S219534

IN THE

SUPREME COURT OF CALIFORNIA

JOHNNY BLAINE KESNER,

Plaintiff, Appellant, and Respondent.

vs.

PNEUMO ABEX, LLC,

Defendant, Respondent, and Petitioner.

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

ANSWER TO PETITION FOR REVIEW

JOSIAH W. PARKER (SBN 278703)
Weitz & Luxenberg, P.C.
1880 Century Park East, Suite 700
Los Angeles, CA 90067
Tel: (310) 247-0921
jparker@weitzlux.com

TED W. PELLETIER (SBN 172938)
Kazan, McClain, Satterley & Greenwood
A Professional Law Corporation
Jack London Market
55 Harrison Street, Suite 400
Oakland, California 94607
Tel: (510) 302-1000
Fax: (510) 835-4913
tpelletier@kazanlaw.com

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INTRODUCTION

The petition for review of defendant Pneumo Abex, LLC ("Abex") should be denied because no Rule 8.500 grounds for review exist:

1. The Opinion below raises no "important question" of law for this Court to settle. The Opinion, reversing a judgment on nonsuit, holds that Abex owed plaintiff Johnny Kesner ("Johnny") a duty of care when it exposed him as a child to asbestos that for several years was regularly carried off the Abex premises by its employee, Johnny's uncle George – a "take home" exposure. To assert an "important question," Abex posits a "floodgates" argument: if the Opinion is not reversed, it will supposedly invite "wave after wave" of litigation from a "limitless pool of plaintiffs." [Petition at 4, 5, 22.] Not so. The pool of plaintiffs (those dying of asbestos disease) is fixed, unrelated to any legal rulings on any defendants' duty of care. And of those victims, only a select few will be able to allege, let alone prove, exposure to "take home" asbestos from an identifiable source. No open litigation floodgates are threatened – and thus no important question of law is raised here.

2. The Opinion does not disrupt "uniformity of decision." The trial court granted nonsuit based on *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, which found no "duty of care" in a very different case.

In *Campbell*, insulation workers in the 1940's took home asbestos after installing insulation at a vehicle factory under construction on premises owned by Ford. These insulators worked not for Ford but a third-party contractor. No evidence showed Ford's

specific knowledge that the workers were taking asbestos home or that this would pose a "take home" hazard. And Ford did not itself create any asbestos hazard but rather was sued only for owning the premises on which others created the hazard. [*Id.* at 20-22.] In these circumstances, *Campbell* found that the policy factors of *Rowland v. Christian* balanced in favor of carving an exception to Ford's duty of care. [*Id.* at 26-34; *see Rowland v. Christian* (1968) 69 Cal.2d 108.]

Aside from also involving take-home asbestos exposure, the instant case could not be more different from *Campbell*. Here, Abex worker George in the 1970's took home asbestos released as part of Abex's business of manufacturing asbestos-containing brake shoes – a powder-mixing process that released dust everywhere. Unlike in *Campbell*, the evidence here shows Abex's specific knowledge that workers like George should not take asbestos off-site because it posed a "take home" hazard. Thus, Abex is being sued not for merely owning a premises but for its negligent conduct in creating the hazard itself as part of its business.

In light of these polar distinctions from *Campbell*, the Opinion below holds unanimously that the *Rowland* factors balance here quite differently. [Opinion at 7-11.] The Opinion does not question or disagree with *Campbell*'s holding. [*Id.* at 7.] Accordingly, the Opinion does not disrupt uniformity of decision.[1]

In sum, no grounds for review exist. To claim otherwise, Abex presents a petition that is misleading about the issues raised, the factual record below, and the existence of an asserted statewide

[1] As discussed below, the other cases cited by Abex – *Oddone*, *Elsheref*, and *Haver* – do not change the "uniformity of decision" analysis.

"floodgates" problem that is simply not real. Moreover, the "no duty" rule that Abex's Petition seeks, a blanket liability exception for all off-premises injuries, no matter the circumstances, would violate this Court's "duty" teachings and make terrible policy.

Accordingly, the Petition fails to warrant review of the Opinion below. Review of this issue should be denied outright. [*See* Argument Part B below.]

But if this Court feels compelled to provide guidance in this area of law, it should deny review of the Opinion and grant review of *Haver v. BNSF Railway Co.* (2014) 226 Cal.App.4th 1104 (petition for review filed July 14, 2014). *Haver* is a much better vehicle for this Court's review: a decision lacking any principled analysis and countered by a strong dissent. And reviewing *Haver*, while leaving the Opinion below intact and published, would provide the fairest *status quo* to guide the trial courts during the lengthy review process. [*See* Argument Part C below.]

