Case No. A136416

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

JOHNNY BLAINE KESNER, JR.,
Petitioner,
vs.

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

PNEUMO ABEX LLC,
Real Party in Interest

From the Superior Court of Alameda County
Hon. John M. True III, Judge, Department 512
Case No. RG11578906

AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST AND DEFENDANT PNEUMO-ABEX, LLC

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

TABLE OF AUTHORITIES

Page No.

TABLE OF AUTHORITIES

Page No.

Rules

Other Authorities

I

INTRODUCTION

In this case of second impression, Petitioner seeks this Court's extraordinary writ for a result that is contrary to existing law, and which would send courts down the proverbial slippery slope to unwarranted imposition of civil liability in ever more remote and attenuated circumstances.

This is a case of second, not first, impression because the issue of "take-home exposure" liability has already been addressed in *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15. *Campbell* held that there is no "duty to protect family members of workers ... from secondary exposure to asbestos used during the course of ... business." (206 Cal.App.4th at 29.) The court reached this conclusion by an analysis of the factors in the classic case *Rowland v. Christian* (1968) 69 Cal.2d 108. The *Rowland* factors that dispositively weighed in favor of no duty are present in both *Campbell* and the present case: the attenuated exposure and the burden on the defendant of "potentially infinite liability."

The court in *Campbell* correctly stated the law and limited the scope of liability. The only salient difference between *Campbell* and the present case is that in *Campbell*, the defendant was a premises owner, while here it is an employer. That difference should not create a distinction in liability.

Instead, California law should adhere to a bright-line test for duty. While there may be a duty to someone who comes on to the premises, or is employed at the site, or who uses a product claimed to be defective, there is and should be no duty for "second-hand" or "take-home" exposure.

Petitioner argues for recognition of a duty based on the supposed foreseeability of injury. "California should follow the other jurisdictions that ... find that the take-home duty exists, because the harm is foreseeable." (Pet. at 4.) But California courts distinguish foreseeability from duty. "[F]oreseeability is not synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552.) "[T]he foreseeability of harm, standing alone, is not a sufficient basis for imposing ... liability." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362.) "Foreseeability does not create a duty but sets limits once a duty is established." (*Id.* at 358, cite omitted.) So even if injury by take-home exposure was "foreseeable" decades ago (unlikely, given that lawsuits and research on the issue have been uncommon until recently), that is not enough to impose a duty.

California law is thus more in line with the other jurisdictions that have addressed the issue and find that no take-home duty exists. (See, e.g., *In re New York City Asbestos Litigation* (2005) 5 N.Y.3d 486, 494 ["foreseeability bears on the scope of a duty, not whether a duty exists in

the first place"]; *id.* at 497 [contrary New Jersey decision "is distinguishable legally in that New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis."]; see *O'Neil*, 53 Cal.4th at 353 [citing with approval cases where "New York's highest court refused to impose ... a duty based solely on foreseeability."])

This Court's ruling is thus significant as a practical matter with respect to asbestos and other "toxic tort" claims in particular, and as a doctrinal matter with respect to tort law generally. Because Petitioner's theory would unduly expand liability, and because the support offered for that theory are (1) cases from jurisdictions that consider duty differently than does California and (2) unpublished California decisions (see Pet. at 31, 49) in flagrant and unapologetic violation of Rules of Court, rule 8.1115, subd. (a), Amici request that the petition be denied.

II

THE PROBLEM: A "POTENTIALLY LIMITLESS POOL OF PLAINTIFFS"

The problem has been well-described in the many decisions denying take-home asbestos exposure liability: it "would create a potentially limitless pool of plaintiffs." (*In re Certified Question from Fourteenth Dist. Court of Appeals of Texas* (2007) 479 Mich. 498, 521, quoted in *Campbell*, 206 Cal.App.4th at 34.) "Such an expansion of the duty of employers of independent contractors to exercise reasonable care would

arguably also justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat." (*Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 699.) If take-home exposure liability was the law, then: "Plaintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes." (*In re New York City Asbestos Litigation* (2005) 5 N.Y.3d 486, 519, cite omitted.) There is no end to the number and variety of people with whom the exposed individual might come into contact. Workers and patrons at a bar or restaurant where the worker stopped on the way home. Fans sitting nearby at the ballpark.

