No. A162561; A163492

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION TWO

NATHAN K. WILLIAMS, as successor-in-interest to CORNELIUS WILLIAMS

Plaintiff and Respondent,

v.

J-M MANUFACTURING COMPANY, INC.

Defendant and Appellant.

On Appeal from the Superior Court for the State of California, County of Alameda, Case No. RG19032329, Hon. Frank Roesch

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AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC. AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT/APPELLANT

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QUESTION PRESENTED

Whether the Supreme Court's decision in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 ("*Kesner*") and public policy considerations preclude a plaintiff who is not a household member of an asbestos worker from asserting a strict products liability claim against a manufacturer for alleged "take home" exposure.

INTEREST OF *AMICI CURIAE*[1]

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims.[2] The Coalition has filed over 200 *amicus curiae* briefs in appellate cases that may significantly impact toxic tort litigation, including briefs in over twenty California cases.

The Civil Justice Association of California (CJAC) is a statewide association dedicated to improving California's civil liability system through its legislative, regulatory, and judicial advocacy. Founded in 1979, CJAC is a nonprofit, non-partisan, member-supported coalition that represents the interests of businesses, professional associations and financial institutions.

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[1] No party or counsel for a party authored the brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

[2] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; Allianz Reinsurance America, Inc., Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

CJAC advocates for policies that allow California businesses and their employees to grow and thrive through a legal environment that is "fair, economical, and certain."

INTRODUCTION AND SUMMARY OF ARGUMENT

Asbestos litigation has been in progress for half a century and is expected to continue for at least several more decades, costing hundreds of billions of dollars. Originally focused upon claims by plaintiffs directly exposed to friable asbestos products manufactured by major asbestos industry defendants, the litigation expanded and evolved as many of those "traditional defendants" filed bankruptcy. Since the early 2000s, asbestos litigation has focused increasingly on novel theories of tort liability, defendants with increasingly peripheral responsibility for asbestos-related injury, and plaintiffs with increasingly peripheral asbestos exposure.

This appeal exemplifies that trend. Ostensibly, the case concerns a species of asbestos exposure known as "secondary" or "take home" exposure, wherein plaintiffs who are generally spouses or children of asbestos workers claim to have contracted disease as a result of exposure to asbestos fibers brought home on the workers' clothes. In this case, however, plaintiff/respondent alleges that he was exposed to asbestos by way of occasional contact with a brother he did ***not*** live with, at their mother's home and elsewhere. Thus, plaintiff/respondent is even farther removed from any asbestos-containing product than the typical "take home" exposure plaintiff. This case is more accurately described as one involving "take anywhere" exposure.

Take home claims have been filed throughout the country against employers of asbestos workers, owners of premises where asbestos was used, and manufacturers of asbestos-containing products. Courts in many jurisdictions decline to recognize a cause of action for take home exposure, citing, among other things, public policy considerations against expanding tort liability to encompass the essentially unlimited universe of potential plaintiffs who may have had contact with an asbestos worker. In the context of products liability, courts also cite policy considerations against imposing a duty to warn upon manufacturers under circumstances where it would be infeasible, if not impossible, for effective warnings to be provided.

The California Supreme Court addressed take home exposure for the first time in *Kesner*, a case involving take home claims against premises owners and employers. The *Kesner* court concluded that the defendants owed a duty sufficient to sustain a cause of action for negligence. However, citing the same policy considerations against potentially unlimited liability noted by other courts, the California Supreme Court expressly limited the cause of action for take home exposure to household members of asbestos workers. The lower court in this case dismissed the plaintiff/respondent's negligence claims pursuant to *Kesner*, but allowed his product liability claims to proceed to trial, resulting in a verdict and judgment against defendant/appellant.

The Coalition and CJAC respectfully urge this Court to reverse the lower court judgment, and hold that California law limits ***any*** claim for take home exposure to household members of

an asbestos worker, regardless of the theory of liability alleged. Such a holding is warranted for at least three reasons. First, *Kesner*'s recognition of a cause of action for take home exposure, even as limited to household members, itself expands asbestos tort liability substantially beyond that permitted in other states. Second, the public policy considerations that prompted the *Kesner* court to limit take home claims for negligence to household members apply with equal force to take home claims for products liability (or any other tort theory of recovery). Third, additional public policy considerations relating to the feasibility of manufacturer warnings render it more, not less, necessary to limit take home claims to household members in cases where products liability is alleged as in cases where negligence is alleged.

