Rise or Demise of Take-Home Asbestos Exposure Claims? California Supreme Court Set to Weigh In on Debate

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For years, practitioners and courts in several jurisdictions have actively debated the existence and scope of duty that may be owed by product manufacturers and premises owners to persons exposed to asbestos fibers brought home on the wok clothing of family members. The introduction of secondary or "take-home" exposure claims has extended asbestos litigation to a new generation of potential plaintiffs and has premises and manufacturing defendants reeling over the concept that duty of care may now extend to unknown persons who have never stepped foot on a worksite or used an asbestos-containing product. Thus, it comes as no surprise that these "take-home" claims and the extension of duty from the worksite into the family home have been the subject of much litigation and disagreement among trial and appellate courts, not only over the legal viability of the claim itself, but also difficult issues such as defining the scope of duty and identifying potential plaintiffs based on familial relationships.

For example, in New Jersey, the Supreme Court in *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394 (2006) ruled that premises owners owe a duty to spouses based on the foreseeable risk of exposure from asbestos fibers brought home on work clothing. The Court of Appeals of Maryland, however, decided that product manufacturers owe no duty to take-home plaintiffs because the dangers of asbestos exposure were not known until at least 1972, and as such, the dangers of take-home exposure could not have been foreseeable before this time. *See Georgia Pacific v. Farrar*, 432 Md. 523 (Md. Ct. App. 2013). New York, on the other hand, has framed the debate differently, focusing primarily on the existence of a duty, rather than the foreseeability of harm. In *Matter of NYC Asbestos Litigation*, 5 N.Y.3d 486 (N.Y. Ct. App. 2005), the court declined to extend an employer's duty to provide a safe workplace to the spouse of an employee, because, as a threshold issue, this would open up property owners to potential "limitless liability" for exposure that occurred off-site and to persons with whom the employer does not have a relationship.

Most recently, all eyes are focusing on California as we await a crucial decision by the Supreme Court in a prominent jurisdiction, which may set the stage for rulings in other states. The issues have been framed by three California Court of Appeals rulings that appear to be in conflict over the viability of take-home exposure claims. Two courts have ruled that premises owners owe no duty of care to take-home asbestos plaintiffs, while another appellate court imposed liability on a product manufacturer in a similar secondary exposure case.

In *Kesner v. Superior Court*, 171 Cal. Rptr. 3d 811 (May 15, 2014), John Kesner, Jr., alleged that he developed mesothelioma as a result of asbestos exposure during visits to his uncle's home over a period of six years. Mr. Kesner spent two or three nights a week at the home as a teenager, and recalled that his uncle came home in work clothing covered in dirt and dust. Mr. Kesner claimed that he and his uncle would play while the uncle was wearing the work clothing, and that his uncle would sometimes sleep in close proximity to him. His uncle was employed by Pneumo Abex at a site where asbestos-containing brake linings were manufactured.

The claim was that Pneumo Abex owed a Mr. Kesner a duty for this non-incidental and recurring secondary exposure at the uncle's home.

Pneumo Abex initially moved for nonsuit, arguing that no duty was owed based on the ruling in *Campbell v. Ford Motor Co.*, 206 Cal.App.4th 15 (2012), where the court found that premises owners owe no duty to family members of employees who may be exposed to asbestos at the worksite. The trial court granted the motion based on Campbell finding no distinction between the duty owed by premises owners and that owed by product manufactures in a secondary exposure case.

The Court of Appeals reversed and distinguished the Campbell holding on the grounds that *Kesner* involved a "manufacturer" of asbestos-containing products and not a premises owner. The court did not address whether it approved of the conclusion in Campbell with regard to premises owners, instead explaining that the circumstances presented in *Kesner* did not require it to reach that issue. *Id.* at 816. The court independently analyzed the *Kesner* facts based on factors established in *Rowland v. Christian*, 69 Cal.2d 108, 112-113 (1968):

> [T]he 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 the prevalence of insurance for the risk involved.

Kesner, 226 Cal. App.4th at 814-15.

In discussing the factors, the *Kesner* court explained that "[w]hile the same Rowland factors are pertinent to the analysis of a negligence claim, the balance that must be struck is not necessarily the same as under a claim of premises liability." *Kesner*, 226 Cal.App.4th at 816. With regard to foreseeability, the court explained that "the harm to third parties that can arise from a lack of precautions to control friable asbestos that may accumulate on employees' work clothing is generally foreseeable." *Id.* at 816-17. While not the only consideration, foreseeability "is among the most significant, if not the single most significant, factor." *Id.* at 818.

As for product manufacturers, the court found that "there is a high degree of foreseeability of harm from secondary, or take-home, exposure to those whose contact with an employer's workers is not merely incidental, such as members of their household or long-term occupants of the residence." *Id.* at 818. The court made clear that incidents where contact is merely "casual or incidental," would not necessarily produce the same result. *Id.* Additionally, the court emphasized that its holding on this issue was not meant to imply that the facts alleged would support a finding of negligence. Rather, the questions of fact as to the accuracy of the allegations in the plaintiff's Complaint would properly belong to a jury. *Id.* at 819.

Shortly after the *Kesner* decision, a different California court concluded that premises owners have no duty to take-home asbestos plaintiffs. *Haver v. BNSF Railway Co.*, 172 Cal. Rptr. 3d 771 (June 23, 2014). In *Haver*, the heirs of Lynn Haver, claimed that she developed mesothelioma from exposure to asbestos fibers brought home on the clothing of her husband when he was employed by a predecessor to defendant BNSF Railway Company. Plaintiffs sued on a theory of premises liability since asbestos-containing products and equipment were used at its jobsite.

