No. 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,

v.

BNSF RAILWAY COMPANY,

Defendant and Respondent.

SUPREME COURT
FILED

AUG - 4 2014

Frank A. McGuire Clerk

Deputy

After A Decision By The Court Of Appeal, Second Appellate District,
Division Five, No. B246527
Los Angeles County Superior Court, No. BC435551,
The Honorable Richard E. Rico

ANSWER TO PETITION FOR REVIEW

SELIM MOUNEDJI (173347)
SIMS LAW FIRM, LLP
19762 MacArthur Blvd., Suite 350
Irvine, California 92612
Telephone: (949) 253-7900

VERONICA LEWIS
(*pro hac vice* application pending)
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

*THEODORE J. BOUTROUS, JR. (132099)
TBoutrous@gibsondunn.com
JOSHUA S. LIPSHUTZ (242557)
ALEXANDER M. FENNER (287025)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Defendant and Respondent
BNSF RAILWAY COMPANY

No. 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,

v.

BNSF RAILWAY COMPANY,

Defendant and Respondent.

After A Decision By The Court Of Appeal, Second Appellate District,
Division Five, No. B246527
Los Angeles County Superior Court, No. BC435551,
The Honorable Richard E. Rico

ANSWER TO PETITION FOR REVIEW

SELIM MOUNEDJI (173347)
SIMS LAW FIRM, LLP
19762 MacArthur Blvd., Suite 350
Irvine, California 92612
Telephone: (949) 253-7900

VERONICA LEWIS
(*pro hac vice* application pending)
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6912
Telephone: (214) 698-3100
Facsimile: (214) 571-2900

*THEODORE J. BOUTROUS, JR. (132099)
TBoutrous@gibsondunn.com
JOSHUA S. LIPSHUTZ (242557)
ALEXANDER M. FENNER (287025)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Defendant and Respondent
BNSF RAILWAY COMPANY

TABLE OF CONTENTS

Page

INTRODUCTION 1

DISCUSSION 2

I. The Courts Of Appeal Agree On The Premises-Liability Question At Issue. 2

A. The Court Of Appeal Correctly Applied *Campbell*, Which Bars Premises Liability For "Take-Home" Asbestos Claims. 3

B. *Kesner* Does Not Conflict With The Decision Below. 9

II. There Is No Other Reason To Grant The Petition.................... 13

A. Plaintiffs' Unprecedented Theory Of Premises Liability Raises Significant Policy Concerns. 13

B. Plaintiffs' Unprecedented Theory Of Premises Liability Would Make California An Outlier. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

A. Teichert & Son, Inc. v. Superior Court (1986)
179 Cal.App.3d 657 16

Alcoa Inc. v. Behringer (Tex. Ct. App. 2007)
235 S.W.3d 456 18

Barnes v. Black (1999)
71 Cal.App.4th 1473 17

Bridgman v. Safeway Stores, Inc. (1960)
53 Cal.2d 443 8

Burgess v. Superior Court (1992)
2 Cal.4th 1064 19

Campbell v. Ford Motor Company (2012)
206 Cal.App.4th 15 .... *passim*

Campbell v. Ford Motor Company (Aug. 8, 2012)
No. S203797 6

CSX Transp., Inc. v. Williams (Ga. 2005)
608 S.E.2d 208 17

DaFonte v. Up-Right Inc. (1992)
2 Cal.4th 593 16

Davert v. Larson (1985)
163 Cal.App.3d 407 17

Erlich v. Menezes (1999)
21 Cal.4th 543 18

Garcia v. Paramount Citrus Ass'n, Inc. (2008)
164 Cal.App.4th 1448 16

Greenman v. Yuba Power Products, Inc. (1963)
59 Cal.2d 57 11

In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Mich. 2007)
740 N.W.2d 206 .... 17, 18

Page(s)

