COPY

S219534

# IN THE SUPREME COURT OF CALIFORNIA

**JOHNNY BLAINE KESNER, JR.**
*Petitioner,*

*v.*

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

**PNEUMO ABEX, LLC,**
*Real Party in Interest.*



AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE
CASE NO. A136378 (CONSOLIDATED W/ A136416)

# REPLY TO ANSWER BRIEF ON THE MERITS

**HORVITZ & LEVY LLP**
*LISA PERROCHET (BAR NO. 132858)
ROBERT H. WRIGHT (BAR NO. 155489)
CURT CUTTING (BAR NO. 199906)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
rwright@horvitzlevy.com
ccutting@horvitzlevy.com

**HUGO PARKER, LLP**
EDWARD R. HUGO (BAR NO. 124839)
JAMES C. PARKER (BAR NO. 106149)
JEFFREY KAUFMAN (BAR NO. 48095)
135 MAIN STREET, 20TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 808-0300 • FAX: (415) 808-0333
ehugo@hugoparker.com
jparker@hugoparker.com
jkaufman@hugoparker.com

ATTORNEYS FOR DEFENDANT AND REAL PARTY IN INTEREST
**PNEUMO ABEX, LLC**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

**Statutes**



**Miscellaneous**

# IN THE SUPREME COURT OF CALIFORNIA

**JOHNNY BLAINE KESNER, JR.**
*Petitioner,*

*v.*

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

**PNEUMO ABEX, LLC,**
*Real Party in Interest.*

# REPLY TO ANSWER BRIEF ON THE MERITS

## INTRODUCTION

Plaintiff Johnny Kesner's brief begins with the argument that a ruling for defendant Pneumo Abex would "turn back the clock" to a bygone era of California law. (ABOM 1.) He contends that this Court long ago rejected the notion of carving out no-duty rules for particular types of cases and plaintiffs. That is demonstrably wrong. Even Kesner concedes later in his brief that this Court still recognizes no-duty rules in certain situations for at least two public policy reasons: (1) to bar liability where the connection between the defendant's conduct and the plaintiff's injury is inherently

attenuated, and (2) to avoid creating liability to an overly expansive pool of plaintiffs. (ABOM 43-44.)

In other words, this Court would not be turning back the clock at all if it found that either of those criteria justified a no-duty rule in this case. Thus, the fundamental dispute between the parties boils down to whether this case implicates either of those public policy concerns. Most courts—in California and elsewhere—have held that *both* concerns warrant a no-duty rule in cases like this.

First, as is true by definition in "take-home" cases, Kesner never set foot on the defendant's property, never used a product made by the defendant, and was not employed by the defendant. Kesner claims only an indirect connection to defendant Abex—that his uncle worked for Abex, got asbestos fibers on his clothing at the workplace, inadvertently transported those fibers home, and unwittingly exposed Kesner. Kesner later experienced direct exposures to many other sources of asbestos during his adult life, and he admits those exposures caused his mesothelioma. But he contends that Abex bears responsibility as well because it contributed to his cumulative lifetime exposure. That lengthy chain of causation—involving multiple links and multiple causative factors—is exactly the sort of connection that this Court has found to be too attenuated to support a finding of a legal duty.

Second, recognizing a duty here would promote litigation by a vast pool of potential plaintiffs against innumerable defendants who never had any relationship of any kind with those plaintiffs. Many of those defendants are already besieged by never-ending claims arising from alleged *direct* exposures, hamstrung in their defense by

the dearth of fact witnesses about long-ago events, and by relaxed burdens of proof that courts have crafted for asbestos plaintiffs. Permitting additional claims for alleged take-home exposures would place intolerable burdens on those defendants, the California court system, and society as a whole.

Kesner seeks to minimize this burden by arguing that California doctors diagnose only a few hundred people with mesothelioma each year. But given the enormous incentive for lawyers to locate those people and encourage them to sue any solvent entities who might be able to pay a damages award, mesothelioma cases already account for a disproportionate expenditure of court and party resources, even without take-home claims. Moreover, Kesner overlooks the reality that imposing a duty in this case would necessarily permit claims involving other latent diseases. And, in focusing on California diagnoses, Kesner overlooks the fact that many asbestos lawsuits in California involve plaintiffs who were diagnosed elsewhere—indeed, Kesner himself is a West Virginia resident and was diagnosed in West Virginia.

If this Court were to recognize a duty in this case, the Court would not only expand the number of plaintiffs bringing lawsuits in California, but it would also multiply the number of claims and defendants in existing cases. The plaintiffs who are already suing in California would be able to add many more defendants in cases involving mesothelioma, cancer, or other latent diseases. The net result would be a profusion of expensive and complex claims of questionable merit. For all these reasons, public policy weighs heavily in favor of a no-duty rule.

## LEGAL ARGUMENT

### I. THIS COURT SHOULD NOT IMPOSE ON EMPLOYERS A DUTY TO PROTECT AGAINST TAKE-HOME EXPOSURES EXPERIENCED BY PEOPLE WHO ARE NEITHER EMPLOYEES NOR VISITORS TO THE EMPLOYER'S PREMISES.

### A. Whether to impose a duty is a question of public policy that requires analysis of multiple factors. One such factor is the relationship between the parties—a factor that remains critically relevant under *Rowland v. Christian.*

As the opening brief explained, the fundamental issue here—whether a defendant owes a legal duty towards a particular plaintiff in a particular factual situation—is ultimately a matter of public policy. (See *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933 (*Hoff*) [duty is " ' "only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection" ' "]; see also OBOM 10-11.) Courts make that policy determination by considering a variety of factors, including the factors enumerated by this Court in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113 (*Rowland*). (OBOM 10.)

