IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S219534

JOHNNY BLAINE KESNER,
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 with A136416))

On Appeal from the Superior Court of Alameda County
(Case No. RG11578906, Honorable John True, III, Judge)

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REAL PARTY IN INTEREST

DEBORAH J. LA FETRA, No. 148875
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: dlafetra@pacificlegal.org

Attorney for Amicus Curiae Pacific Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

APPLICATION TO FILE BRIEF AMICUS CURIAE 1

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. ASBESTOS LAW NEEDS BRIGHT-LINE RULES TO CREATE BOUNDARIES OF LIABILITY 3

II. A RULE BY WHICH A MANUFACTURER OWES A LEGAL DUTY TO AN EMPLOYEE'S INTERMITTENT HOME VISITORS VASTLY EXPANDS THE REACH OF TORT LAW 7

III. THE SCOPE OF THE DUTY IN THIS CASE WILL AFFECT NON-ASBESTOS CASES 14

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

TABLE OF AUTHORITIES

Page

Cases

Alber v. Owens, 66 Cal. 2d 790 (1967) 16

Anderson v. Falcon Drilling Co.,
695 P.2d 521 (Okla. 1985) 9

Black v. William Insulation Co., Inc.,
141 P.3d 123 (Wyo. 2006) 9

Bostic v. Georgia-Pacific Corp.,
439 S.W.3d 332 (Tex. 2014) 1

Campbell v. Ford Motor Co.,
206 Cal. App. 4th 15 (2012) 14

Cash v. Winn, 205 Cal. App. 4th 1285 (2012) 12

Dutcher v. Rees, 331 Mich. 215, 49 N.W.2d 146 (1951) 9

Elden v. Sheldon, 46 Cal. 3d 267 (1988) 6

Farris v. Huston Barger Masonry, Inc.,
780 S.W.2d 611 (Ky. 1989) 9

Georgia Pacific, LLC v. Farrar, 432 Md. 523 (2013) 1

Hegyes v. Unjian Enterprises, Inc.,
234 Cal. App. 3d 1103 (1991) 4

Holdampf v. A.C. & S., Inc. (In re N.Y. City Asbestos Litig.),
840 N.E.2d 115 (N.Y. 2005) 9, 11

Kane v. Hartford Accident & Indemnity Co.,
98 Cal. App. 3d 350 (1979) 4

Kesner v. Superior Court,
171 Cal. Rptr. 3d 811 (2014) 2, 8

Page

Knier v. Albany Medical Center Hospital,
131 Misc. 2d 414 (N.Y. Sup. Ct. 1986) 15-16

Macias v. Saberhagen Holdings, Inc.,
282 P.3d 1069 (Wash. 2012) 1-2

Miller v. Ford Motor Co. (In re Certified Question from the 14th Dist. Court of Appeals), 740 N.W.2d 206 (Mich. 2007) 9, 11

Moon v. Guardian Postacute Services, Inc.,
95 Cal. App. 4th 1005 (2002) 6

Olivo v. Owens-Ill., Inc., 895 A.2d 1143 (N.J. 2006) 12

O'Neil v. Crane Co., 53 Cal. 4th 335 (2012) 1, 5-6

Palsgraf v. Long Island Railroad Company,
248 N.Y. 339 (N.Y. 1928) 3-5

Parsons v. Crown Disposal Co., 15 Cal. 4th 456 (1997) 6

People v. Rodriguez, 28 Cal. 4th 543 (2002) 8

Pugh v. Zefi, 294 Mich. App. 393 (2011) 9

Satterfield v. Breeding Insulation Co.,
266 S.W.3d 347 (Tenn. 2008) 12-13

Schwartz v. Accuratus Corp.,
7 F. Supp. 3d 490 (E. D. Penn. 2014) 12-13

Wawanesa Mut. Ins. Co. v. Matlock,
60 Cal. App. 4th 583 (1997) 4

Page

Statutes

Cal. Labor Code §§ 6400, et seq 16

Rules

Cal. Rule of Court 8.520 1

California Rule of Court 8.520(f) 1

Miscellaneous

Apple workers get shuttle service, car wash, MacNN News (Oct. 18, 2007), *available at* http://www/macnn.com/articles.07/10/18/ apple.shuttle.car.wash (last visited Feb. 27, 2015) 11