In re New York City Asbestos Litigation (N.Y. 2005)
5 N.Y. 3d 486 17

Kesner v. Superior Court (2014)
226 Cal.App.4th 251 .... 1, 9, 10, 11, 12, 15

Oddone v. Superior Court (2009)
179 Cal.App.4th 813 .... 12, 13

Price v. E.I. DuPont De Nemours & Co. (Del. 2011)
26 A.3d 162 17

Rowland v. Christian (1968)
69 Cal.2d 112 16

Vasquez v. Residential Investments, Inc. (2004)
118 Cal.App.4th 269 18

Wilson v. Sespe Ranch (1962)
207 Cal.App.2d 10 17

Rules

Cal. Rules of Court, rule 8.500(b)(1) 2

Other Authorities

Victor E. Schwartz and Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander"* (2013)
23 Widener L.J. 59 15

William L. Anderson et al., *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008* (2012)
22 FALL Kan. J.L. & Pub. Pol'y 1 14

INTRODUCTION

In their Petition for Review, Plaintiffs invent a disagreement among the Courts of Appeal that does not exist. The Court of Appeal's decision below and its earlier decision in *Campbell v. Ford Motor Company* (2012) 206 Cal.App.4th 15 (*Campbell*) are the only reported California cases addressing premises-liability claims for "take-home" asbestos exposure. Both decisions conclude that a premises owner owes no duty to indirectly exposed plaintiffs who never set foot on the owner's property—a well-reasoned and common-sense rule that avoids a dramatic and unprecedented expansion of premises liability to an ill-defined class of potential plaintiffs.

Plaintiffs contend that *Campbell* and the decision below conflict with *Kesner v. Superior Court* (2014) 226 Cal.App.4th 251 (*Kesner*). But *Kesner* involved a distinct issue: the extent of a manufacturer's liability for "negligence in the manufacture of asbestos-containing brake linings." (*Id.* at p. 258.) *Kesner* "[was] not based on a theory of premises liability" and expressly declined to "question" the holding in *Campbell.* (*Ibid.*) Thus, there is no disagreement among the Courts of Appeal and no need for this Court

to "secure uniformity of decision" on the premises-liability question at issue in this case. (Cal. Rules of Court, rule 8.500(b)(1).)

Nor is there any other reason for this Court to grant review. Departing from the rule announced in *Campbell* and followed in this case would trigger an onslaught of questionable asbestos claims and render California an outlier among jurisdictions. Because the Court of Appeal reached the correct conclusion and its decision is consistent with all reported case law in this State, the Petition for Review should be denied.

DISCUSSION

I. The Courts Of Appeal Agree On The Premises-Liability Question At Issue.

The Court of Appeal's decision below, which found that a plaintiff may not recover under a premises-liability theory for exposure to asbestos transported by a relative from the defendant's premises to the plaintiff's home, was a straightforward application of settled California precedent. The Court of Appeal's decision does not warrant review by this Court.

A. The Court Of Appeal Correctly Applied *Campbell*, Which Bars Premises Liability For "Take-Home" Asbestos Claims.

Plaintiffs allege that "BNSF owed a duty of care to avoid exposing Ms. Haver to an unreasonable risk of harm from its premises . . . and that it breached its duty by negligently failing to maintain, manage, inspect, survey, or control its premises, and by negligently failing to abate, correct or warn her of the dangerous condition . . . on its premises." (Pet'n at p. 7, citing 1 AA 9-10.) Phrased in that manner, Plaintiffs' claim sounds like an ordinary premises-liability claim. It is undisputed, however, that Ms. Haver never set foot on, or had any direct contact with, BNSF's property. (1 Appellants' Appendix ["AA"] 1-19.) Rather, Plaintiffs' theory of premises liability depends on a chain of events whereby Ms. Haver's *husband*, who worked for BNSF, "took home" the allegedly dangerous condition that purportedly existed on BNSF's premises. (2 AA p. 255.)

Plaintiffs' novel approach to premises liability seeks a dramatic expansion of that doctrine, creating a duty that would run from a property owner to individuals who never set foot on, or have any direct interaction with, the allegedly dangerous property. Plaintiffs

cite no case supporting their newfangled theory; to the contrary, the *only* published California decision to address this theory of premises liability rejected it. *Campbell v. Ford Motor Company* (2012) 206 Cal.App.4th 15 (*Campbell*).