Kesner does not dispute that California courts can and do adopt no-duty rules based on public policy. But plaintiff argues that

the no-duty rule Abex asserts here would represent a return to the pre-*Rowland* era—when courts determined a landowner's liability solely by looking at the status of the plaintiff vis-à-vis the defendant, i.e., whether the plaintiff was a trespasser, invitee, or licensee. (ABOM 1-2, 4, 45-46.) Kesner contends that, after *Rowland*, California courts can no longer consider the relationship between the plaintiff and defendant as part of the public-policy duty analysis. (ABOM 46 ["In California, the parties' 'relationship' is simply *not* a factor to be balanced in assessing duty' "].)

Kesner is wrong. *Rowland* did not preclude courts from considering the relationship of the parties. *Rowland* rejected the rigid common-law regime that looked *exclusively* to the formal characterizations of plaintiff's status (such as "invitee" or "trespasser"). But *Rowland* expressly held that the relationship between the plaintiff and defendant remains relevant and must be weighed in the mix with other factors. (*Rowland*, *supra*, 69 Cal.2d at p. 119 ["plaintiff's status as a trespasser, licensee, or invitee *may in the light of the facts giving rise to such status have some bearing on the question of liability, [but] the status is not determinative*" (emphasis added)].)

Subsequent decisions have explained that no factors are off limits—courts consider whatever factors are relevant to the question of whether public policy favors imposition of a duty in a particular case. (See *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 728 [after listing the *Rowland* factors, observing that

"[t]his lengthy list of policy considerations, however, is neither exhaustive [citation] nor mandatory"].)[1]

This Court and the Courts of Appeal accordingly take the relationship of the parties into account when analyzing questions of duty, often when discussing the *Rowland* factor that calls for examination of the connection between the defendant's conduct and the plaintiff's injury.[2]

---

[1] See also *Titus v. Canyon Lake Property Owners Assn.* (2004) 118 Cal.App.4th 906, 911-912 ["The *Rowland* court's list of factors and policy considerations is not exhaustive"]; *Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1145 [the list of factors in *Rowland* "is not, nor was it intended to be, exhaustive for all cases involving alleged negligence"]; *Lopez v. McDonald's Corp.*(1987) 193 Cal.App.3d 495, 506 [observing that *Rowland* directs courts to consider "a nonexhaustive list of other factors and policy considerations"].

[2] See, e.g, *Hoff, supra,* 19 Cal.4th at pp. 933-937 [school district's duty to supervise students, which arises out of the relationship between the school district and the student, does not extend to third parties with whom the district has no such relationship]; *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [duty of care to avoid negligent interference with prospective economic advantage arises only upon a showing of a special relationship between plaintiff and defendant]; *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 343-344 [attorney owed no duty to nonclient third parties who relied on attorney's advice; "defendant had no relationship to plaintiffs that would give rise to his owing plaintiffs any duty of care"]; *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405 (*Bily*) [considering "the relationships between auditor, client, and third party" and determining that auditors owe no duty to third parties]; *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 460 (*Elsheref*) [employer owed no duty to employee's child, with whom the employer had no relationship; "AMI's allegedly culpable conduct all relates to its treatment of Waleed's father, Khaled, making the connection between that conduct and Waleed's injury somewhat

(continued...)

As a practical matter, a rule that prohibited courts from considering the relationship between the parties would be unworkable. Courts would have difficulty conducting a meaningful *Rowland* analysis without considering the connection—or lack of connection—between the parties. For example, when analyzing whether a particular injury was foreseeable, courts necessarily must consider whether the defendant had some kind of relationship with the plaintiff that would make such an injury foreseeable. Similarly, when evaluating whether a duty would impose an undue burden on the defendant, courts should consider whether the parties' relationship would facilitate or impair the defendant's

---

(...continued)
attenuated"]; *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 30 (*Campbell*) [premises owner owed no duty to plaintiff who "never set foot on those premises"]; *Garcia v. Becker Bros. Steel Co.* (2011) 194 Cal.App.4th 474, 485-487 [defendant who owned a piece of machinery that caused injury to an employee was not liable when the machinery was sold to a subsequent purchaser, and employee of that purchaser was injured in the same way; the court noted that the defendant had no employer-employee relationship with the plaintiff]; *Karen Kane, Inc. v. Bank of America* (1998) 67 Cal.App.4th 1192, 1202 [bank owed no duty to retailer whose checks were fraudulently cashed by a third-party, because plaintiff retailer "had no relationship with the [b]ank"]; *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 481 [same]; *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 71 [realtors involved in the sale of residence where collapse of a balcony occurred had no prior relationship with, and thus owed no duty to, partygoers injured in the collapse]; *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 315-316 [defendant physician owed no duty to disability claimant whom physician examined in connection with disability claim; "we find no physician-patient relationship, express or implied, of the sort giving rise to a duty of care"].

ability to comply with the duty. It will often be less burdensome for a defendant to take steps to protect a party with whom the defendant has a relationship, whereas it may be quite burdensome to attempt to identify and protect parties who are strangers to the defendant.

In any event, Abex does not seek a return to the pre-*Rowland* era. Abex does not ask this Court to resolve the duty question here by focusing exclusively on the remoteness of any connection between Abex and Kesner without considering other factors. Abex argues only that, when all relevant factors are taken into account, public policy favors the adoption of a no-duty rule for the circumstances presented by take-home cases. (See pp. 12-27, *post.*)

## B. Other jurisdictions that have rejected take-home liability have considered the same policy factors that California courts consider.