ARGUMENT

I. *KESNER* EXPANDED ASBESTOS TORT LIABILITY IN CALIFORNIA BEYOND BOUNDARIES THAT OTHER STATES DECLINE TO CROSS

The proposition that alleged take home exposure should give rise to tort liability under any theory remains controversial. The supreme courts of New York, Michigan, Arizona, Georgia, Iowa, and North Dakota all expressly declined to recognize claims like the one at issue in *Kesner*, *i.e.*, negligence claims by household members of asbestos workers against employers or premises owners. The courts in those states concluded that the proffered claim would constitute an unwarranted expansion of tort law. *See Quiroz v. Alcoa Inc.* (Ariz. 2018) 416 P.3d 824, 843 ("a limitless duty framework is impractical, unmanageable, and has never been the law in this state"); *Palmer v. 999 Quebec, Inc.* (N.D. 2016) 874

N.W.2d 303, 310 ("regardless of whether the focus is on foreseeability of injury, relationship of the parties or a combination of both," take home plaintiff failed to raise fact issue as to alleged duty of father's employer); *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689, 699 ("We conclude such a dramatic expansion of liability would be incompatible with public policy, and therefore reject it"); *Miller v. Ford Motor Co.* (Mich. 2007) 740 N.W.2d 206, 222 ("the imposition of a duty, under these circumstances, would expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs" (internal quotes and citation omitted)); *Holdampf v. A.C.&S., Inc. (In re New York City Asbestos Litigation)* (N.Y. 2005) 5 N.Y.3d 486, 497 ("plaintiffs are, in effect, asking us to upset our long-settled common-law notions of an employer's and landowner's duties"); *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 210 ("adher[ing] to the position that an employer's duty to provide a safe workplace does not extend to persons outside the workplace").[3]

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[3] Other states have enacted legislation against the expansion of tort liability to take home exposure claims. *See* Kan. Stat. Ann. § 60-4905(a) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property"); Ohio Rev. Code Ann. § 2307.941(a)(1) ("A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property"); *Gergely v. Ace Hardware Corp.* (Colo. Dist. Ct. Denver Cnty. Dec. 16, 2016) 2016 Colo. Dist. LEXIS 812, *4 (take home exposure claimant not within the

Other states' supreme courts have been equally inhospitable to take home claims against asbestos manufacturers alleging products liability. *See, e.g., CertainTeed Corp. v. Fletcher* (Ga. 2016) 794 S.E.2d 641, 645 ("we think it unreasonable to impose a duty on [defendant manufacturer of asbestos-containing pipes] to warn all individuals in [plaintiff daughter of pipe worker's] position . . . as the mechanism and scope of such warnings would be endless"); *Georgia Pacific, LLC v. Farrar* (Md. 2013) 69 A.3d 1028, 1038 ("The simple fact is that, even if [defendant manufacturer] should have foreseen" the danger to plaintiff from asbestos carried home on her grandfather's clothes, "there was no practical way that any warning given by it to any of the suggested intermediaries would or could have avoided that danger").

Federal courts adjudicating products-based take home claims have reached similar conclusions. *See Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 447 (affirming summary judgment on strict liability take home claim under Kentucky law where "there is no evidence that the danger from secondary exposure was reasonably foreseeable at the time of Mr. Martin's exposure");[4] *Rohrbaugh v. Owens-Corning Fiberglass Corp.* (10th Cir. 1992) 965 F.2d 844, 846-47 (defendant asbestos

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classes of persons entitled to recover under the Colorado Premises Liability Act).

[4] *Kesner* distinguished *Georgia Pacific* and *Martin* on the ground that the asbestos exposures at issue in those cases took place at a time when the defendants might not have known of the danger to household members. That distinction is irrelevant to the issues addressed herein.

products manufacturer did not have a duty to warn wife of worker "of the dangers associated with their products because [wife] was not a foreseeable purchaser or user of the product. Appellants could not have foreseen that [wife] would be exposed to their products in the manner in which she was. It is undisputed that [wife] was never exposed to asbestos as a user or present where the product was used. Her exposure to asbestos dust, it is asserted, was brought about by contact with her husband's work clothes. To hold that Appellants could reasonably foresee that [wife] would be affected by their products would be an overextension of Oklahoma manufacturer's products liability law"); *Neumann v. Borg-Warner Morse Tec LLC* (N.D. Ill. 2016) 168 F. Supp. 3d 1116, 1125 (holding that asbestos products manufacturer did not owe a duty to take home plaintiff under Illinois law "in light of the magnitude of the burden of protecting [plaintiff] and the ramifications of imposing that burden on [manufacturer]").

