Case No. **S219534**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JOHNNY BLAINE KESNER,
Petitioner,

vs.

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)

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF REAL PARTY IN INTEREST

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California (CJAC or amicus)[1] welcomes the opportunity to address the principal issue this case presents:

> **Does an employer owe a duty under negligence law to warn those who do not live with but visit the homes of family member workers about dangers from – or take precautions to prevent their exposure to – asbestos dust carried home by their employees on their work clothes?**

According to the trial court, the defendant owes "no duty" to plaintiff, who never visited or came near the defendant employer's plant, for his exposure through contact with take-home asbestos dust on his uncle's (an employee of defendant) work clothes when plaintiff visited him at his home. The appellate opinion reversed this "no duty" ruling, holding instead that "the likelihood of causing harm to a person [who has

[1] By application accompanying this brief, CJAC asks the Court to accept it for filing.

secondary] contact with the [defendant's] employee, in this case [the home of plaintiff's] uncle, is sufficient to bring [plaintiff] within the scope of those to whom the [defendant] . . . owes the duty to take reasonable measures to avoid causing harm." *Kesner v. Superior Court (Pneumo Abex, LLC)* (2014) Cal.Rptr.3d 811, 813.

CJAC believes the trial court decided correctly; and that a contrary holding of "duty" under the circumstances of this case extends liability beyond reason and fairness. Indeed, if duty is affirmed here, it will cinch defendant's liability to third party bystanders as well as the future liability of others by effectively converting negligence law into absolute liability for manufacturers of asbestos and other toxic containing products, employers whose employees work with those products, and owners who lease buildings to those manufacturers and employers. "[A]bsolute liability is unfair and unduly limits individual freedom by imposing liability on people for harms they can only prevent by refraining from acting altogether." Bernard W. Bell, *The Wide World of Torts: Reviewing Franklin & Rabin's Tort Law and Alternatives* (2001) 25 *SEATTLE U.L. REV.* 1, 8.

This transmutation of negligence law into absolute liability by finding duty here is implied in the appellate court's express holding: "[T]he *likelihood of causing harm* to [plaintiff] . . . is *sufficient* to bring [plaintiff] within the scope of those to whom the [defendant] . . . owes [a] *duty* . . .." 171 Cal.Rptr.3d at 813; italics added. In other words, according to the appellate court and plaintiff, *forseeability* of harm ("the likelihood of causing harm") is enough to determine *duty*. Significantly, once duty is found, the remaining elements for negligence fall into place as easily as toppling a line of dominoes. These elements are duty, breach of the duty, causation, and damages. *Artiglio*

v. Corning Inc. (1998) 18 Cal.4th 604, 614.

Working backward from these listed elements in the circumstances of this case, damage is a given: the plaintiff contracted mesothelioma, a cancer often – but not solely – caused by exposure to asbestos. Next comes the element of *causation*, both *actual* (cause-in-fact) and *legal*, what used to be known as *proximate*. Actual causation follows as certain as night follows day because of the relaxed causation test created by *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 when, as here, we have "injury claims based on exposure to asbestos from multiple sources." See also CACI No. 435. Plaintiffs in such cases "may establish causation . . . by showing that the asbestos was a substantial factor contributing to the . . .*risk* of developing cancer." *Id.* at 969, 977. That plaintiff here named 19 defendants (none of whom, except Abex, remained in the suit by the time the trial court made its "no duty" ruling) indicates multiple sources of asbestos exposure that "contributed to the risk" of his acquiring mesothelioma. It also illustrates the accuracy of former asbestos plaintiffs' lawyer Richard "Dickie" Scruggs' comment that asbestos litigation has become an "endless search for a solvent bystander."[2]

Then we have *legal causation*, for which there is respectable authority that the court, as with the duty issue, can make a determination rather than the jury.[3] But

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[2] Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 *MEALEY'S ASBESTOS BANKR. REP.* 5 (Feb. 2002).

