S219919

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs, Appellants and Petitioners,

vs.

BNSF RAILWAY COMPANY,

Defendant and Respondent.

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

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PETITIONERS' REPLY BRIEF ON THE MERITS

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Plaintiffs, Appellants and Petitioners Joshua Haver, Christopher Haver, Kyle Haver, and Jennifer Morris (collectively, Plaintiffs) hereby submit this reply brief on the merits.

INTRODUCTION

As shown by Plaintiffs in their opening brief (OB), the judgment of the Court of Appeal should be reversed because there was and is no basis for relieving Defendant and Respondent BNSF Railway Company (Defendant BNSF or BNSF) of a duty of care in this case, by creating a categorical exception to the general duty of care of Civil Code section 1714, subdivision (a).[1] (OB, pp. 17-39.) Plaintiffs demonstrated that the factors for determining whether a categorical exception should be created, as identified in *Rowland v. Christian* (1968) 69 Cal.2d 108, do not warrant an exception here. (*Ibid.*) Plaintiffs cited numerous California cases, going back several decades, recognizing that a property owner's duty of care is not limited to persons injured on its premises, but extends to persons injured off the premises by the property owner's negligent use, control or maintenance of its premises. (*Id.* at pp. 39-41.) Plaintiffs also cited several cases from other jurisdictions that follow a *Rowland*-type analysis for determining issues of duty, where a duty of care was recognized under circumstances analogous to this case. (*Id.* at pp. 41-49.) Additionally,

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

Plaintiffs demonstrated that this case is distinguishable from *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 and that, in any event, *Campbell* is incorrect and should be disapproved. (*Id.* at pp. 49-56.)

Not surprisingly, BNSF disagrees. It argues in its answer brief (AB) that the *Rowland* factors support a sweeping "bright-line" categorical duty exception that a defendant who uses asbestos on its premises does not owe a duty of care to a person exposed to and injured by that asbestos, unless the person was employed by the defendant or was exposed while present on the defendant's premises. (AB, pp. 3, 11.) If the person was exposed elsewhere, such as in this case, where Lynne Haver (Ms. Haver) was exposed to asbestos used by BNSF when her husband unknowingly carried the asbestos home from work on his body and clothing, no duty is owed, according to BNSF, because the exposure is purportedly "indirect and attenuated." (*Id.* at pp. 9, 17-23.)

Raising perceived policy issues, BNSF claims there will be "intolerable consequences for businesses, consumers, and the State as a whole" if a duty of care is recognized under the circumstances of this case, because it will "substantially exacerbate the asbestos litigation crisis" and force blameless companies into financial ruin or bankruptcy. (AB, pp. 1-3, 25-37.) BNSF further argues that a categorical duty exception is necessary because take-home asbestos injury claims are "dubious," "questionable," and "tenuous," "predicated on unreliable causation evidence," "shaky

science," and "weak or misleading expert testimony," and are the work of "opportunistic plaintiffs' lawyers." (*Id.* at. pp. 2, 20, 27, 34-35, 45.) Additionally, BNSF argues that recognition of a duty of care would "promote forum shopping," give plaintiffs "an even greater ability to manipulate venue rules," and turn California into an "outlier" and a haven for "out-of state plaintiffs." (*Id.* at pp. 36-37, 45.)

Finally, BNSF argues that if the court "permit[s] some forms of take-home liability claims under some circumstances," it should not do so under a premises liability theory, where the plaintiff "never set foot on the defendant's property," because it "would be an unprecedented and dramatic expansion of the doctrine of premises liability." (AB, pp. 3, 42.)

As discussed below, all of these arguments are meritless. BNSF's assessment of the *Rowland* factors is seriously flawed, contrary to the record, and does not support the sweeping duty exception it seeks. Equally flawed are BNSF's claims that "intolerable consequences" will follow if a duty of care is recognized, that California will become an "outlier" and a magnet for "opportunistic plaintiffs' lawyers," and that a categorical duty exception is necessary because take-home asbestos injury claims are "dubious" and "predicated on unreliable causation evidence." These arguments are nothing but empty rhetoric and have been rejected by courts that have recognized a duty of care in take-home asbestos injury cases. And as to the suggestion that a take-home asbestos injury claim cannot be

based on a premises liability theory, if the plaintiff was not exposed on the defendant's property, as noted above, it is well-settled in California that a property owner's duty of care "encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478-1479.)

Accordingly, the judgment of the Court of Appeal should be reversed because there is no justification for a categorical exception to the general duty of care of section 1714 under the circumstances of this case.

STATEMENT OF THE FACTS

Plaintiffs provide the following factual statement in response to the "counter-statement of facts" in Defendant BNSF's answer brief.

As it did in the Court of Appeal, Defendant BNSF devotes a portion of its brief to the summary judgment motion it filed in Ms. Haver's personal injury action and the appeal after that motion was granted. (AB, pp. 4-5.) As Plaintiffs explained in the Court of Appeal, those matters have no relevance to the demurrer ruling on the duty issue in this appeal in the wrongful death action, nor can they can be considered as part of the review of that ruling because they are extrinsic to the complaint and not subject to judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994; *SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905-

906.) Nevertheless, Plaintiffs respond to clarify the record.

Prior to her death, Ms. Haver filed a personal injury action. (1 Appellants' Appendix [AA] 34-56.) The complaint named multiple defendants, including BNSF. (*Ibid.*) BNSF filed a motion for summary judgment in which it argued, inter alia, that the claims against it were preempted by federal law, specifically the Locomotive Boiler Inspection Act (BIA), because they were premised on Ms. Haver's take-home exposure to asbestos from locomotives on its premises. (*Id.* at pp. 58-73.) The trial court granted the motion and the judgment was affirmed on appeal. (*Id.* at pp. 75-77, 79-84, 135-153; *Haver v. BNSF Railway Company* (Apr. 16, 2010, B215600 [nonpub. opn.]).) The Court of Appeal held that the claims against BNSF, as alleged in the complaint, were based solely on exposures to asbestos from locomotives, that those claims were preempted by the BIA, and that any claims based on exposures to asbestos from non-locomotive sources on BNSF's premises were not alleged in the complaint. (1 AA 136-137, 146-153.) Because its ruling on the preemption issue was dispositive, the court did not address other issues in the appeal, including "the adequacy of [Ms. Haver's] evidentiary showing that the railroad facility contained asbestos." (*Id.* at pp. 152-153.)

Following Ms. Haver's death, Plaintiffs filed the complaint in this action alleging claims for wrongful death against BNSF based on theories of negligence and premises liability. (1 AA 1-18.) BNSF demurred to the

complaint, arguing, inter alia, that Plaintiffs' claims were barred by the doctrine of collateral estoppel (issue preclusion) because Ms. Haver's prior personal injury action was adjudicated in its favor and the judgment was affirmed on appeal. (*Id.* at pp. 19-155.) The trial court agreed and sustained the demurrer without leave to amend. (*Id.* at pp. 189-196.) Plaintiffs appealed from the resulting judgment and the Court of Appeal reversed, holding that Plaintiffs' wrongful death claims, as premised on Ms. Haver's exposure to asbestos from non-locomotive sources on BNSF's premises, were not barred by collateral estoppel based on her earlier personal injury action.[2] (*Id.* at pp. 197-209; 269-278; *Haver v. BNSF Railroad Co.* (May 3, 2012, B229415 [nonpub. opn.]).)

Thereafter, the case was returned to the trial court and BNSF filed the demurrer that is the subject of this appeal, in which it argued that it did owe a duty of care to Ms. Haver. (See OB, pp. 10-13.)

LEGAL DISUCSSION

I. THE *ROWLAND* FACTORS DO NOT JUSTIFY A CATEGORCIAL DUTY EXCEPTION.

As shown by Plaintiffs in their opening brief, based on the general duty of care of section 1714, Defendant BNSF owed a duty to Ms. Haver to protect her from injury from its use of asbestos on its premises. (OB, pp. 14-39.) Plaintiffs provided a detailed analysis of the *Rowland* factors,

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[2] BNSF's petition for review of the court's decision was denied by this court (No. S203226).

demonstrating that there was and is no justification for a categorical duty exception that will relieve BNSF of that duty. (*Id.* at pp. 17-39.)

BNSF disagrees. It argues that "the *Rowland* factors counsel strongly against the creation of a new duty to take-home asbestos plaintiffs" because even if the harm to Ms. Haver was foreseeable, and BNSF claims it was not, "foreseeability provides no workable limiting principle" and "cannot be the determinative factor in this case." (AB, p. 9; see also *id.* at pp. 1-3, 10, 16, 29 [arguing that Plaintiffs are seeking to "create" a "new" duty].) According to BNSF, it is "the third [*Rowland*] factor – the closeness of the connection between the defendant's conduct and the alleged injury – [that] suggests the proper limitation to a defendant's duty" and that precludes a duty of care in take-home asbestos injury cases because the "exposure is indirect and attenuated." (*Id.* at p. 9.) In addition, BNSF argues that "[t]he remaining factors" – the public policy considerations – "also counsel strongly against" a duty of care. (*Id.* at pp. 8-9.) BNSF is wrong.

To begin, as this court has observed, to argue in terms of creating a "new" duty is to "materially misstate[] the issue." (*Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 783.) "The question is not whether a *new duty* should be created, but whether an *exception* to Civil Code section 1714's duty of exercising ordinary care in one's activities ... should be created." (*Ibid*, original italics.) And, as this court has emphasized, "an

exception to the general rule of Civil Code section 1714" is proper "only where 'clearly supported by public policy'" and "only when foreseeability and policy considerations justify a categorical no-duty rule." (*Cabral, supra*, 51 Cal.4th at pp. 771-772, quoting *Rowland, supra*, 69 Cal.2d at p. 112.) Contrary to BNSF's arguments, foreseeability and public policy do not clearly support "a categorical no-duty rule" that will relieve BNSF of a duty of care in this case.