Apple, Google commuter shuttles to be charged fee for using San Francisco bus stops (Jan. 21, 2014), *available at* http://appleinsider.com/articles/14/01/21/ apple-google-commuter-shuttles-to-be-charged-fee-for-using-san-francisco-bus-stops (last visited Feb. 27, 2015) 11

Boston, Gerald W., *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 Envtl. L. 549 (1995) 14

Cardi, W. Jonathan, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. Rev. 1873 (2011) 5

Finley, Lucinda M., *The Spectre of Future Tort Liability for Communicable Diseases in the Workplace,* 309 Prac. L. Inst. 354 (Aug. 1, 1986) 15

Hetrick, R. Scott, *The Employer's Duties Regarding Communicable Disease in the Workplace*, 24 Am. J. Trial Advoc. 35 (2000) 15

Hodgson, John T. & Darnton, Andrew, *The Quantitiative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure*, 44 Ann. Occup. Hyg. 565 (2000) 7

Page

Kaplan, Sarah, *From beetles to bubonic plague: Bizarre DNA found in NYC subway stations*, The Wash. Post (Feb. 6, 2015), *available at* http://www.washingtonpost.com/news.morning-mix/wp/2015/02/06/from-beetles-to-bubonic-plague-bizarre-dna-found-in-nyc-subway-stations/ (last visited Feb. 27, 2015) 15

Landin, David C., et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & Pol'y 589 (2008) 5

Metro, Metro Rideshare: Rewards, *available at* http://www.metro.net/about/rideshare-rewards/ (last visited Feb. 27, 2015) 10

Perlman, Harvey S., *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61 (1982) 8

Riehle, Paul J., et al., *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33 (2009) 7

San Bernardino Associated Governments, Rideshare Program, *available at* http://www.sanbag.ca.gov/commuter/rideshare.html (last visited Feb. 27, 2015) 10

Toxicological Profile for Asbestos, DHHS Public Health Service, Agency for Toxic Substances and Disease Registry (2001), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp61.pdf (last visited Feb. 27, 2015) 7

U.S. Census Bureau State & County Quickfacts, *available at* http://quickfacts.census.gov/qfd/index.html (last visited Feb. 27, 2015) 13

U.S. Env. Protection Agency, Office of Air and Radiation, *Carpool Incentive Programs: Implementing Commuter Benefits as One of the Nation's Best Workplaces for Commuters* (Nov. 2005), *available at* http://www.bestworkplaces.org/pdf/carpool_June07.pdf (last visited Feb. 27, 2015) 10

Page

Valic, Fedor, *The Asbestos Dilemma: Assessment of Risk, available at* http://www.chrysotile.com/data/valic_1_risk_assessment.pdf (last visited Feb. 27, 2015) 7

White, G. Edward, *Tort Law In America: An Intellectual History* (1985) 4

APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Real Party in Interest Pneumo Abex, LLC. Amicus is familiar with the issues and scope of their presentation, and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation's (PLF) Free Enterprise Project was developed to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in tort law, and barriers to the freedom of contract. PLF has participated in cases across the country on matters affecting the expansion of product liability, including cases that involve asbestos liability, *see, e.g.*, *Webb v. Special Electric Co.*, docket no. No. S209927 (pending); *Bostic v. Georgia-Pacific Corp*., 439 S.W.3d 332 (Tex. 2014); *Georgia Pacific, LLC v. Farrar*, 432 Md. 523 (2013); *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012); *Macias v. Saberhagen Holdings, Inc.*, 282

[1] Pursuant to California Rule of Court 8.520, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

P.3d 1069 (Wash. 2012); *Aubin v. Union Carbide Corp.*, No. SC2012-2075 (Fla. S. Ct. filed Oct. 1, 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

Johnny Kesner was diagnosed with mesothelioma in 2011. Because this is an asbestos-related illness, he cast a wide net and sued 19 defendants, most of whom were Kesner's former employers where Kesner was exposed to asbestos on the premises, but also including Pneumo Abex, LLC, which employed his uncle. Having resolved his claims against all other defendants, Kesner's only remaining claim against Pneumo Abex is that his uncle left work with asbestos dust on his clothes and that he was exposed to it because, as a child and teenager, he spent up to three days per week visiting his uncle's home. *Kesner v. Superior Court*, 171 Cal. Rptr. 3d 811, 812-13 (2014). The trial court granted Pneumo Abex's motion for nonsuit, and the Court of Appeal reversed, holding that employers owe a duty in take-home cases, and that this duty exists in favor of anyone (friend, acquaintance, colleague, or extended family member) who had "recurring and non-incidental contact with the employer's employee." *Id.* at 813.