Given that hindsight is often 20/20, a retrospective analysis of "foreseeability" can neither guide a defendant away from tortious behavior nor form a defensible basis for imposing liability. "Foreseeability" can't draw lines where liability stops. The issue is of course not limited to cases involving workers bringing home dust. Were Kesner's theory applied outside the asbestos context, for example, a health professional who

misdiagnosed a communicable disease (e.g., tuberculosis) would be liable, not just to the patient, but to everyone with whom the patient foreseeably came in contact and who contracted the disease. The present case illustrates why foreseeability should not be the test. This Court should deny the petition because it seeks a result contrary to California law.

III

CALIFORNIA LAW AVOIDS THE PROBLEM BY ASSESSING DUTY BASED ON MORE THAN MERE FORESEEABILITY

The California Supreme Court and appellate courts have avoided the problem of a "potentially limitless pool of plaintiffs" by rejecting the use of foreseeability alone to determine duty.

"[T]he foreseeability of harm, standing alone, is not a sufficient basis for imposing ... liability." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362.) "Foreseeability does not create a duty but sets limits once a duty is established." (*Id.* at 358, cite omitted.) "Instead, the recognition of a legal duty of care 'depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability.'" (*Id.* at 364, quoting *Burgess v. Superior Court (Gupta)* (1992) 2 Cal.4th 1064, 1072 [finding duty based on relationship between plaintiff and defendants].)

Foreseeability is historically a limit on, not an indefinite expansion of, tort liability. (See, e.g., *Palsgraf v. Long Island R. Co.* (1928) 248 N.Y. 339, 343-344.) In *Palsgraf*, a railroad guard dislodged a passenger's

package, which happened to contain fireworks that exploded, knocking "down some scales at the other end of the platform, many feet away." (*Id.* at 341.) The court rejected the claims of a plaintiff injured by the falling scales. "The conduct of the defendant's guard, [even] if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away." (*Id.* at 341.) Petitioner Kesner, in contrast, asserts the opposite: that duty arises from conduct, not relationship (Pet. at 37), a sort of a *malum in se* that is a duty to the world.

"[F]oreseeability is not synonymous with duty; nor is it a substitute." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552 [rejecting tort liability for negligent breach of contract].) "Even when foreseeability was present, we have on several recent occasions declined to allow recovery on a negligence theory." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 399 [rejecting general duty of care of auditors to parties other than client].) "The foreseeability approach has also encountered substantial criticism from commentators, who have questioned, among other matters, its failure to consider seriously the problem of indeterminate liability." (*Id.* at 392.) "[W]e will not treat the mere presence of a foreseeable risk of injury to third persons as sufficient, standing alone, to impose liability." (*Id.* at 399, emphasis added.)

"[T]here are clear judicial days on which a court can foresee forever ... but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 668 [limiting recovery for negligent infliction of emotional distress to accident bystanders, withholding it from a mother who foreseeably learned of her child's injuries later].) "In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited." (*Id.*, 48 Cal.3d at 664.) "Given enough imagination, everything is foreseeable .... If the law imposed a duty to protect against every *conceivable* harm, nothing could function." (*Jefferson v. Quik Corner Market, Inc.* (1994) 28 Cal.App.4th 990, 996, emphasis in original [no duty despite alleged foreseeability of accident].)

"[T]here are many situations involving foreseeable risks where there is no duty." (*Richards v. Stanley* (1954) 43 Cal.2d 60, 66 [Traynor, J.] [rejecting liability of car owner who left keys in car to victim of accident after car was stolen; no duty to protect plaintiff from negligent driving by car thief, despite foreseeability of harm]. Accord: *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 838-839 [foreseeability of harm

from a finished product is not sufficient to impose a duty to warn on a component part manufacturer]; *Taylor v. Elliott Turbomachinery Co.* (2009) 171 Cal.App.4th 564 [same].)

In *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, plaintiff sought to hold a hotel owner liable because the bathtub in her hotel was slippery, and therefore defective. The Supreme Court rejected as a matter of law the contention that the hotel proprietor was liable. "The mere circumstance that it was contemplated that [the hotel's] customers would use the products in question ... does not transform the owners of the [hotel] into the equivalent of retailers of those products." (10 Cal.4th at 1199-2000.)

