 Cal.4th at 781.]

Again, these factors are assessed at the "general" level, *i.e.*, how they apply to the "entire category of cases" at issue. [*Id.* at 772.]

We address these factors in a different order than stated in *Rowland*, addressing first the "burden" factor that has "evolved to become the primary" *Rowland* factor on the "policy" side. [*Campbell*, 206 Cal.App.4th at 33.]

(i) Burden on the defendant and community.

Among the four "policy" factors, the most important is the "extent of the burden to the defendant and consequences to the community" resulting from enforcing the duty. [*See Castaneda*, 41 Cal.4th at 1213.]

Here, Abex posits the "intolerable burden" of "lawsuits" from a "limitless pool of plaintiffs."[8] [OB at 3; *accord id.* at 16 ("virtually boundless liability" to an "enormous pool of potential plaintiffs").]

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[8] Abex's petition for review was even more dramatic, portending "wave after wave" of "excessive and uncontrolled litigation." [Petition for Review at 4, 5, 22.]

Campbell accepted this argument – not based on any evidence there but by quoting a prior court's statement that "imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope." [*Campbell*, 206 Cal.App.4th at 33 (*quoting Oddone*, 179 Cal.App.4th at 822-823).]

The Opinion below countered effectively, noting that (1) the asserted burden is illusory because the injury in our category of cases, cancer, "can hardly be claimed by everyone," let alone an "unlimited number of persons," and (2) even with any lesser burden, the *Rowland* "balance" still "falls far short of terminating liability at the door of the employer's premises." [Op. at 10.]

The Opinion is correct. Abex's assertion of "boundless liability" to a "limitless pool of plaintiffs" is not supported factually, nor is its demand for protection from that "burden" supported legally.

A) The pool of plaintiffs is finite and fixed.

Refusing to carve an exception to the duty of care here will not, as Abex posits, create a "limitless pool of plaintiffs." [OB at 3, 16.] In fact, it will not create *any* new plaintiffs, the "pool" of which is fixed and finite: people dying of cancer like mesothelioma.[9]

Cases where this Court has drawn a duty "line" to limit the "pool" of potential plaintiffs have involved outwardly expanding circles of people who could claim injury derivative of another's

[9] To our knowledge, the only plaintiffs in the category of asbestos take-home cases are victims of terminal cancer like mesothelioma, which can be caused by relatively smaller exposures, as opposed to chronic conditions like asbestosis that are typically suffered by industrial workers.

misfortune. A primary example is *Thing v. LaChusa*, where this Court considered a claim for emotional-distress damages caused by reaction to someone else's "negligently inflicted injury." Such cases do present a potentially "limitless pool" of plaintiffs: imagine a grisly car accident at a busy intersection witnessed by dozens of people, all of whom could claim some "emotional distress" from the experience. And even more remote people could assert "emotional distress" merely from being told later about the accident's gruesome details. All of these emotional-distress injuries are arguably "foreseeable." [*See Thing*, 48 Cal.3d at 668 (imagining "clear judicial days on which a court can foresee forever").] But this Court found it appropriate in such cases to "limit" the "class of potential plaintiffs" to assure that "liability bears a reasonable relationship to the culpability of the negligent defendant." [*Id.* at 667.] Accordingly, this Court "limited" the plaintiff pool to those people most certain to have suffered genuine injury: only plaintiffs (1) "closely related" to the primary "injury victim"; who (2) were "present at the scene and then aware that it is causing injury;" and (3) suffered "serious emotional distress" beyond "that which would be anticipated in a disinterested witness." [*Id.* at 667-668.] Though even "disinterested" witnesses to an accident might foreseeably suffer *some* emotional distress, this Court excluded them to limit the otherwise "limitless" pool of plaintiffs. [*Id.* at 668.]

Other cases setting "duty" limits have reflected this Court's similar concern about a large pool of plaintiffs asserting derivative injuries:

- **Derivative emotional distress from mishandling corpses:** On desecration of human remains, this Court limited the pool of potential plaintiffs to "close family members who were aware" that funeral "services were being performed" for their "benefit." [*Christensen*, 54 Cal.3d at 868.]

- **Derivative economic injury:** On professional malpractice by financial auditors against a corporation, this Court limited the pool of potential plaintiffs by finding no duty to prevent derivative economic injury to third party investors who relied on the audits. [*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370.]

- **Derivative loss of consortium:** On claims for loss of consortium derived from a loved one's primary injuries, this Court limited the pool of potential plaintiffs to married spouses, not unmarried cohabitants [*Elden v. Sheldon* (1988) 46 Cal.3d 267], nor children [*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441], nor parents [*Baxter v. Superior Ct. (Sheldon)* (1977) 19 Cal.3d 461].