The opening brief explained that the great weight of authority from around the country favors Abex's position. (OBOM 12-20.) Kesner argues that this Court should disregard the collective wisdom of other jurisdictions because, according to Kesner, their method of analyzing duty questions differs dramatically from California law. (ABOM 46-47.) Kesner's brief quotes selectively from each of the six state Supreme Court cases finding no duty in take-home cases, offering a snippet of language discussing the relationship between the parties. (*Ibid.*) Using these snippets,

Kesner posits that these other states focused their analysis on a factor that is irrelevant in California. (*Ibid.*)

Kesner's argument rests on two false premises. The first false premise is that California courts do not consider the relationship of the parties when analyzing questions of duty. We have already shown that Kesner is mistaken about that. (*Ante*, pp. 5-7.)

The other false premise of Kesner's argument is that the out-of-state decisions going against him all "hinged" on the relationship of the parties, and not on a balancing of multiple factors. (ABOM 47.) But of course that is not true. Courts in other states ask the same question that California asks, namely, whether considerations of public policy warrant the imposition of a duty in a particular case. And courts in other jurisdictions, like California, take various factors into account when answering that question.

For example, the Maryland Supreme Court stated that " '[a]t its core, the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the defendant.' " (*Georgia Pacific, LLC v. Farrar* (2013) 432 Md. 523, 529 [629 A.3d 1028, 1032] (*Farrar*).) It is hard to see much difference between that statement and this Court's statement that duty is " ' "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' " (*Hoff, supra*, 19 Cal.4th at p. 933.)

The Maryland Supreme Court went on to explain that Maryland law requires courts to consider a "non-exclusive list of factors" when deciding whether public policy warrants imposing a

duty, including: " '[t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the 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 . . . ." (*Farrar, supra*, 69 A.3d at p. 1032.)

That list bears more than a passing resemblance to the non-exhaustive list of factors appearing in *Rowland*. (*Rowland, supra*, 69 Cal.2d at pp. 112-113.) Thus, Maryland law and California law are indistinguishable in their approach to analyzing questions of duty.

Similarly, it is difficult to perceive much difference between California law and Michigan law when it comes to analyzing questions of duty. The Michigan Supreme Court has used *precisely* the same language as this Court in explaining that duty is ultimately a question of public policy. (See *In re Certified Question from the Fourteenth Dist. Court of Appeals of Texas* (2007) 479 Mich. 498, 505 [740 N.W.2d 206, 210-211] [duty " ' "is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection" ' "] [tracing the language back to Prosser, Torts (4th ed. 1971) § 53, pp. 325-326].) And the Michigan Supreme Court has provided a non-exhaustive list of factors that overlaps considerably with the *Rowland* factors. (*In re Certified Question*, at p. 211 ["The inquiry involves considering, among any other relevant considerations, ' "the

relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented" ' "].)

Similar language appears in many other out-of-state cases; courts all over the country view duty as a public policy question that requires the balancing of multiple factors. (See *Van Fossen v. MidAmerican Energy Co.* (2009) 777 N.W.2d 689, 696 [in Iowa, as in California, the law imposes a general duty to exercise reasonable care to avoid injury to others, but " 'when an articulated countervailing principle or policy warrants denying or limiting liability . . . a court may decide that the defendant has no duty' "]; *Matter of New York City Asbestos Litig.* (2005) 5 N.Y.3d 486, 493 [840 N.E.2d 115, 119] [" 'Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public polices affect the expansion or limitation of new channels of liability' "].)[3]

---

[3] See also *Gillen v. Boeing Co.* (E.D.Pa., Aug. 26, 2014, No. 2:13-cv-03118-ER) ___ F.Supp.2d ___ [2014 WL 4211354, at p. *2] [applying Pennsylvania law] ["Under Pennsylvania law, the concept of duty in a negligence case is 'rooted in public policy.' . . . [¶] '[T]he determination of whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.' "]; *Alcoa, Inc. v. Behringer* (Tex.Ct.App. 2007) 235 S.W.3d 456, 460 ["To determine whether a defendant is under a legal duty, Texas courts consider several interrelated factors, including the risk, (continued...)

In sum, among jurisdictions that have declined to impose a duty of care in take-home cases, those jurisdictions' approach to the question of duty is not materially different from California law. Although there are undoubtedly differences from state to state in the words courts use to articulate the inherently abstract concept of public policy, the way those courts have approached the question of take-home liability comports with California's own test for balancing competing interests in refining the scope of common law duties.

### C. Prior California decisions have concluded that imposing a duty in take-home cases would be bad public policy, because of the attenuated connection between the parties and the likelihood of creating unbounded liability to an expansive pool of plaintiffs.

Much of Kesner's brief is an attack on the Court of Appeal's opinion in *Campbell*, which followed the nationwide consensus and declined to impose a duty to guard against take-home asbestos exposure. (See, e.g, ABOM 4 ["*The Trouble With Campbell*"].) Kesner paints *Campbell* as a rogue decision, out of step with the mainstream of California law. (ABOM 24-44.) But as the opening brief pointed out, *Campbell*'s holding was nothing new. (OBOM 20-

---

(...continued)
foreseeability, and likelihood of injury, weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant"].

22.) *Campbell* adopted the rationale and holding of an earlier decision—*Oddone v. Superior Court* (2009) 179 Cal.App.4th 813 (*Oddone*).[4] The reasoning of *Oddone* was in turn embraced by *Elsheref*. (See OBOM 22-23.) Thus, it was the Court of Appeal's opinion below, not *Campbell*, that was outside the mainstream.

