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 BRIEF ON THE MERITS

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INTRODUCTION

Plaintiffs ask this Court to impose a new, logically unbounded duty on companies and premises owners that would substantially exacerbate the asbestos litigation crisis—a duty that has been rejected by the majority of courts in California and other jurisdictions. This Court should reject Plaintiffs' invitation and hold that an employer or premises owner has no duty to plaintiffs who allegedly were exposed to asbestos only *indirectly*, through their purported contacts with *other* individuals who were employed by, or frequented the premises of, the defendant.

Plaintiffs claim that the attenuated chain of alleged asbestos exposure connecting BNSF's predecessor to Plaintiffs' decedent, Lynne Haver ("Ms. Haver"), was foreseeable, and that BNSF therefore owed a duty to Ms. Haver. But even if the alleged exposure was foreseeable (it was not), accepting Plaintiffs' argument would open wide the door to other, equally foreseeable claims by relatives, cohabitants, service workers, and others who might plausibly allege they were exposed to toxins on the person or clothing of another individual with more direct contacts to the defendant. There is simply no principled distinction that can be drawn to separate the claims of an

ex-spouse (like Ms. Haver) from those of other relatives, long-time unmarried partners or roommates, or workers at a laundry patronized by the defendant's employee. Under such circumstances, imposing a newly created duty would contravene well-established California law.

Moreover, Plaintiffs' expansion of defendants' liability to third parties with whom they have had no contact whatsoever would have intolerable consequences for businesses, consumers, and the State as a whole. Their rule would significantly increase the number of potential asbestos plaintiffs and likely lead to a corresponding increase in the volume of asbestos litigation. But the proliferation of litigation would not be limited to asbestos cases alone—individuals who develop many forms of lung and other diseases would be encouraged to scour their pasts for connections to other individuals who may in turn have been exposed to toxins, increasing the prevalence of dubious claims predicated on unreliable causation evidence. Just as seriously, Plaintiffs' rule would dramatically expand the number of *defendants* each plaintiff can sue, facilitating the perverse tactic of naming deep-pocket defendants based on their ability to pay rather than their culpability. And by opening the door to claims against defendants without any direct connection to a

plaintiff's harm, Plaintiffs' rule would increase the probability of damages awards out of proportion to defendants' fault. Policy concerns like these are the principal reason that the high courts in other States have largely rejected the doctrine, holding that employers and premises owners owe no duty to secondary or "take-home" asbestos plaintiffs.

Plaintiffs try mightily to cabin the scope of the duty they ask this Court to create, in order to mitigate the severe harms described above. But they encounter the same problem faced by the two jurisdictions (Tennessee and New Jersey) that have permitted take-home asbestos claims: There is simply no way to circumscribe the new duty other than by arbitrarily privileging some potential plaintiffs over others. This Court should instead draw a far more sensible bright-line rule and hold that a defendant employer or property owner owes no duty to secondary-exposure plaintiffs who never worked for, or set foot on the property of, the defendant.

Finally, even if the Court decides to permit some forms of take-home liability claims under some circumstances, it should not condone them where, as here, the plaintiff advances only a premises liability theory and yet has never set foot on defendant's property.

COUNTER-STATEMENT OF FACTS

Plaintiffs are the children of and successor in interest to Ms. Haver. Their sole remaining cause of action in this litigation, which has generated three separate appeals, is a claim for premises liability based on Ms. Haver's alleged exposure to asbestos carried home by her former husband, Mike Haver, from his job at a Barstow, California facility operated by BNSF's predecessor, the Atchison Topeka and Santa Fe Railway Company ("ATSF"). (1AA001, 005.) ATSF was a railroad that never manufactured or distributed asbestos products. (1AA062.)

I. BNSF Defeats Ms. Haver's Personal Injury Claims on Summary Judgment

The initial complaint filed in this litigation was a personal injury claim filed by Ms. Haver against 19 defendants, including BNSF. (1AA034-035.) Although Ms. Haver also brought products liability claims, the sole cause of action that pertained to BNSF was her negligence claim. (1AA034-044.) Ms. Haver claimed that Mike Haver worked as a fireman/hostler for ATSF between 1972 and 1974 and that his chief responsibility was moving locomotives into and out of diesel shops. (1AA041-042, 061-062.) According to Ms. Haver's complaint, Mike Haver was exposed to asbestos dust generated by

locomotive brakes and while observing locomotives being repaired. (1AA139.)

BNSF moved for summary judgment on Ms. Haver's negligence claim. Undisputed evidence showed that while he worked at ATSF, Mike Haver did not handle asbestos-containing materials (1AA062, 141); the diesel locomotives he worked on had few asbestos-containing components, and those they did have are "non-friable" and thus unlikely to release asbestos into the air. (1AA062, 141). BNSF presented evidence showing that the specific maintenance activities performed around Mike Haver were unlikely to result in significant asbestos exposures. (1AA061, 070.) Further, BNSF showed that derivative, take-home asbestos exposures require very high levels of primary exposure—levels to which Mike Haver would not have been exposed while working at ATSF. (1AA070, 141.)

The trial court granted BNSF's summary judgment motion, finding, inter alia, that the plaintiff's evidence was "too unsupportive, insubstantial and incompetent" to raise a triable issue of fact. (1AA076.) The Court of Appeal affirmed.

II. Plaintiffs File the Operative Complaint and the Trial Court Grants BNSF's Demurrers

On April 12, 2010, Plaintiffs filed the operative complaint, bringing survivorship and wrongful death claims against BNSF. (1AA001.) Like Ms. Haver's prior lawsuit, Plaintiffs' complaint alleged that Mike Haver was exposed to "locomotive engine repairs" and "brake repairs." (1AA005.) It also alleged that Mike Haver was exposed to asbestos from sources unrelated to BNSF, including from "various glazing and joint compound products containing asbestos while [Mike Haver was] working with the family business in Barstow, California from approximately 1974 to 1978." (*Ibid.*) The complaint further alleged that Mike Haver "also performed brake repair and replacement on his friends' and family's personal automobiles." (*Ibid.*) The trial court granted BNSF's first demurrer, which argued that all of Plaintiffs' claims were barred by res judicata and collateral estoppel. (1AA019-020, 207-208.) The Court of Appeal reversed, holding that Plaintiffs' premises-liability claim against BNSF based on alleged exposures from non-locomotive sources was not actually litigated in the prior lawsuit. (2AA269-278.)

On remand to the trial court, BNSF filed a second demurrer based on the recent decision in *Campbell v. Ford Motor Company*

(2012) 206 Cal.App.4th 15 (*Campbell*), which held that a property owner has no duty to a take-home asbestos plaintiff who had never been exposed to asbestos on the owner's property. (1AA210-211.) The court in *Campbell* reasoned that "even assuming a property owner can reasonably be expected to foresee the risk of latent disease to a worker's family members secondarily exposed to asbestos used on its premises . . . strong public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure." (*Campbell, supra*, 206 Cal.App.4th at p. 32.) Relying on *Campbell*, the trial court granted BNSF's demurrer on October 26, 2012, and Plaintiffs appealed.