"[P]olicy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk. This proposition is self-evident." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 274, emphasis added.)

Elden declined to extend liability for negligent infliction of emotional distress and loss of consortium to unmarried but cohabiting couples. One reason it gave – special protection and encouragement of marriage – is not relevant here, but the other two are perhaps particularly significant.

"The final justification for our conclusion is *...the need to limit the number of persons to whom a negligent defendant owes a duty of care...*

'Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.'" (46 Cal.3d at 276, emphasis added and citation omitted.) *Elden* noted that other jurisdictions had been willing to extend emotional distress claims outside the traditional family structure. "We decline to follow the rationale of these decisions for to do so would result in the unreasonable extension of the scope of liability of a negligent actor. The need to draw a bright line in this area of the law is essential..." (46 Cal.3d at 277.) Surely "the need to limit the number of persons to whom a negligent defendant owes a duty of care" and the "need to draw a bright line" are no less essential for premises owners, employers, or product manufacturers in circumstances like those presented in this case. Owing a duty to people with whom one is direct contact is one thing. Expanding that duty to everyone who comes in contact with those people exponentially widens the circle of liability.

"A second basis for our determination is that the allowance of a cause of action in the circumstances of this case would impose a difficult burden on the courts. It would require a court to inquire into the relationship of the partners to determine whether" liability should attach. (*Elden*, 46 Cal.3d at 275.) Similarly here, take-home liability "would require a court to inquire into the relationship of the" plaintiff and the

directly-exposed worker. Where is the line to stop? Petitioner was not a member of the immediate family of the allegedly exposed employee. Should liability be extended to people with whom the exposed person came into contact only occasionally? Once a week at church? Every, but only at, holiday? A court imposing "take-home" liability court would have to undergo an examination of these contacts, often (as in this case) at a distance of some decades.

The same concern has led to courts refusing to extend liability in other circumstances and under other theories, even for the benefit of family members foreseeably injured by a tortious act. (See, e.g., *Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441 [children have no cause of action for loss of consortium]; *Baxter v. Superior Court (Sheldon)* (1977) 19 Cal.3d 461 [same for parents].) *Borer* and *Baxter* reiterated the social and economic need for a bright line of liability to temper the pure foreseeability of distress, which otherwise would be virtually boundless. (*Borer*, 19 Cal.3d at 444-450; *Baxter*, 19 Cal.3d at 464, 466.)

Campbell correctly applied these principles to take-home asbestos exposure. Similar considerations were expressed in *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, involving take-home exposure to unspecified film processing chemicals. Kesner's arguments are contrary to these principles of California law and should be rejected.

IV

CALIFORNIA IS MORE IN LINE WITH THE JURISDICTIONS THAT REJECT A "TAKE-HOME DUTY" THAN WITH JURISDICTIONS THAT IMPOSE SUCH A DUTY

Kesner correctly notes that "the other jurisdictions that ... find that the take-home duty exists, because the harm is foreseeable." (Pet. at 4.) The flip side is also true: jurisdictions finding no such duty do so because, like California, foreseeability does not determine duty.

"The trial court found that Eva's injuries and death were foreseeable, but it held that to impose a duty would create a limitless number of potential plaintiffs, as literally anyone who came in contact with Vernon's and John's work clothes could be exposed." (*Nelson v. Aurora Equipment Co.* (2009) 391 Ill.App.3d 1036, 1038.)

The Georgia Supreme Court rejected "mere foreseeability ... as a basis for extending a duty of care." (*CSX Transp., Inc. v. Williams* (Ga. 2005) 278 Ga. 888, 890.) Accordingly, the court found "no duty to non-employees to protect them from exposure to airborne asbestos emitting from its employees' work clothing away from the CSXT workplace." (278 Ga. at 889.)