A. Foreseeability And Related Factors.

1. The foreseeability of harm to the plaintiff.

As this court has long recognized, "foreseeability of injury [is] a major factor in determining duty," (*Cabral, supra*, 51 Cal.4th at p. 771, fn. 2), and is "'[t]he most important of these [*Rowland*] considerations in establishing duty.'" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237, fn. 15, quoting *Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 434; accord, *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1189; *Randi W. v. Murdoc Joint Unif. Sch. Dist.* (1997) 14 Cal.4th 1066, 1077; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.) Like all the *Rowland* factors, foreseeability of harm is "evaluated at a relatively broad level of factual generality." (*Cabral, supra*, 51 Cal.4th at p. 772.) The question is not "'whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, 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 appropriately be imposed ....'" (*Ibid*, quoting *Ballard*, *supra*, 41 Cal. 3d at p. 572, fn. 6; see also *id.* at pp. 775-776 [discussing "the generalized sense of foreseeability pertinent to the duty question"]; accord, *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58.)

Thus, in *Cabral*, the issue was not whether the particular motor vehicle collision in that case was foreseeable, but rather, more generally, whether it was foreseeable that "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." (*Cabral*, *supra*, 51 Cal.4th at p. 775.) As this court found, such an injury "is clearly foreseeable." (*Ibid.*)

The same is true here. The inquiry is not whether Ms. Haver's particular injury was foreseeable in light of Defendant BNSF's particular conduct. Rather, it is whether it was generally foreseeable at the time of the events in this case (the early-to-mid 1970s) that an employee exposed to asbestos from his employer's use of asbestos-containing products could carry asbestos fibers home on his body and work clothing, where a household member, such as a spouse, could be exposed to those fibers, resulting in injury to that person. As shown by Plaintiffs in their opening brief, based on the existing and proposed allegations, that risk of harm was certainly foreseeable, indeed, even highly foreseeable. (OB, pp. 17-21.)

BNSF believes otherwise. It argues that "Plaintiffs have failed to

show that any harm to Ms. Haver was foreseeable in the period from 1972 to 1974" and that the allegations, including the proposed allegations, do not "establish that harm from take-home asbestos exposure was a foreseeable risk for a railroad in the early 1970s." (AB, pp. 12-14.) Indeed, according to BNSF, Plaintiffs' proposed allegations are nothing but "a hodgepodge" and a "patchwork of conclusory allegations." (*Id.* at pp. 13-14.) These arguments are baseless.

First, the question is not whether "harm from take-home asbestos exposure was a foreseeable risk for *a railroad* in the early 1970s." (AB, p. 14, italics added.) As noted above, the foreseeability inquiry does not focus on a particular defendant or type of defendant. Rather, it is a more general inquiry that looks at foreseeability at a "broad level of factual generality." (*Cabral, supra*, 51 Cal.4th at pp. 772, 775-776.)

Second, BNSF ignores the content and effect of Plaintiffs' proposed allegations. Those allegations establish that: (1) "Defendant BNSF's predecessor, The Atchison, Topeka and Santa Fe Railway Company, who employed Ms. Haver's former husband, Mike Haver, from July 1972 until 1974, had actual knowledge that exposure to asbestos could cause fatal lung disease in human beings no later than 1937"; (2) the risk of exposure to asbestos carried home on the clothing of workers was known or knowable as early as the 1930s and was well established by the early-to-mid 1970s, when the exposures in this case took place; (3) as early as the 1930s and

1940s, government and private organizations recognized the need for changing rooms, showers and isolation of dusty clothes to prevent workers from taking home toxic dust; (4) by the time of the exposures in this case (July 1972 to 1974), the scientific and medical literature had specifically demonstrated that take-home asbestos exposures could cause mesothelioma; and (5) employers were required, pursuant to federal OSHA asbestos regulations enacted in 1972, to use warnings, protective equipment and other methods to protect against exposure to asbestos. (2 AA 256-259.)

Indeed, with respect to the last point, in June 1972, the month *before* Mr. Haver began working for BNSF, OSHA adopted regulations aimed specifically at the problem of employees transporting asbestos from the workplace into the family home on their bodies and clothing. Among other things, these regulations required employers to (1) "provide, and require the use of special clothing, such as coveralls or similar whole body clothing, head coverings, gloves, and foot coverings," by employees exposed to asbestos; (2) provide employees exposed to asbestos with changing rooms and separate lockers for their street and work clothes, "to prevent contamination of the employee's street clothes from his work clothes"; and (3) provide for the laundering of asbestos-contaminated clothing in a safe manner. (37 Fed.Reg. 11321 (June 7, 1972); 29 C.F.R. § 1910.1001(h).)[3]

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[3] These OSHA regulations may properly be considered in the foreseeability analysis in this case. A request for judicial notice is

Accordingly, contrary to BNSF's arguments, Plaintiffs' proposed allegations are more than sufficient to establish the "general foreseeability" contemplated under the *Rowland* analysis. (*Cabral, supra*, 51 Cal.4th at pp. 772, 775-776.) Indeed, as Plaintiffs contend, they are sufficient to demonstrate a heightened level of foreseeability of the risk of injury from take-home asbestos exposures. BNSF cannot argue otherwise by falsely claiming that the proposed allegations are "a hodgepodge" or a "patchwork of conclusory allegations." (AB, pp. 13-14.) The proposed allegations are set forth in 18 paragraphs, they are heavily detailed and factual in nature, and BNSF cannot simply dismiss them on the false assertion that they are "conclusory."[4] (2 AA 256-259.)

Moreover, as this appeal arises from a general demurrer sustained without leave to amend, the factual allegations of the complaint must be accepted as true and cannot be disregarded or contradicted by BNSF. (*Alcorn v. Anbro Eng'g, Inc.* (1970) 2 Cal.3d 493, 496; *Sisemore v. Master Fin., Inc.* (2007) 151 Cal.App.4th 1386, 1397; *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal.App.4th 1137, 1144.) This well-settled rule extends with equal force to the proposed allegations. The fact that those

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"unnecessary." (*Cabral, supra*, 51 Cal.4th at p. 775, fn. 5.)

[4] Because of their length, Plaintiffs did not fully quote the proposed allegations in their opening brief. Rather, they summarized the allegations and cited to the portion of the record – Plaintiffs' demurrer opposition – where they could be viewed "in detail." (OB, p. 9, citing 2 AA 256-258.)

allegations were set forth in Plaintiffs' demurrer opposition does not preclude their consideration or diminish their significance, as leave to amend must be granted, after the sustaining of a demurrer, if there is a reasonable possibility the plaintiff can amend the complaint to state a cause of action. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Indeed, new allegations to cure a pleading defect can be proposed for the first time on appeal. (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 226; *Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 796.)

As a secondary argument, BNSF argues that even if the risk of harm from take-home asbestos exposures was foreseeable, this factor alone "cannot be determinative" of the duty question in this case because foreseeability, on its own, does not support the "'bright-line'" rule that is necessary for "delimiting the scope of a defendant's duty." (AB, pp. 14-16; see also *id.* at pp. 10-12.) BNSF claims that if foreseeability alone is sufficient to support a duty of care, there will be no limit to a defendant's duty in take-home asbestos injury cases. (*Id.* at pp. 15-16.)

This is a "straw man" argument, as Plaintiffs do not argue or suggest that foreseeability *alone* is sufficient to support a duty of care. Indeed, Plaintiffs agree that while foreseeability is necessary for a duty of care, it is not "synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.) Rather, as discussed in Plaintiffs' opening

brief, (OB, pp. 14-17, 38-39), whether a duty of care is owed or, more precisely, whether a categorical exception to the general duty of care of section 1714 should be created, is dependent upon an evaluation of "foreseeability and policy considerations" under the *Rowland* factors, (*Cabral*, *supra*, 51 Cal.4th at pp. 771-772), and those considerations do not support a categorical no-duty rule here. However, as made clear by this court on numerous occasions, foreseeability is "a major factor" in the analysis, (*id.* at p. 771, fn. 2), and is "'[t]he most important of these considerations in establishing duty.'" (*Delgado*, *supra*, 36 Cal.4th at p. 237, fn. 15, quoting *Tarasoff*, *supra*, 17 Cal.3d at p. 434; accord, *John B.*, *supra*, 38 Cal.4th at pp. 1189, 1192; *Randi W.*, *supra*, 14 Cal.4th at p. 1077; *Ballard*, *supra*, 41 Cal.3d at p. 572, fn. 6.)[5]

Accordingly, the foreseeability of harm factor weights against a categorical duty exception.

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

As shown by Plaintiffs in their opening brief, (OB, p. 21), "[t]he degree of certainty that the plaintiff suffered injury" is satisfied because there is no doubt that Ms. Haver was injured, as she contracted and died

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[5] BNSF's argument that a "bright line" no-duty rule is necessary in take-home asbestos injury cases, in order to "delimit[] the scope of a defendant's duty," is actually a policy argument, (AB, pp. 14-16; see also *id.* at pp. 10-12), which Plaintiffs address in their discussion of the *Rowland* public policy factors. (*Post*, pp. 30-32.)

from mesothelioma. (*Cabral, supra*, 51 Cal.4th at p. 781, fn. 9 [certainty-of-injury factor was satisfied because "Adelelmo Cabral was killed in the accident"].) Nor is there any question that Plaintiffs "undisputedly ha[ve] a remedy in wrongful death if [Ms. Haver's] death was negligently caused." (*Ibid*; Code Civ. Proc., § 377.60.)

Defendant BNSF does not dispute that Ms. Haver suffered injury or that Plaintiffs have a wrongful death remedy. Indeed, BNSF does not even address this factor in its answer brief. (See AB, pp. 8-41.) Accordingly, the certainty-of-injury factor weighs against a categorical duty exception.

