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Premises liability and asbestos

RECENT COURT CASES TURN THE TIDE OF LIABILITY FOR TAKE-HOME EXPOSURE TO ASBESTOS

Premises liability "refers to the liability of certain persons for injuries and damages to others arising from the ownership or possession of real property." (Paul, et al., Cal. Civ. Prac. Torts (2017) § 16:1.) How far does this duty extend? This fundamental question has been litigated for decades, encompassing many different areas of potential liability for premises owners.

Recently, there has been some uncertainty in California as to whether a premises owner or employers owed a duty to protect against the risks presented by take-home asbestos exposure. Before 2012, claims were successfully litigated based on the theory of take-home exposure to asbestos. Then, in *Campbell v. Ford Motor Company* (2012) 206 Cal.App.4th 15, the court held that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business." (*Id.* at p. 34.) Based on this ruling, many lower courts granted summary judgment motions brought by defendants sued on the basis of take-home exposure to asbestos. Eventually the issue reached the California Supreme Court, which rejected the decision in *Campbell*, and held that California employers and premises owners have a duty to use reasonable care to prevent take-home exposure to the members of a worker's household. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132.)

Take-home exposure

Understanding the importance of take-home exposure is germane to understanding the long, winding path this litigation has taken through the courts. Take-home exposure to asbestos occurs when a worker is exposed to asbestos on the job and subsequently takes home asbestos fibers on his clothing, thereby exposing his family to this deadly fiber. Frequently, this exposure resulted from shaking out and

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subsequently laundering the worker's dirty clothes. It also occurs from close contact with the worker when he comes home from work covered in dust.

Unfortunately, these workers and their families did not know that this dust had potentially deadly consequences. For some, decades later, someone in their family would develop mesothelioma as a direct result of the asbestos brought home from the job.

Kesner v. Superior Court

In *Kesner,* the Supreme Court coordinated two separate cases involving take-home exposure to asbestos for review. As discussed below, the analysis of both of these cases dealt with the same factors to determine if the Defendants owed a duty of care to protect against take-home exposure to asbestos. Thus, to understand the reasoning for the application of a duty to a premise owner, it is necessary to examine the Court's application of this duty against employers.

In *Kesner*, Johnny Kesner alleged that his mesothelioma was caused by take-home asbestos exposure from his uncle's work at an Abex plant. Mr. Kesner alleged that this exposure occurred when he stayed over at his uncle's house three nights a week between 1973 and 1979. In *Haver*, Lynne Haver's children alleged that she died from mesothelioma caused by asbestos exposure from her ex-husbands work at BNSF Railway Company between 1972 and 1974. Despite these similarities, there was one key difference between the cases. In *Kesner*, the claim was based on the negligent manufacture of brake pads, and in *Haver* the claim was based on a theory of premises liability. Despite this difference, the California Supreme Court came to the same conclusion – both employers and premise owners owe a duty to use reasonable care to prevent take-home exposure to the members of a worker's household.

In the first step in its decision, the Court recognized that it is a fundamental principle of California law that each person has a general duty to act with "reasonable care for the safety of others." (*Kesner, supra,* 1 Cal.5th at p. 1141 quoting Code Civ. Proc. § 1714.) The Court went on to recognize that the only exceptions to this duty occur when there is a statutory exception to this duty or when they are "'clearly supported by public policy.'" (*Id.* at p. 1143 citations omitted.) The remainder of the Court's analysis focused on whether public policy would support an exception to the general duty in cases dealing with take-home exposure to asbestos.

The test

In determining if an exception to the general duty applied, the *Kesner* Court further evaluated the factors developed in *Rowland v. Christian* (1968) 69 Cal.2d 108. These factors include "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 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 p. 113; *Kesner, supra,* 1 Cal.5th at p. 1143.) These factors can be divided into two different categories – foreseeability and public policy concerns.

When considering these factors, the independent facts of each case were irrelevant because the question before the Court was whether an entire category of cases should be excluded from liability for breach of this general duty. The specific facts of a case are used by the jury to determine whether the defendant breached an existing duty of care. Thus, the specific facts of a case are relevant to determining whether there was a breach, but not to determine if the duty of care itself existed.

Foreseeability and *Rowland*

Under the *Rowland* factors, the key consideration is foreseeability of the injury. In discussing foreseeability, the Court looked first to what a "reasonably thoughtful [person] would take account of . . . in guiding practical conduct." (*Kesner, supra,* 1 Cal.5th at p. 1145 quoting *Bigbee v. Pac. Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58.) The Court determined that a reasonably thoughtful person would understand that asbestos fibers could be attached to a worker's clothing and be transported to their home, thereby exposing their family members. In explaining this conclusion, the Court referenced the examples of cleaning an attic or spending time in a smoky room to establish the general understanding that substances can be taken home with a worker. Thus, the Court used everyday common experience in order to establish that the initial concept of take-home exposure would be foreseeable to a reasonably thoughtful person.