1. In *Campbell*, the plaintiff (represented by the same counsel that represents Plaintiffs in this action) brought a premises-liability action against Ford alleging that she had contracted mesothelioma as a result of laundering her relatives' clothing while they were working at a plant owned by Ford. (*Id.* at p. 19.) Just like here, it was "undisputed" that the plaintiff had "never set foot on [Ford's] premises; rather, she alleged her father and brother brought asbestos dust home on their clothing." (*Id.* at p. 30.)

The Court of Appeal analyzed the plaintiff's claim under the framework established in *Rowland v. Christian* (1968) 69 Cal.2d 112 (*Rowland*) and concluded that Ford, as a premises owner, owed no duty to the plaintiff. (*Campbell*, *supra*, 206 Cal.App.4th at p. 26.) As the court explained, "[e]ven if it was foreseeable to Ford that workers on its premises could be exposed to asbestos dust as a result of the work performed on its premises, the 'closeness of the connection' between Ford's conduct [on the premises] . . . and the

injury suffered *by a worker's family member* off the premises is far more attenuated." (*Id.* at p. 31, quoting *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 397.) In reaching its decision, the Court of Appeal noted the "major importance" that this Court has "placed . . . on the existence of possession and control as a basis of tortious liability for conditions on the land." (*Id.* at p. 30 [internal quotation marks omitted].)

In addition, the *Campbell* court explained that policy considerations weighed strongly against allowing premises-owner liability in such circumstances. Imposing a duty on premises owners to individuals who never entered or interacted with their property would "'saddle'" owners with "'a burden of uncertain but potentially very large scope," the costs of which would ultimately be "borne by the consumer.'" (*Campbell*, *supra*, 206 Cal.App.4th at p. 33, quoting *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822 (*Oddone*).) As the court pointed out, it would be extremely difficult to "draw the line between those nonemployee persons to whom a duty [would be] owed" under the plaintiff's theory and "those nonemployee persons to whom no duty is owed":

> Including "all family members" into the former category would be too broad, as not all family members will be in constant and personal contact with the employee. Limiting the class to spouses would be at once too narrow and too broad, as others may be in contact with the employee and spouses may not invariably be in contact with the employee. Limiting the class to those persons who have frequent and personal contact with employees leaves at large the question what "frequent" and "personal" really means. This is only a sampling of the problem. Moreover, in a case such as [the plaintiff's], where the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater, including fellow commuters, those performing laundry services and more.

(*Id.* at pp. 32-33 [internal quotation marks omitted].)

Because permitting the plaintiff to recover for her secondary exposure would "extend[] tort liability" to a large and ill-defined set of potential plaintiffs, the court "conclude[d] that a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business." (*Id.* at p. 34.)

This Court denied the requests for depublication of the *Campbell* opinion. (*Campbell v. Ford Motor Company* (Aug. 8, 2012) No. S203797.)

2. *Campbell* is on all fours with this case. Here, plaintiffs allege that the decedent was "exposed to . . . asbestos fibers through

direct and indirect contact with her former husband," who worked at a site that was "owned, maintained, managed and controlled by BNSF." (Pet'n at p.6.) Just like the plaintiff in *Campbell*, the decedent here never set foot on the premises containing the allegedly dangerous condition on which her claim is based. And just as in *Campbell*, allowing Plaintiffs to recover here would expose property owners to an onslaught of secondary-exposure litigation.

Plaintiffs attempt to avoid the result in *Campbell* by pointing to a purported distinction between this case and that one: In *Campbell*, the relative of the decedent who worked on Ford's premises was employed "by [an] independent contractor, not Ford." (Pet'n at p. 16, italics omitted.) In Plaintiffs' view, this renders *Campbell* inapposite where, as here, the on-premises relative was a direct employee of the premises owner. (*Id.* at p. 17.) Indeed, this assertion is so central to Plaintiffs' argument that they repeat it on fifteen separate pages of their petition. (See Pet'n at pp. 2, 3-4, 5, 9, 13-18, 20, 24-25, 26.)