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

Defendant BNSF argues that this factor – "the closeness of the connection between the defendant's conduct and the injury suffered" – is dispositive of the duty question in this case because it purportedly "suggests the proper limitation to a defendant's duty." (AB, pp. 9, 17.) According to BNSF, no duty of care is owed to a person exposed to and injured by asbestos emanating from a defendant's premises, unless the person was exposed to that asbestos while physically present on the premises or was otherwise "directly" exposed by the defendant. (*Id.* at pp. 9, 17-20.) If the exposure occurred off the defendant's premises or the person was not "directly" exposed by the defendant, there can be no duty of care, BNSF argues, because the exposure is purportedly "indirect and

attenuated." (*Ibid.*)

Having set up its duty/no-duty paradigm, BNSF argues that "Plaintiffs' contention that 'Ms. Haver's disease and death ... were direct results of BNSF's negligent use of asbestos' is manifestly false" because there is no "allegation that Ms. Haver ever set foot on BNSF's property," that she "was exposed to any asbestos-containing product manufactured or controlled by BNSF," or that she "was in any other way exposed to asbestos directly from BNSF." (AB, p. 17, italics omitted.) According to BNSF, because Ms. Haver was exposed to asbestos from its premises through contact with her husband, who was himself exposed on the premises in the course of his employment with BNSF, her exposure was "secondary, rather than primary," and "involves an attenuated chain of events" that "relies on the intervening acts of a defendant's employee to transmit the alleged asbestos risk to the plaintiff." (*Id.* at pp. 17-18, italics omitted.) This "causal chain," BNSF argues, does not support a duty of care under "the closeness-of-connection factor" because "BNSF had no direct connection whatsoever to Ms. Haver" and because, "without the intervening conduct of a third person acting outside BNSF's control, there is no way that Ms. Haver could have been exposed to asbestos that originated on BNSF's property." (*Id.* at pp. 18-20.) This argument fails for several reasons.

First, BNSF's contention that this factor weighs against a duty of

care because Ms. Haver did not "set foot on BNSF's property," or because she "had no direct connection" to BNSF, (AB, pp. 17, 19-20), misses the mark. The "connection" factor does not inquire if there was a pre-existing connection or relationship between the parties. Rather, it looks for "a connection between the defendant's *conduct* and the *injury* suffered" and "the closeness" of that connection. (*Cabral*, *supra*, 51 Cal.4th at pp. 771, 779, italics added; *Rowland*, *supra*, 69 Cal.2d at pp. 112-113.) Moreover, as discussed below, the fact that an injury occurs off the defendant's premises does not preclude a duty of care or a claim for premises liability. (*Post*, pp.48-53.)

Second, BNSF's contention that the connection between its conduct – its negligent use of asbestos – and Ms. Haver's injury is "indirect" and "attenuated" because she was exposed to the asbestos it used through "the intervening conduct of a third person acting outside of BNSF's control" is baseless. (AB, pp. 17-20.) The "third person" to whom BNSF refers was not some stranger or an unforeseeable actor. It was Mike Haver, Ms. Haver's husband, who was employed and exposed to asbestos by BNSF in its workplace. Nor was the "intervening conduct" here some unforeseeable or negligent act. Rather, it consisted simply of Mr. Haver going home after work, where Ms. Haver was exposed to the same asbestos to which he was exposed by BNSF. Most outlandish, however, is BNSF's claim that it had no control over Ms. Haver's exposure. BNSF clearly had control over the

asbestos-containing products it used in its workplace, including how those products were used. It had control over whether it utilized protective measures to prevent or minimize the risk of exposure to its employees who worked with or around asbestos, and it certainly had control over whether its employees who were exposed to asbestos were permitted to leave work and go home while still wearing their asbestos-contaminated clothing or without first showering or doing something to remove the asbestos from their bodies and clothing. In short, BNSF had full control over the creation of the asbestos hazard on its premises and whether that hazard was carried home by unknowing employees, where their family members could be exposed and injured.

Contrary to what BSNF would have this court believe, this case does not involve an injury caused by an intervening or negligent act of a third party. Mr. Haver did nothing to increase the risk of harm created by BNSF. He simply went to work, where he was exposed to asbestos by BNSF, and then went home, where his wife was exposed to the same asbestos. The asbestos did not change or become more hazardous when he left the workplace; it was the same asbestos and presented the same hazard. (Cf. *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 660 [asbestos fibers do not change]; *Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1187-1190 [same]; *Jenkins v. T & N PLC* (1996) 45 Cal.App.4th 1224, 1228-1229 [same].)

Third, BNSF cites three cases in support of its "intervening conduct" argument, none of which is apposite. (AB, pp. 18-19.) In *Richards v. Stanley* (1954) 43 Cal.2d 60, the defendant left the ignition key to her parked car in the car's lock. A thief stole the car and negligently collided with a motorcycle operated by the plaintiff. (*Id.* at pp. 61-62.) The court held that the defendant did not owe a duty of care to the plaintiff because she had "no duty to protect plaintiff from harm resulting from the activities of third persons" and no "duty to protect plaintiff from the negligent driving of a thief." (*Id.* at pp. 65-66.)

In *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, the defendant was arrested for drunken driving. The tow truck driver summoned by police to remove the defendant's vehicle was struck and killed by another motorist. (*Id.* at p. 774.) The court recognized that the defendant "owed a duty to decedent not to drive under the influence of alcohol" and was negligent for doing so. (*Id.* at p. 779.) However, the connection between that negligence (driving while intoxicated) and the injury suffered was too attenuated to support an actionable duty of care because "there is no logical cause and effect relationship between that negligence and the harm suffered by decedent except for the fact that it placed decedent in a position to be acted upon by the negligent third party." (*Id.* at p. 782.) Accordingly, the court held that the defendant did not have a "duty to protect decedent from the possibility of injury resulting from the negligence of another driver."

(*Id.* at p. 783.)

In *Cabral*, this court discussed and distinguished both *Richards* and *Bryant* because, in contrast to those cases, "no third party negligence intervened between the Ralphs driver's negligent conduct and Adelelmo Cabral's injury." (*Cabral*, *supra*, 51 Cal.4th at pp. 778-780.) As the court explained, "Ralphs did not merely 'place[ ] decedent in a position to be acted upon by [a] negligent third party' [citation]." (*Id.* at p. 780.) Rather, by "stopping his tractor-trailer alongside an interstate highway for a nonemergency reason," the Ralphs driver "directly created the risk of a collision for any vehicle leaving the freeway at that point, the same risk that eventuated and resulted in Cabral's death." (*Ibid.*)

The same is true here. "[N]o third party negligence intervened between" BNSF's negligent use of asbestos, whereby its employee, Mr. Haver, was exposed to and allowed to leave work contaminated with asbestos, and Ms. Haver's exposure to and injury from that same asbestos, when she was exposed to it when her husband came home from work. In contrast to *Richards* and *Bryant*, BNSF did not simply create the possibility that Ms. Haver could be injured by the negligent conduct of a third party. Rather, as in *Cabral*, BNSF "directly created the risk of" harm "that eventuated and resulted in [Ms. Haver's] death" through its own negligence. (*Cabral*, *supra*, 51 Cal.4th at p. 780.) The fact that Mr. Haver was an unknowing conduit for the asbestos exposure does not change this

conclusion. An employee going home to his family after work, after being exposed to asbestos by his employer, and without any knowledge of the toxic hazard on his body and clothing, can hardly be described as intervening third-party negligent conduct and is no way comparable to the third-party negligence in *Richards* and *Bryant*.

The third case cited by BNSF, *Hoff v. Vacaville Unified Sch. Dist.* (1998) 19 Cal.4th 925, is inapposite for the same reasons. In *Hoff*, a non-student pedestrian was struck and injured by a vehicle driven by a student after the student exited a school parking lot. (*Id.* at pp. 930-931, 937.) This court held that the school district did not owe a duty of care to the pedestrian to control or supervise the student, unless school personnel knew or should have known the student had "a tendency to drive recklessly." (*Id.* at pp. 933-937.) Thus, as in *Richards* and *Bryant*, the defendant in *Hoff* did not create the risk of injury to the plaintiff and had no duty to protect the plaintiff from the negligent conduct of a third party. (*Id.* at p. 937.) Here, in contrast, BNSF's negligent use of asbestos directly created the risk of injury to Ms. Haver from exposure to that asbestos when it was unknowingly carried home by her husband.

To diminish the close connection between its negligent conduct and Ms. Haver's injury, BNSF argues that "mesothelioma can develop even without any exposure to asbestos." (AB, pp. 20-21, italics omitted.) The intended implication of this statement – that asbestos exposure is only one

of several causes and is not the near exclusive cause of mesothelioma – is false. As this court has recognized, there is "a strong linkage between mesothelioma and exposure to asbestos fibers." (*Hamilton v. Asbestos Corp., Ltd.* (2001) 22 Cal.4th 1127, 1135.) Other courts have observed that "mesothelioma is a signature asbestos disease that can be contracted from low doses of asbestos exposure," (*Holcomb v. Georgia-Pacific, LLC* (Nev. 2012) 289 P.3d 188, 196 & fn. 9), that the "[t]he causal link between asbestos exposure and mesothelioma contraction" has been recognized as "a universal causal relationship," (*Zimko v. American Cyanamid* (La. Ct. App. 2005) 905 So.2d 465, 484, fn. 21), and that "mesothelioma ... is closely associated with exposure to asbestos." (*Satterfield v. Breeding Insulation Co.* (Tenn. 2008) 266 S.W.3d 347, 370.)

Next, BNSF argues that "even if Ms. Haver's illness was asbestos-related, there is no reason to assume her mesothelioma was caused by BNSF." (AB, p. 21, italics omitted.) There certainly is a reason to make that assumption: the complaint alleges that her mesothelioma and death were caused by BNSF. (1 AA 5-10, 13, 17-18 [¶¶ 10-13, 22-24, 26-34, 44 and Exs. A and B]; typed maj. opn. at pp. 2-3.) As discussed above, because this appeal arises from a general demurrer, the factual allegations of the complaint are assumed and must be accepted as true. (*Alcorn, supra*, 2 Cal.3d at p. 496; *Sisemore, supra*, 151 Cal. App.4th at p. 1397.)