The legal rules of duty and foreseeability have evolved with the understanding that extending tort liability indefinitely has serious social and economic costs. As a matter of public policy, tort law liability should not reach beyond any employer's or premises owner's expectations about claims

by plaintiffs with whom they have no business or other relationship. But if the Court holds that some form of take-home liability claim exists in California, then it must be limited to immediate family members who can prove actual exposure to the toxin alleged to cause the injury.

ARGUMENT

I

ASBESTOS LAW NEEDS BRIGHT-LINE RULES TO CREATE BOUNDARIES OF LIABILITY

In the most famous negligence case of all time, *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339 (N.Y. 1928), Judge Benjamin Cardozo held that defendants owe a duty of reasonable care only to those persons who are within a class of foreseeable victims of negligence. Tort duty can be based only on the foreseeability of harm to the person in fact injured, and not on an abstract duty to the entire world, as dissenting Judge Andrews contended. 248 N.Y. at 350 (Andrews, J., dissenting). In that case, a railroad passenger being helped onto a train dropped a package of explosives; they went off, producing vibrations which caused a scale to fall on Mrs. Palsgraf, injuring her. Judge Cardozo found that because the railroad employees could not have anticipated injury to Mrs. Palsgraf, they owed her no duty and, therefore, could not be liable to her for negligence. *Palsgraf*, 248 N.Y. at 343. While every act of every person conceivably can be traced to positive or negative effects on

others, imposing legal liability for such attenuated results would have serious negative effects on worthwhile economic enterprises.

Although the merits of both Cardozo's and Andrews' approaches have been extensively debated through the years, one conclusion is clear: in tort law, the concept of duty is one in which considerations of public policy should be primary. "In short, the *Palsgraf* case balanced the 'justice' of Mrs. Palsgraf's position as an innocent passenger injured by the carelessness of a solvent enterprise against the threats to the future financial solvency of that enterprise posed by too extensive an ambit of tort liability." G. Edward White, *Tort Law In America: An Intellectual History* 99 (1985); *see Wawanesa Mut. Ins. Co. v. Matlock*, 60 Cal. App. 4th 583, 585, 589 (1997) (relying on *Palsgraf*'s limitation of duty to hold that a teenager who provided cigarettes to his friend is not liable when the friend accidently drops a lit cigarette while trespassing in a warehouse, starting a fire that causes considerable property damage); *Hegyes v. Unjian Enterprises, Inc.*, 234 Cal. App. 3d 1103, 1131 (1991) ("[T]he important practical effect of the *Palsgraf* rule is that liability for unforeseeable consequences is avoided by limiting the scope of *duty*" and "the existence of a legal duty is not to be bottomed on the factor of foreseeability alone."); *Kane v. Hartford Accident & Indemnity Co.*, 98 Cal. App. 3d 350, 356 (1979) (relying on *Palsgraf*, holding that a plaintiff raped on hospital premises by an employee of an independent contractor had no claim against the insurer that bonded the employee).

Like *Palsgraf*, this case presents a question about when duty is owed by a defendant to a victim whose injury is so distant from the defendant's involvement that imposing liability on the defendant could have seriously harmful consequences for a valuable, socially productive industry. The pleadings in this case demonstrate the difficulty of answering this question, because cases can be found to support the most restrictive Cardozo view as well as the most expansive Andrews approach. *See generally* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. Rev. 1873, 1875 (2011) ("Perhaps the most persistent impression left after having reviewed hundreds of duty cases is just how frustratingly inconsistent, unfocused, and often nonsensical is the present state of duty law."). This Court must, nonetheless, determine where to draw the line. David C. Landin, et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & Pol'y 589, 626 (2008) ("tort law must draw a line between the competing policy considerations of providing a remedy to everyone who is injured and of extending tort liability almost without limit.").