III. The Court of Appeal Affirms, Holding That BNSF Owed No Duty Under Plaintiffs' Premises Liability Theory

The Court of Appeal affirmed. It held that the trial court correctly concluded that *Campbell* controlled and that *Campbell* correctly stated California law. (*Haver v. BNSF Railway Co.* (2014) No. B246527, slip op. at p. 2 ("slip op.").) It also held that *Kesner v. Superior Court* (2014) 171 Cal.Rptr.3d 811 (previously published at 226 Cal.App.4th 251) (*Kesner*), was distinguishable. Although the court in *Kesner* allowed a take-home plaintiff to sue for exposure allegedly resulting from "negligence in the manufacture of asbestos-

containing brake linings," it explicitly declined to "question the conclusion in *Campbell* that" under a *premises liability* theory, "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*, 171 Cal.Rptr.3d at p. 816.) Because "[t]he only cause of action" remaining in this litigation "is for premises liability," the Court of Appeal below held that *Campbell*'s "no duty rule" applied and affirmed the trial court's ruling granting BNSF's second demurrer. (Slip op. at p. 8.)

Plaintiffs filed a petition for review on July 15, 2014, and this Court granted their petition on August 20, 2014.

DISCUSSION

I. The *Rowland* Factors Do Not Support Imposition of a Duty to Alleged Secondary Exposure Victims

As Plaintiffs acknowledge, this Court applies the factors set out in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113 (*Rowland*), to determine whether a defendant owes a duty of care to a plaintiff:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and

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

(*Ibid.*) The Court evaluates these factors "at a relatively broad level of factual generality" rather than focusing on the specific facts of a particular case. (*Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 772 (*Cabral*).)

The *Rowland* factors counsel strongly against creation of a new duty to take-home asbestos plaintiffs—a duty that would lead to a serious and unjustifiable expansion of asbestos litigation and liability. Even if the harm to Ms. Haver was theoretically foreseeable (it was not), foreseeability provides no workable limiting principle and therefore would not avert the disastrous consequences of Plaintiffs' proposed new rule. In short, foreseeability cannot be the determinative factor in this case. Rather, the third factor—the closeness of the connection between the defendant's conduct and the alleged injury—suggests the proper limitation to a defendant's duty: Although a defendant may owe a duty to individuals directly exposed to asbestos through its acts or on its premises, it owes no duty to those whose exposure is indirect and attenuated. The remaining factors—which Plaintiffs refer to as "public policy factors" (AOB at p. 23)—

also counsel strongly against the costly and disruptive rule Plaintiffs advocate.

In an effort to avoid the obvious and unacceptable consequences of their position, Plaintiffs ask the Court to limit the new duty they seek to create. But the limits they seek to establish are arbitrary, indeterminate, and gerrymandered to resemble Plaintiffs' pleaded facts—they do not provide a principled rule that can be broadly applied, as is required for the establishment of a duty. (See, e.g., AOB at p. 35 [arguing that new duty of care should be limited to "mesothelioma victims" who had "regular, close and prolonged contact" with employees exposed to asbestos]; *id.* at p. 1 [arguing that duty should be limited to "immediate family members"]; *id.* at p. 30 fn. 3 [arguing that scope of duty is limited based on the number of cases "involving women"]; *id.* at p. 31 fn. 5 [relying on statistics limited to mesothelioma victims "with identified occupations of 'housewife' or 'homemaker'"].)

This Court has explicitly counseled against such an approach. When defining the scope of a defendant's duty, "[t]he need to draw a bright line . . . is essential." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 (*Elden*).) This Court has refused to endorse arbitrary, under- or

over-inclusive definitions of a defendant's duty when doing so would prevent courts from "draw[ing] a principled distinction" between plaintiffs permitted to sue and those whose suits were barred. (*Ibid.*) Thus in *Elden*, the court declined to permit recovery for negligent infliction of emotional distress by unmarried cohabitants of accident victims, because it could not rationally distinguish those plaintiffs from "de facto siblings, parents, grandparents or children," and permitting *all* of these groups to sue would amount to "an extension of liability [that] would place an intolerable burden on society." (*Ibid.*, citation omitted.)

Analysis of the *Rowland* factors shows that Plaintiffs cannot draw any "bright line" between their claims and those of untold other plaintiffs secondarily exposed to asbestos or other toxins. Instead, this Court should draw the only clear, predictable, and enforceable line it can, and hold that a defendant owes no duty to take-home asbestos plaintiffs who never set foot on the defendant's property and do not allege any direct exposure caused by the defendant.

A. Foreseeability Alone Is Not Determinative

Foreseeability of injury to the plaintiff is a necessary condition for the existence of a tort duty. Indeed, this Court has concluded that

"[f]oreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations" under *Rowland*, although "in a given case one or more of the other *Rowland* factors may be determinative of the duty analysis." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 (*Castaneda*).)

As this Court has repeatedly held, however, "foreseeability alone is *not* sufficient to create an independent tort duty." (*Ehrlich v. Menezes* (1999) 21 Cal.4th 543, 552 (*Ehrlich*), italics added .) The duty analysis "'recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk.'" (*Ibid.*, quoting *Elden, supra*, 46 Cal.3d at p. 274.) "'[F]oresight alone'" can never "provide[] a socially and judicially acceptable limit on recovery of damages for [an] injury,'" and foreseeability is neither "synonymous with duty[] nor . . . a substitute." (*Ehrlich*, *supra*, 21 Cal.4th at p. 552, quoting *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668.)

1. As an initial matter, Plaintiffs have failed to show that any harm to Ms. Haver was foreseeable in the period from 1972 to 1974 when Mike Haver worked for ATSF. Plaintiffs acknowledge that to demonstrate foreseeability, their allegations must show that "a

reasonably thoughtful person would take account of" the risk of secondary exposure to harmful chemicals "in guiding practical conduct." (AOB at pp. 17-18, quoting *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 24 Cal.3d 49, 57, alterations and quotation marks omitted (*Bigbee*).) Their complaint itself does not come close to making this showing. It includes only conclusory allegations that defendants (including BNSF) "knew, or should have known" that Ms. Haver "would use or be in proximity of and exposed to . . . asbestos fibers" allegedly generated or released by ATSF's activity. (1AA004.) But the complaint does not allege any *facts* whatsoever showing or suggesting that take-home asbestos exposure was a foreseeable risk at the time of Mike Haver's employment with ATSF.

Acknowledging this deficiency, Plaintiffs have proposed to amend their complaint to add a hodgepodge of references to academic, industrial, and governmental documents suggesting either general risks associated with asbestos exposure or potential risks from secondary exposure. (AOB at p. 9.) Plaintiffs never allege in more than conclusory terms, however, that BNSF or its predecessors had any reason to be aware of any of these documents in the 1970s—indeed, the only document they point to that could reasonably give

rise to constructive knowledge of the risks of take-home asbestos on the part of employers is an NIOSH report from 1995. (See 2AA256.)