BNSF also argues that Plaintiffs, in their complaint, "have identified

other potential sources of asbestos that may have caused [Ms. Haver's] illness" and that this "casts further doubt on whether any 'connection' exists between her injuries and BNSF's conduct." (AB, p. 21.) Again, this argument impermissibly ignores the allegations of the complaint that Ms. Haver's mesothelioma was caused by BNSF's negligence. In addition, it ignores this court's statements in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, that a plaintiff is an asbestos injury case is "free to ... establish that his particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' [citation] that contributed to his risk of injury," and that "a defendant cannot escape *liability* simply because it cannot be determined with medical exactitude the precise contribution that exposure to fibers from defendant's products [or activities] made to plaintiff's ultimate contraction of asbestos-related disease." (*Id.* at p. 958; accord, *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 976; *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1417.)

In *Cabral*, this court stated that "the question of 'the closeness of the connection between the defendant's conduct and the injury suffered' [citation] is strongly related to the question of foreseeability itself." (*Cabral, supra*, 51 Cal.4th at p. 779.) If "the injury suffered is connected only distantly and indirectly to the defendant's negligent act, the risk of that type of injury from the category of negligent conduct at issue is likely to be

deemed unforeseeable. Conversely, a closely connected type of injury is likely to be deemed foreseeable." (*Ibid.*) Contrary to BNSF's suggestion, Ms. Haver's disease and death were not "connected only distantly and indirectly to" its negligent use of asbestos, but rather were direct results of that negligence. BNSF's negligence directly resulted in Mr. Haver's exposure to asbestos, which he foreseeably carried home on his body and clothing and which foreseeably and directly resulted in Ms. Haver's exposure Accordingly, there was a direct and close connection between BNSF's negligent conduct and Ms. Haver's injury, which weighs against a categorical duty exception.

B. Public Policy Factors.

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

Defendant BNSF argues that the "moral blame" factor is not satisfied because a defendant's "mere negligence" is not "sufficient ... to support imposition of a tort duty." (AB, p. 23.) Citing *Campbell*, BNSF argues that "'a higher degree of moral culpability'" is required, but is not present here. (*Id.*, pp. 24-25, citing *Campbell*, *supra*, 32 Cal.App.4th at p. 32.)[6]

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[6] In its answer brief, BNSF states that "the Court in *Rowland*" stated that "'the moral blame that attends ordinary negligence is generally not sufficient to tip the balance ... in favor of liability.'" (AB, p. 24.) The *Rowland* court did *not* make that statement. That statement is from *Campbell*, quoting another case, as BNSF notes in the supporting

Before addressing this argument, Plaintiffs note that BNSF asserts, "[a]s an initial matter," that it "disputes Plaintiffs' allegations of negligence." (AB, p. 24.) This is irrelevant, given the nature of the proceeding from which this appeal arises. Again, because this appeal arises from a general demurrer, the factual allegations of the complaint must be accepted as true. (*Alcorn*, *supra*, 2 Cal.3d at p. 496; *Sisemore*, *supra*, 151 Cal.App.4th at p. 1397.)

Turning to the substance of BNSF's argument, Plaintiffs cited several cases in their opening brief holding that in the context of the *Rowland* analysis, moral blame attaches to negligent conduct that causes injury, even if only ordinary negligence is involved. (OB, pp. 30-31 [citing *Pedeferri v. Seidner Enters.* (2013) 216 Cal.App.4th 359, 366; *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 823; *Ludwig v. City of San Diego* (1998) 65 Cal.App.4th 1105, 1113; *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal. App. 4th 1830, 1844].) BNSF does not address any of these cases in its moral blame discussion. (AB, pp. 23-25.)

Moreover, even if, as BNSF argues, "a higher degree of moral culpability" is required to establish moral blame in a case involving ordinary negligence, "such as where the defendant ... had actual or constructive knowledge of the harmful consequences of [its] behavior,"

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parenthetical citation. (*Ibid*, citing *Campbell*, *supra*, 206 Cal.App.4th at p. 32.)

(*Campbell*, supra, 206 Cal.App.4th at p. 32; AB, pp. 24-25), the proposed allegations satisfy this heightened standard because they demonstrate that BNSF had actual or constructive knowledge of the health hazards posed by exposure to asbestos, including the hazards of take-home exposures, at the time of the events in this case. (2 AA 256-259.) Indeed, the Court of Appeal found that the allegations were sufficient to establish that "BNSF knew at all times of the danger of asbestos exposure, including secondary exposure to the spouses of its employees, but failed to abate the dangerous conditions on its premises or warn Lynn of their existence." (Typed maj. opn. at p. 3.)

BNSF disagrees. It claims that the proposed allegations "are not remotely sufficient to establish that BNSF had 'actual or constructive knowledge' of the harm it allegedly caused take-home asbestos victims like Mr. Haver" and that "the only document Plaintiffs reference that could possibly have led to constructive knowledge of the alleged risk is a report published by the National Institute for Occupational Safety and Heath [NIOSH] in 1995, more than 20 years after Mr. Haver stopped working for BNSF." (AB, p. 25, italics omitted.) This argument simply ignores the proposed allegations, which demonstrate that BNSF "had actual knowledge that exposure to asbestos could cause fatal lung disease in human beings no later than 1937" and that the risk of exposure to asbestos carried home on the clothing of workers was known or knowable as early as the 1930s and

was well established by the early-to-mid 1970s, when the exposures in this case took place. (2 AA 256-258.) Consistent with this longstanding knowledge, NIOSH, in its 1995 Report to Congress on Worker's Home Contamination Study, concluded that "families of asbestos-exposed workers have been at increased risk of pleural, pericardial, or peritoneal mesothelioma." (*Id.* at p. 256.)

Additionally, as discussed above, in June 1972, the month *before* Mr. Haver began working for BNSF, OSHA adopted regulations designed to prevent the transmission of asbestos from the workplace into the homes of employees. These regulations required employers to (1) provide employees exposed to asbestos with, and require them to use, protective clothing and gear, (2) provide employees exposed to asbestos with changing rooms and separate lockers for their street and work clothes, so that their work clothes would not contaminate their street clothes with asbestos, and (3) provide for the laundering of asbestos-contaminated clothing in a safe manner. (37 Fed.Reg. 11321 (June 7, 1972); 29 C.F.R. § 1910.1001(h).)

Accordingly, whether the moral blame attendant to ordinary negligence is sufficient or a heightened level of moral culpability is required, the allegations are sufficient to establish moral blame on the part of BNSF. This factor, therefore, weighs against a categorical duty exception.

2. The policy of preventing future harm.

As discussed in Plaintiffs' opening brief, in *Cabral*, this court explained that "[t]he overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Cabral*, *supra*, 51 Cal.4th at p. 781.) Here, Defendant BNSF was responsible for Ms. Haver's mesothelioma and death, as she was exposed to asbestos as a direct result of its negligent use of asbestos. It should therefore bear the costs of its negligence, consistent with "[t]he overall policy of preventing future harm." (*Ibid.*)

BNSF dismisses the assessment of this factor in *Cabral* because "[e]mployers have already virtually eliminated the use of asbestos in the United States" and because "[e]xtensive federal and state regulatory regimes mandate safe handling of potential carcinogens in the workplace." (AB, pp. 37-40.) However, the fact that asbestos use in this country is comparatively low today, compared to decades ago, and is subject to government regulation does not mean that a defendant should be relieved of responsibility, as a matter of law, for injuries caused by its negligent past use of asbestos. Nor does it mean that the imposition of duty a care in take-home asbestos injury cases will not advance the policy of preventing future harm. After all, asbestos is not the only toxin or hazardous substance used by employers, and it takes little imagination to see how recognition of a duty could encourage employers to improve workplace safety and utilize

safe work practices, thereby preventing harm to others in the future.

BNSF also suggests that this factor is not satisfied because "Ms. Haver's illness ... was allegedly caused by events that took place more than 40 years ago." (AB, p. 39.) This circumstance does not support a categorical duty exception, as "mesothelioma ... has an average latency period of 30 to 40 years." (*Hamilton*, *supra*, 22 Cal.4th at p. 1136.) Simply because a defendant's negligent conduct occurred years earlier does not mean it should be allowed to avoid responsibility for the resulting injury, where that injury takes decades to develop. Nor does it mean that "the policy of preventing future harm" will not be advanced if a duty of care as to that injury is recognized.

Accordingly, the prevention of future harm factor weighs against a categorical duty exception.

3. The extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach.

As discussed by Plaintiffs in their opening brief, "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," (*Cabral*, *supra*, 51 Cal.4th at p. 771; *Rowland*, *supra*, 69 Cal.2d at pp. 112-113), do not outweigh the other factors in the *Rowland* analysis or otherwise justify a categorical no-duty rule under the circumstances of this case. (OB, pp. 26-36.) Defendant BNSF disagrees. It argues that if a duty of care is

recognized, "the burden on defendants and society at large ... would be intolerable" because it "would significantly expand the universe of plaintiffs" and "dramatically expand the number of defendants each existing asbestos plaintiff could sue." (AB, pp. 25-27, 32, italics omitted; see also *id.* at pp. 2-3.) These arguments have no factual or legal support and do not warrant the sweeping duty exception BNSF seeks.

a. The pool of potential plaintiffs in take-home asbestos injury cases is limited and small.

As noted by Plaintiffs in their discussion of foreseeability, Defendant BNSF argues that a "bright-line" no-duty rule is required in take-home asbestos injury cases to "delimit[] the scope of a defendant's duty." (AB, pp. 10-12, 14-16.) In line with this argument is BNSF's claim that recognition of a duty of care will create an "intolerable" burden by "significantly expanding the universe of plaintiffs" and causing a "corresponding increase in the volume of asbestos litigation." (*Id.* at pp. 2, 25-27.) Both arguments are meritless.

In support of its "bright-line" no-duty argument, BNSF cites *Elden v. Sheldon* (1988) 46 Cal.3d 267 for the proposition that there is a "'need to draw a bright line'" when determining the scope of a defendant's duty. (AB, pp. 10, 16, quoting *Elden*, *supra*, 46 Cal.3d at p. 277; see also *id.* at pp. 11, 15, 20.) Plaintiffs discussed *Elden* in their opening brief, along with *Thing v. LaChusa* (1989) 48 Cal.3d 644 and *Bily v. Arthur Young & Co.*

(1992) 3 Cal.4th 370. (OB, pp. 27-31.) In all three cases, this court declined to recognize a duty of care or permit liability, despite the presence of foreseeability, because the injuries there were intangible and derivative and it was necessary to limit the scope of a defendant's liability for those types of injuries to prevent liability out-of-proportion to fault.