In short, by recognizing a cause of action for take home exposure ***limited to household members***, *Kesner* expanded asbestos tort liability in California to an entire category of plaintiffs that other states exclude from their courts. This circumstance, in itself, counsels against the further expansion of liability proposed in this case.

II. THE POLICY CONSIDERATIONS UNDERLYING THE *KESNER* LIMITATION TO HOUSEHOLD MEMBERS APPLY TO ANY AND ALL TAKE HOME CLAIMS

In California, as elsewhere, public policy considerations guide the resolution of any case involving the proposed expansion of tort liability to a "new frontier" of cases. *See*, *e.g.*, *Kesner*, 1

Cal.5th at 1143 ("a judicial decision on the issue of duty entails line drawing based on policy considerations"); *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362 ("The question whether to apply strict liability in a new setting is largely determined by the policies underlying the doctrine").

The California Supreme Court in *Kesner*, while reaching a different result from the cases discussed in section I, expressly acknowledged as "forceful" the same public policy concern that persuaded the courts in those cases to reject any tort liability for take home exposures: *i.e.*, "that a finding of duty in [the case before the court] would open the door to an 'enormous pool of potential plaintiffs'" who may have had contact with an asbestos worker. *Kesner*, 1 Cal.5th at 1153; *see also Van Fossen*, 777 N.W.2d at 699 (imposing duty in take home case before the court "would arguably also justify a rule extending the duty to a large universe of other potential plaintiffs" who "came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat"); *Quiroz*, 416 P.3d at 824 (take home duty urged by plaintiffs in that case would have extended "to any person that [the asbestos worker] encountered after leaving the plant", including "neighbors and friends, babysitters and cab drivers, waiters and bartenders, dentists and physicians, and fellow church members"); *CSX Transp., Inc.*, 608 S.E.2d at 209 (recognition of a cause of action in take home case would "create an almost infinite universe of potential plaintiffs") (internal quotes and citation omitted).

Having recognized the foregoing public policy concerns, the *Kesner* court found that they "do not clearly justify a categorical rule against liability for foreseeable take-home exposure[,]" but "[i]nstead, the concerns point to the need for a limitation on the scope of the duty here[,]" as follows:

> We hold that an employer's or property owner's duty to prevent take-home exposure extends only to members of a worker's household, i.e., persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time. To be sure, there are other persons who may have reason to believe they were exposed to significant quantities of asbestos by repeatedly spending time in an enclosed space with an asbestos worker -- for example, a regular carpool companion. But any duty rule will necessarily exclude some individuals who, as a causal matter, were harmed by the conduct of potential defendants. By drawing the line at members of a household, we limit potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm.
>
> . . . . This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims.

Kesner, 1 Cal.5th at 1154-1155.

The public policy concern that *Kesner* and the other cases address is inherent in any asbestos claim predicated upon take home exposure. By recognizing contact with an asbestos worker as legally sufficient to state a tort claim, a court inevitably unleashes a Pandora's Box of new claims by other plaintiffs within the

"almost infinite universe" of people who have had contact with an asbestos worker.

Most importantly for purposes of this appeal, the public policy concerns with respect to generating an almost infinite universe of new take home claims are the same regardless of the tort theory on which any given take home claim proceeds (*i.e.*, whether negligence or strict products liability) or the defendant against which it is asserted (*i.e.*, whether a premises owner/employer or a manufacturer). Either way, the universe of potential plaintiffs extends to all those who have had contact with an asbestos worker. *Compare CSX Transp., Inc.*, 608 S.E.2d at 209 (finding that a cause of action for negligence against an employer based on take home exposure would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs") with *CertainTeed Corp.*, 794 S.E.2d at 645 (reiterating the above with respect to a cause of action for products liability against a manufacturer). As set forth above, the Supreme Court in *Kesner* expressly recognized that those public policy concerns constitute a "forceful" argument against an unlimited expansion of asbestos tort liability to all take home claims, and the court expressly chose to address those concerns by limiting take home claims to plaintiffs who were members of an asbestos worker's household.

This Court should hold that the *Kesner* limitation to household members applies to ***all*** California lawsuits predicated on take home exposure, regardless of the particular tort claim(s) alleged. Such a holding would effectuate the Supreme Court's

expressly stated intention to "limit potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm[,]" while also "protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims."

A contrary ruling, by contrast, would create a precedent that is irreconcilable with *Kesner*. Were this Court to uphold the judgment below on the theory that the *Kesner* household members limitation does not apply to products liability claims, it would implicitly authorize take home claims alleging products liability from any and all potential plaintiffs within the "almost infinite universe" of persons who have had contact with an asbestos worker. Those inclined to pursue claims for take home exposure would thus be empowered to do so by the simple expedient of naming manufacturers as defendants instead of employers and premises owners, thereby evading *Kesner*, and thwarting its expressly stated goals.