FACTUAL BACKGROUND

Before showing a lack of any ground for review, we briefly summarize this case to facilitate this Court's understanding of the issues and the Petition's flaws.

This case involves a plaintiff (Johnny Kesner) who without question is injured, dying of terminal mesothelioma caused by exposure to asbestos. As a child in the 1970's, Johnny was regularly exposed to asbestos brought home on the clothing of his uncle, George (also known in the record as "Uncle Peachy"), from his work at Abex's plant manufacturing asbestos-containing brakes.

The Abex plant manufactured brake shoes. [4 AA 1058 (Depo. 25:4-12).] This process involved mixing dry powders, including "asbestos." [*Id.* at 1060 (Depo. 30:1-31:10).] This process made the plant "dusty" and "dirty": "when you're working with dry powder, it's dusty" and "there's no way you're going to get away from the dust. It don't matter where you're at." [*Id.* at 1060 (Depo. 32:6-14), 1065 (Depo. 50:4-8).]

George returned home from work "covered in asbestos dust." [Opinion at 3; 4 AA 1066 (Depo. 54:4-8).] From 1973 to 1979, Johnny was a frequent and sometimes overnight guest at George's home, where the two would "often play" together while George was still in his dusty work clothes. [Opinion at 3.] During these years, Johnny was exposed to asbestos from the Abex plant.

Evidence presented below shows that Abex, throughout Johnny's exposure period (1973-1979), knew specifically that offsite persons like Johnny should not be exposed to its asbestos. A 1972 industrial-hygiene survey of the Abex plant found hazardous levels of asbestos dust and cautioned Abex specifically to protect not just its onsite workers but those who "laundered" their clothing. [4 AA 1103, 1109 (requiring "special clothing," "change rooms," and "double lockers" and warning about "contaminated clothing": "must inform launderer of the hazard").] And in 1977, Abex bought 1,200 copies of a booklet, intended to be given to workers, called "What You Should Know About Asbestos and Health." [5 AA 1123, 1125.] This booklet specifically cautioned the reader to "prevent taking asbestos home on any work clothes" in order to "protect members of your family," who "should not be needlessly exposed to asbestos dust." [5 AA 3303.]

Unfortunately, Abex never gave this booklet to its workers; months later, George received a different booklet that omitted any reference to the hazard from "taking asbestos home."[2] [*See* 5 AA 1145, 1149-1154.]

On these facts, Abex challenged its negligence liability by asserting that, as a matter of law, it owed no duty of care to Johnny—simply because he was "off site" when he was foreseeably exposed to Abex's asbestos dust. The trial court agreed, citing *Campbell* to rule that Abex owed Johnny "no duty" simply because "none of [his] exposures took place at or inside Abex's plant." [5 AA 1269-1270.]

The Opinion below reversed, recognizing Abex's duty of care in these circumstances, which differ materially from *Campbell.* [Opinion at 7-11.]

[2] As discussed further below, the general "duty" question at issue here is not limited to this case's specific exposure and knowledge facts. But these facts are illustrative of the types of well-founded cases that would be nullified by Abex's proposed rule, *i.e.*, that every defendant (employer and landowner) owes no duty to anyone exposed off the premises—no matter the facts of the plaintiff's exposure nor the defendant's knowledge of the hazard.

ARGUMENT

This Court should deny review. As we show below, the Petition raises neither an important question of law nor a lack of uniformity of decision, and Abex's proposed no-duty-ever rule would violate California duty law and make terrible public policy. But first, to provide context for that showing, we are compelled briefly to correct two main themes of the Petition that are materially misleading.

A. Abex's Petition is materially misleading.

Abex's challenge to the Opinion is misleading in two main ways: (1) inaccurately framing the "duty" issue; and (2) falsely presenting the pivotal "foreseeability" issue by omitting the key foreseeability evidence.

1. The Opinion does not "create" a "new" duty.

Abex frames the "duty" issue inaccurately, asserting repeatedly that the Opinion "creates" or "extends" or "imposes" a "new" duty of care.[3] Not so. The duty of care for negligence claims, codified in Civil Code section §1714, generally requires all actors to use reasonable care in the management of their person and property. As this Court recently reiterated in *Cabral*, that duty presumptively applies – unless an "exception" is "clearly supported by public policy." [*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771; *see* Opinion at 4-5.] Thus, the starting point here is that Abex, in

[3] *E.g.*, Petition at 2 (holding that duty owed "for the first time"; "extension of a duty"), 3 ("expanded the scope of an employer's duty"), 10 ("breaks new ground"), 11 ("impose a duty," "extended a duty"), 12 ("new duty"), 13 ("imposing a duty").

conducting its business, owed Johnny (and everyone) a duty of reasonable care. Abex seeks an exception to that duty.