*Campbell* performed the multi-factor balancing test required by *Rowland* and concluded—like courts in other jurisdictions—that two considerations in particular weigh heavily against imposing a duty on employers to guard against take-home exposures: (1) the attenuated connection between the plaintiff's injury and the defendant's conduct, and (2) the enormous burden that would accompany imposition of a duty towards a limitless number of plaintiffs. (*Campbell, supra*, 206 Cal.App.4th at p. 33; see also *Oddone, supra*, 179 Cal.App.4th at pp. 820, 822.)

**The attenuated connection.** As in *Campbell*, the claimed connection between Abex's alleged misconduct and Kesner's injury is inherently indirect and attenuated. Kesner never set foot on Abex's property, never used an Abex product, and was never employed by Abex. He had no relationship with Abex, and claims

---

[4] Plaintiff's brief relegates its analysis of *Oddone* to a footnote, which contains the meaningless statement that *Oddone* was "case-specific." (ABOM 25, fn. 4.) The facts of *Oddone* are similar enough to this case—and to *Campbell*—that the court's reasoning is instructive. Although *Oddone* did not involve asbestos, that factual difference only makes *Oddone* more useful here, because it shows that the question of take-home liability arises outside of asbestos litigation, and this court should not accept plaintiff's representation that a ruling for plaintiff here will be cabined to mesothelioma cases.

exposure to asbestos from Abex's plant only as a result of visits to his uncle's house. (5 AA 1238.) Moreover, he does not claim that asbestos fibers from the Abex plant were the primary source of his asbestos exposure, or that those fibers were even capable by themselves of causing his mesothelioma. He claims only that those fibers, combined with the exposures he experienced during years of working directly with asbestos fibers in the workplace, increased his risk of developing mesothelioma. (5 AA 1219-1220, 1224.)

Kesner contends that a connection is attenuated only when "the defendant is not the primary cause of the injury." (ABOM 30.) He contends that an intervening negligent act by a third party is required to create a truly remote connection between plaintiff and defendant. (ABOM 30-31.)

A closer examination of California law reveals that Kesner is mistaken. Courts analyzing the *Rowland* factors have found a remote connection between the defendant's conduct and the plaintiff's injury, even in the absence of third-party negligence, especially when the plaintiff's injury resulted from multiple causative factors. (See, e.g., *Richard P. v. Vista Del Mar Child Care Service* (1980) 106 Cal.App.3d 860, 867 [finding that the connection between the defendant's conduct and the plaintiff's injury was remote because the injury was "necessarily the result of a variety of causative factors"]; *Smith v. Alameda County Social Services Agency* (1979) 90 Cal.App.3d 929, 934, 937 [observing that the connection between the defendant's conduct and the plaintiff's injury was a remote one, because plaintiff's injuries were "necessarily the result of a host of causative factors"]; see also *Garcia, supra*, 194

Cal.App.4th at pp. 485-486 [holding, in a case not involving any third-party negligence, that the connection between the defendant and the plaintiff's injury was remote because the plaintiff's injury was "many steps removed" from the defendant's alleged misconduct].)

Moreover, Kesner's claimed exposure here resulted from a host of causative factors. His own complaint alleges that, including his uncle's conduct in bringing fibers home from the workplace, no fewer than 20 different parties exposed him to asbestos over the course of his lifetime. (5 AA 1218-1219.) Thus, even if it were true that courts can find a "remoteness of connection" only when third-party conduct is involved, that requirement is met here in spades. Suffice it to say, any connection between Abex's conduct and Kesner's injury was far from direct.

**The burden of imposing a limitless duty.** *Oddone* and *Campbell* both held that imposing a duty to take-home plaintiffs would permit liability to a vast and unbounded group of plaintiffs, resulting in an undue burden on defendants and society as whole. (*Campbell, supra*, 206 Cal.App.4th at p. 33 [" 'The gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope' "], quoting *Oddone, supra*, 179 Cal.App.4th at pp. 873-874; see also *Elsheref, supra*, 223 Cal.App.4th at p. 460-461 [same].) The particular way in which asbestos cases must be tried—in multi-week proceedings, usually involving many parties, many experts in a variety of fields, and often requiring trial on a preference basis—dramatically exacerbates the burden.

Kesner argues that these concerns are misplaced, because the pool of mesothelioma plaintiffs is very small, with only 250 cases diagnosed annually in California. (ABOM 33-36.) Kesner further contends that only 7 or 8 percent of California mesothelioma plaintiffs attribute their disease to take-home exposures, although he cites nothing to support that assertion. (ABOM 36.)

The duty question presented here is not limited to mesothelioma cases, or even asbestos cases. Other diseases and substances give rise to take-home claims, as the published cases on this issue demonstrate. (See, e.g., *Oddone, supra,* 179 Cal.App.4th 813 [take-home claim involving toxic vapors and chemicals]; *Stanton v. Battelle Energy Alliance, LLC* (D.Idaho, Jan. 6, 2015, No. 4:14-CV-00231-EJL-CWD) ___ F.Supp. ___ [2015 WL 75265] [take-home claim involving radioactive contaminants]; *Schwartz v. Accuratus Corp.* (E.D.Pa. 2014) 7 F.Supp.3d 490 [take-home claim involving beryllium particulate]; *Hoyt v. Lockheed Shipbuilding Co.* (W.D.Wash., June 26, 2013, No. C12-1648 TSZ) 2013 WL 3270371 [take-home claim involving lung cancer]; *Doe v. Pharmacia & Upjohn Co., Inc.* (2005) 388 Md. 407 [879 A.2d 1088] [take-home claim involving HIV virus]; see also *Elsheref, supra,* 223 Cal.App.4th 451 [claim by minor for injury caused by father's exposure to workplace chemicals].) If this Court were to impose a duty upon Abex here, plaintiffs would undoubtedly take advantage of that ruling by pursuing claims involving other injuries and other substances.