And, in fact, the Court has drawn some bright lines, even in cases presenting highly sympathetic plaintiffs. For example, in *O'Neil v. Crane Co.*, 53 Cal. 4th at 365, a mesothelioma case, this Court declined to expand a manufacturer's duty of care to "impose an obligation to compensate on those whose products caused the plaintiffs no harm." The Court recognized that

product liability law does in fact have boundaries imposed by policy considerations to "'delimit liability' even for foreseeable injury. . . .'" *Id*. at 366, citing *Parsons v. Crown Disposal Co.*, 15 Cal. 4th 456, 476 (1997). *See also Elden v. Sheldon*, 46 Cal. 3d 267, 276-77 (1988) (limiting cause of action for negligent infliction of emotional distress to immediate family members of the injured person because "[e]very injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree.") (citation omitted); *Moon v. Guardian Postacute Services, Inc.*, 95 Cal. App. 4th 1005 (2002) (son-in-law cannot state a cause of action for negligent infliction of emotional distress for witnessing the alleged negligent treatment of his mother-in-law at a nursing facility).

As explained below, the lower court's ruling that an uncle's employer has a duty to the man's nephew (who only occasionally visited his uncle's home, never his workplace), represents an expansive Andrews-like approach to tort duties at odds with California law.

II

A RULE BY WHICH A MANUFACTURER OWES A LEGAL DUTY TO AN EMPLOYEE'S INTERMITTENT HOME VISITORS VASTLY EXPANDS THE REACH OF TORT LAW

Before knowledge of asbestos's harmful effects became widespread, asbestos products could be found almost everywhere. By the middle of the twentieth century more than 3,000 products—including textiles, building materials, insulation, and brake linings—contained some amount of asbestos. Paul J. Riehle, et al., *Products Liability for Third Party Replacement or Connected Parts: Changing Tides from the West*, 44 U.S.F. L. Rev. 33, 34 (2009). As a practical matter, that means that millions of people of a certain age have had multiple exposures to asbestos, or recurring contact with someone else with multiple exposures.[2] Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every

[2] It is generally accepted that any exposure to asbestos creates an increased risk of illness. Toxicological Profile for Asbestos, DHHS Public Health Service, Agency for Toxic Substances and Disease Registry, 20 app. F (2001), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp61.pdf (last visited Feb. 27, 2015); John T. Hodgson & Andrew Darnton, *The Quantitiative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure*, 44 Ann. Occup. Hyg. 565-601 (2000) (there is no perfectly "safe" amount of asbestos exposure; rather, decreasing exposure implies only decreasing risk, and vice versa). However, it is also widely accepted that not every exposure to asbestos will necessarily cause any given illness. Indeed, even people who are regularly exposed to asbestos do not have a 100% rate of developing the disease. Fedor Valic, *The Asbestos Dilemma: Assessment of Risk*, at 8. *Available at* http://www.chrysotile.com/data/valic_1_risk_assessment.pdf (last visited Feb. 27, 2015).

potential wrong resulting from an action, economic enterprise simply could not go on. "At some point," therefore, "it is generally agreed that the defendant's act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982). Thus, there is a point at which imposing liability has negative consequences—where there is a serious risk of discouraging worthwhile conduct.

The court below purports to limit the scope of its holding by describing potential plaintiffs as having "recurring and non-incidental" contact with the employee who allegedly brought asbestos-contaminated clothing in his home. *Kesner*, 171 Cal. Rptr. 3d at 813. While this precise phrase has never been defined by California courts, this Court has defined the similar phrase of "recurring access" to mean the "ongoing ability to approach and contact someone time after time." *People v. Rodriguez*, 28 Cal. 4th 543, 547 (2002) (citing dictionaries). Assuming a similar definition in this case, the lower court's formulation covers far more people than a nephew occasionally—even frequently—visiting his uncle's home.