Plaintiffs' patchwork of conclusory allegations (and proposed allegations) is insufficient to establish that the risk of take-home exposure was, in fact, so "well established" by the early 1970s that "a reasonably thoughtful person would take account of . . . the risk" in guiding his or her conduct at that time. (AOB at pp. 17-18, alterations and quotation marks omitted.) This is especially clear because BNSF does not produce asbestos or asbestos-containing products; its workers came into contact with asbestos (if at all) only infrequently and incidentally. (See 1AA061-062.) Plaintiffs' proposed allegations seek to exploit the benefit of hindsight, but they never establish that harm from take-home asbestos exposure was a foreseeable risk for a railroad in the early 1970s.[1]

2. Even if Plaintiffs could satisfactorily allege foreseeability (they cannot), their discussion of this factor does not address, let alone

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[1] Indeed, Plaintiffs allege that Ms. Haver herself—presumably a "reasonably thoughtful" person (AOB at pp. 17-18, quotation marks omitted)—had no knowledge of the dangers of asbestos, let alone secondary exposure to asbestos, during the relevant time period. (See 1AA006.)

resolve, the fundamental line-drawing problem that plagues Plaintiffs' entire argument.

If Plaintiffs are right that health risks related to off-site, secondary exposure to asbestos were foreseeable at the time of the exposures they allege, then there is no rational justification for differentiating between individuals in Ms. Haver's position and others who could just as foreseeably have come into contact with asbestos. Plaintiffs' effort to limit the scope of their rule to "immediate family member[s]" (AOB at p. 1) of defendants' employees makes no sense. Under this proposed rule, a worker's wife could sue for secondary exposure whether or not they cohabitate, but the worker's roommate, live-in girlfriend, or unmarried domestic partner could not. Laundry workers who regularly handled the worker's clothes and transit officials who transported the worker to and from the defendant's job site daily would have no claim, even though they may have faced far more significant exposures than the worker's "immediate family members." These perverse and inconsistent outcomes cannot be reconciled with this Court's insistence that tort duties be delimited by "bright line[s]" based on "principled distinction[s]." (*Elden, supra*, 46 Cal.3d at p. 277.)

Foreseeability also fails to distinguish mesothelioma claims from other alleged asbestos-related illnesses, as Plaintiffs attempt to do in certain portions of their brief. (See AOB at pp. 30-31.) In fact, in other portions of their brief, Plaintiffs acknowledge that their proposed rule would not be limited to mesothelioma alone. (See AOB at p. 9 [alleging that BNSF's predecessor had "actual knowledge that exposure to asbestos could cause *fatal lung disease* in human beings no later than 1937," italics added]).

In short, even if Plaintiffs could establish foreseeability (they cannot), the foreseeability factor cannot be determinative of this Court's duty analysis. If Plaintiffs' purported showing of foreseeability were sufficient to create a duty, it would expand the scope of that duty beyond any limits Plaintiffs propose or defend. And in the take-home asbestos context, foreseeability of harm cannot satisfy the "essential" "need to draw a bright line" delimiting the scope of a defendant's duty. (*Elden, supra*, 46 Cal.3d at 277.) Instead, this is a case where "one or more of the other *Rowland* factors" should "be determinative." (*Castaneda, supra*, 41 Cal.4th at p. 1213.)

B. Any Connection Between a Defendant's Conduct and Illness Ostensibly Related to Take-Home Asbestos Exposure Is Indirect and Attenuated at Best

As discussed above, the "foreseeability" factor does not provide any clear distinction between those to whom businesses owe a duty to protect from asbestos exposure and those to whom no duty is owed. But examining the "the closeness of the connection between the defendant's conduct and the injury suffered" (*Rowland, supra*, 69 Cal.2d at p. 113) provides a sharp distinction between direct and attenuated asbestos exposure that counsels strongly against the expanded duty proposed by Plaintiffs.

Plaintiffs' contention that "Ms. Haver's disease and death . . . were *direct* results of BNSF's negligent use of asbestos" is manifestly false. (AOB at p. 22, italics added.) Plaintiffs do not seek relief based on any allegation that Ms. Haver ever set foot on BNSF's property, was exposed to any asbestos-containing product manufactured or controlled by BNSF, or was in any other way exposed to asbestos *directly* from BNSF. Instead, they claim only that "Ms. Haver's *husband* was exposed to . . . asbestos [carried] home from the workplace on his clothing and body, where Ms. Haver was exposed through contact with him." (AOB at p. 1, italics added.) This case

concerns allegations of *secondary*, rather than *primary*, exposure—it involves an attenuated chain of events leading from Mr. Haver's alleged exposure at his workplace to Ms. Haver's ultimate alleged exposure through connection with him or his clothing at their home. This kind of attenuated connection, which relies on the intervening acts of a defendant's employee to transmit the alleged asbestos risk to the plaintiff, weighs strongly against the imposition of a legal duty.

This Court has routinely held that where a plaintiff's theory of causation rests upon the intervening acts of third parties, that theory is too attenuated to justify imposing a duty on the defendant. For example, in *Hoff v. Vacaville Unified School District* (1998) 19 Cal.4th 925, the Court held that a school owed no duty to protect a nearby pedestrian who was struck by a vehicle driven by a student who had just exited the school parking lot. The Court concluded that any obligation on the part of the school to supervise students did not trump the "general rule" that "one has no duty to control the conduct of another." (*Id.* at p. 933, quotation marks and citation omitted). It also rejected the plaintiff's argument that the existence of a relationship between the school and the student (but not between the school and the plaintiff) was sufficient to impose a duty. (*Id.* at pp.

933-934.) Likewise, in *Richards v. Stanley* (1954) 43 Cal.2d 60, 65 (*Richards*), the Court held that a defendant who negligently left her keys in the ignition of her car owed no duty to another driver who was struck by a thief driving the defendant's car. (*Id.* at pp. 61-62.) And in *Bryant v. Glastetter* (1995) 32 Cal.App.4th 770, the Court of Appeal held that a drunk driver who was stopped and arrested on the side of a highway owed no duty to the tow truck driver who, while working to remove the defendant's vehicle, was struck by another driver and killed.

The causal chain in this case is equally attenuated. Here, without the intervening conduct of a third person acting outside of BNSF's control, there is no way that Ms. Haver could have been exposed to asbestos that originated on BNSF's property.[2] Because BNSF had no direct connection whatsoever to Ms. Haver and she

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[2] This fact could also be relevant to defeat causation by showing the existence of an intervening cause. This Court has made clear, however, that the relevance of an intervening cause to the *causation* analysis differs materially from its relevance to the *duty* analysis: "In the latter case the problem is whether or not the defendant's conduct was wrongful *toward the plaintiff*, while in the former it is whether he should be relieved of responsibility for an admitted wrong because another's wrongful conduct also contributed to the injury." (*Richards, supra*, 43 Cal.2d at pp. 68-69, italics added.) Thus, even an innocent act by a third party may sufficiently attenuate the causal chain to prohibit recognition of a legal duty.

could not have been exposed to asbestos absent the conduct of a third party, the closeness-of-connection factor militates against recognition of a duty here.