[3] According to former Chief Justice Traynor, if "the extent of defendant's liability is determined in terms of '[legal] cause,' it should be recognized that the issue is one of law . . . . In so far as the issue of [legal] cause is concerned . . . with limitations imposed upon liability as a matter of public policy, the issue is for the court." *Mosley v. Arden Farms Co.* (1945) 26 (continued...)

whether the satisfaction of this element is determined by the court or jury is of little moment if the argument advanced by plaintiff is accepted, for the finding of "duty" is, as the appellate opinion held and plaintiff contends, based largely on "forseeability," a primary factor in determining *legal causation*. See, e.g., *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 772 ("[T]he touchstones of proximate [legal] cause analysis are causation in fact and *foreseeability of harm*."); italics added. It would be surprising, indeed, if the determination of duty based on foreseeability did not, if only from force of the principle of consistency, lead the court or jury to also find "legal causation" because it too depends largely on foreseeability.

That leaves the last remaining element of negligence liability: *breach* of the duty, a jury determination. *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278 ("T]he elements of breach of . . . duty and causation are ordinarily questions of fact for the jury's determination."). But where a jury is confronted with findings of duty, damages and causation, "breach" seems a forgone conclusion; how else explain why a plaintiff who is owed a duty by defendant and who suffered damage as a result of what defendant did or did not do respecting that duty, could end up in the position he finds himself absent breach? Ergo, the metamorphosis from negligence, which is the

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(...continued)
Cal.2d 213, 222-23.

Traynor was not alone in this view. Professor Leon Green has long argued that proximate or legal cause is generally a duty question to be discharged by the court. See Green, *Duties, Risks, Causation Doctrines* (1962) 41 TEX. L. REV. 42, 58-64; Green, *The Causal Relation in Negligence Law* (1962) 60 MICH. L. REV. 543, 562-74. Numerous judicial opinions concur, recognizing that the policy part of legal cause "asks the larger, more abstract question: *should* the defendant be held responsible for . . . causing the plaintiff's injury?" *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 573. See also *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834-35.

only cause of action here asserted, to absolute liability is complete; defendant's and other similarly situated defendants' fates are sealed.

Thus, the extrapolation of duty infects the remaining negligence elements, effectively imposing absolute liability upon defendant, which concerns CJAC because it implicates our primary purpose. A 37-year-old non-profit organization of businesses, professional associations and financial institutions, CJAC is dedicated to educating the public about ways to make our civil liability laws more fair, economical, efficient and certain. Toward this end, we regularly petition government for redress when it comes to deciding who pays, how much, and to whom when the conduct of some is said to occasion harm to others. We have, for instance, researched asbestos filings in California and reported they are "on a significant upward trend."[4] We recently weighed-in as *amicus curiae* in *Grigg v. Owens-Illinois, Inc.*, A139597, a pending take-home asbestos liability case where the trial court delegated, improperly we contend, the duty question to the jury. We spoke up there and do so here for the same reason: the jurisprudential line separating viable tort claims from absolute liability is one judges should make using the doctrines of duty and legal causation to best assure that liability is imposed in a principled, uniform, and fair way. This case presents an opportunity for the Court to do just that.

PROCEEDINGS BELOW

In 2011, plaintiff sued 19 defendants for exposing him to asbestos fibers over the course of his life. He alleged three causes of action: negligence, breach of

[4] CJAC, *ASBESTOS RESEARCH PROJECT* (2014) p. 4 <http://goo.gl/LZZZF8>.

warranties, and strict liability. The defendants included manufacturers of pumps, turbines, oil purifiers and other assorted supplies, a ship builder, suppliers of raw asbestos fiber and others. The gravamen of plaintiff's complaint was that he handled or used defendants' asbestos-containing products; but defendant Abex was sued because it made automotive brake linings and plaintiff's uncle, "Uncle Peachy", was an employee of defendant who carried asbestos dust home on his work clothes. Plaintiff alleged that he was exposed to this take-home asbestos dust when he visited, but did not reside, at his uncle's home in the 1970s, and that this exposure contributed to his contracting of mesothelioma in 2011.