The Court's analysis of foreseeability did not end here. The Court went on to reference the 1972 Occupational Health and Safety Administration ("OSHA") provisions. These federal regulations included rules and guidelines for employers who used asbestos in the workplace. Included in the OSHA regulations are precautions to avoid the transmission of asbestos on an employee's clothing outside of the workplace. Moreover, the Court recognized that prior to the OSHA regulations; there were guidelines which required federal contractors to provide workers with facilities to prevent the clothing worn home by workers from being contaminated with harmful materials. In addition, the Court noted that by 1965, the literature recognized that serious injury could result from take-home exposure of asbestos. When looking to the available scholarly literature, the Court rejected Defendants' argument that a scientific consensus was necessary to establish a duty for take-home exposure. For these reasons, the Court recognized that the harm from exposure to take-home asbestos was reasonably foreseeable.

The next *Rowland* factor that addresses the issue of foreseeability deals with the degree of certainty that the plaintiff suffered an injury. Thus, the less certain the injury, the less likely the injury would be foreseeable. This factor has essentially been limited to those circumstances where the injury in question

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is an intangible harm. The Court noted that there was no question that both Mr. Kesner and Ms. Haver had injuries that were certain – they both had mesothelioma, and they both died as a result.

Finally, *Rowland* also analyzed the closeness "'between the defendant's conduct and the injury suffered'" in determining the foreseeability of the injury. (*Kesner, supra,* 1 Cal.5th at 1146 quoting *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 779.) Defendants argued that the injuries were too attenuated from their actions because the worker taking asbestos home on his clothing resulted in household exposure. They argued that this transfer by the worker from the workplace to the home was an intervening act. The Court rejected this argument, noting that the supposed intervening conduct of a worker returning home after work is foreseeable. Indeed, the court even noted that "[a]n employee's role as vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the work place." (*Id.* at p. 1148.)

The Court concluded that the fact that a worker returned home after the work day was behavior that can be assumed. It is a common enough occurrence that a "'reasonably thoughtful [employer or property owner] would take account of it in guiding practical conduct' in the workplace.'" (*Kesner, supra,* 1 Cal.5th at p. 1149 quoting *Bigbee, supra,* 34 Cal.3d at p. 57.) Moreover, as noted above, a worker returning home from work carrying asbestos on his clothing is the result of the employer or property owners' failure to control the exposure to asbestos at the workplace. Thus, the Defendant's conduct was directly connected to the injury suffered.

Based on these three factors, the Court found that the foreseeability factors weighed in favor of finding a duty to protect against take-home exposure to asbestos.

Public policy concerns

After determining that the foreseeability factors weighed in favor of imposing a duty on the premises owner, the Court then went on to evaluate the public-policy concerns. Where an injury is foreseeable, a duty will not exist only "'where the social utility of the activity concerned is so great, and the avoidance of the injuries so burdensome to society, as to outweigh the compensatory and cost-internalization values of negligence liability.'" (*Kesner, supra,* 1 Cal.5th at p. 1150 citing *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 502.)

The first factor looked at in this analysis is the policy of preventing future harm. Here, the defendants argued that the risk of future harm due to asbestos exposure was low because federal regulations have reduced the risk of developing mesothelioma. The federal regulations have continued to reduce the acceptable exposure limits for asbestos and have provided protections against take-home exposure. Because mesothelioma is a dose-responsive disease, this reduction in exposure reduces the risk that individuals will develop mesothelioma. The Court rejected this argument, noting that when determining "whether or how the imposition of liability would affect the conduct of current asbestos users, [the Court's] analysis looks to the time when the duty was assertedly owed." (*Ibid.*) Therefore, the Court evaluated whether the imposition of liability at the time of exposure would have prevented future harm. Guided by the regulations which established protective measures and exposure limits for asbestos exposure, the Court found that "there is a strong public policy limiting or forbidding the use of asbestos." (*Id.* at p. 1151.)

Next, the Court looked at the moral blame involved with the conduct. Moral blame has been found where "the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue." (*Kesner, supra,* 1 Cal.5th at p. 1151.) The Court found that take-home cases present the same elements the Court had recognized in these previous cases. Namely, it is the defendants who benefited from the use of asbestos and had the control to protect against the risks presented by asbestos. Moreover, the defendants had superior knowledge regarding the risks. Thus, it is morally blameworthy to negligently use asbestos in such a manner that results in take-home exposure.