In all of these cases, a primary injury had potential "ramifying consequences, like the ripplings of water, without end" – driving this Court to "limit the number of persons to whom a negligent defendant owes a duty of care." [*Elden*, 46 Cal.3d at 276.]

These are the types of cases that threaten an unduly large "pool of plaintiffs" – a potentially unlimited group whose injuries, while arguably foreseeable, are of questionable severity and even legitimacy.

No such concerns exist here. In our category of cases, the pool of victims is fixed. [*See* Op. at 10 ("Unlike indirect financial loss or mental anguish," mesothelioma "can hardly be claimed by every-one.").] And every mesothelioma victim is certainly and severely injured. Hence, recognizing the duty of care will not create *any* more

plaintiffs. [*See id.* (recognizing "duty of care" does "not threaten employers with potential liability for an intangible injury that can be claimed by an unlimited number of persons").]

B) The pool of take-home mesothelioma victims is relatively small.

The fixed "pool" of mesothelioma plaintiffs is itself not very large. Mesothelioma is an extraordinarily rare disease, with only about 250 cases annually in California (of about 2,500 nationwide).[10] Of these 250, only a small portion involve "take home" exposures: about 7 or 8 %. Hence, the "pool" of California take-home victims sits steadily at about 19 or 20 people per year. There simply isn't an "enormous pool" of take-home plaintiffs. [*See* OB at 16.]

Nor has there ever been. Indeed, before *Campbell* first carved a take-home duty exception in 2012, there were no "waves" of take-home litigation. And none will flow from the disapproval of *Campbell* and restoration of the general duty of care here.[11]

Nor does the small subset of take-home mesothelioma cases add in any significant way to the "elephantine mass" of "asbestos litigation" that "strain[s]" the courts' resources. [*See* OB at 25-26.] As the Tennessee Supreme Court has explained well, this "mass" is comprised primarily of "unimpaired claimants": "persons who have been exposed to asbestos" but "are not impaired" by "disease" and

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[10] *See* NIOSH, "Malignant Mesothelioma: Mortality (Archive)," available at <http://www2a.cdc.gov/drds/worldreportdata/FigureTableDetails Archive.asp?FigureTableID=2539&GroupRefNumber=T07-04>.

[11] The *Haver* dissent agrees, "question[ing] the factual basis" for the claimed "specter of a flood of lawsuits." [Haver Op., Dissent at 2.]

"likely never will be." [*Satterfield v. Breeding Insul. Co.* (Tenn. 2008) 266 S.W.3d 347, 369-370.] According to "surveys funded by asbestos defendants," from *66% to 90%* of asbestos plaintiffs are "unimpaired." [*Id.* at 369.] It is this massive pool of unimpaired claimants who have comprised the "elephantine mass" – while "persons with more serious illnesses" have been "lost in the shuffle."[12] [*Id.* at 370.] Thus, while the "argument that [take-home] liability should be foreclosed" because of the "asbestos litigation crisis" might "have resonance" regarding "unimpaired claimants," for a claimant "who has died of mesothelioma," the argument "rings hollow." [*Id.*]

C) Duty does not equal liability.

Next, Abex is wrong to claim that recognizing the duty of care in this category of cases will bring "boundless *liability*." [OB at 3, 16 (emphasis added).]

As the Opinion correctly notes, duty does not equal liability: the "existence of a duty is not the same as a finding of negligence." [Op. at 11; *accord Pedeferri v. Seidner Ents.* (2013) 216 Cal.App.4th 359, 369.]

Instead, duty is just the first step in proving a negligence case. Even among the small, finite pool of "take home" mesothelioma victims, the ability to recover from anyone remains limited naturally – without any need for drastic judicial "no duty" intervention.

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[12] *Accord In re Cert. Ques. (Miller v. Ford Motor Co.)* (Mich. 2007) 740 N.W.2d 206, 229 (Cavanaugh, J., dissenting) (courts invoking "litigation crises" to justify take-home duty exception are "strangely silent with respect to the toll that asbestos exposure has taken on human life").]

Abex insists that a duty of care allows victims to "seek redress from the employer of any friend or relative that the person regularly visited decades earlier." [OB at 3; *accord id.* at 16 (exposure in a "taxicab" or "grocery store").]

Not so. A mesothelioma victim can rightly "seek redress" from such an "employer" only if the person they "regularly visited" was *exposed to asbestos* by their employer's negligence and repeatedly brought the hazard home. [*See Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 997-998 (asbestos plaintiff "must first establish some threshold exposure" to the defendant's asbestos).] Here, Johnny is able to prove such exposure because his uncle consistently brought Abex asbestos home. But many take-home victims will not have such proof. A victim exposed by a chance encounter in a "taxicab" or "grocery store" will rarely even know the identity of the other person, let alone be able to trace the exposure to a specific source.