Importantly, this factor also provides the "bright line" that *should* limit the scope of defendants' duty under these circumstances. (*Elden, supra*, 46 Cal.3d at p. 277.) There is a stark qualitative difference between direct exposure to asbestos—exposure that takes place on a defendant's premises, affects a defendant's employee, or is caused by use of a defendant's product—and indirect exposure, which (as here) takes place *off* the defendant's premises and allegedly affects individuals who have no relationship with the defendant whatsoever.

Further, the challenges interposed by recognizing a duty for attenuated and indirect "take-home" asbestos cases, like this one, are compounded by the shaky science underlying such claims. As an initial matter, mesothelioma can develop even without *any* exposure to asbestos. (See Brickman, *Fraud and Abuse in Mesothelioma Litigation* (2014) 88 Tul. L.Rev. 1071, 1072 fn. 5 ["mesothelioma occurs in all populations even absent asbestos exposure," citation omitted]; see also, e.g., Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501, 527 [reporting estimates that "twenty to

thirty percent" of mesotheliomas "are not asbestos-induced"].) But even if Ms. Haver's illness was asbestos-related, there is no reason to assume her mesothelioma was caused by *BNSF*. In fact, Plaintiffs have identified several other potential sources of asbestos that may have caused her illness. For example, in their complaint Plaintiffs allege that Ms. Haver's "former husband, Mike Haver, worked with and/or around various glazing and joint compound products containing asbestos while working with the family business in Barstow, California from approximately 1974 to 1978"—twice as long as he worked for BNSF. Mike Haver "also performed brake repair and replacement on his friends' and family's personal automobiles." (1AA005.) And when Ms. Haver originally brought suit, she named at least 18 *other* companies as defendants. (See 1AA034-035.) The fact that Ms. Haver faced other, potentially much more serious, direct, and prolonged incidents of asbestos exposure casts further doubt on whether any "connection" exists between her injuries and BNSF's conduct, much less a connection so close it would justify imposition of a legal duty.

Plaintiffs' suggestion that the closeness-of-connection factor is automatically satisfied by "[a] finding of foreseeability" is flatly

wrong. (AOB at p. 21.) Even if, "[g]enerally speaking," the issues of foreseeability and the closeness of the connection between the defendant's conduct and the injury suffered are "strongly related" (*Cabral, supra*, 51 Cal.4th at p. 779), this Court has never stated or held (as Plaintiffs suggest) that they coincide in every case.[3] In *Richards, supra*, 43 Cal.2d at p. 65, for example, it did not matter that "both theft and negligent driving . . . were foreseeable consequences of leaving the key in the car"—the Court held there was no duty anyway, recognizing that "there are many situations involving foreseeable risks where there is no duty." (*Id.* at 64, 66.) This Court has since described the *Richards* outcome as "resting on a too attenuated connection between the defendant's negligent conduct . . . and the plaintiff's injury." (*Cabral, supra*, 51 Cal.4th at p. 779.) Even where each link in a causal chain is foreseeable, the chain may simply extend too far for a duty to attach.

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[3] Plaintiffs cite statements in *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131, and *Bigbee, supra*, 34 Cal.3d at pp. 59-60, fn. 14. But especially in light of this Court's recognition in *Cabral* that these factors only "[g]enerally" coincide, the most sensible reading of these statements is that foreseeability and the closeness-of-connection factor were logically aligned *under the facts of those cases*. Indeed, Plaintiffs' alternative reading would render the closeness-of-connection factor a mere redundancy, even though it is explicitly enumerated in *Rowland*.

Finally, Plaintiffs' effort to distinguish this case from *Campbell* is unconvincing. (See AOB at p. 23.) Plaintiffs argue that because BNSF *employed* Mr. Haver, the connection is more direct than in *Campbell*, where asbestos was carried home by an employee of an independent contractor working on the defendant's property. But the Court of Appeal 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.) Rather, the court's ruling was based on the fact that "the injury suffered by an employee's family member [was] off of the premises" and therefore was too "attenuated" to give rise to a duty. (*Ibid.*, italics omitted.) Because there is no close connection between a take-home asbestos plaintiff and a defendant that never employed the plaintiff and whose property the plaintiff never visited, this factor weighs heavily against imposition of a duty.

C. The Moral Blame Criterion Is Not Satisfied by Mere Negligence

Plaintiffs allege that BNSF was negligent, and argue that mere negligence on the part of a defendant is sufficient for the "moral blame" factor to support imposition of a tort duty. Not so.

As an initial matter, BNSF disputes Plaintiffs' allegation of negligence. As BNSF demonstrated in defending Ms. Haver's suit, the activities in which Mike Haver participated while an employee of ATSF did not place him at an unreasonable risk of significant asbestos exposure, let alone create an unreasonable risk for those with whom he subsequently came into contact. (1AA061-062, 141.) Indeed, Plaintiffs have never alleged that BNSF or its predecessor violated the extensive federal regulatory scheme pursuant to the Locomotive Safety Act, which pre-empts state-law tort claims. (See *Kurns v. R.R. Friction Prods. Corp.* (2012) 132 S.Ct. 1261, 1270; see also *United Transportation Union v. Long Island R.R. Co.* (1982) 355 U.S. 678, 687-688 ["Railroads have been subject to comprehensive federal regulation for nearly a century."].)

Even if BNSF were negligent, though, that would not mean that the "moral blame" factor counsels in favor of imposition of a duty. As articulated by the Court in *Rowland*, "the moral blame that attends ordinary negligence is generally not sufficient to tip the balance . . . in favor of liability.'" (*Campbell, supra*, 206 Cal.App.4th at p. 32, quoting *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270.) Instead, "courts require a higher degree of moral culpability"—one

that is not even alleged here. And Plaintiffs' proposed allegations—a scattered collection of studies without any allegations about their circulation, reception, or availability to BNSF's predecessor (see 2AA256-259)—are not remotely sufficient to establish that BNSF had "'actual or constructive knowledge'" of the harm it allegedly caused take-home asbestos victims like Ms. Haver. (AOB at p. 25, quoting *Campbell, supra*, 206 Cal.App.4th at p. 32.) Indeed, the only document Plaintiffs reference that could possibly have led to constructive knowledge of the alleged risk is a report published by the National Institute for Occupational Safety and Health in *1995*, more than 20 years after Mr. Haver stopped working for BNSF. (2AA256.)

Because neither Plaintiffs' complaint nor their proposed additional allegations establish that BNSF's predecessor's conduct was more than simply negligent, this factor does not support imposition of a duty on BNSF here.

D. Finding a Duty Here Would Force Solvent Defendants To Litigate Dubious Claims and Impose a Significant Burden on Defendants, Consumers, and Society at Large

As this Court has recognized, "the extent of the burden to the defendant" is ordinarily one of the "crucial considerations" in the *Rowland* analysis. (*Castaneda, supra*, 41 Cal.4th at p. 1213.) Here,

the burden on defendants and society at large of recognizing a duty to secondary-exposure asbestos plaintiffs would be intolerable.