Determining whether such a duty exception is clearly demanded by public policy requires application of the *Rowland* factors, which comprise two main groups: (1) three foreseeability-related factors (foreseeability, certainty of injury, and closeness of connection); and (2) four policy-related factors (moral blame, preventing future harm, burden on the defendant, and availability of insurance). [*Cabral*, 51 Cal.4th at 771, 774, 781; *see Rowland*, 69 Cal.2d 108.] From these two groups arise two "primary" factors to be balanced: "foreseeability" of the type of harm versus the "burden" on defendants from recognizing the duty. [Opinion at 6 (*quoting Campbell*, 206 Cal.App.4th at 33).]

The Opinion below properly balances these factors to recognize Abex's duty here. [Opinion at 4-11.] Thus, the Opinion does not "create" a "new" duty – it rejects Abex's argument that public policy clearly demands an exception to Abex's existing duty.

2. The Opinion does not "assume" foreseeability – Abex's Petition omits the foreseeability evidence.

To challenge the Opinion's *Rowland* analysis as faulty (and thus as raising grounds for this Court's review), Abex inaccurately summarizes the record, omitting key evidence (before the trial court on nonsuit) affecting the *Rowland* "foreseeability" factor.

The Opinion finds a "high degree of foreseeability of harm from secondary, or take-home, exposure" to those like Johnny with regular "contact" with the exposed worker. [Opinion at 10.] Abex

protests that the Opinion rests this finding on mere "assumptions about the state of employers' understanding in the 1970's and 1980's" about the "risk" of off-site asbestos exposures to "family members." [Petition at 28 (emphasis added).] Abex assures this Court that, in truth, the "foreseeability" of such "harm" was "minimal." [*Id.* at 11.]

This argument ignores the record. The Opinion's finding of "high" foreseeability rests not on any "assumptions" but on the specific evidence that Abex knew the danger that asbestos from its plant posed to people exposed offsite: the 1972 industrial-hygiene survey ("must inform launderer of the hazard") and the 1977 undistributed safety booklets ("prevent taking asbestos home on any work clothes" to "protect members of your family").

Only by ignoring this evidence could Abex possibly posit merely "minimal foreseeability of latent harm to third parties" like its workers' family members. [Petition at 1.]

In light of this proper context in which the Opinion arises, we now show that no grounds for review exist.

B. No grounds for review exist.

The Petition fails to show any grounds for review. The Opinion raises neither an important question of law nor a lack of uniformity of decision. Moreover, review should be denied also because the universal "no duty" rule that the Petition ultimately seeks would make terrible policy and violate this Court's duty teachings in *Cabral*.

1. No important question of law: The Opinion does not threaten "limitless" litigation.

The Petition fails to present an "important question of law" for this Court to "settle." [*See* Rule 8.500, subd. (b)(1).]

Initally, Abex suggests that an "important question" exists because the Opinion supposedly "immeasurably expand[s] the scope of an employer's duty" of care. [Petition at 5-6 (emphasis added).] But, as shown above, the Opinion does not "expand" Abex's duty – that duty exists, and the Opinion properly refuses to carve an undue duty exception.

The main thrust of Abex's "important question" contention is a classic "floodgates" argument: absent this Court's intervention, the Opinion will supposedly unleash "wave after wave" of "overwhelming" claims and "excessive and uncontrolled litigation" from a "limitless pool of plaintiffs." [Petition at 4, 5, 22.]

This characterization is false, for several reasons.

a. The "pool" of plaintiffs is finite and fixed.

Refusing to carve an exception to the duty of care owed by defendants like Abex to offsite asbestos-exposure victims like Johnny will not, as Abex posits, create a "potentially limitless pool of plaintiffs." [*See* Petition at 22.] In fact, it will not create any new plaintiffs, the "pool" of which is fixed and finite: people dying of asbestos diseases.

Cases where this Court has drawn a duty "line" to limit the "pool" of potential plaintiffs have involved outwardly expanding

circles of people claiming injury that was derivative of another's misfortune.

The primary example is *Thing v. LaChusa* (1989) 48 Cal.3d 644, where this Court considered a claim for emotional-distress damages caused by reaction to someone else's "negligently inflicted injury." Such cases do present a potentially "limitless pool" of plaintiffs: imagine a grisly car accident at a busy intersection witnessed by dozens of people, all of whom could claim some "emotional distress" from the experience. And even more remote people could assert emotional distress merely from being told later about the accident's gruesome details. All of these emotional-distress injuries are arguably "foreseeable." [*See id.* at 668 (imagining "clear judicial days on which a court can foresee forever").] But this Court found it appropriate in such cases to "limit" the "class of potential plaintiffs" to assure that "liability bears a reasonable relationship to the culpability of the negligent defendant." [*Id.* at 667.] Accordingly, this Court "limited" the pool of plaintiffs to those most certain to have suffered genuine injury: only plaintiffs (1) "closely related" to the primary "injury victim"; who (2) were "present at the scene and then aware that it is causing injury;" and (3) suffered "serious emotional distress" beyond "that which would be anticipated in a disinterested witness." [*Id.* at 667-668.] Though even "disinterested" witnesses to an accident might foreseeably suffer some emotional distress, the "merely negligent actor does not owe [them] a duty" of care. [*Id.* at 668.]