Moreover, any plaintiff who can identify a take-home source still must prove exposure, medical causation, and the defendant's lack of due care. [*See* Op. at 11 (listing "factual questions" for trial).]

Indeed, Abex's brief highlights the many factual defenses it will be able to raise before a jury:

- **Exposure:** A jury could find that Johnny did not suffer take-home exposures because Uncle Peachy's clothes were only a "little bit" dusty, Peachy "dusted himself off" and "removed his shoes" at home, and Johnny "did not launder his uncle's clothes." [OB at 5, 6.]

- **Causation:** A jury could find that Johnny's take-home exposures were not a substantial factor in causing his disease, which might have been "caused by" his "own occupational

work with asbestos," his use of others' "asbestos-containing products," or even something besides asbestos. [OB at 7, 30.]

- **Negligence:** A jury could find that Abex acted with due care because it "placed caution labels" on its brake products, "provided" workers with a "written booklet" about "potential health hazards," "regularly swept and dusted" its plant, was "never cited for any excessive dust violations," had an "industrial hygiene department," conducted "air samplings," and "took numerous dust suppression steps." [OB at 5-6, 31.]

- **Comparative fault:** A jury could assign blame to Uncle Peachy, who assertedly "was aware that air samples were taken" and that "OSHA inspected the plant, who was "provided" a hazard "booklet," and who "could" have but "rarely changed [clothes] before going home." [OB at 5-6.]

In light of these potential proof problems faced by take-home plaintiffs, the "line" between take-home victims who can recover and those who cannot draws itself. The defendants' liability ends where the evidence ends – and unfortunately many take-home victims will simply lack sufficient evidence to prevail. Thus, defendants enjoy ample factual protection from any unwarranted suit – without any need for a drastic "no duty" line from this Court.

But those take-home victims who *can* make the factual connection between their off-site exposure and a defendant's on-site negligence should be able to recover on proper proof. Indeed, *Rowland* and *Cabral* demand it. The only real "burden" faced by this category of defendants is that they may be held responsible for their very real misconduct.

In sum, contrary to Abex's claim, take-home defendants face no "intolerable burden" from refusing to carve a duty exception – nor any real burden at all.

(ii) Moral blameworthiness of conduct.

In the category of asbestos take-home cases, the defendant's conduct – allowing the asbestos hazard to be taken from its premises by unwitting workers, themselves potential victims – carries significant moral blame. Some defendants (like Ford in *Campbell*) acted with constructive knowledge of the hazard; others (like Abex here) with actual knowledge of the specific take-home hazard at its premises. In all cases, the injury threatened by asbestos exposure is *death*.

These facts warrant higher moral blame than in *Cabral*, where "[s]topping alongside the freeway" was deemed not "especially blameworthy" and "hardly a heinous act." [*Cabral*, 51 Cal.4th at 782.] Nevertheless, in *Cabral* this lesser blameworthiness did not warrant a broad no-duty exception. [*Id.*] Indeed, this Court noted that there were no "laws or mores indicating approval of the conduct [highway parking]." [*Id.*] Here, by contrast, specific "laws" indicate *disapproval* of the conduct, from California's General Safety Orders (dating to the 1930s) to OSHA's specific regulation of the take-home hazard in the 1970s. [*E.g.*, Cal. Code Regs., tit. 8, §§ 2005 *et seq.*(1946 ed.); *Id.* §§ 5147- 5149, § 5155 (1972 ed.) (regulations requiring numerous precautions for asbestos work including protective gear, showers, and change facilities).]

Campbell cited this factor, stating that the "moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability." [*Campbell*, 206

Cal.App.4th at 32 (*quoting Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270).] Abex cites this language here. [OB at 31.]

But the next sentence of *Campbell* described factors showing a "higher degree of moral culpability," including when the defendant: (1) "had actual or constructive knowledge of the harmful consequences of behavior" – true in our category of cases; (2) acted with a "reckless indifference to the results of its conduct" – true in many cases, including as to Abex here; or (3) "engaged in inherently harmful acts" – again true as to any defendant working carelessly with asbestos products, which are as harmful as can be. [*See Campbell*, 206 Cal.App.4th at 32.]

Although *Campbell* listed these culpability factors showing moral blame, it never applied them, simply moving on to the "next" factors. [*Id.*] Abex simply ignores them altogether. [OB at 31.]

Instead, Abex asserts low moral blame because the "complaint" merely "alleg[es] that Abex was aware (in some undefined way) of [the] risks of asbestos exposure." [*Id.*] This simply ignores the *evidence* (on nonsuit) of Abex's actual knowledge of not only the asbestos "risks" but the specific take-home hazard posed by its Winchester plant.