III. PUBLIC POLICY CONSIDERATIONS RENDER THE LIMITATION TO HOUSEHOLD MEMBERS EVEN MORE IMPERATIVE IN THE CONTEXT OF STRICT PRODUCTS LIABILITY

The argument against applying the household members limitation in this case essentially boils down to the proposition that a claim for strict products liability, unlike one for negligence, should not be limited to a defined class of plaintiffs notwithstanding the reasoning of *Kesner*. As discussed above, however, the household members limitation is predicated on public policy considerations, which guide the application of strict liability just as they do other principles of tort law. *See O'Neil*, 53 Cal.4th

at 362 ("[T]he strict liability doctrine derives from judicially perceived public policy considerations and therefore should not be expanded beyond the purview of these policies") (internal quotes and citation omitted).

Moreover, the expansion of tort liability for take home exposure to manufacturers under the strict liability doctrine raises public policy concerns above and beyond those applicable to negligence claims. Where, as here, the court is asked to impose strict liability based on duty to warn, policy considerations include the question of whether the manufacturer has "a feasible way of carrying out that duty" and whether there is "some reason to believe that a warning will be effective[,]" because "[t]o impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect would be poor public policy indeed." *Georgia Pacific, LLC*, 69 A.3d at 1039.

As the *Georgia Pacific* court pointed out, the proposition that manufacturers of asbestos-containing products could feasibly have warned take home plaintiffs is questionable at best:

> [I]n an era before home computers and social media, it is not at all clear how the hundreds or thousands of manufacturers and suppliers of products containing asbestos could have directly warned household members who had no connection with the product, the manufacturer or supplier of the product, the worker's employer, or the owner of the premises where the asbestos product was being used, not to have contact with dusty work clothes of household members who were occupationally exposed to asbestos.

Id. Similarly, in *CertainTeed Corp.*, the court rejected the lower court's finding that the manufacturer owed a duty to warn in a

take home case based on the theory that the asbestos worker could have been warned. Under that theory, the court explained:

> the warning aimed at protecting third parties would not have been systematically distributed or available to the individuals to which it was targeted; instead, the onus would have been on the worker to keep those third parties safe. It is not difficult to envision that, while some workers might have taken steps to protect or warn family members or other individuals with whom they came in contact, other workers might not have taken such steps.

CertainTeed Corp., 794 S.E.2d at 645.

Georgia Pacific and *CertainTeed* determined that product warnings were not feasible, and declined to impose a duty to warn on the manufacturer, in cases where the plaintiffs ***were*** household members of the asbestos worker. In a case such as this one where the plaintiff is not a household member, the infeasibility of warning obviously weighs even more strongly against imposing a duty to warn on the manufacturer.

In short, the expansion of asbestos tort liability to claims of take home exposure alleging strict products liability raises even ***more*** concerns from a public policy perspective than those the *Kesne*r court addressed with respect to negligence claims. Indeed, the *Kesner* court itself implicitly acknowledged as much. *See* 1 Cal.5th at 1162 (noting that product liability defendants "have no control over the movement of asbestos fibers once the products containing those fibers are sold"). Those additional public policy concerns should further compel the Court to enforce the *Kesner* limitation to household members in this case.

CONCLUSION

For these reasons, the Court should reverse the judgment below and enforce the limitations recognized in *Kesner*.

Respectfully submitted,

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Dated: April 14, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with Rule 8.204(c)(1) of the California Rules of Court in that it consists of 3,368 words in Century Schoolbook 13-point font, not including the caption page, tables of contents and authorities, signature blocks, this Certificate, or the Proof of Service, as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

/s/ Andrew Trask
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Dated: April 14, 2023

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over 18 years of age and not a party to this action. My business address is 2049 Century Park East, Suite 3000, Los Angeles, CA 90617.

On April 14, 2023, I served a true copy of the *Amici Curiae* Brief of Coalition for Litigation Justice, Inc. and Civil Justice Association of California in Support of Defendant/Appellant on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document in a sealed envelope addressed to the persons on the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our firm's practice for collecting and processing correspondence for mailing. Under that practice, the correspondence is deposited with the U.S. Postal Service in a sealed envelope with postage prepaid.

BY ELECTONIC SERVICE: I caused the above-referenced document to be filed with the Court using the TrueFiling system. Partipants in the case who are registered will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by court rules.

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

/s/ Andrew Trask
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SERVICE LIST

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