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'Take home' exposure to asbestos ruling raises new questions

By Christine D. Calareso and Michael Sandgren

Last week, the California Supreme Court published a seminal decision on the issue of "take home" exposure to asbestos. The issue before the court was whether traditional negligence liability claims should include not just those individuals who had direct contact with a premise owner or an employer, but also "household members" who had no direct contact with the premise owner or employer. In resolving this dispute in favor of the plaintiffs, the California Supreme Court has now established a legal precedent that will expand claims for asbestos exposure, and other toxic exposures claims, throughout the state of California.

In its published opinion, *Kesner v. Superior Court* and *Haver v. BNSF Railway Company*, 2016 DJDAR 11907 (Dec. 1, 2016), the Supreme Court addressed two conflicting appellate decisions on the issue of "take home" exposure. In the *Kesner* case, plaintiffs alleged that Johnny Kesner Jr. was exposed to asbestos from the work clothing of his uncle, George Kesner, who worked at an Abex brake factory. Johnny Kesner did not live full time with George Kesner, but spent an average of three nights a week at George Kesner's home over a sixty-year time span. During those visits, plaintiffs claimed that Johnny Kesner inhaled asbestos fibers from his uncle George Kesner's work clothing. In a published decision, the 1st District Court of Appeal concluded that Pneumo Abex owed a duty of care to protect Johnny Kesner from exposure to asbestos from the work clothing of his uncle.

In the *Haver* case, plaintiffs alleged that Lynne Haver was exposed to asbestos from the work clothing of her former husband, Mike Haver, an employee of the BNSF Railway Company. Mike Haver worked around pipe insulation and other asbestos-containing materials located at a BNSF affiliated railyard. During their marriage, Lynne Haver allegedly inhaled asbestos fibers from Mike Haver's work clothing. In contrast to the *Kesner* decision, the 2nd District Court of Appeal held that BNSF Railway Company did not owe a duty of care to protect the spouse of its employee.

Faced with two contradictory appellate decisions, the Supreme Court consolidated the appeals in the *Kesner* and *Haver* cases and heard oral argument in September. In this unanimous decision, the court resolved the conflict between these appellate decisions based on the negligence standard codified under Civil Code Section 1714.



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Under this code provision, negligence claims in California are based on the concept that each person owes a general duty to exercise "ordinary care" for the safety of others. As the court explained, this general negligence concept has two exceptions, one based on statutory carve outs by the California Legislature and the second based on public policy considerations. Since the Legislature has not yet addressed this issue, several appellate courts, including *Haver*, had concluded that public policy considerations limited asbestos negligence claims to those individuals with direct exposure. Focusing on public policy consideration, those appellate decisions barred claims for indirectly injured household members.

In this groundbreaking decision, the Supreme Court expressly overturned *Haver* as well as all other similar appellate opinions. As the court explained, creating an exception to this general duty to exercise "ordinary care" should only occur where justified by "clear considerations of policy." And, since various scientific publications and governmental agencies had warned about potential toxin risk from contaminated work clothing starting in the 1950s, the court concluded that "policy considerations" were insufficient to warrant creation of a liability exception.

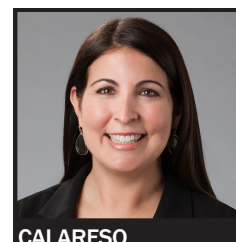
Although this decision expressly addressed the issue of whether "employers or landowners owe a duty of care to prevent secondary exposure to asbestos," this ruling will undoubtedly have a far reaching impact. As the Supreme Court noted, the elements of a negligence claim and a premises liability claim are the same: legal duty of care, breach of that duty, and proximate cause resulting

in injury. Under California law, negligence claims for property owners, employers, contractors or other individuals or entities are all based on these same principles. Thus, while this decision expressly focuses on liability for property owners and employers, nothing in this ruling limits this decision to this subset of negligence defendants.

In resolving this dispute in favor of plaintiffs, the Supreme Court has now provided the plaintiff bar with a roadmap for pursuing "take home" exposure claims. At the heart of its decision, the court has concluded that an employer or property owner owes a duty to prevent take home exposure to members of the worker's household, regardless of their formal relationship. As the court decision confirms, these take-home exposure claims will now include any "persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time." In its decision, the court emphasized that its ruling creates a bright-line distinction between "household members" versus those with only a "casual" relationship, such as regular carpool companions. However, the facts of the *Kesner* case suggest that the distinction might not provide the "bright line" the court hoped to create.

Rather than putting the issue to rest, this California Supreme Court decision has now created a new battle line over the definitions of "household members," as well as "close and sustained contact," definitions that litigants will grapple with in the years to come.

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