In *Elden*, the court held that while an immediate family member of an injured person can recover for negligent infliction of emotional distress caused by witnessing the injury, an unmarried cohabitant cannot so recover. (*Elden, supra*, 46 Cal.3d at pp. 276-277.) The court explained that "[t]he need to draw a bright line *in this area of the law* is essential" because it would be an "unreasonable extension of the scope of liability of a negligent actor" to allow recovery of emotional distress by a person outside "the immediate family of the injured person." (*Id.* at p. 277, italics added.)

In *Thing*, the court held that the mother of an accident victim could not recover for emotional distress because she did not witness the accident. (*Thing, supra*, 48 Cal.3d at p. 669.) Although the mother's emotional distress was foreseeable, the court stated that "reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for *an intangible injury*," and that "to avoid limitless liability out of all proportion to the degree of a defendant's negligence, ... the right to recover for negligently caused emotional distress must be limited." (*Id.* at pp. 663-664, italics added.)

In *Bily*, the court did not allow third-party investors in a corporation to maintain a negligence claim against an accounting firm hired by the corporation because "[a]n award of damages for pure economic loss suffered by third parties raises the spectre of vast numbers of suits and limitless financial exposure" out of proportion to an auditor's fault. (*Bily*, *supra*, 3 Cal.4th at pp. 398, 400.)

As explained by Plaintiffs in their opening brief, these cases demonstrate that the court has acted to limit a defendant's liability by restricting "[t]he class of potential plaintiffs," (*Thing*, *supra*, 48 Cal.3d at p. 667), despite foreseeability, only when there is potential for significant or disproportionate liability for intangible injuries suffered by a large or unlimited pool of plaintiffs. (OB, pp. 27-31.) These concerns are not implicated in this case because, unlike the intangible injuries in *Elden* (emotional distress), *Thing* (emotional distress) and *Bily* ("pure economic loss"), the injury here – mesothelioma – is physical, tangible and "inevitably fatal." (*Hamilton v. Asbestos Corp., Ltd., supra*, 22 Cal.4th at pp. 1135-1136; see also *Buttram v. Owens-Corning Fiberglas Corp.* (1996) 16 Cal.4th 520, 529.) Moreover, as shown by Plaintiffs in their opening brief, the pool of potential take-home asbestos injury plaintiffs is limited and small. On average, there are about 264 mesotheliomas in California each year, of which approximately 7 percent, or 16, are attributable to take-home asbestos exposures. (OB, pp. 30-31.) BNSF takes issue with these

estimates, calling them "extremely misleading." (AB, p. 29.) Not so.

To begin, BNSF complains that Plaintiffs do not "explain why they have limited their analysis to 'very rare' mesothelioma, rather than other, much more common illnesses that often give rise to asbestos-related claims (such as lung cancer and pneumoconiosis)." (AB, p. 29.) This argument ignores that, with relatively few exceptions, the injury caused by take-home asbestos exposures is mesothelioma, not one of the other asbestos-related illnesses, because take-home exposures are typically lower dose[7] and mesothelioma, unlike other asbestos-related illnesses, is caused by low dose asbestos exposures. (*Hamilton*, *supra*, 22 Cal.4th at p. 1136 ["it takes far less asbestos exposure to cause mesothelioma than to cause asbestosis"]; *Holcomb v. Georgia-Pacific, LLC*, *supra*, 289 P.3d at p. 196 & n.9 ["unlike asbestosis, mesothelioma can result from low doses of asbestos"; "mesothelioma is a signature asbestos disease that can be contracted from

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[7] BNSF does not disagree. In its answer to Plaintiffs' petition review, BNSF stated that "'take-home' asbestos claims involve lower levels of exposure than direct exposure claims." (Answer to Pet. for Review, p. 14.)

The Association of Defense Counsel of Northern California and Nevada and the Association of Southern California Defense Counsel (collectively, Defendant Counsel Associations) also agree. In a joint amicus curiae brief filed in *Kesner v. Superior Court*, while that case was pending in the Court of Appeal, Defense Counsel Associations made the point that a take-home asbestos victim is exposed to only a "small fraction" of the asbestos to which the exposed worker is exposed. (Amicus Curiae Brief in Support of Real Party in Interest and Defendant Pneumo-Abex, LLC [Amicus Curiae Brief], *Kesner v. Superior Court*, A136416, Nov. 15, 2012, p. 14; 2012 WL 5949131, p. *14.)

low doses of asbestos exposure."]; *Zimko v. American Cyanamid*, *supra*, 905 So.2d at p. 484, fn. 21.) That the vast majority of take-home asbestos injuries involve mesothelioma, rather than other asbestos-related illnesses, is demonstrated by the take-home cases cited in the parties' briefs, in almost all of which the injury was mesothelioma, just as it is in this case and in *Kesner*. (*Campbell*, *supra*, 206 Cal.App.4th at pp. 19-20; *Bobo v. Tennessee Valley Authority* (N.D. Ala., Aug. 25, 2014, No. CV 12-S-1930-NE) Memorandum Opinion and Order, pp. 6-7; *Simpkins v. CSX Corp.* (Ill. App. Ct. 2010) 401 Ill.App.3d 1109, 111 [929 N.E.2d 1257, 1258-1259]; *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 691-692; *Chaisson v. Avondale Indus., Inc.* (La. Ct. App. 2006) 947 So.2d 171, 176-177; *Zimko*, *supra*, 905 So.2d at p. 470; *Georgia-Pacific, LLC v. Farrar* (Md. 2013) 432 Md. 523, 525 [69 A.3d 1028, 1030]; *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas* (Mich. 2007) 479 Mich. 498, 501, 503-504 [740 N.W.2d 206, 209-210]; *Olivo v. Owens-Illinois, Inc.* (N.J. 2006) 186 N.J. 394, 399-400 [895 A.2d 1143, 1146]; *Matter of New York City Asbestos Litig.* (N.Y. 2005) 5 N.Y.3d 486, 490 [840 N.E.2d 115, 117]; *Satterfield v. Breeding Insulation Co.*, *supra*, 266 S.W.3d at pp. 351-353; *Rochon v. Saberhagen Holdings, Inc.* (Wash. Ct. App. 2007) 2007 WL 2325214, p. *1.)[8] Accordingly, Plaintiffs' focus on

[8] Pursuant to California Rules of Court, rule 8.1115(c), copies of the opinions in *Bobo* and *Rochon* were attached to Plaintiffs' opening brief

mesothelioma, as opposed to other asbestos-related illnesses, for identifying the limited pool of potential plaintiffs in take-home asbestos injury cases is sound and proper.

Next, BNSF argues that Plaintiffs' estimate that approximately 7 percent of mesotheliomas are attributable to take-home asbestos exposures is "flawed" because it is based on a NIOSH report "that of 541 mesothelioma deaths in 1999, 37, or 6.8 percent, involved victims with identified occupations of 'housewife' or 'homemaker.'" (AB, p. 30; OB, p. 31, fn. 5.) BNSF complains that "Plaintiffs do not say why 'housewives' and 'homemakers' should be the only ones permitted to bring claims for secondary exposure to asbestos" and that this "restriction is vastly under-inclusive." (AB, p. 30.) This is a "straw man" argument. Plaintiffs have *never* argued that only "'housewives'" and "'homemakers'" should be allowed to bring claims for take-home asbestos injuries. The NIOSH report, which supplies an occupational breakdown of mesothelioma deaths, provides a reliable basis upon which to approximate the percentage of mesothelioma cases attributable to take-home asbestos exposures because one can reasonably conclude that individuals identifying their occupations as "housewife" and "homemaker" were exposed to asbestos in the home, as opposed to an industrial or work environment. (OB, pp. 30-31 & fn. 5.) BNSF does not to point to any data or information showing that Plaintiffs'

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under Tabs 1 and 2, respectively.

estimate of 7 percent is wrong or too low, and even if the percentage is higher, say 10 or even 15 percent, the number of take-home mesotheliomas would still be a small subset of an already "very rare cancer." (*Hamilton*, *supra*, 22 Cal. 4th at pp. 1135-1136.)

As seen, BNSF argues that recognition of a duty of care will "significantly increase the number of potential asbestos plaintiffs," with "a corresponding increase in the volume of asbestos litigation." (AB, p. 2; see also *id.* at pp. 26-27.) Interestingly, in their amicus curiae brief filed in *Kesner*, while that case was pending in the Court of Appeal, Defense Counsel Associations claimed that the "odds" of developing an asbestos-related disease are "vanishingly small" for a worker who is occupationally exposed to asbestos and even "more vanishingly small" for a take-home exposure victim. (Amicus Curiae Brief, *Kesner v. Superior Court*, A136416, Nov. 15, 2012, p. 14; 2012 WL 5949131, p. *14.) If the "odds" of suffering a take-home asbestos injury are so "vanishingly small," supporting the conclusion that such injuries are relatively few in number, how can it be that if a duty of care is recognized, there will suddenly be a "significant[] increase [in] the number of potential asbestos plaintiffs" and "a corresponding increase in the volume of asbestos litigation"? (AB, p. 2.) It simply does not add up.

Two other arguments by BNSF bear a response. First, BNSF argues that "even if Plaintiffs were correct that only 7% of potential asbestos cases

would include secondary exposure claims, estimates of the number of asbestos claims that will be filed [in the United States] in the coming decades range from 1.7 million to as high as 2.6 million, meaning there could be hundreds of thousands of secondary exposure claims." (AB, p. 31.) This is another "straw man" argument. Plaintiffs do *not* argue that "7% of potential asbestos cases would include secondary exposure claims." Rather, they argue that approximately 7 percent of mesotheliomas are attributable to take-home asbestos exposures and that, with few exceptions, mesothelioma is the injury involved in take-home asbestos claims. Thus, Plaintiffs correctly argue that the number of potential plaintiffs in take-home asbestos injury cases is limited and small and does not come anywhere near the "hundreds of thousands" suggested by BNSF.