Even if mesothelioma were the only disease that could give rise to a take-home claim, there is no reason why this Court should

focus only on mesothelioma cases diagnosed in California. Law firms that specialize in representing asbestos plaintiffs routinely bring California lawsuits on behalf of plaintiffs who live elsewhere and were diagnosed elsewhere. In this case, for example, Kesner was a West Virginia resident, claimed exposure to Abex's asbestos at his uncle's home in West Virginia, and was diagnosed with mesothelioma in West Virginia. (See 1 AA 98; 4 AA 910-911.)

Kesner further argues that the Court need not worry about creating boundless liability, because even if this Court were to recognize a duty in take-home cases, defendants would still be able to defeat marginal take-home claims by poking holes in other aspects of the plaintiff's case—e.g., by showing that the plaintiff's exposure to the defendant's product was not a substantial factor in causing his disease, that the defendant acted with due care, or that third parties should bear a greater share of the fault. (ABOM 37-39.)

This Court rejected the same kind of argument in *Bily*. There, the plaintiff argued that this Court need not worry about imposing a duty on auditors to protect third parties, because defendants would be able to defeat many third-party claims by showing no negligence or no causation. (*Bily, supra*, 3 Cal.4th at p. 406.) This Court held that it would be unwise to recognize a duty that would "produce[ ] *large numbers of expensive and complex lawsuits of questionable merit.*" (*Ibid.*, emphasis added.) The *Bily* reasoning still holds true—the fact that so many take-home cases would have questionable merit is a reason *not* to recognize a duty, rather than a reason to allow such claims to proceed.

Moreover, Kesner's argument ignores the realities of California asbestos litigation. California law gives tremendous advantages to asbestos plaintiffs. The Judicial Council has approved a special jury instruction, for use *only* in asbestos cases, that eases the plaintiff's burden of proving causation. (See CACI No. 435.) The Legislature has enacted a special statute of limitations for asbestos personal-injury claims, with the practical consequence that no claims are time-barred. (See Code Civ. Proc., § 340.2.) Most significantly, the Courts of Appeal have permitted plaintiffs to recover against defendants based on expert testimony that "*even a single exposure* to respirable asbestos fibers was a substantial factor in increasing [the plaintiff's] risk of developing mesothelioma." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 977, fn. 5, emphasis added.) Under that lax standard, if this Court were to recognize a duty to protect against take-home exposures, few defendants could prevail in such cases by challenging the plaintiff's exposure or causation evidence.

Similarly, allocation of fault would do little to circumscribe the boundless nature of take-home liability. Under Proposition 51, a defendant is jointly and severally liable for the entirety of a plaintiff's economic damages if the jury allocates *any* fault to that defendant. (See Civ. Code, § 1431.2.) Accordingly, even if a defendant in a take-home case could persuade a jury to limit its share of fault to only 1 percent, that defendant would still be exposed to liability for millions of dollars. (See, e.g., *Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 997 [jury allocated only 1.95 percent fault to asbestos defendant, who then became jointly and

severally liable for economic damages exceeding $1 million].) Moreover, mesothelioma plaintiffs often ask for eight-figure noneconomic damages awards, and even a nominal 5 percent share of a $10 million award is no small sum to pay. And plaintiffs routinely include punitive damages claims in these cases, raising the potential exposure by many millions more. Because of the huge uncertainties in how a jury will view the liability and damages claims, cases are difficult to settle, and the litigation costs alone can easily exceed a million dollars. Thus, if a duty is recognized here, plaintiffs will have ample motivation to bring any possible claim for take-home exposure, even those based on the smallest exposures.

Despite Kesner's efforts to minimize the consequences of the duty he proposes, the reality is that a ruling in his favor would subject this state's employers, premises owners, and manufacturers to lawsuits by all sorts of people claiming they encountered a toxic substance on someone else's clothing—extended family members, babysitters, neighbors, friends, roommates, carpool partners, fellow commuters on public transportation, laundry workers, etc. Saddling employers with potential liability to that limitless group of plaintiffs would be bad public policy.

### D. The Court of Appeal's discussion of countervailing public policies was flawed.

The opening brief explained that the Court of Appeal's reasons for imposing a duty were misguided. (OBOM 28-33.) The court not only downplayed the public policy concerns discussed

above, but it stretched to find other countervailing factors that supposedly weigh in favor of recognizing a duty. Below we respond to Kesner's attempt to defend the Court of Appeal's analysis of these additional factors.

**Foreseeability.** First and foremost, " 'foreseeability is not coterminous with duty.' " (*Onciano v. Golden Palace Restaurant, Inc.* (1990) 219 Cal.App.3d 385, 393.) Foreseeability is *necessary* for imposition of a duty, but *not sufficient*: "[i]f the court concludes the injury was not foreseeable, there was no duty . . . However, the opposite is not necessarily true. A foreseeable injury does not necessarily ordain a conclusion of duty." (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306; see also *Ehrlich v. Menezes* (1999) 21 Cal.4th 543, 552 [foreseeability is neither "synonymous with duty[ ] nor . . . a substitute"].)