But, as the Court of Appeal concluded, Plaintiffs' interpretation of *Campbell* "is simply incorrect." (Slip op. at p. 6.) In fact, the court in *Campbell* explicitly stated that its "analysis *does not turn* on th[e] distinction" between direct employee and subcontractor. (*Campbell*,

supra, 206 Cal.App.4th at p. 31, fn. 6, italics added.) That is why *Campbell* used the term "workers," which includes "those employed by the property owner, as well as those employed by independent contractors to work on the premises of the owner." (Slip op. at 6.)

Moreover, the refusal of the *Campbell* court and the court below to distinguish between employee and subcontractor in this context is consistent with traditional notions of tort liability. In a premises-liability suit, a property owner can be held liable for an unsafe condition on its property of which it has actual or constructive knowledge *regardless* of whether the condition was created by the defendant itself or a third party—because premises liability turns on the owner's "control" over the *property*, not the worker. (*Campbell*, *supra*, 206 Cal.App.4th at p. 30, internal quotation marks and citation omitted; see also, e.g., *Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 447 [premises owner liable even where the condition was "brought about by natural wear and tear or by third persons"].) The employment relationship between a property owner and a worker may be relevant to the level of duty owed by the property owner *to the worker*, but it is irrelevant to the duty owed (if any) by the property owner *qua property owner* to an off-premises nonemployee.

Plaintiffs allege that BNSF was negligent in its capacity as a property owner, not an employer. Because their claim is for premises liability for the death of Ms. Haver, an off-premises nonemployee, *Campbell* is directly on point irrespective of whether BNSF exercised "direct control" over Mr. Haver. (Pet'n at p. 17.)

B. *Kesner* Does Not Conflict With The Decision Below.

Plaintiffs also attempt to create a conflict between *Campbell* and the decision below, on the one hand, and the First District's decision in *Kesner v. Superior Court* (2014) 226 Cal.App.4th 251 (*Kesner*), on the other hand. But no such conflict exists.

In *Kesner*, the nephew of a worker who was frequently exposed to asbestos developed mesothelioma and sued his uncle's former employer. (*Id.* at p. 255.) Rather than allege that the uncle's employer was liable as a landowner for a dangerous condition on its premises, the plaintiff brought a *products liability* claim alleging "negligence in the manufacture of asbestos-containing brake linings" (*id.* at p. 258) and sought to hold the employer liable "for injuries arising as a result of the plaintiff's exposure to a harmful substance through contact with the manufacturer's employee." (*Id.* at p. 256.)

As Plaintiffs acknowledge (see Pet'n at p. 20), the court in *Kesner* explicitly distinguished—and did not "question"—the conclusion in *Campbell* that "a landowner owes no duty of care to those coming into contact with persons whose clothing carries asbestos dust from the landowner's premises." (*Kesner*, *supra*, 226 Cal.App.4th at p. 258.) The Court of Appeal explained that "[w]hile the same *Rowland* factors are pertinent to the analysis of a [products-liability] negligence claim" against a manufacturer, "the balance that must be struck is not necessarily the same as under a claim of premises liability." (*Id.* at p. 258.) The court therefore applied the *Rowland* factors and concluded that the plaintiff's contacts with his uncle (as a "frequent visitor" to his uncle's home) could be sufficiently "extensive" to justify imposing a duty on the manufacturer that employed his uncle. (*Id.* at pp. 256, 261.)

The distinction between premises liability and negligent manufacturing is critical. "'[I]mposing a duty on a landowner to anybody who comes in contact with somebody who has been on the landowner's property'" would expose landowners to unpredictable "liability [of an] unknown but potentially massive dimension.'" (*Kesner*, *supra*, 226 Cal.App.4th at p. 258, quoting *Campbell*, *supra*,

206 Cal.App.4th at p. 34.) Property owners do not and could not possibly plan for such expansive and unknowable risks. Manufacturers, on the other hand, place goods into the stream of commerce and therefore expect (and insure against) the risk of liability (even strict liability) arising out of their manufacturing to plaintiffs they never encounter and with whom they have no preexisting relationship. (See *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62 ["A manufacturer is strictly liable in tort when an article he places on the market . . . proves to have a defect that causes injury to a human being."].)