By the time of trial, plaintiff resolved his claims against all his past employers and manufacturers of asbestos containing products he had used except for defendant Abex. The breach of warranties and strict liability claims were summarily adjudicated in favor of Abex, leaving solely the negligence claim based on the take-home exposure to asbestos dust from the uncle's work for defendant. At no time did plaintiff ever work for defendant, use its product or visit defendant's premises.

Defendant moved for nonsuit on the eve of trial largely in reliance on the recently published opinion of *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 (*Campbell*), which held that no duty of care was owed by premises owners to family members of workers who were exposed to take-home asbestos dust on their work clothes. The trial court granted nonsuit and entered judgment for Abex, but the appellate court reversed.

SUMMARY OF ARGUMENT

The role of "duty" in negligence law, which is exclusively the province of courts to decide, is to fix the legal standard applicable to the defendant's conduct. Duty rulings must, therefore, be categorical. They must set the standard of care owed by some class of potential injurers – common carriers, or ski lift operators, or sellers of prescription drugs or, as here, employers and business owners – to a class of potential plaintiffs.

In establishing categorical rules of duty, courts cannot, of course, anticipate every future dispute that may arise, but neither, if duty is to mean anything of practical value, must the category devised be so general that all courts can do under it is hand-off the determination of a defendant's liability to the jury. That would amount to an abdication of judicial responsibility, resulting in clogged courts where every negligence claim gets submitted to a jury. No, courts should and must provide boundaries, "bright lines" demarcating (from the facts alleged) whether in a given case or category of cases similarly situated defendants owe a duty to similarly situated plaintiffs.

Accordingly, courts have – from the felt necessities of the times – devised a variety of duty categories based on a weighing of factors pertinent to duty, known as the *Rowland* factors from the name of the plaintiff in the opinion that identified criteria to aid courts and counsel in duty determinations. Not all seven *Rowland* factors must accompany every duty determination, nor are any to be necessarily accorded greater or equal weight with all the others. Neither are these factors exhaustive of what a court may consider.

In this take-home asbestos exposure case, three *Rowland* factors, as most recently limned in an analogous case to this by the appellate court opinion in *Campbell*, tip the scales in favor of a "no duty" ruling: the closeness of the connection between the plaintiff and defendant, the extent of the burden to defendants, and the consequences to the community if the court imposes on a particular defendant a duty of care toward similarly situated plaintiffs. Plaintiff has no connection to defendant; as mentioned, he never worked for, used a product made by, or visited the premises of defendant. His sole link to defendant is through visits to the home of his uncle, an employee of defendant, and exposure to asbestos dust from his uncle's take-home work clothes. Imposing a duty on defendant in this circumstance would be an unfair burden that, in terms of consequences to the community, defies any bright line boundary of liability. It would result in absolute liability based on nothing more than a notion of forseeability that requires defendants to "foresee forever."

ARGUMENT

I. EMPLOYERS SHOULD NOT BE CHARGED WITH A DUTY TO PROTECT THOSE WHO ARE NEITHER EMPLOYEES NOR VISITORS TO THE EMPLOYER'S PREMISES FROM TAKE-HOME EXPOSURES TO ASBESTOS DUST ON THEIR EMPLOYEES' WORK CLOTHES.

Of all common law defenses to negligence claims, absence of *duty* is the best known and most frequently asserted. Indeed, "duty" is an essential element in every negligence action, and plaintiffs have the burden of demonstrating its existence. For negligence claims, a plaintiff must show a defendant's legal duty to a plaintiff to conform to a standard of care, a breach of that duty (negligence), and damages *caused* (both factually and legally) by the breach. *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465,

477. Some of these issues, *i.e.*, breach, factual foreseeability (cause-in-fact) and damages, are the exclusive province of the jury; the two others – duty and ofttimes legal causation – are the responsibility of the court.

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." *Paz v. State of California* (2000) 22 Cal.4th 550, 559. Whether this prerequisite to a negligence cause of action has been satisfied in this case is a question of law to be resolved by the court, *not* the jury. As the Court stated in *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925 (*Hoff*): "To say that someone owes another a duty of care 'is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . .. Duty is not sacrosanct in itself, but 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.' " [Citation.] "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Id.* at 933.