Moreover, as explained by the Tennessee Supreme Court, most asbestos claims are filed by "[u]nimpaired claimants," that is, "persons who have been exposed to asbestos ..., but who are not impaired by an asbestos-related disease and likely never will be." (*Satterfield, supra*, 266 S.W.3d at pp. 369-370, footnote omitted.) Indeed, the court noted that "surveys funded by asbestos defendants suggest that between sixty-six and ninety percent of claimants are unimpaired," and that because of these unimpaired claimants, "persons with more serious illnesses caused by exposure to asbestos have been 'lost in the shuffle.'" (*Id.* at p. 369, footnotes omitted.) Accordingly, BNSF cannot rely on misleading estimates of future

nationwide asbestos claims to justify the categorical no-duty rule it seeks, where the vast majority of those claims will be by unimpaired claimants who have not been and never will be injured. As the *Satterfield* court observed, while the "argument that liability should be foreclosed as a matter of law because of the current asbestos litigation crisis might have resonance with regard to recognizing a [take-home] duty to unimpaired claimants ..., it rings hollow with regard to a claimant ... who has died of mesothelioma." (*Id.* at p. 370.) "Victims of mesothelioma are regularly identified as precisely the type of claimants whose claims should be protected," not "inhibited," "because mesothelioma is a serious and fatal illness that rarely occurs in the general population and that is closely associated with exposure to asbestos." (*Ibid*, footnotes omitted.)

Second, relying on *Campbell*, BNSF argues that a categorical no-duty rule is necessary because "it is 'hard to draw the line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed,'" and because "the 'class of secondarily exposed plaintiffs is far greater.'" (AB, pp. 27-28, quoting *Campbell*, *supra*, 206 Cal.App.4th at pp. 32-33.) According to BNSF, if a duty of care is owed to Ms. Haver, then a duty will be owed to any person with "secondary exposure" to asbestos, and that "[f]or each worker exposed to asbestos during the course of his or her employment, there may be innumerable relatives, friends, acquaintances, or service providers who

could foreseeably have been exposed to asbestos on the worker's person." (*Id.* at pp. 28, 30.)

This argument fails because the duty of care owed to a member of an employee's household, such as a spouse, who has regular contact with the employee, is premised on the substantial foreseeability of harm attendant to that relationship and the closeness of the connection between the defendant's conduct and the injury suffered. The suggestion that if a duty of care is recognized under the circumstances of this case, a duty will be owed to any person who happens to come into contact with the employee, no matter how trivial or incidental and regardless of the balance of the *Rowland* factors, is a gross exaggeration. Moreover, implicit in BNSF's argument is the notion that an individual can sue for mere exposure to asbestos. This is simply incorrect. To have a cause of action, a person must have suffered a "compensable injury" and exposure is not an injury. (*Hamilton*, *supra*, 22 Cal.4th at p. 1144; *Buttram*, *supra*, 16 Cal.4th at pp. 530-531, 537; *Leonard v. John Crane, Inc.* (2012) 207 Cal. App.4th 1274, 1287-1288.) Indeed, "medical science" has clearly shown "that the vast majority of persons who are exposed to asbestos or asbestos-containing products do not develop mesothelioma, or any other asbestos-related disease." (*Austin v. Abney Mills, Inc.* (La. 2002) 824 So.2d 1137, 1160 (dis. opn. of Victory, J.).) And, as shown, the pool of potential take-home asbestos injury plaintiffs is limited and small.

b. Defendant BNSF's "expanding pool of defendants" argument is meritless.

Defendant BNSF argues that recognizing a duty of care under the circumstances of this case would "dramatically expand the number of defendants each existing asbestos plaintiff could sue" and "exacerbate several already-troubling trends in asbestos litigation." (AB, pp. 27, 32; see also *id.* at pp. 2-3.) According to BNSF, an affirmative duty finding will result in a catastrophic parade of horribles. It will purportedly: (1) "increase the likelihood of defendants being targeted based on their solvency rather than their culpability," (2) make "businesses ... pay damages that are shockingly disproportionate to their liability," (3) "flood the courts with tenuous claims based on dubious science" and "weak or misleading expert testimony," and (4) "promote forum shopping" by "opportunistic plaintiff's lawyers" and give plaintiffs "an even greater ability to manipulate venue rules." (*Id.* at pp. 2-3, 20, 27, 32-37, 45.) These arguments are nothing but empty rhetoric and do not support, let alone "'clearly support[],'" a categorical duty exception. (*Cabral*, *supra*, 51 Cal.4th at pp. 771-772, quoting *Rowland*, *supra*, 69 Cal.2d at p. 112.)

The accusation that "plaintiffs target defendants based on their ability to pay rather than their culpability," and that this "perverse tactic" will continue and grow unless the court creates a categorical duty exception, is spurious and wholly unsupported by the record. (AB, 2, 32-

34.) The only matter cited by BNSF in support of this contention is an review article by two well-known toxic tort defense attorneys who have a long history of acting to shield defendants from liability for asbestos-related injuries. (*Id.* at p. 33.)

Equally meritless is BNSF's contention that unless a no-duty rule is adopted, businesses will be "made to pay damages that are shockingly disproportionate to their liability." (AB, pp. 33-34; see also *id.* at pp. 2-3.) Where is the support for this argument? There is none. Indeed, case law shows otherwise. In *Campbell*, the jury found that the defendant, Ford Motor Company, "was responsible for 5 percent of Honer's damages" from mesothelioma, resulting in a total judgment of $40,000 against Ford. (*Campbell*, *supra*, 206 Cal.App.4th at p. 23 & fn. 2.) Where is the disproportionate liability there? Indeed, a law professor, in reviewing and expressing his disagreement with *Campbell*, aptly remarked: "Nor is this a case of an out-of-control verdict. The jury only found Ford five percent liable. Which means Ms. Campell [*sic*] gets an award of $40,000. That's relative chump change. We're not talking about a jury that went crazy." (Martin, California Appellate Report (May 21, 2012) at <http://calapp.blogspot.com/2012/05/campbell-v-ford-motor-co-cal-ct-app-may.html> [as of Feb. 9, 2015].)

It is more of the same with respect to BNSF's claim that recognition of a duty of care will result in a "flood" of take-home asbestos injury

lawsuits. Again, where is the support? BNSF does not point to any data from states that have recognized a duty of care in take-home asbestos injury cases, such as Illinois, (*Simpkins*, *supra*, 929 N.E.2d at pp. 1261-1266), Louisiana, (*Chaisson*, *supra*, 947 So.2d at pp. 180-184; *Zimko*, *supra*, 905 So.2d at pp. 482-484), New Jersey, (*Olivo*, *supra*, 895 A.2d at pp. 1146-1149), Tennessee, (*Satterfield*, *supra*, 266 S.W.3d at pp. 364-375), and Washington, (*Rochon*, *supra*, 2007 WL 2325214 at pp. *1-*4), showing a "flood" of such cases. This precise point was made by the dissenting justice in this case in the Court of Appeal, who "question[ed] the factual basis" for the claimed "specter of a flood of lawsuits," not to mention the claim of "companies being forced out of business." (Typed dis. opn. at p. 2.)

As to BNSF's contention that take-home asbestos injury claims are "dubious," "questionable," "tenuous," and "predicated on unreliable causation evidence," "shaky science," and "weak or misleading expert testimony," (AB, pp. 2, 20, 27, 34-35, 45), not only is it false and unsupported, it impermissibly contradicts the allegations in this case. (See *Alcorn*, *supra*, 2 Cal.3d at p. 496 ["it is well settled that a general demurrer admits the truth of all material factual allegations in the complaint"] accord, *Sisemore*, *supra*, 151 Cal.App.4th at p. 1397; *Gould*, *supra*, 31 Cal.App.4th at p. 1144.) As seen, the proposed allegations establish that the risk of exposure to asbestos brought home on the clothing of workers was known

as early as the 1930s and was well established by the early-to-mid 1970s, when the exposures in this case took place. (2 AA 256-258.) As early as the 1930s and 1940s, government and private organizations recognized the need for changing rooms, showers and isolation of dusty clothes in order to prevent workers from taking home toxic dust. (*Ibid.*) Further, by the time of the exposures in this case (June 1972 to 1974), the scientific and medical literature had specifically demonstrated that take-home asbestos exposures could cause mesothelioma, the disease that killed Ms. Haver. (*Ibid.*)

Additionally, in *Campbell*, the undisputed medical evidence showed that "[b]y the early 1900s, ... the dangers of toxic substances being transferred from the workplace to the home through workers' clothing as well as methods for preventing such 'take home' exposures were known"; that "there was no dispute that asbestos was a known toxin by the 1930s"; and that "both asbestos hazards and the risk of toxic take home exposures had been reported in the scientific literature before 1945." (*Campbell*, *supra*, 206 Cal.App.4th at p. 21.)

BNSF suggestion that take-home asbestos injury claims are "dubious" because they often involve lower levels of asbestos exposure, (AB, pp. 34-35), ignores that "mesothelioma is a signature asbestos disease that can be contracted from low doses of asbestos exposure." (*Holcomb*, *supra*, 289 P.3d at p. 196 & n.9; accord, *Zimko*, *supra*, 905 So.2d at p. 484, fn. 21; see also *Hamilton*, *supra*, 22 Cal.4th at p. 1136 ["it takes far less

asbestos exposure to cause mesothelioma than to cause asbestosis"].) Moreover, under the causation standard for asbestos-related injury cases established in *Rutherford v. Owens-Illinois, Inc.*, *supra*, 16 Cal.4th at pp. 982-983, it has been held that asbestos exposures "similar to the asbestos levels recorded in ambient air" can constitute a substantial factor. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1000; see also *Izell v. Union Carbide Corp.*, *supra*, 231 Cal. App.4th 962, 975-978 [whether "brief" or "small" exposures to asbestos can constitute a substantial factor in increasing the risk of developing mesothelioma is a factual question for the jury].)