Plaintiffs acknowledge, as they must, that "the prospect of indeterminate, uncertain or unlimited liability . . . may counsel against recognition of a duty of care or call for a limited duty." (AOB at p. 27, citing *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 398 (*Bily*).) Additionally, they recognize that this Court has repeatedly "declined to allow recovery on a negligence theory when damage awards threatened to impose liability out of proportion to fault." (*Bily, supra*, 3 Cal.4th at p. 398; see AOB at p. 27.) But they fail to admit that these standards are fatal to their claim.

Imposing a duty on premises owners or employers to protect secondary-exposure asbestos plaintiffs would both create "indeterminate [and] uncertain . . . liability" and permit "damage awards" that are dramatically "out of proportion to fault." (AOB at p. 27; *Bily, supra*, 3 Cal.4th at p. 398.) There are two reasons this is so. First, recognizing a duty to secondary-exposure plaintiffs would significantly expand the universe of potential asbestos *plaintiffs*, capturing a large and amorphous population whose exposures to asbestos are less significant, more difficult to prove, and less likely to

be causally connected to a given defendant than those of traditional asbestos plaintiffs. Second, recognizing a duty running from businesses to indirectly exposed plaintiffs would dramatically expand the number of *defendants* each existing asbestos plaintiff could sue, increasing the probability of nuisance-value settlements and inordinately large damages awards against negligibly culpable but enticingly solvent defendants.

1. Despite Plaintiffs' protestations, recognition of a duty here would significantly expand the universe of plaintiffs who could bring questionable asbestos claims against businesses. As the Court of Appeal correctly observed in *Campbell*, the fundamental problem is that it is

> hard to draw the line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed. 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.

(*Campbell, supra*, 206 Cal.App.4th at p. 32, quoting *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822 (*Oddone*) [no duty

where plaintiff alleged she was harmed by toxic chemicals brought home from her husband's workplace].) Indeed, in take-home asbestos cases the "class of secondarily exposed potential plaintiffs is far greater, including fellow commuters, those performing laundry services and more." (*Campbell, supra*, 206 Cal.App.4th at p. 33.)

As described *ante*, this line-drawing problem plagues Plaintiffs' entire argument. Plaintiffs claim BNSF owes a duty because Ms. Haver's injuries allegedly resulting from indirect asbestos exposure were supposedly foreseeable. But they ignore—and certainly never defend—the consequences that would follow if all secondary-exposure plaintiffs alleging equally foreseeable harms could bring suit. For each worker exposed to asbestos during the course of his or her employment, there may be innumerable relatives, friends, acquaintances, or service providers who could foreseeably have been exposed to asbestos on the worker's person. Moreover, even if the worker never develops a disease that can be attributed to asbestos exposure, one of these secondarily exposed individuals might.

Plaintiffs never dispute that this prospect of dramatically expanded liability would impose an unacceptable burden on defendants, consumers, and society at large. Instead, they do

everything they can to avoid the logical consequences of their theory, claiming that, in fact, the "pool of potential plaintiffs is finite and small." (AOB at p. 30.) To reach this unsupportable conclusion, Plaintiffs reason that mesothelioma is a "very rare cancer, even among persons exposed to asbestos," with only 264 cases occurring in the state of California in the average year. (*Ibid.*, quotation marks omitted.) Then, they assert that "no more than 7 percent [of mesothelioma cases] are attributable to take-home asbestos exposures"; thus, according to Plaintiffs, there are "on average . . . no more than 16 take-home mesothelioma cases" in California each year. (*Id.* at p. 31.)

Plaintiffs' estimates are extremely misleading. As an initial matter, Plaintiffs never explain why they have limited their analysis to "very rare" mesothelioma, rather than other, much more common illnesses that often give rise to asbestos-related claims (such as lung cancer and pneumoconiosis). And the new duty Plaintiffs propose would not even be limited to asbestos-related allegations; plaintiffs (like the plaintiff whose claim was rejected in *Oddone*) claiming injuries ostensibly caused by other toxins would surely take advantage of it as well. In fact, limiting the scope of the new duty to asbestos-

induced mesothelioma would be inconsistent with Plaintiffs' own formulation of the issue presented for review in this case, stated in the very first sentence of their brief, which asks whether an "employer who uses a toxin"—any toxin—has a duty of care to protect against secondary exposure without any limitation on the types of illnesses that might give rise to such a claim. (AOB at p. 1.)

Further, Plaintiffs' contention that only 7% of mesothelioma patients could bring claims for secondary exposure is also deeply flawed. Plaintiffs arrive at that number by pointing to a 1999 report that found that 6.8 percent of mesothelioma cases that year "involved victims with identified occupations of 'housewife' or 'homemaker.'" (AOB at p. 31 fn. 5.) Plaintiffs do not say why "housewives" and "homemakers" should be the only ones permitted to bring claims for secondary exposure to asbestos or other toxins; the restriction is vastly under-inclusive, as working outside the home does not immunize someone from the possibility of secondary exposure to asbestos. Plaintiffs' flawed analysis is merely an effort to obscure the serious adverse consequences of their proposed rule.

When the true scope of Plaintiffs' theory of liability for secondary exposure to asbestos is examined, the math changes

dramatically. For example, although there were only 2,484 mesothelioma deaths in the United States in 1999, there were more than *162,000* lung cancer deaths that same year—any number of which could have given rise to a secondary asbestos exposure claim like the one Plaintiffs are pursuing. (National Institute for Occupational Safety and Health, *Work-Related Lung Disease Surveillance Report 2007*, pp. 178, 279 <http://www.cdc.gov/niosh/docs/2008-143/pdfs/2008-143.pdf>.)

Further, even if Plaintiffs were correct that only 7% of potential asbestos cases would include secondary exposure claims, estimates of the number of asbestos claims that will be filed in the coming decades range from 1.7 million to as high as 2.6 million—meaning there could be hundreds of thousands of secondary exposure claims. (See Judicial Council of Cal. Admin. Off. of Cts., *Improving Asbestos Case Management in the Superior Court of San Francisco*, (Nov. 2010) DataPoints, p. 1 <http://www.courts.ca.gov/documents/asbestos-final1112.pdf> ("*Improving Asbestos Case Management*").) Plaintiffs' suggestion that this Court's decision will affect the claims of only 16 "housewives" or "homemakers" every year misses the mark by orders of magnitude.

2. In addition to dramatically expanding the pool of potential asbestos *plaintiffs*, Plaintiffs' position would expand the pool of potential *defendants* each asbestos plaintiff could sue. It is no secret that asbestos lawsuits often name long lists of defendants; indeed, this multiplicity of defendants is one of the reasons the Administrative Office of the Courts notes that asbestos litigation "tends to place a disproportionate case management burden on court clerical staff." (*Improving Asbestos Case Management, supra*, p. 3.)