Maryland rejected take-home asbestos exposure claims and held that an employer owed no duty to the wife of its employee who allegedly washed her husband's dust-laden clothes. (*Adams v. Owens-Illinois* (1998)

119 Md.App. 395; see also *Doe v. Pharmacia & Upjohn Co., Inc.* (2005) 388 Md. 407 [employer owed no duty to wife of lab technician who became infected with HIV in course of employment and transmitted it to wife]; *Dehn v. Edgecombe* (2005) 384 Md. 606 [no duty to wife re negligent vasectomy counseling to husband, because the rationale for extending the duty would apply to all potential sexual partners and expand the universe of potential plaintiffs].)

Michigan determined that there was no duty to family members of employees because "[u]nlike [jurisdiction finding such a duty], Michigan relies more on the relationship between the parties than foreseeability in determining whether a duty exists." (*In re Certified Question from Fourteenth District Court of Appeals of Texas* (2007) 479 Mich. 498, 512-513.) As in California, "the question whether the defendant owes an actionable legal duty to the plaintiff is one of law which the court decides after assessing the competing policy considerations for and against recognizing the asserted duty." (Id. at 525, cite omitted.)

New York determined that there was no duty to family members of employees, and held that a contrary New Jersey decision relied on by Kesner "is distinguishable legally in that New Jersey, unlike New York, relies heavily on foreseeability in its duty analysis." (*In re New York City*

Asbestos Litigation (2005) 5 N.Y.3d 486, 497, distinguishing *Olivo v. Owens-Illinois, Inc.* (2006) 186 N.J. 394, cited in Pet. at 34.)

V

"FORESEEABLE" TO WHOM, OVER WHAT PERIOD OF TIME?

This case illustrates the correctness of the California rule that foreseeability should not be a surrogate for duty. Foreseeability itself is a squirrelly concept.

Petitioner Kesner argues that it was foreseeable that his uncle would bring dust home on this clothes, and argues that his uncle's employer "should have known" about the dangers of asbestos, therefore there is a duty.

"The dose makes the poison." (Paracelsus, the 16th century "father of toxicology," quoted in Eaton, *Scientific Judgment and Toxic Torts – A Primer in Toxicology for Judges and Lawyers* (2003) 12 J.L. & Policy 5, 11.) Even if the employer here "should have known" that asbestos in the amounts received by workers could be harmful, even if the employer "should have known" that workers would ignore safety rules about cleanup and bring dust home, there is nothing to suggest that they "should have known" that the much smaller amounts brought home could be dangerous to anyone (or, according to Kesner, everyone) at home.

The vast majority of workers exposed to chrysotile never develop any asbestos-related disease. Virtually all Americans alive today have been exposed to asbestos in various forms, and the vast majority never develops any asbestos-related disease. When the odds are vanishingly small for someone working with chrysotile, how much more vanishingly small are they for someone who gets only the small fraction of that that comes home on clothes? Yet it is this vanishingly small portion of an infinitesimally small risk that Kesner says is so foreseeable that duty should be imposed.

Something creating a duty "must be *sufficiently likely* before it may be foreseeable in the legal sense." (*Jefferson v. Quik Corner Market, Inc.* (1994) 28 Cal.App.4th 990, 996, emphasis in original.) Other courts have recognized that second-hand asbestos risks do not meet this standard. (*Martin v. Cincinnati Gas and Elec. Co.* (6th Cir. 2009) 561 F.3d 439 [no duty under Kentucky law because no one knew of dangers of second-hand exposure]; *Alcoa, Inc. v. Behringer* (Tex.Ct.App.2007) 235 S.W.3d 456, 462 ["the danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s."]) This Court should not go the other way.

VI

CONCLUSION

Amici request that this Court not extend liability beyond what any reported California decision has done, because to do so in the circumstances of this case would do violence to long-standing principles of duty. The Court should follow *Campbell* and deny the writ.

Respectfully submitted,

Dated: November 15, 2012

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CERTIFICATE OF WORD COUNT

I certify pursuant to Rules of Court, rules 8.204(c) and 8.409(b)(6) that the word count of this brief is 4,068 words, as calculated by the word processing program used to produce the brief.

Dated: November 15, 2012

Don Willenburg

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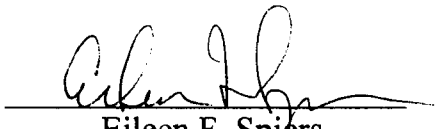

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