Kesner takes two contradictory positions on the issue of foreseeability. First, he argues that Abex actually did foresee in the 1970s that its conduct posed a risk to people like Kesner. (ABOM 3, 15 ["Johnny presented evidence that Abex (in the 1970s) had *actual* knowledge of the specific hazard that its manufacturing process posed to not only workers like Uncle Peachy but their *family members* like Johnny"].) Later in his brief, he contradicts that position by arguing that Abex's actual knowledge in the 1970s is irrelevant. (ABOM 26 ["Our inquiry is not whether the asbestos take-home hazard was specifically foreseeable in the 1970s to Abex (although the evidence shows Abex's actual knowledge)"].)

Kesner's contradictory arguments illustrate the limited utility of the foreseeability factor in a case of this nature. This Court has

explained that foreseeability of harm should be evaluated at a "relatively broad level of factual generality." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772 (*Cabral*).) If, contrary to that principal, the Court were to take Kesner's suggestion to focus on the evidence of what Abex knew, the duty question would turn on a defendant-by-defendant inquiry, requiring the court to examine the extent to which knowledge trickled down from the medical and industrial hygiene communities to employers, premises owners, and manufacturers in a pre-Internet era.

On the other hand, resting a duty on broad foreseeability principles is much easier to do in a case like *Cabral,* where the nature of the defendant's act—parking a tractor-trailer on the side of an interstate highway—is such that the foreseeability of harm is constant over time.

With asbestos, however, foreseeability of harm has evolved a great deal, and continues to do so. In the early decades of the twentieth century, asbestos was viewed as a "magic mineral" and the various different forms of asbestos were widely used in a variety of different industries. (Kotlarsky, *The "Peripheral Plaintiff": Duty Determinations in Take-Home Asbestos Cases* (2012) 81 Fordham L.Rev. 451, 462-463 (hereafter Kotlarsky).) Over time, researchers in various fields began to conduct studies and publish papers on possible health risks of certain types of asbestos in certain occupational settings. Prior to the 1950s, medical literature focused on health risks from the use of raw asbestos in mining and textile manufacturing. (*ACandS, Inc. v. Godwin* (1995) 340 Md. 334, 363 [667 A.2d 116, 129-130]; see also 60 Am.Jur. (1996) Trials, § 1 ["It

was once thought that only asbestos miners, shipyard workers, and pipe fitters were in danger"].) In 1972, the Occupational Safety and Health Administration (OSHA) adopted a permissible exposure level for asbestos dust in the workplace, but the Secretary of Labor simultaneously announced that, with precautions designed to bring exposures to a low level, asbestos would not be a health hazard. (Kotlarsky, *supra*, at p. 464; *ACandS*, 667 A.2d at p. 131). Knowledge has continued to evolve and OSHA has lowered the permissible limit multiple times. (See 60 Am.Jur. (1996) Trials, § 17.)

In the context of constantly evolving information of potential hazards, there is simply no way to find categorically that defendants reasonably could have foreseen harm to unknown persons who had no relationship with the defendant, the defendant's premises, or the defendant's products. That is one reason why commentators have criticized the use of foreseeability as the primary consideration in take-home duty analysis. (See Kotlarsky, *supra*, 81 Fordham L.Rev. at p. 484 ["Decisions based on foreseeability do not provide clear precedents for future cases. . . . Other courts later facing the same issue can reach a different interpretation of foreseeability simply by distinguishing the facts from the previous case."]; see also OBOM 20, fn. 3.)

In any event, Kesner overstates the record when he argues that Abex was actually aware of the potential harm to people in his position. He points to a 1972 industrial hygiene survey of Abex's plant in Winchester, Virginia, warning of a possible hazard to "launderer[s]," to the extent that laundering could release fibers in

excess of the regulatory limits. (4 AA 1109, cited at ABOM 15.) But that does not establish Abex's knowledge that at-home washing of a single worker's clothes could release fibers in excess of the limit, and it certainly does not establish Abex's knowledge of a hazard to someone like Kesner, who did not launder his uncle's work clothes. (4 AA 1069.)

Kesner also points to a pamphlet that Abex purchased in 1977 to distribute to its workers. (See ABOM 15-16, citing 4 AA 891; 5 AA 1123, 1125.) He emphasizes that the pamphlet cautioned workers to avoid taking loose asbestos fibers home, and to handle work clothes carefully and wash them separately. (ABOM 16, citing 5 AA 1133.) Kesner fails to mention, however, that the same pamphlet also stated that when dust levels are kept low and within safe levels, "the risk to the worker and the incidence of asbestos-related disease is low." (5 AA 1127.) Thus, the pamphlet shows at most that Abex's knowledge about a take-home risk, if any, was limited to someone at home who experienced high levels of dust exposure. The pamphlet does not establish Abex's awareness of a risk to people in Kesner's position—non-residents of the household who did not launder work clothes and would not be expected to experience anything more than minute exposure levels.

The record does not by any means establish that Abex knew an injury to someone in Kesner's position was *likely*. As this Court has explained, the foreseeability factor does not weigh in favor of imposing a duty when the possibility of injury was only theoretical. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6 [a court's task in evaluating foreseeability as part of a duty analysis is to

determine "whether the category of negligent conduct at issue is *sufficiently likely* to result in the kind of harm experienced" (emphasis added)]; see also *Nicole M. v. Sears, Roebuck & Co.* (1999) 76 Cal.App.4th 1238, 1245 [" 'the creation of a legal duty requires more than a mere possibility of occurrence since, through hindsight, everything is foreseeable' "].)