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

[*E.g.*, *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (no duty to prevent economic injury to investors from professional malpractice that injured a corporation); *Christensen v. Superior Ct. (Pasadena Crem. of Altadena)* (1991) 54 Cal.3d 868 (duty not to inflict "severe emotional distress" by mishandling corpses limited to "close family members who were aware" that funeral "services were being performed" for their "benefit"); *Elden v. Sheldon* (1988) 46 Cal.3d 267 (duty to prevent derivative injury for loss of consortium limited to married spouses).] In *Elden*, this Court summarized when it is proper to "limit the number of persons to whom a negligent defendant owes a duty of care": when a primary injury has "ramifying consequences, like the ripplings of water, without end." [*Elden*, 46 Cal.3d at 276.]

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

No such concerns exist here. The pool of victims is fixed. [*See* Opinion at 10 ("Unlike indirect financial loss or mental anguish," mesothelioma "can hardly be claimed by everyone.").] And every mesothelioma victim is certainly and severely injured. Hence, recognizing Abex's duty of care here, or that of Abex-like defendants generally, will not create <u>any</u> more plaintiffs. [*See id.* (recognizing "duty of care" does "not threaten employers with potential liability for an intangible injury that can be claimed by an unlimited number of persons").] At most, it will allow those already-existing plaintiffs to pursue compensation from those defendants who wrongfully contributed to causing their diseases.

b. The "pool" of take-home mesothelioma victims is relatively small.

Despite Abex's portention of "wave after wave" of plaintiffs, the actual pool of California take-home victims is not nearly as large as Abex insinuates. Mesothelioma is an extraordinarily rare disease, with only about 250 cases annually in California (of about 2,500 nationwide).[4] Of these 250, only a small portion invoke "take home" issues. As amicus curiae for Abex put it below, the "odds" of contracting mesothelioma are already "vanishingly small" for an occupationally exposed worker, and even "more vanishingly small" for a take-home exposure victim. ["Amicus Curiae Brief" filed below by Associations of Defense Counsel ("Amicus Brief") at 14.]

Before *Campbell* first carved out a duty exception in take-home cases two years ago, there were no "waves" of take-home litigation – and none will flow from the Opinion below. The small pool of unfortunate asbestos victims – and the far smaller percentage of take-home victims – will continue to contract mesothelioma, and to seek compensation from those responsible, at the same rate as before.

c. Limiting liability for take-home exposures does not require a drastic "no duty" ruling.

Even among the small, finite pool of "take home" mesothelioma victims, their ability to recover from anyone is naturally limited – without any need for drastic judicial "no duty" intervention.

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

Abex insists that, if the Opinion below stands, "the door is open for any person to seek redress from the employer of any friend or relative that the person regularly visited." [Petition at 5; *accord id.* at 24 ("carpool members" and "bus drivers"); Amicus Brief at 4 ("restaurant" patrons and nearby "ballpark" fans).]

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

As the Opinion wisely notes, finding the "existence of a duty" does not equal automatic negligence liability. [Opinion at 11.] A plaintiff still must prove exposure, medical causation, and the defendant's lack of due care.

Indeed, Abex's Petition highlights the many factual defenses it will be able to raise before a jury: that Johnny suffered only small exposures because George's clothes were only a "little bit" dusty; that Abex acted in reasonable care because it swept and dusted its plant and maintained low exposure levels; and that George shared comparative fault in carrying the asbestos home. [Petition at 7-8; *see* Opinion at 11 (cataloguing valid "factual questions" raised by Abex.]

In light of all of these potential proof problems, the "line" between take-home victims who can recover and those who cannot draws itself. The defendants' liability ends where the evidence ends – and unfortunately many take-home victims will simply lack sufficient evidence to prevail. Thus, defendants enjoy ample factual protection from any unwarranted suit.

But those take-home victims who can make the factual connection between their off-site exposure and a defendant's on-site negligence should be able to recover on proper proof.

Accordingly, a categorical "no duty" line would be both wholly unnecessary and manifestly unjust. Abex's Petition, seeking such an unwarranted no-duty line, fails to present an "important question of law" for this Court to settle.