Permitting secondary-exposure claims would expand the number of defendants available to a given asbestos plaintiff even further. Whereas plaintiffs currently sue only former employers or businesses with whose premises or products they have come into direct contact, Plaintiffs' proposed rule would allow them to name additional defendants based solely on the contacts of their relatives and acquaintances.

Expanding the pool of available defendants would exacerbate several already-troubling trends in asbestos litigation. First, it would increase the likelihood of defendants being targeted based on their solvency rather than their culpability. After several decades of asbestos litigation, many of the businesses that bore the greatest

responsibility for asbestos exposures have been driven into bankruptcy and cannot compensate new claimants. The collapse of these businesses has transformed asbestos litigation into a search for solvent defendants, in which plaintiffs pursue claims against entities that did not significantly contribute to asbestos exposures simply because those entities can satisfy a judgment. (See generally Schwartz and Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander"* (2013) 23 Widener L.J. 59.) These businesses can be made to pay damages that are shockingly disproportionate to their liability: As joint tortfeasors, they are jointly liable for *all* of a plaintiff's economic damages (which include medical expenses, see Civ. Code, § 1431.2 subd. b.), as well as severally liable for their adjudged proportion of noneconomic damages. (See Civ. Code, § 1431.2.) Permitting suits against defendants for secondary asbestos exposure would make this stratagem more common and less fair, providing plaintiffs a greater probability of finding a solvent defendant on whom they could attempt to pin a significant and disproportionate share of liability.

This inequitable outcome flies in the face of voters' declared intention in enacting Proposition 51. In that ballot measure, the voters

declared that overbroad application of "[t]he legal doctrine of joint and several liability, also known as 'the deep pocket rule', . . . has resulted in higher prices for goods and services to the public" because "[s]ome governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault." (Civ. Code, § 1431.1.) As the voters recognized, the elimination of joint and several liability for non-economic harm resulted only in "liab[ility] in *closer* proportion to [defendants'] degree of fault." (*Ibid.*, italics added.) Under current law, defendants who have not yet been driven into bankruptcy by the onslaught of asbestos litigation still face "liability" for potentially substantial economic damages that is "out of proportion to fault." (*Bily, supra*, 3 Cal.4th at p. 398.) Expanding the scope of defendants' duty to reach secondary-exposure plaintiffs would exacerbate this "unfair and inequitable" result. (Civ. Code, § 1431.1.)

Relatedly, expanding the pool of available defendants would also flood the courts with tenuous claims based on dubious science. Because plaintiffs target defendants based on their ability to pay rather than culpability, they may end up taking cases to trial based on weak

or misleading expert testimony that increases the possibility of an incorrect result. This problem is especially serious in take-home asbestos cases, where the attenuated connection between the defendant's actions and the plaintiff's exposure almost invariably gives rise to thorny causation issues. In these "de minimis exposure scenarios . . . where the already miniscule exposures from the product or work activity are reduced even further to near obscurity," plaintiffs hire experts to advance the unsupported theory that "'each and every exposure' to asbestos . . . no matter how small, is a substantial contributor to asbestos disease.'" (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 Kan. J.L. & Pub. Pol'y 1, p. 2.) And where courts permit such testimony, "defendants rarely escape the risk of an asbestos jury trial." (*Ibid.*)

According to Plaintiffs, the fact that take-home asbestos claims often rely on questionable scientific evidence counsels *in favor* of recognizing a duty because it supposedly "demonstrate[s] that there are numerous factual defenses available to defendants in these cases." (AOB at p. 34.) But this is little comfort to non-culpable defendants

who face the burdens of participating in discovery and defending a case up to and through a jury trial, as well as the unavoidable risk of a potentially massive erroneous judgment against them. Defendants will often settle the claims against them simply to avoid these significant burdens; multiplying the number of potential suits against a particular defendant, as Plaintiffs propose, will inflate this unpalatable cost of doing business in California.

Finally, expanding the set of defendants available to a given plaintiff would further promote forum shopping. As the Administrative Office of the Courts has noted, "[b]ecause a typical asbestos case involves multiple defendants, multiple insurance carriers, and countless locations of alleged exposure, plaintiffs enjoy considerable latitude in selecting their venues." (*Improving Asbestos Case Management, supra*, at p. 2.) As a result, "asbestos claims often have weak connections to the venue in which they are filed." (*Ibid.*) For example, from 2001 to 2010 more than 70 percent of asbestos cases in California were filed in San Francisco, ostensibly because juries there were considered particularly favorable to plaintiffs. (*Ibid.*) With a broader selection of defendants to draw on, plaintiffs would have an even greater ability to manipulate venue rules to

centralize asbestos litigation in a few plaintiff-friendly but overburdened superior courts. Forum shopping can take place between states, too: Recognizing a duty to secondary-exposure asbestos plaintiffs would increase the probability of California businesses being sued by out-of-state plaintiffs and make it more likely that such claims would be filed in California.

Recognizing a duty to take-home asbestos plaintiffs would place a massive, unforeseen, and unwarranted new burden on defendants. "'Ultimately,'" as the courts of appeal have recognized, "'such costs are borne by the consumer.'" (*Campbell, supra*, 206 Cal.App.4th at p. 33, quoting *Oddone, supra*, 179 Cal.App.4th at p.823.) This "crucial consideration[]" (*Castaneda, supra*, 41 Cal.4th at p. 1213) should be the determinative one here: Plaintiffs have not justified the extraordinary burden that their proposed expansion of liability would place on defendants, consumers, or society at large.

E. Imposing a Duty Will Not Prevent Future Harm

Notably, the duty Plaintiffs seek to impose would do nothing to transform business practices or improve workplace safety. The reason is simple: Employers have already virtually eliminated the use of asbestos in the United States. According to the CDC, "asbestos use

peaked at 803,000 metric tons in 1973" but had declined to "approximately 1,700 metric tons" by 2007. (Centers for Disease Control, *Malignant Mesothelioma Mortality – United States – 1999-2005*, (Apr. 2009) <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5815a3.htm>.) Extensive federal and state regulatory regimes mandate safe handling of potential carcinogens in the workplace. (See, e.g., 29 C.F.R. § 1910.1200 [federal regulations governing hazardous materials in the workplace]; Lab. Code, §§ 9000-9052 [statutes mandating safe handling of workplace carcinogens].) The railroad industry is no exception: "In a 1996 report to Congress, the [Federal Railroad Administration] noted that the two primary builders [of locomotives] . . . had 10 years earlier ceased to use friable asbestos and were careful to avoid the use of asbestos in new and rebuilt locomotives." (*Scheiding v. GMC* (2000) 22 Cal.4th 471, 477 fn. 2, quotation marks omitted.)[4] And, as even Plaintiffs admit, nothing in this Court's decision will change the fact that employers "are already obligated to protect the safety and health of their employees." (AOB at p. 35.)

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[4] In fact, "the FRA could find no evidence of asbestos being a health problem [even] for crews of older locomotives." (*Ibid.*, quotation marks omitted.)