In any event, even if the decision below and *Kesner* were in conflict (which they are not), *Kesner* was wrongly decided. Indeed, it is far from certain that the plaintiff in *Kesner* could recover even under the expansive rule Plaintiffs urge in this case: The plaintiff in *Kesner* was neither an immediate family member of the on-premises worker nor a resident of the worker's household—he was merely the worker's nephew, who sometimes visited the worker's house. (226 Cal.App.4th at p. 255.) In extending a duty to the plaintiff in *Kesner*, the Court of Appeal "emphasize[d] . . . that Kesner's contact with his uncle was extensive," distinguishing other situations in which the

contact might only be "casual or incidental." (*Id.* at p. 261). But that fuzzy distinction reflects the very line-drawing problem that troubled the Court of Appeal in *Campbell* and in this case. (See *Campbell*, *supra*, 206 Cal.App.4th at p. 32; see also *Oddone*, *supra*, 179 Cal.App.4th at p. 822.) Property owners should not be saddled with expansive exposure to liability based on such vague and undefined distinctions; clear lines, like the rule set forth by the Court of Appeal in this case, are essential.

* * *

Plaintiffs' faulty readings of *Campbell* and *Kesner* are their only bases for asserting that review is "'necessary to secure uniformity of decision.'" (Pet'n at pp. 4-5, quoting Cal. Rules of Court, rule 8.500(b)(1).) The fact is that *Campbell*, *Kesner*, and this case are all in *agreement* that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business." (*Campbell*, *supra*, 206 Cal.App.4th at p. 34.) Under this unanimous precedent, BNSF had no duty to Ms. Haver and Plaintiffs' premises-liability claim was properly dismissed.

II. There Is No Other Reason To Grant The Petition.

Because the Court of Appeal faithfully applied *Campbell* and other longstanding principles of premises liability, there is no "'important question of law'" for this Court to settle. (Pet'n at p. 5, quoting Cal. Rules of Court, rule 8.500(b)(1).) Indeed, the novel position urged by Plaintiffs would expand premises liability without any natural limiting principle, bringing California law into conflict with the emerging majority of jurisdictions that bar "take-home" liability for asbestos claims.

A. Plaintiffs' Unprecedented Theory Of Premises Liability Raises Significant Policy Concerns.

"Take-home" liability theories like the one urged by Plaintiffs raise serious policy concerns that weigh heavily against the creation of a new duty of premises owners to indirectly injured persons.

The rule Plaintiffs urge this Court to adopt would be devastating for businesses, exposing them to liability that is "uncertain" but "potentially very large" (*Oddone*, *supra*, 179 Cal.App.4th at p. 822)—especially in the asbestos context where, as the Court of Appeal observed, "'litigation has already rendered almost one hundred corporations bankrupt.'" (Slip op. at p. 7, quoting Note, *Continuing War with Asbestos: The Stalemate Among State Courts*

On Liability for Take-Home Asbestos Exposure (2014) 71 Wash. & Lee L. Rev. 707, 711.) Without a clear principle limiting the spread of secondary liability, more businesses would find it impossible to assess and manage their litigation risks and would inevitably go bankrupt. Worse, as Plaintiffs recognize, this risk would spread far beyond the asbestos context because "'asbestos is not the only toxin to which an employer's obligations apply.'" (Pet'n at p. 21, quoting *Kesner*, *supra*, 226 Cal.App.4th at p. 259.)