2. No lack of uniformity of decision.

The Petition also argues that the Opinion disturbs "uniformity of decision" (Petition at 5-6), asserting that four California appellate cases (*Campbell*, *Oddone*, *Elsheref*, and *Haver*)[5] have "held" that "there is no duty for property owners or employers to people secondarily exposed" to asbestos off the worksite. [*Id.* at 12.]

Abex is wrong. None of the cited cases contains such a broad duty holding, and none conflicts with the Opinion below.

[5] *Campbell*, 206 Cal.App.4th at 15; *Oddone v. Superior Ct. (Technicolor, Inc.)* (2009) 179 Cal.App.4th 813; *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451; *Haver*, 226 Cal.App.4th at 1104.

a. *Campbell.*

Of the four cases cited by Abex, the only one that contains any relevant duty "holding" is *Campbell.*

As discussed above, *Campbell* is very different from the instant case. *Campbell* arose in the 1940's, during construction of a Ford vehicle plant that involved asbestos-insulation work. Two employees of an insulation contractor brought asbestos home and exposed their family member. Although Ford knew that asbestos-insulation work was occurring on its premises, it did not participate in the work or the creation of the hazard. Instead, Ford was sued as a mere premises owner – for owning the premises on which someone else created a hazard. [*Campbell*, 206 Cal.App.4th at 20-22.] And no evidence showed Ford's specific knowledge of the hazard that "take home" asbestos posed to persons off-site. [*Id.* at 21-22 (only constructive notice of general "industrial hygiene" knowledge).]

In those circumstances, *Campbell* found that the *Rowland* policy factors balanced in favor of carving an exception to Ford's duty of care. [*Id.* at 26-34.] Although *Campbell* did not expressly analyze just how foreseeable the harm was to Ford, it implied that it was minimal. [*Id.* at 32 (merely "assuming" that any harm could be foreseen).] And the court found that "strong public policy considerations" outweighed the foreseeability factors "in this case." [*Id.*]

The Opinion below is not in conflict. To the contrary, the Opinion expressly notes that it "need not question" *Campbell*'s holding to reject Abex's request for a duty exception here because the two cases are very different. [Opinion at 7.]

The Opinion well articulates these differences. First, unlike the *Campbell* claims against Ford for mere "premises liability," here Johnny asserts Abex's liability for "negligence in the manufacture of asbestos-containing brake linings." [*Id.* at 7.] This is a clear distinction – between nonfeasance (owning a premises) and misfeasance (creating a hazard).[6] And these differences result in a far different application of several *Rowland* factors, including both the "closeness of the connection" between the defendant's conduct and the plaintiff's harm and the defendant's "moral blame." [*See id.* at 8.]

Second, unlike in *Campbell* (where Ford had at most constructive knowledge), here the evidence shows that "Abex was aware of the risks to those exposed directly or indirectly to the asbestos dust generated in its facility" but "took no steps to avoid those risks." [Opinion at 8 (emphasis added).] Thus, the *Rowland* "foreseeability" factor weighs much more heavily here.

In these circumstances, unlike in *Campbell*, the "foreseeability of harm" to Abex was "substantial" – and not "clearly" outweighed by the *Rowland* policy factors. [*Id.*] Thus, in this very different case, the

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[6] *See Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1202 ("Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, *i.e.*, defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention. Liability for misfeasance is based on [Civil Code section 1714's] general duty of ordinary care to prevent others from being injured by one's conduct. Liability for nonfeasance is limited to situations in which there is a special relationship that creates a duty to act." [Internal citations omitted.]).

Opinion below correctly rejects Abex's no-duty argument—a holding that does not conflict with *Campbell*.[7]

b. *Oddone.*

Oddone also does not hold that "no duty" exists to "people secondarily exposed" to asbestos off the worksite. [*See* Petition at 12.] Indeed, it contains no general "duty" rule at all.

In *Oddone*, a Technicolor employee died of a brain tumor after exposure on the job to "toxic chemicals." [*Oddone*, 179 Cal.App.4th at 815.] The appeal involved a claim brought by the employee's wife for her own alleged injuries caused when "her husband brought home toxic vapors and chemicals." [*Id.* at 815-816.] But through two complaints (original and amended), the wife was unable to allege either any "chemical that caused the injury" or any "specific illness" that she allegedly suffered. [*Id.* at 816-817, 820-822.] Thus, her complaint violated this Court's decision in *Bockrath*, under which a complaint alleging harmful chemical exposure "must specify" both the "chemical that caused the injury" and "the injury." [*Oddone*, 179 Cal.App.4th at 821 (*citing Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 80).]