In light of the virtual disappearance of asbestos from the American workplace, the extensive regulatory structures now in place to prevent harmful exposures, and the overwhelming incentives created by employers' duties to their own employees, Plaintiffs' proposed expansion of businesses' tort duties would do nothing to prevent future harm. Plaintiffs' scant paragraph addressing this factor practically acknowledges as much: The only harm it mentions is Ms. Haver's illness, which was allegedly caused by events that took place more than 40 years ago. (AOB at p. 26.)

Plaintiffs' reliance on *Cabral* for the proposition that some "[o]verall policy of preventing harm" would be served by expanding businesses' liability is misplaced. (AOB at p. 26.) In *Cabral*, the plaintiffs' decedent lost control of his vehicle and veered off a highway, where the defendant's employee had negligently parked his commercial truck in an emergency parking zone "in order to have a snack." (*Cabral, supra*, 51 Cal.4th at p. 768.) The Court held that truck drivers owe a duty to other road users not to stop in emergency parking zones absent an emergency. (*Ibid.*) By imposing liability on truck drivers for negligently parking where they may be struck by errant motorists, the Court had every reason to believe its decision

would affect truck drivers' behavior—in the future, drivers would wait to pull over until they reached a rest area or other safe parking place. But there is no basis for an analogous prediction here. To the extent businesses can change their practices with respect to asbestos, they have already done so by virtually eliminating the use of asbestos as an industrial material in the United States.

F. The Availability, Cost, and Prevalence of Insurance for Take-Home Asbestos Claims Does Not Support Imposition of a Duty

The final *Rowland* factor—the "availability, cost, and prevalence of insurance for the risk involved"—counsels against imposition of a duty to protect against take-home asbestos exposure. Even if companies' existing general commercial liability insurance policies might cover take-home asbestos claims (an uncertain proposition), businesses likely did not purchase that coverage with the expectation that California courts would recognize a new and potentially significant class of liability. They may find that the costs of defending, settling, or ultimately paying judgments in take-home cases exceed their policy limits, forcing them to absorb the costs themselves. Of course, businesses could try to purchase supplemental insurance to cover the new liability risks associated with take-home

asbestos claims. But because Plaintiffs' proposed rule would create significant uncertainty regarding the size of the potential class of take-home plaintiffs, such coverage may not be available and would likely be costly.

Most importantly, as the court in *Campbell* correctly observed, even if the costs of take-home asbestos claims are borne by defendants' liability insurers in the first instance, "'[u]ltimately such costs [will be] borne by the consumer.'" (*Campbell, supra*, 206 Cal.App.4th at p. 33, quoting *Oddone, supra*, 179 Cal.App.4th at p. 823.) Yet again, public policy concerns counsel strongly against recognition of the broad and amorphous duty Plaintiffs ask the Court to impose here.

II. Imposing a Duty on Premises Owners Under a Premises Liability Theory Is Particularly Inappropriate

Because the *Rowland* factors counsel strongly against recognizing a duty to protect against secondary asbestos exposure, this Court should hold that businesses and employers owe no duty to take-home asbestos plaintiffs under any theory of liability. However, even if the Court does permit take-home asbestos claims under some circumstances, it should not do so where, as here, Plaintiffs bring suit on a premises liability theory.

As Plaintiffs have acknowledged, their core allegation in this suit is 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 for Rev. at p. 7, citing 1AA009-010.) But recognizing a duty of premises owners to persons secondarily exposed to asbestos traced to their property would be an unprecedented and dramatic expansion of the doctrine of premises liability. This is why the *only* published appellate decision to consider this newfangled theory of premises liability squarely rejected it. (See *Campbell, supra*, 206 Cal.App.4th 15.)

In *Campbell*, the plaintiff brought a premises-liability claim against Ford alleging that she had contracted mesothelioma after laundering the clothing of relatives who worked at a Ford plant. (*Id.* at p. 19.) As in this case, it was "undisputed" that the plaintiff had "never set foot on [the defendant's] premises; rather, she alleged her father and brother brought asbestos dust home on their clothing." (*Id.* at p. 30.) The Court of Appeal's conclusion that no duty was owed

under the *Rowland* framework was bolstered by its understanding of 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 [quotation marks omitted].)

Plaintiffs have consistently sought to obscure the emphasis that the premises liability doctrine places on property ownership and control. They argue that this case is distinguishable from *Campbell* because Mr. Haver was an employee of BNSF's predecessor whereas the plaintiff in *Campbell* worked for an independent contractor. (See, e.g., Pet'n for Rev. at p. 16; AOB at p. 23.) But the court in *Campbell* declared explicitly that its analysis did *not* turn on this irrelevant distinction. (See *ante*, p. 23.) 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 by the property owner *qua property owner*. Plaintiffs' argument would take the "premises" out of premises liability and unsettle the tort law that applies to all property owners in this State.

This Court has never expanded premises liability to permit lawsuits by plaintiffs whose only connection to the property at issue is an encounter with someone who visited the site. (See *Campbell*,

supra, 206 Cal.App.4th at p. 30.) And none of Plaintiffs' litany of court of appeal decisions has decoupled premises liability from the property at issue. (See AOB at pp. 39-40.)

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 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. Rancho Sespe* (1962) 207 Cal.App.2d 10, 17 [owner liable where fire spread to neighboring properties].)

Plaintiffs' hypotheticals all suffer from a similar flaw. A "toxin negligently emitted from an employer's factory and carried by the wind into a nearby neighborhood" may injure residents by virtue of their proximity to the factory (AOB at p. 40), but the factory owner's duty would still be geographically bounded. Likewise in the event of a fire that "spreads to a nearby neighborhood" (*id.* at p. 41), the residents' geographic proximity to the plant would be the reason they are injured, and the scope of the factory owner's liability would still be geographically constrained. Neither of these hypothetical scenarios involves intervening human conduct that severs the relationship between the geographic location of the defendant's property and the place of the alleged harm.

III. Recognizing a Duty to Alleged Secondary Exposure Victims Would Leave California Out of Step with the Majority of Other States That Have Confronted the Issue

Adopting Plaintiffs' secondary-exposure theory would render California an outlier among jurisdictions that have considered take-home asbestos claims and would risk transforming the State into the forum of choice for opportunistic plaintiffs' lawyers advancing dubious asbestos claims. This Court should follow the majority of

state courts of last resort to decide the issue and rule that property owners and employers owe no duty to take-home asbestos plaintiffs.

A. The Majority Position Rejects Take-Home Asbestos Claims

To date, six state high courts have rejected the argument that businesses owe a duty to take-home asbestos plaintiffs. These courts hinge their analysis on many of the same factors that California courts look to under *Rowland*. For example, in *CSX Transportation Inc. v. Williams* (2005) 608 S.E.2d 208, 210 (*CSX*), the Georgia Supreme Court declined to impose "any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." As this Court has done (see *ante*, p. 12), the Georgia court rejected the argument that "mere foreseeability" could be a basis for extending the duty of a defendant. (*CSX, supra*, 608 S.E.2d at p. 209.) Instead, it held that "in fixing the bounds of duty, not only logic and science, but policy play an important role. . . . [T]here is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree." (*Ibid.*, quoting *Widera*

v. Ettco Wire and Cable Corp. (N.Y.A.D. 2 Dept., 1994) 611 N.Y.S.2d 569.)