Under *Rowland*,[5] foreseeability of the "risk of harm" is one factor the court considers in determining whether a defendant owes the plaintiff a tort duty (while whether, for defendants owing a duty, a particular harm in a particular case was foreseeable is a fact question for the jury). However,"foreseeability, when analyzed to determine the evidence or scope of duty, is a question of law to be decided by the court." *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1300.

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[5] *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*). See discussion *post* at 13.

That duty should not be determined by foreseeability of the risk of harm alone is underscored by *Thing v. LaChusa* (1989) 48 Cal.3d 644, which cautioned when tightening the test for recovery by third parties for their negligently inflicted emotional distress that "there are clear judicial days on which a court can foresee forever and thus determine liability, but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Id.* at 668. This same concern was reiterated in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370: "Policy considerations may dictate a cause of action should not be sanctioned *no matter how foreseeable* the risk . . . for the sound reason that the consequences of a negligent act must be limited in order to avoid an intolerable burden on society." *Id.* at 399, quoting *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274; emphasis added.

A compelling reason for courts to eschew the equation of *foreseeability* with *duty* under negligence law is that

> If the foreseeability formula were the only basis of determining both duty and its violation, such activities as some types of athletics, medical services, construction enterprises, manufacture and use of chemicals and explosives, serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted. Duties would be so extended that many cases now disposed of on the duty issue would reach a jury on the fact issue of negligence.

Leon Green, *Foreseeability in Negligence Law* (1961) 61 *COLUMB. L. REV.* 1401, 1417-18. That, unfortunately, is what the appellate court occasioned here contrary to this Court's sound authority. See, *e.g.*, *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774-784 [rejecting claimed exception to duty of care for stopping alongside a freeway]; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472–478 [recognizing exception to duty of

care for normal operation of garbage truck near bridle path]; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1185 [operators of commercial parking garages had no duty to take precautions against criminal activity in the absence of similar crimes in the past, rejecting contention that a string of robberies was sufficiently similar to plaintiff's rape to impose a duty]; and *Nicole M. v. Sears, Roebuck & Co.* (1999) 76 Cal.App.4th 1238 [defendant owes no duty toward a patron who is victim of attempted assault in defendant's parking lot absent prior criminal attacks].

A. "Duty" in the Circumstances of this Case Cannot be Determined from a Specific Statute; this is not Negligence Per Se.

"Duty" is not found "in the air;" it derives from a "special" or "contractual" relationship between the parties, by specific statute (negligence *per se*), or by court determination based on the alleged facts of each case. Only the last of these approaches applies here. There is no "special" or "contractual" relationship" between defendant and plaintiff, and plaintiff does not contend otherwise.

Plaintiff does argue, however, that a statutory duty finds expression in Civil Code section 1714, enacted more than 140 years ago to provide that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . .." Answer Brief on the Merits, p. 19. But this implicit backdoor assertion of negligence per se will not wash. As *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 explained when interpreting the language of section 1714 to provide for comparative fault, though it had consistently been held for more than a century to instead provide for the quite different all-or-nothing defense of contributory negligence:

> [I]t was not the intention of the Legislature in enacting sections of th[e civil] code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Li, *supra*, 13 Cal.3d at 814.

"Continuing judicial evolution" has made it abundantly clear that absent a special relationship or contractual source for finding duty, courts rely on reason and the guidance of published opinions limning what constitutes a common-law "duty" owed by a defendant to a third-party plaintiff. Section 1714 merely a codifies the general common law principle that persons should use due care in their conduct toward others; but it is universal in scope and not specific enough to constitute a basis for negligence per se. No California statute specifies responsibilities that employers who manufacture or use asbestos products in their business, or landlords who lease their property to such employers, owe to family members of their employees who have no direct contact with the employer, manufacturer or landlord.