The *Oddone* decision could and should have ended there, affirming the judgment on demurrer under *Bockrath* based on inadequate pleading.

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[7] If this Court disagrees and grants review on the ground that the Opinion conflicts with *Campbell*, plaintiff reserves his right to argue on the merits that *Campbell* was wrongly decided, improperly usurping the jury's role in assessing "breach" in the guise of "duty" analysis, in violation of *Cabral*, 51 Cal.4th at 772-773.

But *Oddone* continued, purporting to weave the *Bockrath* pleadings analysis into a *Rowland* duty examination. [*Id.* at 822-823.] In that unnecessary context, *Oddone* found no "duty" in that specific case. The *Rowland* balance necessarily favored no duty because the pleading deficiencies negated any "foreseeability" showing. [*Id.* at 822 (because "we do not know what the harm is" we "cannot even ask" if it "was foreseeable").]

Again, the analysis could and should have ended there. But the court plodded on, finally musing generally about the defendant's "burden of uncertain but potentially very large scope." [*Id.* at 822.]

But *Oddone* did not purport to lay down a "duty" rule for anything beyond that case's specific facts. The court's ruling was expressly case-specific: "[G]iven the allegations of this complaint, we cannot say that Technicolor had a duty to petitioner." [*Id.* at 823.] And the court was careful to note that it did "not hold that a plaintiff cannot state a cause of action for secondary exposure to toxic chemicals" – the deficiency was merely "in this case." [*Id.* at 822.]

Indeed, Abex admitted as much below, seeking a no-duty ruling only when *Campbell* was decided (on the eve of trial) and acknowledging that, "[u]ntil last week [*Campbell* decision filed] there was no reported California appellate decision addressing" the "duty of care" issue in "take-home exposure cases." [2 AA 494, 497:20-22.]

Because *Oddone* contains no general "duty" rule, the Opinion below cannot and does not conflict with it.

c. *Elsheref.*

Elsheref also does not hold that "no duty" exists to "people secondarily exposed" to a toxin off the worksite. [*See* Petition at 12.] Like *Oddone*, *Elsheref* is fact-specific and contains no general "duty" rule at all.

Indeed, *Elsheref* is not even a "secondary exposure" case. There, an employee was exposed at work to toxic chemicals and radiation. [*Elsheref*, 223 Cal.App.4th at 454.] He did not carry any toxins off-site. Instead, his complaint alleged that such exposures injured him, including in affecting his ability later to create a healthy child – and that his employer, AMI, knew of this risk. [*Id.* at 455.] When the employee and his wife later conceived, their child was born with severe birth defects.[8] [*Id.*]

In these unique circumstances (unrelated to secondary, off-site exposure), *Elsheref* found that the *Rowland* factors balanced in favor of a duty exception "in the circumstances of this case." [*Id.* at 460-461.] The court did not purport to issue any broader no-duty rule that applied in secondary-exposure or other cases.

Contrary to Abex's insinuation here, the Opinion did not "bypass" *Elsheref* because that decision is somehow applicable or contrary. The Opinion does not cite *Elsheref* because Abex did not bring that Opinion (decided after briefing) to the appellate court's attention.[9]

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[8] Contrary to Abex's claim here, *Elsheref* did not involve "*in utero*" toxin exposures. [Petition at 3.]

[9] When oral argument was scheduled, plaintiff submitted a case-update letter; Abex did not. [*See* http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2023585&doc_no=A136378.]

d. *Haver.*

Nor does *Haver* hold that "no duty" exists to any "people secondarily exposed" to asbestos off the worksite. [*See* Petition at 12.] *Haver* simply holds that its circumstances are governed by *Campbell*, so that "BNSF owed no duty of care to Lynn" under the circumstances presented. [*Haver*, 226 Cal.App.4th at 1111.]

Haver contains virtually no independent analysis, simply following *Campbell*. In rejecting the plaintiff's claim that *Campbell* was "incorrectly decided," *Haver* cites no part of the *Campbell* decision, not even that case's facts. [*Id.* at 1109-1110.] Nor does *Haver* cite any other case law, from California or otherwise, instead resting its ruling on two torts treatises and two out-of-state law review articles.[10] [*See id.*]

Haver's attempt to distinguish the Opinion below is similarly vacuous. The Opinion, and the nonsuit it reverses, involve only a claim for Abex's negligence. [Opinion at 4 ("This case involves the asserted liability of a negligent manufacturer to a plaintiff for injuries arising as a result of the plaintiff's exposure to a harmful substance through contact with the manufacturer's employee away from the manufacturer's premises.").] Plaintiff's strict-product-liability claim was earlier dismissed on summary adjudication of issues. [2 AA 496:27-28.] But *Haver* brushes the Opinion aside because

[10] *Haver*'s deficiencies run deeper than its utter lack of principled analysis. The opinion is simply sloppy, from using wrong words ("waivered" [sic wavered], 226 Cal.App.4th at 1109), to requiring a modification to correct two mistaken references from "Defendants" to "Plaintiffs" (*id.* at 1109).