BNSF moved to dismiss arguing that, under the *Campbell* ruling, it had no duty to protect Haver from secondary asbestos exposures that occurred off-site. The trial court agreed and dismissed the claim. On appeal, plaintiffs presented three separate arguments.

First, they argued that *Campbell* was factually distinguishable because the persons creating the secondary exposure in that case were employees of independent contractors and not direct employees of the defendant. *Id.* at 774. The court disagreed, noting that *Campbell* explicitly stated that its decision did not turn on this distinction and that the term 'workers' includes those employed by the property owner, as well as those employed by independent contractors." *Id.* at 775. Thus, the court held that premises owners, such as defendant, do not have a duty to protect family members of direct employees, or employees of independent contractors, from secondary exposure to asbestos.

Plaintiffs argued in the alternative that *Campbell* was incorrectly decided. The Court of Appeal rejected this contention finding that *Campbell* "is consistent with the majority view on the issue of premises liability to third parties based on off-site exposure to asbestos." *Id.* It also noted that although courts want to allow victims of asbestos exposure to recover for their injuries, courts "are wary of the consequences of extending employers' liability too far, especially when asbestos litigation has already rendered almost one hundred corporations bankrupt." *Id.* The court thus concluded that it was satisfied that Campbell had been properly decided.

Finally, plaintiffs argued that defendant had a duty to protect Haver from secondary asbestos exposure pursuant to the ruling in *Kesner*. The court disagreed finding that the *Kesner* court specifically stated that it need not opine about whether Campbell was correctly decided because *Campbell* concerned premises liability, which was not at issue in *Kesner*, a products case. *Id.* at 776. Thus, *Kesner* did not affect the holding in either *Campbell* or *Haver*, and the court concluded that the claims were properly dismissed. The court also took the opportunity to emphasize that the *Campbell* ruling "made clear that its no duty rule encompassed all plaintiffs who suffered secondary exposure to asbestos off the landowner's property." *Id.*

While *Kesner* and *Haver* have now been certified for review by the California Supreme Court, a third Court of Appeals case was just decided in favor of premises owner defendants. In *Wanda Beckering v. Shell Oil Company*,[1] plaintiff alleged that she developed mesothelioma as a result of exposure to asbestos brought home on the clothing of her husband, who was employed as a machinist at two different Shell facilities during the course of his career. This premises

[1] 2014 WL 6611088, Cal.App. 2 Dist., Nov. 21, 2014, unpublished (Nov 21, 2014) review filed (Dec 31, 2014).

claim against Shell centered on the fact that the plaintiff would launder her husband's clothing, even though she had never been to the Shell site.

The trial court granted Shell's motion for summary judgment, finding that Shell owed no duty of care to plaintiff. The court relied on the *Campbell* ruling and dismissed the claim, explaining that even though it may be foreseeable that a family member could conceivably come into contact with asbestos fibers brought home on an employee's clothing, there is still no duty of care between the premises owner and the non-employee family member. Plaintiff appealed, arguing that *Campbell* was distinguishable, since it was limited to employees of independent contractors.

The Court of Appeal, Second District, held, in an unpublished decision, that Shell owed no duty of care to the plaintiff. It was not persuaded by plaintiff's argument that *Campbell* should be limited to employees of independent contractors, and found that *Campbell* was controlling authority in this case. In delivering the opinion for the majority, Judge Richard Dennis Aldrich confirmed that a premises owner "has no duty to protect a family member from secondary exposure to asbestos off the premises arising from her association with a family member who wore asbestos-contaminated work clothes home." He continued, "[t]o hold otherwise would impose limitless liability on premises owners." Thus, the court's decision was in line with the court in *Haver*, which likewise found that premises owners owe no duty of care to take-home plaintiffs.

Judge Joan Klein dissented and criticized the majority's interpretation of the *Rowland* factors. In evaluating the factors, Judge Klein focused primarily on the issue of foreseeability and concluded that harm to a close family member who would be laundering an employee's work clothes is reasonably foreseeable and the relationship between husband and wife is close enough to impose a duty. She explained

> Given the high degree of foreseeability of harm to family members or members of the household, persons whose contact with an employer's workers is not merely incidental – compounded by the moral blame attributable to disregarding a known risk to others and the important public policy of preventing future harm, a duty should lie in these circumstances.

Judge Klein concluded that Shell had knowledge of the dangers of asbestos exposure, and was therefore in a position to prevent future harm by instituting the proper warnings and precautions. She also commented that concern over "limitless liability" should not deter the court, because a potential plaintiff is still required to show repeated, regular, and substantial contact with asbestos to prove liability. Notably, however, Judge Klein did not address or attempt to distinguish the holding in *Campbell*.

This tripartite of recent appellate court rulings now sets the stage for a decision by the Supreme Court on the future of take-home claims in California and perhaps beyond. Whether the Court will side with the majority opinions in *Haver* and *Beckering,* or the views of Justice Klein and the *Kesner* court, or perhaps chart a new course, remains to be seen. However, the

current state of affairs remains good news for premises owner defendants with ambiguities in the *Kesner* ruling also providing hope for product defendants.

There are implications outside of California as well with trends suggesting that more and more courts are reluctant to extend liability to arguably unknown limits under circumstances presented with take-home exposure claims. The battle lines are clearly drawn here those on the defense side arguing for complete abolition of the claims outside of direct exposure plaintiffs and others suggesting that reliance on foreseeability and limiting the class of plaintiffs to immediate family members is the more reasonable approach. California is next in line to stake a claim in the debate and perhaps influence the future of take-home claims around the nation.