In our category of cases, the moral blameworthiness of the defendants' conduct is on the high side. [*See* Op. at 8 ("indifference" to hazard is "morally blameworthy").]

(iii) Preventing future harm.

Refusing to immunize defendants like Abex from asbestos take-home liability will promote the policy of preventing future harm by

similar defendants. As *Cabral* notes, the "overall policy of preventing future harm" is served by "imposing the costs of negligent conduct upon those responsible." [*Cabral*, 51 Cal.4th at 781.] And as the Opinion below notes, a "rule of law that holds an employer responsible to avoid injury to nonemployees who may foreseeably be harmed by exposure to toxins disseminated in its manufacturing process can be expected to prevent harm to others in the future." [Op. at 9.]

Abex, echoing *Campbell*, counters that a duty here will not prevent future harm because asbestos is "already the subject of strict regulation." [OB at 32-33; *see Campbell*, 206 Cal.App.4th at 33.]

The Opinion below answers this contention effectively. Asbestos is "not the only toxin" generated by industry, and recognizing the duty of care "serves as a warning for manufacturers creating [all] potentially dangerous products to be cautious." [Op. at 9 (*quoting Clair v. Monsanto Co.* (Mo.App. 2013) 412 S.W.2d 295, 309 (applying California law)).]

This factor certainly does not clearly demand a duty exception.

(iv) Availability of insurance.

The final *Rowland* policy factor is the "availability, cost, and prevalence of insurance for the risk involved." [*Cabral*, 51 Cal.4th at 781.]

The record provides no "reason to believe that manufacturers" like Abex lack "insurance to protect against their liability." [Op. at 10.]

Abex does not contest this finding or address this *Rowland* factor. [OB at 28-33.] Its only mention of "insurance" is in quoting

Campbell, which in turn quoted the following bit of twisted wisdom from *Oddone*:

> One of the consequences to the community [of a take-home duty] is the cost of insuring against liability of unknown but potentially massive dimension. * * * [¶] Assuming for the purposes of argument that there is some risk to nonemployee persons, in a less than perfect world *it appears to make more sense to look to the nonemployee person's insurance to cover the risk.*

[*Campbell*, 206 Cal.App.4th at 33 (emphasis added) (*quoting Oddone*, 179 Cal.App.4th at 822–823).]

Yes, that is the application of the *Rowland* "insurance" factor on which every subsequent *Campbell*-based defense judgment rests: *let the victims get their own insurance.*

This cannot be a proper application of the *Rowland* policy-based analysis that this Court crafted to promote our "increasing regard for human safety."

(c) Policy: The big picture.

In sum, the *Rowland* factors do not remotely support carving a duty exception for the entire category of defendants who caused asbestos to be taken off their premises and to expose innocent offsite victims. They most certainly do not "clearly support" such a duty exception. [*See Cabral*, 51 Cal.4th at 771.]

As the appellate court recently noted in *Pedeferri*, California courts analyzing duty properly give "controlling weight" to policy concerns "only where the potential for tort liability directly leads to undesirable incentives or policy outcomes." [*Pedeferri*, 216

Cal.App.4th at 369.] Thus, when this Court has carved duty exceptions, it has done so to avoid *real* "undesirable" outcomes: from liability to an (actual) expansive pool of plaintiffs (*Thing*, *Christensen*, *Elden*) to attenuated liability for another's misconduct (*Castaneda*, *Hoff*, *Richards*, *Bryant*) or an uncontrollable event (*Parsons*, *Verdugo*).

Here, no such undesirable outcome exists: unless you count the defendants' "desire" not to be held responsible for terminal injuries caused directly by their negligence.

In the end, these asbestos take-home cases are no different from cases involving a hazard carried offsite by a different agent. Whether the agent is wind, water, or a worker, it is an unwitting transporter.[13] The only difference is that, in our category of cases, that agent is himself also a victim of the defendant's misconduct.

Justice Werdegar's opinion in *Cabral* provides the punctuation mark here. In dismissing the truck driver's claim of a "heavy burden" of "potential liability," the opinion quotes the "cogent" response of the appellate court's dissenting justice: "[T]he majority asks, 'If a duty is imposed under the facts of this case, where does it end?' [Citation.] In turn, I ask: "If a duty is *not* imposed under the facts of this case, then where does it begin?" [*Cabral*, 51 Cal.4th at 784 (emphasis in original).] Although the specific *Cabral* facts – parking 16 feet off the road to have a quick snack – seemed reasonable, what about parking "six inches" off the road "to sleep for hours" and thus not "pay for a motel room?" [*Id.*] What about "an inch" from traffic,

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[13] *See also Davert v. Larson* (1985) 163 Cal.App.3d 407, 410 (upholding duty of care when horse wandered off property and caused collision).