Moreover, the dramatic expansion of premises liability for secondary exposure to asbestos and other toxins that Plaintiffs propose relies on scientific theories that are shaky at best. By their very nature, "take-home" asbestos claims involve lower levels of exposure than direct exposure claims, making them likely candidates for misleading testimony by experts who claim that *any* exposure to asbestos—no matter how trivial—may be a substantial-factor cause of mesothelioma. (See William L. Anderson et al., *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008* (2012) 22 FALL Kan. J.L. & Pub. Pol'y 1, 2 ["asbestos cases have targeted increasingly de minimis exposure scenarios, including . . .

'take-home' cases where the already miniscule exposures from the product or work activity are reduced even further to near obscurity"].) Finding a duty here would encourage more lawsuits based on trivial levels of asbestos exposure, increasing the risk of erroneous verdicts based on dubious theories.

Expanding the number of businesses that each asbestos plaintiff can sue will also lead to more meritless claims against deep-pocket defendants, especially where the entities who actually bear the blame for significant asbestos exposure have already been driven into bankruptcy. (See generally Victor E. Schwartz and Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander"* (2013) 23 Widener L.J. 59.) This phenomenon is readily apparent in the "take-home" liability cases discussed herein. In *Kesner*, the plaintiff tacked on a secondary exposure claim in a suit that otherwise targeted defendants who exposed him to asbestos directly. (226 Cal.App.4th at p. 255.) And in *Campbell*, where the jury apportioned Ford only five percent of the fault for the plaintiff's injuries, Ford could have been held jointly and severally liable for the *entire amount* of the plaintiff's economic damages if the plaintiff had not abandoned her economic damages claim. (206 Cal.App.4th at p. 23; see also

DaFonte v. Up-Right Inc. (1992) 2 Cal.4th 593, 599-600.) The rule proposed by Plaintiffs could lead to decades of additional asbestos litigation targeting defendants based on their ability to pay rather than the significance of their alleged contributions to plaintiffs' injuries.

The rule proposed by Plaintiffs would also conflict with traditional notions of premises liability. Even though this Court has departed from rigid common-law classifications that turn on the *reasons* for visitors being on a property (see *Rowland*, 69 Cal.2d at p. 118), it has never expanded premises liability to include plaintiffs whose only connection with the property is an encounter with someone who visited the site. (See *Campbell*, *supra*, 206 Cal.App.4th at p. 30.) Plaintiffs' theory effectively decouples premises liability from the premises at issue.[1]

---

[1] Plaintiffs observe that premises liability may sometimes extend to "persons injured off the property by the owner's negligent use, control and/or maintenance of the property." (Pet'n at p. 32.) But in two of the cases that Plaintiffs cite, the court found no duty. (See *Garcia v. Paramount Citrus Ass'n, Inc.* (2008) 164 Cal.App.4th 1448, 1452 [owner of private road intersecting with public road had no duty where unauthorized user of private road caused accident in intersection]; *A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 662-63 [owner of property owed no duty where truck driver turning onto property caused accident].) In the other three cases cited by Plaintiffs, the injury occurred as a result of the

[Footnote continued on next page]

B. Plaintiffs' Unprecedented Theory Of Premises Liability Would Make California An Outlier.

Plaintiffs' proposed expansion of a premises owner's duty also contravenes the weight of authority from other States. As the Court of Appeal correctly noted, the "'emerging majority view'" holds that "an employer can have no legal duty to an employee's spouse who never set foot inside the employer's facility.'" (Slip op. at p. 6, quoting 4 Cetrulo, Toxic Torts Litigation Guide (2013) § 33:6.) The high courts of Delaware, Georgia, Michigan, and New York have all rejected "take-home" asbestos claims,[2] and Plaintiffs do not identify a single decision from the highest court of a State supporting their position.

[Footnote continued from previous page]

plaintiff's geographic proximity to the defendant's property—a self-limiting principle that retains the traditional link between the *premises* and the *liability*. (See *Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1477-1478 [tenant sued landlord after child playing at apartment complex lost control of bicycle and veered into busy street]; *Davert v. Larson* (1985) 163 Cal.App.3d 407, 412 [owner liable where horse escaped from property and struck automobile on adjacent road]; *Wilson v. Sespe Ranch* (1962) 207 Cal.App.2d 10, 17 [owner liable where fire spread to neighboring properties].)