Moreover, because of the high burden that would accompany a finding of liability in take-home cases (see *ante*, pp. 15-19), the foreseeability factor would not support imposing a duty unless Kesner established a *heightened foreseeability*. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125 [" 'The degree of foreseeability necessary to warrant the finding of a duty will thus vary from case to case. For example, in cases where the burden of preventing future harm is great, a high degree of foreseeability may be required.' "]; *Thai v. Stang* (1989) 214 Cal.App.3d 1264, 1271-1272 [same].) For all the reasons discussed above, the record here provides no basis to believe that any mesothelioma risk to people like Kesner was highly foreseeable in the 1970s, if it was even foreseeable at all.

**Certainty of injury.** Courts rarely devote much discussion to this factor, because in hindsight, the certainty of injury is typically obvious. This case, however, presents the uncommon scenario in which the plaintiff's injury is clear, but the defendant's role in causing that injury is far from clear. This factor thus weighs *against* imposing a duty. (See OBOM 31.) Kesner argues that the only relevant consideration is certainty that he suffered injury, not that Abex played any role in causing the injury. (ABOM 28-29.) He

cites *Rowland* to support that assertion, but *Rowland* did not address a situation like this—where the plaintiff claims that the defendant's conduct was one of many contributing factors that incrementally increased his risk of developing a latent disease. Kesner offers no response to that point.

**Moral blameworthiness.** Abex argued in its opening brief that this *Rowland* factor is implicated only when the defendant's conduct was more blameworthy than mere negligence, which is not the case here. (OBOM 31-32.) Kesner responds that Abex's conduct was highly blameworthy because one injury threated by asbestos exposure is death (ABOM 40), and because, according to him, the evidence shows that Abex was aware of a danger from take-home asbestos (ABOM 41).

As noted above, Kesner overstates the record with regard to Abex's awareness of a risk from take-home asbestos. (*Ante*, pp. 22-23.) Moreover, although Kesner attempts to portray Abex as a company that turned a blind eye to asbestos hazards, the record shows that Abex took a wide variety of steps to minimize any dangers from its use of asbestos. Those steps included placing caution labels on its products, providing its employees with a booklet about potential health hazards, sweeping and dusting its plant, maintaining an industrial hygiene department and conducting regular air samples, employing dust suppression techniques, and providing showers for employees to use before going home—showers that Kesner's uncle apparently chose not to use. (OBOM 5-6.) If, as Kesner contends, Abex should have done more, its conduct was no more blameworthy than ordinary negligence.

**Preventing future harm.** Kesner argues that imposing a duty here would prevent future harm because, although asbestos is already heavily regulated, asbestos is not the only toxin generated by industry, and imposing a duty here would serve as a warning to employers who use other substances at their workplaces. (ABOM 41-42.) That argument certainly undermines Kesner's earlier argument that imposing a duty would pose no undue burden outside of the narrow confines of mesothelioma cases. At the same time, as Abex pointed out in its opening brief, federal and state occupational health and safety regulations already govern *all* manner of hazardous substances that may be found in the workplace, not just asbestos. (OBOM 33.) Thus, imposing a duty here would not incentivize employers, premises owners, or manufactures to do anything they are not already required to do; it would merely punish them for conduct decades ago when the science of industrial hygiene was in its infancy. Kesner offers no response to that point.

**Availability of insurance.** Abex's opening brief did not discuss this factor, because the record contains no evidence regarding the availability, cost, or prevalence of insurance for take-home risks. Kesner argues that, in the absence of any evidence that defendants like Abex *lack* insurance, this factor weighs in favor of imposing a duty. (ABOM 42.)

The relevant inquiry under *Rowland* is whether defendants have a realistic ability to obtain insurance to spread the burden *of the specific risk involved.* (See *Rowland, supra,* 69 Cal.2d at p. 113 [calling for consideration of "the availability, cost, and prevalence of insurance *for the risk involved*" (emphasis added)].)

It is a matter of public record that insurers stopped writing coverage for asbestos-related injuries long ago. (See, e.g., *Stonewall Ins. Co. Asbestos Claims Management Corp.* (2d Cir. 1995) 73 F.3d 1178, 1203 [noting that asbestos liability insurance was no longer available after 1985]; *Keene Corp. v. Insurance Co. of North America* (D.C. Cir. 1981) 667 F.2d 1034, 1045 [stating that after 1976 "insurance companies ceased issuing policies that adequately cover asbestos-related disease"].)

Perhaps some defendants might have liability policies that pre-date that era, and perhaps the limits on some of those policies might not be exhausted despite the tremendous volume of litigation that asbestos defendants have been facing for decades. Even so, there is no reason to believe that insurance for such claims would be prevalent, or that defendants would be able to purchase additional insurance to cover a new wave of take-home claims.

## E. The proximate cause doctrine also weighs against liability for take-home exposures.

The opening brief explained that this Court could analyze the issues presented here as a question of proximate cause, as well as a question of duty, because the same public policy concerns are relevant both to duty and proximate cause. (See OBOM 33-36.) As this Court has explained, proximate cause is a concept that is " ' "ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his, [her, or its] conduct." ' " (*Ferguson v.*

*Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.)

Kesner argues that the proximate cause doctrine is off the table because Abex did not argue it below. (ABOM 49.) Abex did, however, assert proximate cause as a defense in its answer to plaintiff's complaint. (1 AA 27.) And more to the point, the policies underlying the proximate cause doctrine are not materially different from the policies relevant to a duty analysis. Kesner concedes this. (ABOM 49.) Both parties thoroughly briefed and argued those policies in the trial court and the Court of Appeal. Certainly Kesner can claim no prejudice if this Court were to analyze the same policy concerns through the lens of the proximate cause doctrine.