For example, the Michigan Supreme Court rejected take-home liability in part because of its inability to draw any principled lines, were it to open the door to such claims. Future potential plaintiffs might include anyone who came into contact with an exposed worker or to his clothes, including

co-workers, children living in the house, "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes," as well as local laundry workers or others who handled the worker's clothes. *Miller v. Ford Motor Co. (In re Certified Question from the 14th Dist. Court of Appeals)*, 740 N.W.2d 206, 219 (Mich. 2007); *see also Holdampf v. A.C. & S., Inc. (In re N.Y. City Asbestos Litig.)*, 840 N.E.2d 115, 122 (N.Y. 2005) (fearing that to expand duty would raise the "specter of limitless liability," perhaps resulting in liability to the family babysitter or employees of a neighborhood laundry).

Consider the carpool. Some employees may be required to carpool. *See Anderson v. Falcon Drilling Co.*, 695 P.2d 521, 525 (Okla. 1985). Other employees may do so as a matter of convenience and economy. *See Black v. William Insulation Co., Inc.*, 141 P.3d 123, 126 (Wyo. 2006) (daily commute carpool); *Farris v. Huston Barger Masonry, Inc.*, 780 S.W.2d 611, 612 (Ky. 1989) (same). Because of the economic benefits of carpooling, they may be arranged among co-workers who otherwise have no social contact, or may even be strangers to one another. *Pugh v. Zefi*, 294 Mich. App. 393, 399-400 (2011), citing *Dutcher v. Rees*, 331 Mich. 215, 219, 49 N.W.2d 146 (1951) (concluding that "[t]he fact that [the parties] had not met each other until the evening in question does not in itself make the tender of a ride a commercial transaction").

California and many local governments within the state offer incentives to encourage carpools and other types of ridesharing. For example, Metro Rewards is an incentive program for commuters who rideshare to work in Los Angeles County. Participants receive a Metro Rewards Coupon Discount Book with over $1,000 in immediate savings. *See* Metro, Metro Rideshare: Rewards;[3] San Bernardino Associated Governments, Rideshare Program (offering $400/month subsidy for vanpools to or from Victor Valley).[4] The federal government has lauded California's efforts to encourage workers to ride public transit, or share vehicles. U.S. Env. Protection Agency, Office of Air and Radiation, *Carpool Incentive Programs: Implementing Commuter Benefits as One of the Nation's Best Workplaces for Commuters* (Nov. 2005)[5] (describing a variety of incentive programs, including several counties in California, to encourage workers to rideshare, carpool, vanpool, use public transit, or otherwise commute collectively).

Private industry also encourages and offers incentives to employees to rideshare. Some large companies, like Apple and Google, offer shuttle bus services to their employees. *See Apple, Google commuter shuttles to be*

---

[3] *Available at* http://www.metro.net/about/rideshare-rewards/ (last visited Feb. 27, 2015)

[4] *Available at* http://www.sanbag.ca.gov/commuter/rideshare.html (last visited Feb. 27, 2015).

[5] *Available at* http://www.bestworkplaces.org/pdf/carpool_June07.pdf (last visited Feb. 27, 2015).

charged fee for using San Francisco bus stops (Jan. 21, 2014);[6] *see also Apple workers get shuttle service, car wash*, MacNN News (Oct. 18, 2007)[7] (describing Apple's shuttle service for its employees to ferry workers between various places in the Bay Area and the Cupertino campus). Not only are employees exposed to each other, but the shuttle driver is exposed to all riding employees, and vice versa. And all this ridesharing occurs twice a day, five days a week—clearly "recurring and non-incidental." Is an employer to be potentially liable for diseases contracted by anyone who ever carpooled with a worker exposed to jobsite toxins?

Similar concerns arise regarding in-home caregivers. Several decisions mention babysitters in the specter of unlimited liability, *see e.g.*, *Miller*, 740 N.W.2d at 219; *Holdampf*, 840 N.E.2d at 122, and rightly so, especially as to those babysitters who are in the home on a regular basis. The scope of the tort duty created below, however, would certainly include personal attendants who provide nursing and daily living assistance, often for many hours during the day. The Court of Appeal's decision in *Cash v. Winn*, 205 Cal. App. 4th 1285 (2012), describes a fairly typical situation where a personal attendant is employed to "supervise, feed or dress" an elderly person who needs care,

---

[6] *Available at* http://appleinsider.com/articles/14/01/21/apple-google-commuter-shuttles-to-be-charged-fee-for-using-san-francisco-bus-stops (last visited Feb. 27, 2015).