For a statute to serve as the basis for a claim of negligence per se, "not only must the injury be a proximate result of the statutory violation, but the plaintiff must be a member of the class of persons the statute . . . was designed to protect, and the harm must have been one the statute . . . was designed to prevent." *Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324. If one is not within the protected class or the injury did not result from an occurrence of the nature which the transgressed statute was designed to prevent, Evidence Code section 669, the basis for negligence per se,

has no application; there is simply no negligence per se. *Mark v. Pacific Gas & Electric Co.* (1972) 7 Cal.3d 170, 183.

B. In Determining Defendant's Duty for Take-Home Asbestos Exposure to others from the Employee's Work Clothes, the Most Important Factor is the Closeness of the Relationship Between the Defendant and Plaintiff.

Campbell, *supra*, 206 Cal.App.4th 15 is especially instructive here for how it addressed the issue of "whether a premises owner has a duty to protect family members of workers on its premises from secondary exposure to asbestos during operation of the property owner's business," and concluded there was "no duty" owed plaintiff. *Id.* at 29, fn. omitted. *Campbell* defined "workers" to include employees of the property owner and those employed by independent contractors to work on the premises of the owner. The plaintiff in *Campbell*, similar to the plaintiff here, claimed she contracted mesothelioma as a result of her secondary exposure to asbestos, which occurred when she shook out and laundered her father's and brother's work clothes. In reaching the conclusion of "no duty," *Campbell* applied the factors for determining duty listed in *Rowland*, *supra*, 69 Cal.2d 108,[6] as further clarified in *Cabral v. Ralphs Grocery Co.*, *supra*, 51 Cal.4th 764.

[6] *Rowland* identified seven considerations that, when balanced together, may justify a departure from the general "duty of care" principle embodied in Civil Code section 1714: "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." *Id.* at 113.

With respect to the first three *Rowland* factors – *i.e.*, foreseeability of harm to the plaintiff, degree of certainty that the plaintiff suffered injury, and closeness of the connection between the defendant's conduct and the injury suffered, *Campbell* reiterated that foreseeability alone was insufficient to impose a duty. *Campbell, supra,* 206 Cal.App.4th at 29-31. Defendant acknowledged the second factor that plaintiff suffered asbestos-caused harm. *Id.* at p. 29. But, even if it were foreseeable to defendant that workers on its premises could be exposed to asbestos dust and fibers, the third factor addressing the "closeness of the connection" between defendant's conduct of hiring and failing to supervise a general contractor and the injury to a worker's family member off the premises was too "attenuated" to impose a duty. *Id.* at 31.

Underscoring that "duty" is a combination of foreseeability of the risk and a weighing of public policy considerations, *Campbell* addressed the remaining factors outlined in *Rowland,* and concluded that "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 32. Defendant Ford's negligence did not rise to the level of moral culpability. *Ibid.* As *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243 explained, "To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability." *Id.* at 270. Ordinary negligence is all that is at issue in this case.

The next two *Rowland* factors – *i.e.*, the extent of the burden to the defendant, and the consequences to the community if the court imposes on a particular defendant

a duty of care toward the plaintiff – weighed heavily against plaintiff there and do so here. *Campbell, supra*, 206 Cal.App.4th at 32. The *Campbell* court noted the difficulty with these factors is drawing the line between persons to whom a duty is owed and those to whom no duty is owed. Relying on the analysis in *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822, which describes the quandary of determining the scope of duty owed those secondarily exposed to toxic chemicals, *Campbell* stated, "in a case such as [this], where the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater, including fellow commuters, those performing laundry services and more." *Campbell, supra,* 206 Cal.App.4th at 32-33. Imposing such a duty would create a burden that is uncertain and potentially large in scope. *Id.* at 33.

Campbell also cited with approval cases from other jurisdictions that have rejected the imposition of a duty on premises owners for secondary asbestos exposure, recognizing that tort law must draw a line between the competing policy considerations of providing a remedy to everyone injured versus extending limitless liability. *Id.* at 34. Accordingly, *Campbell* declined to impose a duty on the premises owner for reasons equally applicable here.