When addressing the burden of imposing a duty, the defendants argued that the application of "liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation, undermine its integrity, and create enormous costs for the courts and community." (*Kesner, supra,* 1 Cal.5th at p. 1152.) However, the Court recognized that its analysis of the burden should be limited to analyzing the burden to the defendant created by following the duty of care. In the case before it, the Court was concerned with the burden to the defendants in protecting against take-home exposure to asbestos. In other words, the Court does not consider the potential cost of the litigation resulting from a defendant's violation of the duty, just the costs related to complying with the duty in the first place. Thus, the Court summarily rejected the defendants' argument. When evaluating the burden that would be imposed by such a duty, the Court determined that there was nothing to suggest that preventing take-home asbestos exposure would create an undue burden on the defendants.

One of the concerns raised by the defendants was that this new duty to protect against take-home exposures would be never ending and that there would be no way to draw a line as to when this line of duty would cease. It could extend to workers that shared a carpool, bus route or had other extenuated exposure to a worker outside of the family home. To address the potential issue of overbroad liability, the Court did limit the duty of employers and property owners to members of a worker's household. The Court recognized that "the term 'household' refers to persons who share 'physical presence under a common roof' or relationships aimed at common subsistence" (*Kesner, supra,* 1 Cal.5th at p. 1155.)

Application to property owners

In its decision in *Kesner*, the Court recognized that "[t]he elements of a negligence claim and a premises liability claim are the same: a legal duty of care, a breach of that duty, and proximate

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cause resulting in injury." (*Kesner, supra,* 1 Cal.5th at p. 1158, citations omitted.) The Court held that the same *Rowland* factors discussed above applied in determining whether property owners owe a duty of care to prevent take-home exposure to asbestos. Again, the Court's analysis of these factors supported a finding of a duty for premises owners to protect against take-home exposure to asbestos.

The defendants argued that there should not be any liability for these injuries because the exposure did not occur as a result of Plaintiff's proximity to the property. However, the Court recognized that the physical boundaries of a property do not determine the liability of the property owner. Indeed, there is much case law establishing that property owners have a duty to protect offsite individuals from an unreasonable risk created by their property. Here, it was the Plaintiff's contact with the asbestos fibers from BNSF's property on the clothes of her ex-husband. The claim against the defendant was based on its failure to act as a reasonable property owner would have to contain a hazardous condition on its property. Thus, the claim is "readily attributable 'to [a] specific condition, natural or artificial,' on BNSF's property." (*Kesner, supra,* 1 Cal.5th at p. 1159 citing *A. Teichert & Son, Inc. v. Superior Court* (1986) 179 Cal.App.3d 657, 663.)

However, while the Court recognized that a duty exists both against premises owners and employers, the duties are not necessarily the same. When asserting a premises-liability claim for take-home exposure to asbestos, the standard affirmative defenses and the exceptions still apply. Thus, there are limitations on the liability of premises owners related to take-home exposure to asbestos. As with any other premises-liability case, a careful evaluation of the applicable affirmative defenses is needed along with specially drafted discovery addressing any potentially applicable defenses.

Decisions examining *Kesner*

Since the *Kesner* decision is relatively new, there are few cases that examine the application of the duties established in *Kesner*. The only published opinion dealing with this decision is *Petitpas v. Ford Motor Company* (2017) _ Cal.Rptr.3d _, 2017 WL 2859760. In *Petitpas*, the Court of Appeal held that under *Kesner* a premises owner did not have a duty to protect against take-home exposure where the plaintiff, Marline Petitpas, was not a household member at the time of the exposure. At the time of the exposure Ms. Petitpas was Joseph Petitpas' girlfriend, and was not living with him. Based on the limitation to household members in *Kesner,* the court held that there was no duty to protect against take-home exposure to a non-live-in girlfriend. Now that this general duty has been established related to take-home exposure, more cases involving the limitations and boundaries of this duty can be expected in the future.

Conclusion

While this case dealt specifically with take-home exposure to asbestos, the analysis applies to any exposure to a toxins in the workplace. It could be argued that based on *Kesner*, employers and property owners have a duty to protect against take-home exposure to other toxic materials that can present a risk to the members of a worker's household. However, when bringing any take-home exposure claim based on premises liability it will be critical to determine the applicability of any relevant defenses. Moreover, during the development of the case, discovery will need to establish defendants' control over the property and the toxic exposure that occurred. Undoubtedly, there are still questions to be answered by the Courts and more litigation on these issues will continue in the future as the application of this duty is established.

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