(assertedly) "the cause of action in *Kesner* is for products liability." [*Haver*, 226 Cal.App.4th at 1106, 1109 (emphasis added).]

By far the most compelling and principled part of *Haver* is its strong dissent by Judge Mink. [*Id.* at 1111-1113.] The dissent properly notes that "*Kesner*" is a "negligence case" and finds that in *Haver*, unlike in *Campbell*, "application of the *Rowland* factors, as fully discussed in *Kesner*, requires a finding that BNSF did owe a duty to Mrs. Haver." [*Id.* at 1112.] The dissent notes the argument, also raised by Abex here, that refusing to carve a duty exception "raise[s] the specter of a flood of lawsuits" – and correctly "question[s] the factual basis" of that concern. [*Id.*] Most importantly, the dissent finds that recognizing the defendant's duty is supported by "stronger public policy considerations": "Society does not benefit by allowing tortfeasors to avoid responsibility for their tortious conduct, particularly in cases . . . where the injury is a physical one and its cause undisputed." [*Id.*]

The *Haver* majority omits any such policy-based analysis. Its parroting of several secondary treatises to justify *Campbell* does not state any categorical "no duty" rule beyond *Campbell*, and its attempt to distinguish the Opinion below rests on a factual misstatement of Johnny's claim against Abex.

In sum, none of Abex's cited decisions state a categorical no-duty rule – and the Opinion below thus does not disturb uniformity of decision.

3. Abex's proposed rule would make terrible policy that violates the rules of proper duty analysis.

This Court should deny review also because the rule that Abex expressly seeks with its Petition would violate the well-established rules for California duty analysis – and make terrible policy.

Abex unabashedly seeks a universal exception to the duty of care in every case involving "off-site" exposure to asbestos. [*See* Petition at 1 (presenting issue of whether "a duty of care" is owed to any "persons claiming injury from exposure to asbestos solely through off-site contact"), 11 (advocating rule that "employer can have no legal duty to an employee's spouse who never stepped foot inside the employer's facility").] This proposed rule would apply in every circumstance, no matter the facts of the case: *i.e.*, no matter how egregious the negligence in exposing the worker on-site, nor how foreseeable it was to the defendant that the worker was exposing others to harm off-site. This unjust result cannot be supported by California public policy.

Indeed, Abex's proposed rule would seem to apply not only to "take home" exposures, where the toxin is carried off-site by an unwitting worker, but to exposures where the toxin is carried by the wind (*e.g.*, toxic clouds negligently released outdoors) or water (*e.g.*, poison negligently dumped into a stream). In each case, the defendant engages in negligent conduct on-site that poses a foreseeable danger to people off-site. But Abex's rule would negate any duty to any such "people secondarily exposed." [*See* Petition at 12.] No valid policy concern would support this. A defendant who releases a danger that

threatens people off its premises – whether carried off-site by wind, water, or worker – should face liability for the harm it causes.[11]

Abex's proposed rule would also violate this Court's duty-analysis teachings. *Cabral* reminds us that a duty exception is proper only when "clear considerations of policy" justify "carving out an entire category of cases." [*Cabral*, 51 Cal.4th at 772.] If a clear, policy-based line cannot be drawn between categories of cases where the duty does and does not apply, then no line should be drawn – the extant duty continues to apply in all cases.

Here, Abex advocates the opposite. Abex concedes that "no rational line can be drawn" between categories of cases: "the principal difficulty with [the *Rowland*] factors is trying to draw a line between those nonemployee persons to whom a duty is owed and those . . . to whom no duty is owed." [Petition at 17.] Abex's solution? Throw out all the cases – even those (as here) where the *Rowland* factors clearly balance in favor of recognizing the duty.

This is backwards – and wrong. *Cabral* dictates that, when a duty line cannot be drawn clearly, then none may properly be drawn at all.

Because Abex's Petition seeks an unsupportable no-duty rule, the Petition should be denied outright.

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[11] *See Davert v. Larson* (1985) 163 Cal.App.3d 407, 410 (horse wandering off property: "A landowner or possessor owes a duty of care to persons who come on his property as well as to persons off the property for injuries due to the landowner's lack of due care in the management of his property.").

C. If review is warranted, this Court should leave the Opinion intact and review *Haver*.

If this Court believes, as Abex asserts, that it must now "settle" the issue of the scope of a defendant's duty to people exposed to asbestos taken off the worksite premises, it should grant review not of the Opinion below but of *Haver* (in which a petition for review was filed on Monday, July 14).