"on the outside of curve," staying "all night without lights? To ask these questions is to see *why a categorical exemption is not appropriate.*" [*Id.* (emphasis added).]

So too here. *Campbell* involved specific facts making the landowner defendant seem reasonable: in *Cabral*'s terms, Ford was the driver parking 16 feet away for a quick snack. But *Campbell* stated a categorical duty exception that would apply to all landowners – including Abex, the equivalent of the driver parking one inch away on a dark curve. As in *Cabral*, the factual variances among take-home cases make any categorical duty exemption inappropriate.

In the big picture, public policy simply cannot demand a rule that would immunize the liability of Abex, who exposed Johnny to asbestos for almost a decade despite actual knowledge of the hazard from specific warnings that it ignored.

3. Duty cases from other jurisdictions are of little relevance – but they support affirmance.

Instead of applying California law (via the *Rowland* analysis), Abex asks this Court to follow what Abex terms a nationwide "majority rule" that "imposing a duty to protect against take-home exposures is bad public policy." [OB at 12-20.] Citing cases from various jurisdictions, Abex asks this Court to carve a duty exception in California for *all* take-home cases, "regardless of the type of defendant involved," based on the parties' pre-existing *relationship*: "defendants do not owe such a duty to those with whom they have no employment, invitee, or customer relationship." [OB at 12.]

On its face, this throwback request should be rejected. As discussed above, almost 50 years ago in *Rowland*, this Court abolished the "ancient" plaintiff classifications (including "invitee") that had determined the scope of the defendant's duty of care in negligence. In California, the parties' "relationship" is simply *not* a factor to be balanced in assessing duty. Thus, even if there was some "majority" relationship-based rule elsewhere, it would not apply in California.[14]

But a careful look at the out-of-state cases reveals not a "majority" rule but various rules that rest on each jurisdiction's established duty-of-care analysis. And within these rules, one relatively clear pattern emerges: states still emphasizing the parties' "relationship" find no duty; states that (like California) balance foreseeability against policy factors recognize the duty.[15]

Thus, in case after case cited by Abex (OB at 12-14), the state's high court found no duty because the parties lacked a pre-existing "relationship" – a critical factor in the jurisdiction:

Delaware: "[N]o duty of care exists between the parties unless a '*special relationship*' between them gives rise to one." [*Price v. E.I. Dupont de Nemours & Co.* (Del. 2011) 26 A.3d 162, 170 (emphasis added).]

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[14] Nevertheless, Abex trumpets other jurisdictions' pronouncements that, in those states, the "relationship of the parties" is the "key consideration" and the "most important factor to be considered." [OB at 15 (citing New York and Michigan law).] Not so in California.

[15] *See Campbell*, 206 Cal.App.4th at 33-34 (recognizing this authority "split"); *Satterfield*, 266 S.W.3d at 361 ("pattern").

Michigan: "The determination whether a legal duty exists is a question of whether the *relationship* between the actor and the plaintiff gives rise to any legal obligation . . . ." [*In re Cert. Ques. (Miller)*, 740 N.W.2d at 211 (emphasis added).]

Maryland: "Determining the existence of a duty requires the weighing of policy considerations," chiefly the "*relationship* (or lack of relationship) between" the parties; "this Court has focused on" the "lack of any *relationship*" to find "no duty to spouses of employees." [*Georgia Pac., LLC v. Farrar* (2013) 69 A.3d 1028, 1038-1039 (emphasis added).]

New York: "The 'key' consideration critical to the existence of a duty" is the "defendant's *relationship* with either the tortfeasor or the plaintiff"; "foreseeability" is irrelevant to "whether a duty exists." [*In re New York City Asb. Litig.* (N.Y. 2005) 840 N.E.2d 115, 119 (emphasis added).]

Iowa: No duty to family members of "independent contractor's employees" because of the "realities of the *relationship*"; "foreseeability" is "not considered." [*Van Fossen v. MidAmerican En. Co.* (Iowa 2009) 777 N.W.2d 689, 696, 698 (emphasis added).]

Georgia: Because plaintiffs "were not" the defendant's "*employees*," the "duty" to "furnish a reasonably safe place to *work*" was "not owed to them." [*CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 209 (emphasis added).]

But in jurisdictions where, like California, the duty hinges not on any pre-existing relationship but instead on the balancing of factors including foreseeability, courts uphold the duty of care:

Tennessee: Policy analysis, which "favors imposing a duty of reasonable care where a 'defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property,'" balances numerous factors, including the "foreseeable probability of the harm or injury occurring," the "possible magnitude of the potential harm," and the "relative costs and burdens" of requiring "safer conduct."[16] [*Satterfield*, 266 S.W.3d at 365.]