Accordingly, there is nothing "dubious," "questionable," "tenuous," "shaky," or "misleading" about take-home asbestos injury claims. It has been known and documented for numerous decades, including well prior to the exposures in this case, that asbestos can be carried home from the workplace by employees on their clothing and bodies, resulting in significant exposures to household members and subsequent illness.

As noted, BNSF also argues that failure to create a categorical duty exception will "promote forum shopping" by "opportunistic plaintiff's lawyers" and give plaintiffs "an even greater ability to manipulate venue rules." (AB, pp. 36-37, 45.) This is just more unsupported rhetoric.

BNSF's policy arguments about the "intolerable consequences" that will purportedly follow if a duty of care is recognized under the

circumstances of this case are not new. (AB, p. 2.) As discussed in Plaintiffs' opening brief, (OB, pp. 45-47), many of the same arguments have been rejected by courts that have recognized a duty of care in take-home asbestos injury cases. (*Simpkins*, *supra*, 929 N.E.2d at pp. 1264-1266; *Chaisson*, *supra*, 947 So.2d 171 at pp. 183-184; *Olivo*, *supra*, 895 A.2d at p. 1150; *Satterfield*, *supra*, 266 S.W.3d at pp. 369-371; *Rochon*, *supra*, 2007 WL 2325214 at p. *4.) As the Tennessee Supreme Court explained in *Satterfield*, there is no policy reason to favor the defendant whose negligence caused the take-home exposures over the individual who was exposed and thereby injured. (*Satterfield*, *supra*, 266 S.W.3d at p. 371.)

Finally, as Plaintiffs pointed out in their opening brief, (OB, pp. 33-34), the mere existence of a duty of care does not equal liability. "[D]uty is but the first of many elements of a tort claim." (*Pedeferri v. Seidner Enters.*, *supra*, 216 Cal.App.4th at p. 368.) To recover in negligence, "[a]n injured plaintiff must also prove that the [defendant] breached the duty of care and proximately caused his or her injury." (*Ibid.*) Plaintiffs strongly disagree with BNSF's attacks on the validity of take-home asbestos injury claims. Nevertheless, these arguments demonstrate that defendants are prepared to present numerous factual defenses in these cases and that

liability is far from established by the mere existence of a duty of care.[9]

* * *

Accordingly, under the circumstances of this case, "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach" do not justify a categorical exception to the general duty of care of section 1714.

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

As discussed by Plaintiffs in their opening brief, "the availability, cost, and prevalence of insurance for the risk involved" weighs against creating a categorical duty exception under the circumstances of this case. (OB, pp. 36-38.) BNSF claims otherwise, arguing that "[e]ven if companies' existing general commercial liability insurance policies might cover take-home asbestos claims," the costs associated with these claims might "exceed their policy limits" and companies might not be able to obtain other coverage. (AB, pp. 40-41.) These arguments are completely speculative and unsupported by anything in the record. (See *Pedeferri, supra*, 216 Cal.App.4th at p. 368 [defendant has burden of demonstrating unavailability of insurance]; see also *Bettencourt v. Hennessy Indus., Inc.*

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[9] Citing page 34 of Plaintiffs' opening brief, BNSF suggests that Plaintiffs' agree with its contention "that take-home asbestos claims often rely on questionable scientific evidence." (AB, p. 35.) That is false, as Plaintiffs expressly stated on that page that they "strongly disagree" with that contention. (OB, p. 34.)

(2012) 205 Cal.App.4th 1103, 1118-1119 [defendant has burden of "justifying imposition of a categorical no-duty rule"]; *FNS Mortgage Serv. Corp. v. Pacific Gen. Group Corp.* (1994) 24 Cal.App.4th 1564, 1570-1571 [same].) Similar to this court's conclusion in *Cabral*, "[t]here is no reason to believe [the] cost or prevalence [of insurance] will be significantly affected by declining to create [a] duty exception." (*Cabral*, *supra*, 51 Cal.4th at p. 784, n.12.)

The real support for BSNF's argument is the *Campbell* court's conclusion that because the cost of insuring against the risk of injury will "'[u]ltimately ... [be] borne by the consumer[,] ... it appears to make more sense to look to the nonemployee person's insurance to cover the risk.'" (*Campbell*, *supra*, 206 Cal.App.4th at p. 33, quoting *Oddone v. Superior Court*, *supra*, 179 Cal.App.4th at p. 823; AB, p. 41.) As discussed by Plaintiffs in their opening brief, this argument is untenable because, if accepted, it would justify a categorical no-duty rule in virtually any case or circumstance. (OB, p. 37.) There is simply no justification for making an injured plaintiff bear the cost of a defendant's negligence because he may have insurance. What if the plaintiff does not have insurance or has insufficient insurance? Simply put, such a rule is bad public policy and, in fact, is directly contrary to the longstanding policy of this state that "a [d]efendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to

provide himself with insurance." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 10; accord, *Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, 9-10.)

Accordingly, the insurance factor weighs against a categorical duty exception.

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

As made clear by this court, "an exception to the general rule of Civil Code section 1714" is proper "only where 'clearly supported by public policy'" and "only when foreseeability and policy considerations justify a categorical no-duty rule." (*Cabral, supra*, 51 Cal.4th at pp. 771-772, quoting *Rowland, supra*, 69 Cal.2d at p. 112.) Here, foreseeability and policy considerations, as evaluated and balanced under the *Rowland* factors, do not clearly support a categorical duty exception that will relieve Defendant BNSF of a duty of care in this case.

II. A PROPERTY OWNER MAY BE HELD LIABLE FOR AN OFF-PREMISES INJURY.

Defendant BNSF argues that if the court "permit[s] some forms of take-home liability claims under some circumstances," it should not do so under a premises liability theory, where the plaintiff "never set foot on the defendant's property," because it "would be an unprecedented and dramatic expansion of the doctrine of premises liability." (AB, pp. 3, 42.) This argument is meritless.

There is no rule that if an injured plaintiff "never set foot on the defendant's property," the defendant cannot be held liable for the plaintiff's injuries under a premises liability (negligence) theory. "Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property in order to avoid exposing others to an unreasonable risk of harm." (*Annocki v. Peterson Enters., LLC* (2014) 232 Cal.App.4th 32, 37, citing *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156; accord, Civ. Code, § 1714, subd. (a).) It has long been the rule in California that this duty of care "is not limited to injuries that occur on premises owned or controlled by the landowner," but also "encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite." (*Barnes v. Black*, *supra*, 71 Cal. App.4th at pp. 1478-1479; accord, *Garcia v. Paramount Citrus Ass'n, Inc.* (2008) 164 Cal.App.4th 1448, 1453; *A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 663 [*Teichert*]; *Davert v. Larson* (1985) 163 Cal.App.3d 407, 409-410.) Indeed, this principle was recently applied by the Court of Appeal in reversing a judgment after a demurrer was sustained, without leave to amend, on the ground that the defendant did not owe a duty of care to a plaintiff who was injured off its premises. (*Annocki*, *supra*, 232 Cal.App.4th at pp. 37-39.)

BNSF argues that the cases cited by Plaintiffs are inapposite because

none of them "decoupled premises liability from the property at issue." (AB, p. 44.) BNSF argues that in two of the cases, *Garcia* and *Teichert*, "the court found no duty" and that in the other cases, "the injury occurred as a result of the plaintiff's geographic proximity to the defendant's property – a self-limiting principle that retains the traditional link between the premises and the liability." (*Ibid.*) These arguments fail.

First, Plaintiffs are not attempting to "decouple premises liability from the property at issue." (AB, p. 44.) BNSF created the risk of injury to Ms. Haver through its negligent use of asbestos on its property and she was exposed to that asbestos when it was unknowingly carried home from work by her husband on his body and clothing. Contrary to any suggestion, Ms. Haver was injured as a direct result of BNSF's negligence in the use and maintenance of its property.

Second, Plaintiffs have not cited *Garcia* and *Teichert*, or any of the other cases they rely on, for their case-specific holdings. Rather, they have cited those cases for the well-established legal principle that a property owner can be subject to liability to a person injured off its premises if the injury was caused by the property owner's negligence in the use, control or maintenance of its premises.

Third, BNSF provides no support for the argument that this principle is somehow limited to situations where there is a "geographic proximity" between the injured person and the defendant's property. (AB, p. 44.)

BNSF does not define this so-called "geographic proximity," but seems to suggest that the person has to be injured in a location that is adjacent to the defendant's property. (*Ibid.*) There is no such "geographic proximity" restriction on a property owner's duty of care, however, and BNSF does not cite a case imposing any such limitation. (*Ibid.*)

In their opening brief, Plaintiffs posited two hypothetical situations. (OB, p. 40-41.) The first situation "involve[ed] exposure to a toxin negligently emitted from an employer's factory and carried by the wind into a nearby neighborhood, where it injures residents[.]" (*Id.*, p. 40.) In the second situation, "a fire negligently breaks out at an employer's factory and spreads to a nearby neighborhood, causing injury to residents." (*Id.*, p. 41.) Plaintiffs argued that in both situations there is "no doubt that the employer would be under a duty of care and could be held liable for the injuries resulting from its negligence." (*Id.*, pp. 40-41.) BNSF does not disagree, but attempts to distinguish those situations from this case based on its self-created "geographic proximity" limitation. (AB, p. 45.) It argues that in the hypothetical situations, "the factory owner's duty would still be geographically bounded ... and the scope of the factory owner's liability would still be geographically constrained," whereas in this case there is no geographic constraint. (*Ibid.*)

This argument does not stand scrutiny because BNSF ignores that in this case, as in both of the hypothetical situations, the hazard or risk of

injury to persons off the property was negligently created by the defendant in its use of its property. That is the basis for the duty of care and any resulting liability. Whether there is a "geographic proximity" between the injured person and the defendant's property is immaterial as to the defendant's duty to avoid exposing persons off the property to a risk of injury from its use of the property.