[2] See *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208; *Price v. E.I. DuPont De Nemours & Co.* (Del. 2011) 26 A.3d 162; *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas* (Mich. 2007) 740 N.W.2d 206 (*In re Certified Question*); *In re New York City Asbestos Litigation* (N.Y. 2005) 5 N.Y. 3d 486.

Plaintiffs attempt to draw a distinction between States that "view . . . foreseeability as the primary factor in determining duty" and States that focus primarily on the "relationship between the parties"—with California supposedly falling in the former category—in order to justify California's departure from the majority view. (Pet'n at pp. 27-28.) This argument fails for two reasons.

First, it assumes that "take-home" asbestos injuries are foreseeable, even though courts in many States have found they are not. (See *In re Certified Question*, 740 N.W. 2d at p. 218; *Alcoa Inc. v. Behringer* (Tex. Ct. App. 2007) 235 S.W.3d 456, 462.)

Second, Plaintiffs' reductive focus on foreseeability misstates California law, which looks to a number of factors and recognizes that "foreseeability alone is not sufficient to create an independent tort duty." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 552; see also, e.g., *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 281 fn. 5, ["foreseeability *and extent of burden to the defendant* . . . have evolved to become the primary factors to be considered," italics added].) Like the *Campbell* court, courts in other States have "weigh[ed]" policy considerations alongside foreseeability and come to the conclusion that the balance of relevant factors militates starkly

against the imposition of a duty in "take-home" asbestos cases. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072; see *Campbell*, *supra*, 206 Cal.App.4th at p. 32.). Adopting Plaintiffs' position and overturning the settled consensus of the Courts of Appeal on the basis of foreseeability alone would therefore bring California law into conflict with other jurisdictions.

CONCLUSION

The sound decision of the Court of Appeal does not warrant this Court's review. The lower courts are in agreement that plaintiffs may not assert premises-liability claims against property owners for secondary exposure to asbestos that occurred off the defendant's premises. There is no reason for this Court to revisit that settled principle, which protects property owners from greatly expanded and unpredictable liability and is consistent with the emerging majority view across the country. Respectfully, this Court should deny the Petition for Review.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 8.504(d), CALIFORNIA RULES OF COURT

In accordance with rule 8.504(d), California Rules of Court, the undersigned hereby certifies that this Answer to Petition for Review contains 3,859 words, as determined by the word processing system used to prepare this brief, excluding the tables, the cover information, the signature block, and the certificates.

Respectfully submitted,

DATED: August 4, 2014

GIBSON, DUNN & CRUTCHER LLP

By: Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

Attorneys for Defendant and Respondent
BNSF RAILWAY COMPANY

CERTIFICATE OF SERVICE

I, Suzanne Maruschak, hereby certify as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, CA 94105, in said County and State; I am employed in the office of Joshua S. Lipshutz of Gibson, Dunn & Crutcher LLP a member of the bar of this Court, and at his direction I caused the **ANSWER TO PETITION FOR REVIEW** to be served on the interested parties in this action (listed below) on August 4, 2014 by:

☑ **SERVICE BY MAIL:** On the above-mentioned date, I placed a true copy of the above documents in a box and addressed it to the addressee(s) listed below. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business:

Paul C. Cook **Michael B. Gurien** **Waters Kaus & Paul** **222 N. Sepulveda Blvd, Ste. 1900** **El Segundo, California 90245**	*Attorneys for Plaintiffs/Petitioners Joshua Haver, Christopher Haver, Kyle Haver and Jennifer Morris*
Court of Appeal **Second Appellate District, Division Five** **Ronald Reagan State Building** **300 South Spring Street** **2nd Floor, North Tower** **Los Angeles, California 90013**	

Superior Court of California
County of Los Angeles
Honorable Richard E. Rico
Judge Presiding, Department 17
111 North Hill Street
Los Angeles, California 90012

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper.

Suzanne Maruschak