[7] *Available at* http://www/macnn.com/articles.07/10/18/apple.shuttle.car.wash (last visited Feb. 27, 2015).

spending up to 18 hours per day in the house, and another caregiver daily visited the house for the purpose of keeping it clean and doing other household chores. *Id*. at 1291-92. Are these caregivers "recurring and non-incidental" visitors to the household? Of course. But they are very far removed from any action of a member of the extended family's employer, where that extended family member may have used toxic substances on the job.

The decisions in *Olivo v. Owens-Ill., Inc*., 895 A.2d 1143, 1147-49 (N.J. 2006), and *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008), most prominently permit this type of expansive take-home claim. However, the scope of *Olivo* is currently understood to be more limited than it may have originally appeared. In *Schwartz v. Accuratus Corp*., 7 F. Supp. 3d 490 (E. D. Penn. 2014), a federal district court recently applied New Jersey law to a situation where a worker's live-in girlfriend (later, wife) alleged exposure to beryllium, a toxin that contaminated the worker's clothes. Considering *Olivo*, the court said, "While an employer working with beryllium might foresee potential danger to mere roommates and visitors, the considerations of policy and fairness noted by the *Olivo* court demand that take-home liability be reasonably limited." *Id*. at 495. The court held it "unreasonable" to hold the boyfriend's employer with "sharp enough foresight to realize that this particular individual [the girlfriend] would later marry one of their employees. Therefore, even New Jersey law does not impose a duty on [the employer] regarding harm to [the girlfriend]." *Id*. at 496. A live-in

girlfriend naturally has greater recurring and non-incidental contact with the employee than an occasionally visiting nephew.

Satterfield, on the other hand, perfectly understood the virtually unlimited scope of the duty it adopted, and embraced it. The court's decision rested solely on whether it was foreseeable that asbestos-contaminated clothes could harm those with whom the employee came into contact. 266 S.W.3d at 374. It blithely dismissed the Michigan Supreme Court's warning about creating a duty to a limitless class of plaintiffs, commenting, "we see no reason to prevent carpool members, babysitters, or the domestic help from pursuing negligence claims against an employer should they develop mesothelioma after being repeatedly and regularly in close contact with an employee's asbestos-contaminated work clothes over an extended period of time." *Id*. Perhaps in Tennessee, with its 2008 population of about 6.3 million people (compared to California's 38.8 million people in 2014),[8] the court could perceive such expansive liability as manageable, with little impact on the state's economy. With a population six times larger, California courts are well served to exercise greater caution. *See e.g.*, *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 33 (2012) ("even assuming a property owner can reasonably be expected to foresee the risk of latent disease to a worker's family members secondarily exposed to asbestos used on its premises, we must conclude strong

[8] U.S. Census Bureau State & County Quickfacts, *available at* http://quickfacts.census.gov/qfd/index.html (last visited Feb. 27, 2015).

public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure.").

III

THE SCOPE OF THE DUTY IN THIS CASE WILL AFFECT NON-ASBESTOS CASES

Toxins come in many forms, and not all of them were taken off the market decades ago. *See* Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 Envtl. L. 549, 551 n.1 (1995) (Toxic tort cases have included exposure to asbestos, cigarette smoke, fumes from mildew, formaldehyde vapors, pesticides, contaminated water supply, and others). For example, this Court should consider the implications of its decision on employer liability for communicable diseases. What is an employer's responsibility when employees become infected with human immunodeficiency virus (HIV), hepatitis C, tuberculosis, or measles? Courts and scholars have considered the employer's responsibilities to workers and others present in the workplace, but this case raises the question of the extent to which employers could be liable if workers are exposed to contagions at work and bring those contagions home, possibly via a carpool, or public transit.[9]

---

[9] *See* Sarah Kaplan, *From beetles to bubonic plague: Bizarre DNA found in NYC subway stations*, The Wash. Post (Feb. 6, 2015) (transit system harbors at least 67 types of disease-causing bacteria, including multi-drug resistant bacteria uncovered in more than 400 stations), *available at* http://www.washingtonpost.com/news.morning-mix/wp/2015/02/06/from-