The Opinion below is well-reasoned and legally supported, unanimous, and strikes a moderate balance on the duty issue (between *Campbell*-type mere-premises cases and *Kesner*-type active-hazard-creation cases). By contrast, *Haver* is supported by no real analysis, contains a strong, principled dissent, and implicitly supports the Draconian no-duty-ever rule that Abex espouses here. [*See Haver*, 226 Cal.App.4th at 1109-1110 (citing "view" that "an employer can have no legal duty" to off-site exposure victims).] Accordingly, *Haver* is a much more appropriate vehicle for this Court's review.

Moreover, if this Court is going to take the requisite time (likely two years or more) to review this issue, it should review (and thus depublish) *Haver* and leave the Opinion below published and intact. The Opinion serves as a proper and needed check on *Campbell*'s overbroad no-duty rule, which purports to apply to every "premises owner," no matter the circumstances. The Opinion correctly and properly limits *Campbell* to its facts, allowing trial courts to analyze the circumstances in assessing duty. This is an appropriate, moderate *status quo* to maintain while this Court reviews the issue.

By contrast, if this Court grants review of (and thus depublishes) the Opinion below, during the review process trial courts will have only *Campbell* (and perhaps *Haver*) as their guide. We submit that it is very unlikely that this Court's review process will ultimately adopt the overbroad no-duty rule of *Campbell* (and *Haver*), a rule that violates both *Cabral* and sound public policy. Accordingly, it makes little policy sense to make that the *de facto* rule during the review process.

Nor would this be just. If this Court reviews the Opinion below, leaving *Campbell* (and perhaps *Haver*) as the governing law on this issue, trial courts will likely dismiss the claims of dying take-home victims, who will then die without a judgment long before this Court's review is complete. A later affirmance of the Opinion below (with or without a disapproval of *Campbell*) will not help these victims, who will have suffered the irreparable harm of losing any claim to non-economic damages for pain and suffering. [*See* Code Civ. Proc. § 377.34.] But if this Court reviews *Haver*, leaving *Campbell* and the Opinion below as the governing law pending review, take-home victims (in *Kesner*-type cases) will be able to obtain a pre-death judgment, preserving all appropriate damages. And defendants in such cases would not suffer any irreparable harm. If this Court ultimately affirms *Haver* and disapproves of the Opinion below, any plaintiff's judgment resting on the Opinion would be subject to reversal on appeal.

In sum, this Court should deny review of the Opinion below. If this Court wants to "settle" the duty rule in take-home exposure cases, it can do so in *Haver*, leaving the well-reasoned Opinion here intact.

CONCLUSION

Abex's Petition for Review, resting on an inaccurate presentation of this case and assertion of a litigation emergency that simply does not exist, should be denied. The Opinion below provides an appropriate, well-reasoned check on *Campbell*, giving the trial courts ample guidance and supporting California policy. If this Court wants to settle the "duty" issue in take-home cases, it should deny review here and grant review of *Haver*.

DATED: July 15, 2014

Respectfully submitted,

WEITZ & LUXENBERG

KAZAN, McCLAIN, SATTERLEY & GREENWOOD
A Professional Law Corporation

By: _____
Ted W. Pelletier
Attorneys for Plaintiff

CERTIFICATE OF WORD COUNT

I, Ted W. Pelletier, hereby certify that this Answer to Petition for Review, exclusive of tables, consists of 6,287 words, in 14-point Times New Roman type, as counted by my word-processing program.

_____
Ted W. Pelletier

PROOF OF SERVICE

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

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

On July 15, 2014, I served true copies of the following document(s) described as:

ANSWER TO PETITION FOR REVIEW

on the interested parties in this action as follows:

Lisa Perrochet
Robert H. Wright
HORVITZ & LEVY LLP
15760 Ventura Blvd., 18th Fl.
Encino, CA 91436-3000
For Petitioner Pneumo Abex, LLC

Edward R. Hugo
James C. Parker
Jeffrey Kaufman
BRYDON HUGO & PARKER
135 Main St., 20th Floor
San Francisco, CA 94105
For Petitioner Pneumo Abex, LLC

Clerk, Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-3600

Hon. John M. True III
Alameda County Superior Court
Administration Building
1221 Oak Street, Room 260, Dept. 23
Oakland, CA 94612

Josiah W. Parker
WEITZ & LUXENBERG, P.C.
1880 Century Park East, Suite 700
Los Angeles, CA 90067
For Plaintiff Johnny B. Kesner

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

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

Executed on July 15, 2014, at Oakland, California.

E.A. Pawek