It is primarily for the aforementioned reasons that

> [M]ost of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists. In jurisdictions where the duty analysis focuses on the relationship between the parties, "the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos." These

> courts include the Supreme Courts of Delaware, Georgia, Iowa, Maryland, Michigan, and New York; appellate courts in California and Illinois; and federal and state courts interpreting Pennsylvania law.

Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: the "Endless Search for a Solvent Bystander"* (2013) 23 *WIDENER L.J.* 59, 80-81 (footnotes and citations omitted). See also authorities cited and discussed in Opening Brief on the Merits (OBM), pp. 12-19.

Plaintiff tells us these jurisdictions are out-of-step with California because the *Rowland* factors comprising "duty" do not expressly mention the "relationship" of the parties to each other, and the facts animating *Rowland* show it did away with the common law "status" categories of invitees, licensees and trespassers with respect to those coming onto another's property. But this is a misreading of *Rowland*. "Status" is a species of relationship; but abolition of the common-law "status" of historically generated "categories" of those coming onto another's land as a basis for determining the landowner's duty to them does not negate the importance of the parties' relationship to the determination of duty. The relationship at play is between the landowner and those injured while on his or her property. That "relationship" is direct and close. Here, in contrast, plaintiff had no direct, close relationship with defendant. He was never on defendant's property, never used a product made by defendant, or was ever employed by defendant. His only contact with defendant was indirect, through visiting the household of his uncle, an employee of defendant. In short, plaintiff's relationship with defendant was not a "close connection" but "remote" and "attenuated."

Rowland and its progeny also make clear that the seven listed factors are not the only ones pertinent to a determination of duty nor must all of them be considered. "This lengthy list of policy considerations . . . is neither exhaustive not mandatory." *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 728. *Accord*: *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 343-344 (attorney owed no duty to non-client third parties who detrimentally relied on his advice); *Hoff*, *supra*, 19 Cal.4th 925. This Court should clarify that the importance of the "closeness of the connection" between plaintiff and defendant, their relationship to each other, is of paramount importance in determining duty.

C. A Majority of Courts throughout the Nation Reject the Imposition of a Duty on Employers to Non-Employees for Exposure to Asbestos and Other Toxins from the Take-Home Clothes of their Workers, and Scholarly Legal Commentary is Generally Critical of Attempts to Impose such a Duty.

"Although holdings from other states are not controlling, and we remain free to steer a contrary course, nonetheless the near unanimity of agreement by courts considering very similar [extensions of duty owed by employers to those exposed to toxins from the take-home work clothes of employees] . . . indicates we should question the advisability" of holding the opposite. *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 298 (reversing third-party bad faith actions against insurance companies previously permitted by *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880).

Opinions from six other state high courts and five federal courts from separate jurisdictions hold that for sound public policy reasons imposing a duty to protect

against take-home toxic exposures is not warranted. See citation to and discussion of cases in OBM, pp. 12-19.[7]

The breadth of criticism leveled at attempts to impose a duty on employers to protect those who are neither employees nor visitors to the employer's premises from take-home exposures to asbestos and other toxins is instructive. It is also pertinent to this Court's consideration of the issue and whether to reverse the reasoning of the appellate opinion. See, e.g., *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 921 (scholarly criticism justified reexamination of prior opinion "to determine its continuing viability").

Commentary has been generally critical of efforts to expand the duty of employers and premises owners to protect others from exposure to asbestos on the