Returning to the hypothetical situations, as noted, BNSF does not disagree that a duty of care would be owed in the case of the toxin blown by the wind into a nearby neighborhood. (AB, p. 45.) How is it that a duty of care is owed in that situation, but if an employee who works in the same factory is negligently contaminated with asbestos by the employer and unknowingly carries the asbestos home, where a family member is exposed and subsequently injured, there is no duty because there is purportedly no "geographic proximity." This makes no sense. What if the employee lives in the same nearby neighborhood? Would there now be "geographic proximity"? Or what if the toxin is blown by the wind into a neighborhood several miles away, but the asbestos-contaminated employee lives only a few streets away or even across the street from the employer's factory? Would there now be "geographic proximity" as to take-home asbestos exposure, but not as to the wind-blown toxin? As Plaintiffs argued in their opening brief, there is no principled distinction between the wind-blown toxin and take-home asbestos situations; a duty of care is owed in both.

Similarly, the duty of care in the fire hypothetical is not dependent on any "geographic proximity" between the employer's factory and the injured residents of the neighborhood. Indeed, a defendant's negligence liability for offsite injuries caused by a fire that begins on its property is not affected by "[t]ime, distance, and the fact that the fire burned over intervening tracts of land." (*Osborn v. City of Whittier* (1951) 103 Cal. App.2d 609, 617.) "Generally, a fire, however far it may go, is one continuous fire – the same fire – and is the proximate cause of all the injuries and damage it may produce in its destructive march, whether it goes to abutting property or several miles. (*Id.* at p. 618; see also *People v. Southern Pac. Co.* (1983) 139 Cal.App.3d 627, 632-634 [liability for negligence where fire on defendant's property "burned hundreds of acres" and damaged property owned by private plaintiffs]; *Wilson v. Sespe Ranch* (1962) 207 Cal.App.2d 10, 13-18.) Why should the rule be any different where, instead of a negligent fire that begins on and leaves the defendant's property, the injury is caused by a defendant's negligence in allowing asbestos it uses on its property to contaminate its employees and be carried home on their clothing and bodies, where family members are exposed and injured? The rule should be the same.

III. COURTS IN OTHER JURISDICTIONS THAT FOLLOW A SIMILAR APPROACH TO DUTY AS CALIFORNIA HAVE RECOGNIZED A DUTY OF CARE IN TAKE-HOME ASBESTOS INJURY CASES.

Defendant BNSF argues that California will become an "outlier" if a duty of care is recognized under the circumstances of this case. (AB, p. 45.) Not so. As discussed by Plaintiffs in their opening brief, courts in several other jurisdictions that follow a *Rowland*-type analysis for determining issues of duty, in which foreseeability and public policy are considered, have recognized a duty of care in take-home asbestos injury cases, including Alabama, Illinois, Louisiana, New Jersey, Tennessee, and Washington. (*Bobo v. Tennessee Valley Authority*, *supra*, Memorandum Opinion and Order at pp. 8-15; *Simpkins v. CSX Corp.*, *supra*, 929 N.E.2d at pp. 1261-1266; *Chaisson v. Avondale Indus., Inc.*, supra, 947 So.2d at pp. 180-184; *Zimko*, *supra*, 905 So.2d at pp. 482-484; *Olivo v. Owens-Illinois, Inc.*, supra, 895 A.2d at pp. 1146-1149]; *Satterfield v. Breeding Insulation Co.*, *supra*, 266 S.W.3d at pp. 364-374; *Rochon v. Saberhagen Holdings, Inc.*, *supra*, 2007 WL 2325214 at p. *1-*4; OB, pp. 41-49.)

Citing what it calls the "majority position," BNSF argues that this court should follow decisions from other jurisdictions (Delaware, Georgia, Iowa, Maryland, Michigan, and New York) that have found no duty of care in take-home asbestos injury cases. (AB, pp. 46-48.) Those decisions, however, are inconsistent with California law because those jurisdictions do

not follow a similar approach to duty as California. Unlike California, in those jurisdictions, whether a duty of care exists is entirely or primarily dependent on the existence of a relationship between the parties, with little or no consideration given to foreseeability. (*Price v. E.I. DuPont de Nemours & Co.* (Del. 2011) 26 A.3d 162, 170 ["[N]o duty of care exists between the parties unless a 'special relationship' between them gives rise to one. Because Mrs. Price and DuPont shared no 'special relationship,' DuPont owed Mrs. Price no duty."]; *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 209-210 [no duty of care owed to plaintiffs because they were not defendant's employees; "declin[ing] to extend on the basis of foreseeability the employer's duty beyond the workplace"]; *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 696, 698 ["the foreseeability of physical injury to a third party is not considered in determining whether an actor owes a general duty to exercise reasonable"; no duty of care owed to family member of independent contractor's employee because of "the realities of the relationship between employers and their contractors"]; *Georgia-Pacific, LLC v. Farrar* (Md. 2013) 432 Md. 523, 540 [69 A.3d 1028, 1038-1039] ["[C]ourts finding no duty have focused on the lack of any relationship between the employer and the injured party. [Citation.] [¶] As noted, with respect to actions against the employer, this Court has focused on the [lack of a relationship] and found no duty to spouses of employees."]; *In re Certified Question from*

Fourteenth Dist. Court of Appeals of Texas (Mich. 2007) 479 Mich. 498, 501, 505-506 [740 N.W.2d 206, 211] ["The most important factor to be considered is the relationship of the parties. . . . '"The determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person.'"'"]; *Matter of New York City Asbestos Litig.* (N.Y. 2005) 5 N.Y.3d 486, 494 [840 N.E.2d 115, 119] ["The 'key' consideration critical to the existence of a duty" is the "'defendant's relationship with either the tortfeasor or the plaintiff'"; "foreseeability bears on the scope of a duty, not whether a duty exists in the first place"].)

The dissenting justice in this case in the Court of Appeal recognized the nationwide split of authority "on the issue of liability for take-home asbestos exposure," noting that "the majority of courts which find no liability are in states which, unlike California, focus on the relationship between the parties as the primary factor in determining duty," while "[t]he majority of courts which find liability are in states which share California's view of foreseeability as the primary factor in determining duty." (Typed dis. opn. at p. 2.) Indeed, even in *Campbell*, the court recognized that the dividing line between those jurisdictions that recognize a duty of care in take-home asbestos injury cases, and those that do not, is whether the inquiry focuses on foreseeability of the harm or the relationship of the

parties. (*Campbell*, *supra*, 206 Cal.App.4th at p. 33; accord, *Satterfield*, *supra*, 266 S.W.3d at pp. 361-363.)

Thus, there is no "majority" or "minority" position on the duty issue in take-home asbestos injury cases. Rather, there is "a pronounced split of authority" with the various decisions coming down to the factors that are pertinent to each jurisdiction's duty analysis. (*Satterfield*, *supra*, 266 S.W. 3d at pp. 371-372.) In California, the duty analysis focuses primarily on foreseeability, in conjunction with policy considerations, and does not look to whether there is a relationship between the parties. (*Cabral*, *supra*, 51 Cal.4th at p. 771; *Rowland*, *supra*, 69 Cal.2d at 112-113.) Indeed, as discussed above, foreseeability of harm is "a major factor" in California's duty analysis, (*Cabral*, *supra*, 51 Cal.4th at p. 771, fn. 2), and is "'[t]he most important of these considerations in establishing duty.'" (*Delgado*, *supra*, 36 Cal.4th at p. 237, fn. 15, quoting *Tarasoff*, *supra*, 17 Cal.3d at p. 434; accord, *John B.*, *supra*, (2006) 38 Cal.4th at p. 1189; *Randi W.*, *supra*, 14 Cal.4th at p. 1077; *Ballard*, *supra*, 41 Cal.3d at p. 572, fn. 6.)

Accordingly, the duty of care at issue here is not unique or novel and its recognition will not turn California into an "outlier." Rather, its recognition, which is fully supported by the *Rowland* factors, will bring California in line with other jurisdictions that follow a similar approach to determining issues of duty, where foreseeability is considered along with policy factors.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeal should be reversed because there was and is no justification for creating a categorical exception to the general duty of care of section 1714 under the circumstances of this case.

Dated: February 9, 2015

Respectfully submitted,

WATERS, KRAUS & PAUL

By: _____

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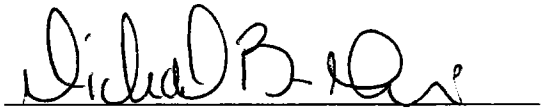
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c)(1), the undersigned hereby certifies that this Petitioners' Reply Brief on the Merits contains 13,977 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Microsoft Word word-processing program used to generate it.



Michael B. Gurien
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PROOF OF SERVICE

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

vs.

BNSF Railway Company, Defendant and Respondent

Los Angeles Superior Court Case Number BC435551

Court of Appeal, Second Appellate District Case Number B246527

Supreme Court of California Case Number S219919

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I, PHILIP KWAN, declare as follows:

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

On February 9, 2015, I served a copy of the following document(s):

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

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

☒ (By Norco Overnite Delivery) By placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery by Norco Overnite Delivery Services as part of the ordinary business practices of Waters, Kraus & Paul, addressed to:

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☒ (By Overnight Delivery) By placing a true copy thereof enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for overnight delivery as part of the ordinary business practices of Waters, Kraus & Paul, addressed to Defendant's counsel:

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

Executed on February 9, 2015, at El Segundo, California.

By: _____
PHILIP KWAN

SERVICE LIST

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

vs.

BNSF Railway Company, Defendant and Respondent

Los Angeles Superior Court Case Number BC435551

Court of Appeal, Second Appellate District Case Number B246527

Supreme Court of California Case Number S219919

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Court of Appeal Second Appellate District, Division Five Ronald Reagan State Building 300 South Spring Street 2nd Floor, North Tower Los Angeles, California 90013	1 copy of Petitioners' Reply Brief on the Merits
Superior Court of California County of Los Angeles Stanley Mosk Courthouse Honorable Richard E. Rico Judge Presiding, Department 17 111 North Hill Street Los Angeles, California 90012	1 copy of Petitioners' Reply Brief on the Merits
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