Under traditional tort doctrine, "[t]he duty to warn [about communicable diseases] probably would not extend . . . to those with whom employees reside, or to other members of the public with whom employees are likely to come into contact, because of foreseeability and privacy concerns." R. Scott Hetrick, *The Employer's Duties Regarding Communicable Disease in the Workplace*, 24 Am. J. Trial Advoc. 35, 54 (2000), *citing* Lucinda M. Finley, *The Spectre of Future Tort Liability for Communicable Diseases in the Workplace*, 309 Prac. L. Inst., Aug. 1, 1986, at 354.

This was the approach taken by a New York court in *Knier v. Albany Medical Center Hospital,* 131 Misc. 2d 414 (N.Y. Sup. Ct. 1986), where a nurse contracted scabies, an infectious disease, from a patient, then passed it to her children and live-in partner. The partner sued the nurse's employer, arguing that the hospital had a duty to warn the general public when one of its staff members has been exposed to a contagious disease. *Id*. at 415. Because Mr. Knier was not married to the nurse, the court noted that a duty limited to family members would not permit him to recover. And, it would be "inherently unreasonable" to expand the duty to individuals living with employees because the hospital would then be required to invade the privacy of its staff to uncover that information. *Id*. Finally, the court explained,

---

beetles-to-bubonic-plague-bizarre-dna-found-in-nyc-subway-stations/ (last visited Feb. 27, 2015). The origin of these bacteria, of course, remains unknown.

> [T]here is no logical reason to limit the class since any member of the general public with whom Mary Ann Warner came in contact could share the same risks of infection as plaintiffs. The court declines to impose a duty upon a hospital to warn the general public that one of its staff members has been exposed to an infectious disease. It would simply be impractical to do so, and would unduly extend responsibilities and liability of institutions furnishing care to the ill. For example, how would defendant meet a duty to warn all Capital District residents that Mary Ann Warner had been exposed to scabies?

Id. at 416.

Employers have a duty to maintain a safe and healthful workplace for their employees. *See* Cal. Labor Code §§ 6400, et seq.; *Alber v. Owens,* 66 Cal. 2d 790, 792 (1967). All manner of potential dangers lurk in the workplace and employers must take all reasonable steps to protect the safety of employees. Tort law does not require, however, that employers take affirmative steps to protect anyone with whom the employees come into contact outside of the workplace, even if those contacts are recurring and non-incidental.

CONCLUSION

The decision below should be reversed.

DATED: March ____, 2015.

Respectfully submitted,

_____
DEBORAH J. LA FETRA

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REAL PARTY IN INTEREST is proportionately spaced, has a typeface of 13 points or more, and contains 3,791 words.

DATED: March ____, 2015.

_____
DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, SUZANNE M. MACDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On March ____, 2015, true copies of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REAL PARTY IN INTEREST were placed in envelopes addressed to:

Ted W. Pelletier
Kazan McClain Satterley and Greenwood PLC
Jack London Market
55 Harrison Street, Suite 400
Oakland, CA 94607-3858
Attorney for Petitioner, John Blaine Kesner, Jr.

Cindy Saxey
Weitz & Luxenberg P.C.
1880 Century Park East, Suite 700
Los Angeles, CA 90067-1618
Attorney for Petitioner, John Blaine Kesner, Jr.

Edward Roger Hugo
Jeffrey Kaufman
James Carl Parker
Brydon Hugo and Parker
135 Main Street, 20th Floor
San Francisco, CA 94105
Attorneys for Real Party in Interest, Pneumo Abex, LLC
Curt C. Cutting

Lisa Perrochet
Robert Herring Wright
Horvitz and Levy LLP
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436-3029
Attorneys for Real Party in Interest, Pneumo Abex, LLC

Superior Court of Alameda County
Honorable John M. True III
1221 Oak Street, Room 260, Dept. 23
Oakland, CA 94612
Respondent

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this ____ day of March, 2015, at Sacramento, California.

_____
SUZANNE M. MACDONALD