New Jersey: "Foreseeability is significant in the assessment of a duty of care"; "[o]nce the ability to foresee harm" is established, "considerations of fairness and public policy govern whether the imposition of a duty is warranted." [*Olivo v. Owens-Illinois, Inc.* (N.J. 2006) 895 A.2d 1143, 1148.]

Thus, there is no nationwide "majority rule" that should govern or even inform California law. The "no duty" jurisdictions continue to emphasize the parties' relationship – an "ancient" concept that California abandoned decades ago because it "can only lead to injustice." [*Rowland*, 69 Cal.2d at 119.]

As a whole, out-of-state law supports this Court's affirmance of the Opinion below by holding, consistent with almost 50 years of *Rowland* jurisprudence – and with express disapproval of *Campbell* – that no duty exception exists for any "category" of asbestos take-home cases.

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[16] Tennessee also echoes California duty law in declaring that the "greater the risk of harm, the less degree of foreseeability is required." [*Id.* at 365-366; *accord John B.*, 38 Cal.4th at 1194.]

4. Abex's requested no-duty rule cannot be adopted as a repackaged "proximate cause" ruling.

Finally, Abex asserts, for the first time in this case, that this Court should negate its liability not as a "duty" question but under the "proximate cause" doctrine. [OB at 33-36.] No it should not:

1. The scope of Abex's Petition for Review, and thus of this Court's review, is two "duty" issues. [*See* Pet. at 1.] No other issues are subject now to review. [*See* Cal. Rule of Court 8.516, subd. (b)(1) (review limited to "issues fairly included in the petition or answer").]

2. Abex has never before raised this proximate-cause issue, which is waived. [*See Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13 n.6 (no new theory of non-liability on appeal).]

3. The cited "proximate cause" doctrine is not materially different from the duty analysis that does not help Abex. As Abex presents it, the doctrine hinges on "public policy considerations" that "are the same as those" relevant on the "duty issue." [OB at 33-34, 35.] Those considerations warrant neither a duty exception nor a proximate-cause bar.

As Abex's brief notes, any proximate-cause bar must result from a "rough sense of justice." [OB at 34.] As should be clear by now, no sense of justice, rough nor laser-sharp, warrants a categorical liability exception that would immunize Abex for its misconduct.

B. If this Court does not disapprove *Campbell*, it should limit the duty exception to a smaller, Ford-like class of defendants.

If this Court believes that "policy" concerns warrant some kind of duty-based limitation on the overall field of asbestos take-home liability, such concerns still cannot possibly demand a line that would immunize Abex, which actively created a take-home hazard despite actual knowledge of it.

We submit that the only duty "line" that could even arguably comply with *Rowland* would limit the duty exception to the limited "category" of cases sharing two attributes (both present in *Campbell*):

1. **Passive premises owner:** The defendant was a "mere premises owner," whose alleged misconduct was only passive nonfeasance regarding a hazard that someone else created (like Ford in *Campbell*), not active misfeasance in creating the hazard (like Abex here).

2. **Constructive knowledge:** The defendant's knowledge of the asbestos take-home hazard was at most constructive (like Ford), not actual (like Abex).

1. *Campbell* should apply only to passive ownership of a premises on which others created an asbestos hazard.

The first *Campbell* fact that lends any legitimacy to its no-duty rule is that Ford did not itself *create* the asbestos hazard on its property. Ford was a mere premises owner – sued *only* because it owned the property on which someone *else* created a hazard that was carried offsite.

Campbell draws its line at "property owners": "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos." [*Campbell*, 206 Cal.App.4th at 34.]

The only reading of this rule that is even arguably consistent with *Rowland* is that the duty exception is limited to those defendants who are *mere* "property owners," sued only for owning the property. Indeed, *Campbell*'s application of several *Rowland* factors makes sense only as to such mere premises owners:

Foreseeability: *Campbell* assumed that Ford had some foreseeability, but insinuated that it was minimal. [*Campbell*, 206 Cal.App.4th at 31 ("Even if it was foreseeable to Ford . . . .").] This finding makes sense only as to a mere premises owner, who lacks expertise in the work being performed (let alone its hazards). But when the premises owner is also performing the asbestos work, it must know more about the work and its hazards – particularly a defendant like Abex in the business of manufacturing asbestos products.