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[7] The highest courts of Georgia, New York, Michigan, Delaware, Iowa, and Ohio have rejected take-home exposure claims, *see Riedel v. ICI Ams. Inc.* (Del. 2009) 968 A.2d 17; *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 210; *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689; *Miller v. Ford Motor Co.* (*In re* Certified Question from the Fourteenth Dist. Ct. App.) (Mich. 2007) 740 N.W.2d 206, 216; *Holdampf v. A.C. & S., Inc.* (*In re* N.Y. City Asbestos Litig.) (N.Y. 2005) 840 N.E.2d 115, 116; *Boley v. Goodyear Tire & Rubber Co.* (Ohio 2010) 929 N.E.2d 448; *see also Rindfleisch v. Alliedsignal. Inc.* (*In re* Eighth Judicial Dist. Asbestos Litig.) (N.Y. Sup. Ct. 2006) 815 N.Y.S.2d 815, 820-21; along with state appellate courts in Texas and Maryland, *see ALCOA, Inc. v. Behringer* (Tex. App. 2007) 235 S.W.3d 456, 462; *Adams v. Owens-Illinois, Inc.* (Md. Ct. Spec. App. 1998) 705 A.2d 58, 66; a federal appellate court applying Kentucky law, *see Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 441: and a federal district court applying Pennsylvania law, *see Jesensky v. A-Best Prods. Co.* (W.D. Pa. Dec. 16, 2003) No. CIV A 96-680, 2003 WL 25518083 (issuing a magistrate opinion recommending grant of summary judgment to Duquesne Light Co.), *adopted by*, No. Civ.A. 96-680, 2004 WL 5267498 (W.D. Pa. Feb. 17, 2004), *aff'd on other grounds*, 287 Fed. Appx. 968 (3d Cir. 2008). Kansas and Ohio have statutorily barred claims against premises owners for off-site asbestos exposures. *See* KAN. STAT. ANN. § 60-4905(a) (2009); OHIO REV. CODE ANN. § 2307.941(a)(1).

take-home work clothes of their employees.[8] See, e.g., Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the past Decade and Hurdles You Can Vault in the Next* (2012) 36 *AM. J. TRIAL ADVOC.* 1, 22 ("Expanding the availability of asbestos actions against premises owners for persons who were not occupationally exposed can create an almost infinite expansion of potential asbestos plaintiffs. Future potential plaintiffs might include anyone who came into contact with an exposed worker or the worker's clothes."); Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 *MEALEY'S LITIG. REP.: ASBESTOS* 15 (July 2006)(noting that potential plaintiffs could include "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker.").[9]

The combination of California appellate opinions finding "no duty" in situations highly analogous to this case, the vast majority of courts from other jurisdictions in agreement with these "no duty" opinions, and the abundance of scholarly criticism of

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[8] But see, e.g., Note, *Second-Hand Asbestos Exposure: Boley v. Goodyear Tire & Rubber Co.* (2011) 37 *OHIO N.U. L. REV.* 901, 916-917: "[I]s it not generally in the public's best interest for those who cause foreseeable harm to others to be held accountable for their actions? After all, it is undisputed that take home asbestos exposure can cause asbestos-related diseases."

[9] See also: Mark A. Behrens, et. al., *The Need for Rational Boundaries in Civil Conspiracy Claims* (2010) 31 *N. ILL. U. L. REV.* 37, 53 ("These 'take home' exposure claims seek to impose a duty of care in the absence of a relationship between the plaintiff and defendant; they are based on the alleged 'foreseeability' of the harm. Most courts, however, have rejected take-home exposure claims after considering the lack of a relationship between the parties and public policy concerns."); and Meghan E. Flinn, *Liability for Take-Home Asbestos Exposure* (2014) 71 *WASH. & LEE L. REV.* 707, 710 ("Take-home asbestos exposure represents a new method for prolonging asbestos litigation. Lawsuits arising from take-home asbestos exposure have been finding their way onto the dockets of state courts, which are already overwhelmed with litigation centered on asbestos.").

contrary judicial determinations, constitutes strong reason and authority for affirming the trial court's ruling here.

CONCLUSION

For all the reasons aforementioned, the Court should reverse the Court of Appeal and uphold the trail court's judgment of nonsuit.

Dated: March 12, 2015

Respectfully submitted,

/s/

Fred J. Hiestand
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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 6,000 words.

Date: March 12, 2015

/s/
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PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On March 12, 2015, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Real Party in Interest in *Kesner v. Superior Court*, S219534 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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

Executed this 12th day of March 2015 at Sacramento, California.

/s/
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