In any event, even if this Court were to view Abex's proximate cause argument as a completely new issue on appeal, that issue would be a pure question of law. (See *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-319; *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 574.) This Court may consider questions of law, regardless of whether anyone raised them below. (*People v. Runyan* (2012) 54 Cal.4th 849, 859, fn. 3 ["we may consider new arguments that present pure questions of law on undisputed facts"]; see also *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 4-5 [courts are more inclined to consider new issues when public policy is involved].)

## II. IF THIS COURT HOLDS THAT EMPLOYERS OWE A DUTY TO PROTECT NON-EMPLOYEES FROM TAKE-HOME EXPOSURES, THAT DUTY SHOULD NOT BE EXTENDED BEYOND IMMEDIATE FAMILY MEMBERS.

The opening brief explained that courts have found it difficult to determine where take-home liability would end if a duty were imposed. (OBOM 36-37.) The inability to draw that line is one of the reasons for not allowing take-home claims at all. (*Ibid.*) The few jurisdictions that have allowed such claims have done so only in cases involving immediate family members living in the household of the directly-exposed person. (OBOM 37-38.)

For example, the New Jersey Supreme Court explained that the duty it recognized was based on the "particularized foreseeability" of harm to a spouse who would be expected to launder work clothing. (*Olivo v. Owens-Illinois, Inc.* (2013) 186 N.J. 394, 405 [895 A.2d 1143, 1150] (*Olivo*).)[5] The court believed that limiting a take-home duty to a narrow class of plaintiffs would "dissipate" any "public policy concerns about the fairness and proportionality of the duty recognized today." (*Ibid.*) Thus, even the New Jersey Supreme Court—one of the few courts to recognize any sort of take-home duty—would not extend that duty to an

---

[5] Kesner argues that *Olivo* did not hold that a non-spouse could not recover. (ABOM 56.) That would be true only if a non-spouse could establish the sort of "particularized foreseeability" that *Olivo* required. Kesner does not suggest any circumstances in which a non-spouse could meet that requirement.

extended family member like Kesner, who did not live with his uncle and did not launder his uncle's clothing.

Kesner argues that, if the Court is to draw any line, it should draw that line based only on the regularity of the plaintiff's contact with the exposed worker. (ABOM 54.) But as explained in the opening brief, a vague and subjective "regularity" test would provide no line at all—no meaningful basis for limiting the vast pool of potential take-home plaintiffs. It would still permit lawsuits by plaintiffs claiming they were exposed to a toxic substance during regular visits to the home of a neighbor, friend, or extended family member, or during regular visits to an office, public place, or public transportation that was also visited or patronized by the defendant's employees.

In sum, recognizing a duty towards anyone claiming "regular" exposure to take-home fibers would open the door to "large numbers of expensive and complex lawsuits of questionable merit." (*Bily*, *supra*, 3 Cal.4th at p. 406.) Refuting such claims will be virtually impossible for defendants, decades after these alleged exposures occurred. For that reason, if the Court imposes any duty on employers to guard against-take home exposures, that duty should be limited to immediate family-members who lived full-time with the employee at the relevant time, and who had frequent close contact with contaminated work clothes.

## CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the Court of Appeal and uphold the trial court's judgment of nonsuit.

February 9, 2015

**HORVITZ & LEVY** LLP
LISA PERROCHET
ROBERT H. WRIGHT
CURT CUTTING
**HUGO PARKER, LLP**
EDWARD R. HUGO
JAMES C. PARKER
JEFFREY KAUFMAN

By: _____
Curt Cutting

Attorneys for Defendant and Real Party in Interest
**PNEUMO ABEX, LLC**

## CERTIFICATE OF WORD COUNT

## (Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 7,697 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: February 9, 2015

Curt Cutting

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

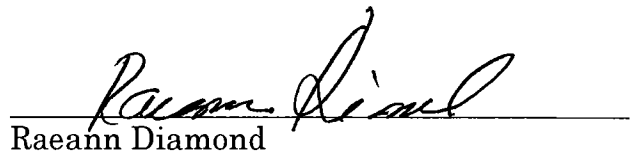
On February 9, 2015, I served true copies of the following document(s) described as **REPLY TO ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on February 9, 2015, at Encino, California.



Raeann Diamond

## SERVICE LIST

***Kesner v. The Superior Court of Alameda County***
**Cal. Supreme Court Case No. S219534**

| | |
|---|---|
| Edward R. Hugo<br>James C. Parker<br>Jeffrey Kaufman<br>Brydon Hugo & Parker<br>135 Main Street, 20th Floor<br>San Francisco, CA 94105 | Attorneys for Real Party in Interest<br>**Pneumo Abex, LLC** |
| Cindy Saxey<br>Josiah Parker<br>Weitz & Luxenberg, P.C.<br>1880 Century Park East, Suite 700<br>Los Angeles, CA 90067 | Attorneys for Petitioner<br>**Johnny Blaine Kesner, Jr.** |
| Ted W. Pelletier<br>Kazan, McClain, Satterley & Greenwood<br>A Professional Law Corporation<br>Jack London Market<br>55 Harrison Street, Suite 400<br>Oakland, CA 94607 | Attorneys for Petitioner<br>**Johnny Blaine Kesner, Jr.** |
| California Court of Appeal<br>First Appellate District, Div. Three<br>350 McAllister Street<br>San Francisco, CA 94102 | Case No. A136378 (consolidated w/ A136416) |
| Hon. John M. True, III<br>Alameda County Superior Court<br>Administration Building<br>1221 Oak Street, Rm. 260, Dept. 23<br>Oakland, CA 94612 | Case No. RG11578906 |