Attenuated connection: *Campbell* found an "attenuated" connection "between Ford's conduct in *having the work performed* and the injury suffered by a worker's family member off of the premises." [*Id.* at 31 (emphasis added and deleted).] This finding makes sense only as to a mere premises owner – one "having the work performed" by another. By contrast, when a defendant does the work itself, the connection to the injury is far less "attenuated," particularly as to an asbestos-product manufacturer like Abex.

Moral blame: *Campbell* found minimal "moral blame." [*Id.* at 31-32.] That finding might apply to a mere premises owner (like Ford), but it makes no sense as to an active hazard creator, particularly one who (like Abex) ignores actual knowledge to make money directly from the hazard creation.

Accordingly, if *Campbell* has any legitimacy, it must be limited to defendants who, like Ford, merely owned a premises where someone else created an asbestos hazard – a line between active and passive negligence.

The Opinion below embraced this limitation of *Campbell*: "The claim" in *Campbell* was "based on Ford's passive involvement as owner of the plant" where a "contractor was installing asbestos insulation"; Johnny's claim here asserts not passive "premises liability" but active "negligence in the manufacture" of Abex's asbestos product. [Op. at 7.] As to these different categories of cases, the "*Rowland*" factors "balance" differently. [*Id.*]

This active/passive distinction draws support also from California law distinguishing active "misfeasance" from passive "nonfeasance":

> Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, *i.e.*, defendant has *created* a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention.

[*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1202.]

The active/passive distinction between hazard creators and mere premises owners draws support also from a recent Missouri case

(applying California substantive law) that upheld the duty of care for an actively negligent toxin manufacturer despite *Campbell*, which was "distinguishable" because it involved mere passive "premises liability." [*Clair v. Monsanto Co.* (Mo.App. 2013) 412 S.W.3d 295, 307.]

Further, the active/passive distinction is similar to the policy-based limitations on premises-owner liability for *onsite* injuries to the employees of independent contractors, liability that can arise not from passive ownership but only from active negligence: when the owner "affirmatively contributed" to causing the injury. [*See Kinsman v. Unocal Corp.* (2005) 37 Cal.App.4th 495, 499.]

2. *Campbell* should apply only to constructive (not actual) knowledge of the asbestos take-home hazard.

The second *Campbell* fact that lends any legitimacy to its no-duty rule is that Ford's knowledge of the asbestos take-home hazard was only constructive, not actual (like Abex here).

Campbell's duty exception rested on a ruling that "policy considerations" outweighed the foreseeability factors. [*Campbell*, 206 Cal.App.4th at 32.] This ruling rested in turn on an implicit finding that Ford's ability to foresee the take-home hazard was minimal.

The evidence cited in *Campbell* supported a finding that Ford's foreseeability was somewhat minimal. Ford was not performing the asbestos-insulation work, which was part of building construction, not Ford's business. [*Id.* at 20.] And Ford's knowledge of the asbestos hazard was at most constructive: the information was known in the

"industrial hygiene community," and Ford "had industrial hygienists." [*Id.* at 21-22.]

As to such a defendant with mere constructive knowledge of a hazard on its premises, *Campbell*'s holding (that foreseeability is outweighed by policy concerns) at least makes arguable sense.

But the holding makes far less sense as to a defendant with *actual* knowledge of the asbestos take-home hazard. As to those defendants, foreseeability is necessarily greater, and the defendant's failure to protect against the known hazard deserves more moral blame – and thus the *Rowland* "policy" factors simply cannot support a duty exception.

In sum, if any duty line is drawn, it should be limited also to claims against defendants whose knowledge of the asbestos take-home hazard was only constructive, not actual.

C. Any plaintiff-based duty "line" should hinge not on any "family" or other relationship but the regularity of the exposure.

Finally, this Court should reject Abex's invitation to draw a line limiting the asbestos take-home duty to only "immediate family members" of the exposed worker. [*See* OB at 36-39.] Any duty line hinging on the status of the injured plaintiff would necessarily violate *Rowland*, which abolished such classifications as a factor in determining duty.

But if this Court is inclined to draw a plaintiff-based line, it should not be drawn at "immediate family members" – an arbitrary,

unprincipled line. Instead, any such line could properly hinge only on the regularity of the plaintiff's contact with the exposed worker.

1. Abex's proposed "immediate family" line is unprincipled and inequitable.

This Court should reject Abex's proposed "immediate family" duty line as unprincipled and inequitable.