The New York Court of Appeals has reached the same conclusion. In *Matter of New York City Asbestos Litigation* (N.Y. 2005) 5 N.Y.3d 486 (*Matter of N.Y. City Asbestos Litig.*), the court expressed concern about the "specter of limitless liability" when the "class of potential plaintiffs to whom the [purported] duty is owed" is not "circumscribed" by some relationship between plaintiff and defendant. (*Id.* at p. 494, quotation marks omitted.) The court identified the same line-drawing problem that undermines Plaintiffs' theory here, rejecting the argument that liability could logically be "confined to members of the household of the . . . employee" because individuals outside the employee's family might well have greater exposure to asbestos carried off the work site on the employee's clothing. (*Id.* at p. 498.)

The Michigan Supreme Court explicitly described the pitfalls of recognizing a duty to take-home asbestos plaintiffs advancing premises liability theories. As that court explained, "Just as recognizing a cause of action based solely on exposure would create a potentially limitless pool of plaintiffs, so too would imposing a duty

on a landowner to anybody who comes into contact with somebody who has been in the landowner's property." (*In re Certified Question from Fourteenth Dist. Ct. of Appeals of Texas* (Mich. 2007) 740 N.W.2d 206, 220 (*In re Certified Question*).) And the Supreme Court of Iowa also noted the absurdity of "extending the duty [of care] to a large universe of other potential plaintiffs who never visited the employer's 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 (*Van Fossen*).)

The Maryland Court of Appeals and Delaware Supreme Court have likewise found no duty on the part of businesses to take-home asbestos plaintiffs. (See *Georgia Pacific, LLC v. Farrar* (Md. 2013) 69 A.3d 1028, 1030 (*Georgia Pacific*); *Price v. E.I. DuPont de Nemours & Co.* (Del. 2011) 26 A.3d 162, 173; see also *Doe v. Pharmacia & Upjohn Co., Inc.* (Md. 2005) 879 A.2d 1088, 1095-1097 [no duty to spouse of laboratory employee who was accidentally infected with HIV].)

B. The Minority Position Is Unpersuasive

In contrast to these decisions, Plaintiffs urge this Court to adopt the minority view permitting take-home asbestos claims. But neither of the two opinions embracing this view is persuasive.

In *Satterfield v. Breeding Insulation Co.* (Tenn. 2008) 266 S.W.3d 347 (*Satterfield*), the Tennessee Supreme Court announced an amorphous and ill-defined standard even broader than the one Plaintiffs seek or defend, recognizing a duty that "extends to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time, regardless of whether they live in the employee's home or are a family member." (*Id.* at p. 374.) As the court acknowledged, any narrower duty adopting the types of limitations proposed by Plaintiffs would be arbitrary and unworkable. But the court offered no solution to the public policy problems generated by its sweeping foreseeability-based rule.

In contrast, the Supreme Court of New Jersey in *Olivo v. Owens-Illinois, Inc.* (N.J. 2006) 895 A.2d 1143, decided to create a duty with arbitrary boundaries, limiting it to the spouses of employees exposed to asbestos. (*Id.* at pp. 1149-1150.) As discussed above,

however, and as recognized by courts in California and elsewhere (including the Tennessee Supreme Court), the spousal limitation is untenable, as it is both under- and over-inclusive.

Plaintiffs ignore the tension between the two minority-view decisions on which they rely. Instead, they claim that these cases show that "[j]urisdictions that focus on foreseeability as the primary factor in the duty analysis have found that a duty exists, whereas jurisdictions that focus on whether there is a relationship between the parties have found no duty." (AOB at p. 47) Plaintiffs assert that "the duty analysis in California . . . focuses primarily on foreseeability," so they reason that this Court must follow one of the two minority decisions and permit Plaintiffs' claim. (*Id.* at pp. 47-48.)

This argument relies on two false premises. First, the *true* common thread among the majority decisions is a pragmatic concern about the policy implications of the expansion of liability that Plaintiffs propose. The high courts of Georgia, New York, Michigan, Iowa and Maryland *all* noted the importance of such policy concerns to their analysis. (See *CSX, supra*, 608 S.E.2d at p. 209; *Matter of N.Y. City Asbestos Litig., supra*, 5 N.Y.3d at p. 498; *In re Certified Question, supra*, 740 N.W.2d at p. 220; *Van Fossen, supra*, 777 N.W.

2d at p. 699; *Georgia Pacific, supra*, 69 A.3d at p. 1032.) The absence of a relationship between the parties is what *causes* many of these policy concerns; it is not, in and of itself, the touchstone of the duty analysis in those other jurisdictions, as Plaintiffs argue. (See, e.g., *Matter of N.Y. City Asbestos Litig., supra*, 5. N.Y.3d at p. 489 [where a relationship exists between plaintiff and defendant, "the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship," quotation marks and citation omitted].)

Second, Plaintiffs overstate the significance of foreseeability in California's duty analysis. Foreseeability undoubtedly is an important factor, as this Court has recognized; however, this Court has also concluded that public policy concerns are equally "crucial," and has consistently held that foreseeability alone is insufficient to extend the scope of a defendant's duty. (*Castaneda, supra*, 41 Cal.4th at p. 1213; *Ehrlich, supra*, 21 Cal.4th at p. 552.) This Court's precedents are thus consistent with the majority position, which insists on preventing the dramatic expansion of liability based on attenuated causal chains.

In sum, the common public policy concerns animating the majority view are the paramount consideration in this case: Plaintiffs' proposed expansion of businesses' tort duties would impose an unreasonable burden on businesses, consumers, and society at large, without preventing any future harm. Courts adopting the minority view offer no logically consistent limiting principle that would ameliorate this problem, and neither do Plaintiffs. The experience of courts in other jurisdictions thus weighs heavily in favor of rejecting the expansion of duty Plaintiffs seek here.

CONCLUSION

BNSF respectfully urges this Court to affirm the bright-line rule adopted by *Campbell* and applied by the Court of Appeal below, rejecting the imposition of duty for take-home asbestos claims.

DATED: December 19, 2014 Respectfully submitted,

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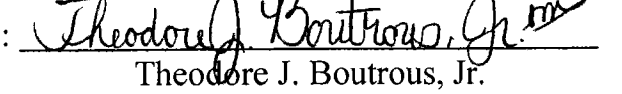
By: 
Theodore J. Boutrous, Jr.

Attorneys for Defendant and Respondent
BNSF RAILWAY COMPANY

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 Brief on the Merits contains 10,328 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: December 19, 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 BRIEF ON THE MERITS** to be served on the interested parties in this action (listed below) on December 19, 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***

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

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