Such a line cannot be justified absent some particular circumstances rendering family status relevant to the *Rowland* factors. Since *Rowland*, this Court has occasionally seen fit to draw family-based duty lines where relevant. For example, in cases involving derivative emotional distress (based on some other primary injury), this Court has limited recovery to family members, assuring that the claimed injuries are legitimate and severe. [*See Thing*, 48 Cal.3d at 644 (witnessing an accident); *Christensen,* 54 Cal.3d at 868 (learning of desecration of human remains).] And in cases involving loss-of-consortium damages, this Court has limited recovery to marital spouses, both limiting the potential "pool" of claimants and limiting recovery to those most certain to suffer from the loss of consortium, *i.e.*, spouses. [*See Elden*, 46 Cal.3d at 267 (no duty for unmarried cohabitants), *Borer*, 19 Cal.3d at 441 (parents), *Baxter*, 19 Cal.3d at 461 (children)].

The factors that justified a family-based duty line in those cases do not exist here. In asbestos take-home cases, *every* plaintiff is certainly and severely injured, dying of cancer. Nor (as discussed above) is there any "unlimited" pool of plaintiffs to rein in. A family-based duty line cannot satisfy *Rowland.*

Nor would such a line be equitable – a fact shown well in this case. It is no coincidence that Abex suggests an "immediate family" line here, where Johnny was not a spouse or child but a nephew. In most other ways, though, he was no different than a typical "immediate" family member: his Uncle Peachy was his "father figure"; he visited the house (and rode in the car) continually for years; and he stayed the night for days at a time, an average of three times a week. [4 AA 912 (Depo. 18:15-17), 915 (Depo. 35:14-37:15); Op. at 3 and n.2.] Nevertheless, under Abex's proposed rule, Johnny could not recover – but a son who had moved out and visited only occasionally *could* recover. This cannot be the proper result of a "policy" analysis.

Finally, the out-of-state cases cited by Abex [OB at 37-38] do not "limit" the duty to "immediate family members." In *Olivo*, New Jersey applied the duty to a plaintiff spouse but did not state that a non-spouse could not recover. [*Olivo*, 895 A.2d at 1149.] And in *Zimko*, Louisiana did not address "family" status at all, applying the duty to "household members." [*Zimko v. American Cyanamid* (La.App. 2005) 905 So.2d 465.]

Indeed, *Olivo* and *Zimko*, far from supporting Abex's proposed duty line, instead indicate its folly. If the line is a "family member," does a particularly close nephew like Johnny qualify? And if the line is "household" members, does it qualify to live at the house part-time, like Johnny, including for weeks at a stretch?

As is plain to see, these arbitrary lines simply introduce nuanced factual questions into what is supposed to be a broad legal ruling.

Abex is correct in one sense: it *is* "hard to draw" duty lines among qualifying plaintiffs. [*See* OB at 36.] But Abex is otherwise wrong: the solution is neither to negate the duty entirely nor to draw arbitrary factual lines based on "family" or "household" status.

2. A regularity-of-exposure line is moderately principled.

If this Court is somehow inclined to draw a plaintiff-based line, the better choice would limit the duty to plaintiffs regularly exposed to the defendant's asbestos.

The Opinion below suggests such a line, holding that the duty applies to plaintiffs, like Johnny, with "recurring and non-incidental contact" with the worker. [Op. at 2.] Tennessee established a similar line, affirming the duty to "persons who regularly and for extended periods came into close contact with" the take-home worker. [*Satterfield*, 266 S.W.3d at 367.]

This "contact" based classification still violates *Rowland* and *Cabral*, drawing another factual line for courts to discern: *e.g.*, just how "regular" and "recurring" is enough? These factual questions should be left to the jury on causation. They should not affect the duty analysis – if the plaintiff's contact was enough to contribute to causing his disease, then he should be able to recover (upon proper proof).

But if this Court feels compelled by "policy" reasons to draw a plaintiff-based line somewhere, this is the most *Rowland*-compliant.

IV. CONCLUSION.

This Court should decline Abex's request to return California duty law to the pre-*Rowland* era. Under that law, from *Rowland* to *Cabral*, public policy does not warrant an exception to Abex's duty of care. The Opinion below should be affirmed.

DATED: December 18 2014

Respectfully submitted,

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By: _____
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CERTIFICATE OF WORD COUNT

I, Ted W. Pelletier, hereby certify that this Answer to Petition for Review, exclusive of tables, consists of 13,943 words, in 14-point Times New Roman type, as counted by my word-processing program.

_____
Ted W. Pelletier

PROOF OF SERVICE

Johnny Blaine Kesner v. Pneumo Abex, LLC
Court of Appeal Case Nos. A136378 & A13416
Supreme Court Case No. S219534

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is Jack London Market, 55 Harrison Street, Suite 400, Oakland, CA 94607.

On December 18, 2014, I served true copies of the following document(s) described as:

ANSWER BRIEF ON THE MERITS

on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kazan, McClain, Satterley & Greenwood for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Oakland, California.

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

Executed on December 18, 2014, at Oakland, California.

Paula Katayanagi