

**S219534**

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**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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**JOHNNY BLAINE KESNER, JR.,**

*Petitioner,*

v.

**ALAMEDA SUPERIOR COURT,**

*Respondent*

**PNEUMO ABEX LLC,**

*Real Party in Interest*

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*After a Decision by the Court of Appeal, First  
Appellate District, Division Three, Case No. A136416*

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**APPLICATION OF CONSUMER  
ATTORNEYS OF CALIFORNIA  
TO FILE AN AMICUS BRIEF IN  
SUPPORT OF RESPONDENT  
JOHNNY BLAINE KESNER, JR.**

**AMICUS BRIEF OF CONSUMER  
ATTORNEYS OF CALIFORNIA**

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**CERTIFICATE OF INTERESTED PARTIES**

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: April 20, 2015

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SHARON J. ARKIN

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**APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENT JOHNNY BLAINE KESNER, JR.**

Consumer Attorneys of California hereby requests leave to file the attached amicus brief in support of respondent Johnny Blaine Kesner, Jr.

Counsel is familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief addresses statistical issues and fundamental public policy issues not otherwise considered or argued by the parties and amicus believes the brief will assist this Court in its consideration of the issues presented.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

**STATEMENT OF INTEREST OF THE *AMICUS***

The Consumer Attorneys of California (“Consumer Attorneys”) is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental

practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in asbestos and other toxic-exposure cases, Consumer Attorneys is interested in the significant issues presented in this case. This case addresses the duty of premises owners and others to act with reasonable care when they allow exposure to toxic substances with known risks to health and safety.

### **ISSUES TO BE ADDRESSED IN THE *AMICUS* BRIEF**

CAOC believes that its *amicus* brief can offer this Court valuable insights with regard to the issues presented. This brief addresses a limited number of issues that have not been otherwise fully discussed in the parties' briefing. For example, CAOC provides this Court with reliable information about the number of mesothelioma cases that are diagnosed each year and the proportion of those annual mesothelioma cases in which so-called "take-home" exposures contributed to the increased risk of mesothelioma. This brief also rebuts assertions that a large number of mesothelioma

diagnoses are not related to asbestos exposures.

Because these issues are so important to a rational and realistic assessment of the public policy impact of failing to recognize a duty to protect families from take-home liability, CAOC has a direct and meaningful interest in the issues in this case and believes that its input and experience can provide needed context for this Court's decision.

Dated: April 20, 2015

By: \_\_\_\_\_  
SHARON J. ARKIN  
Attorney for *Amicus Curiae*

# AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA

## INTRODUCTION

In its briefing, real party in interest, Pneumo Abex, LLC, makes several factual assertions – most of which are unsupported either in the record or otherwise. These include its alarmist rhetoric about the “limitless” and “boundless” liability that will be imposed on asbestos defendants if a duty is imposed in this case; the “intolerable burden” that will be placed on the courts from the “avalanche” of new asbestos cases; the assertion that a significant percentage of mesothelioma cases are not the result of asbestos exposure, and the need to protect defendants from liability for failing to avoid off-premises exposure of other toxic materials.

As discussed in detail below, not only does Pneumo Abex fail to support those assertions with any meaningful statistics or other authority, those assertions are, in fact, in direct conflict with the available information and the accurate information completely undermines the foundation of Pneumo Abex’s contentions.

Indeed, as thoroughly explained in this Court’s decision in *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764 and as discussed in Mr. Kesner’s Answer Brief, the issues raised by Pneumo Abex are relevant to

the question of whether a duty was *breached* and do not support a conclusion under California law that no duty existed. As such, the appellate court's decision should be affirmed.

## LEGAL ARGUMENT

### 1.

#### **RECOGNIZING THE EXISTENCE OF A DUTY FOR OFF- PREMISES EXPOSURE TO ASBESTOS WILL NOT CREATE BOUNDLESS OR LIMITLESS LIABILITY AND WILL NOT IMPOSE AN INTOLERABLE BURDEN ON THE COURTS**

In a variation on the standard “open the floodgates” defense, Pneumo Abex’s brief repeatedly asserts that refusing to carve out an exception to liability for “take-home” exposures to asbestos (or other toxic substances) will result in “limitless” and “boundless” liability for employers and premises owners and will only add to the “avalanche” of asbestos cases overwhelming the courts. (Pneumo Abex Opening Brief, pp 3, 16, 22.) There are two stated bases for that assertion: (1) That recognizing this basis for liability will substantially increase the already-overwhelming flood of asbestos cases; and (2) Every casual encounter will

result in an additional lawsuit. Neither proposition, however, is supported by either statistical analysis or even simple logic.

A. **Mesothelioma is an extremely rare disease, and the rate of take-home cases is only a small proportion of all mesothelioma cases.**

One initial issue needs to be addressed. In an effort to exaggerate the magnitude of the potential “avalanche” of possible litigation that could result from this Court’s recognition of the existence liability for take-home disease, Pneumo Abex fails to distinguish between mesothelioma and other asbestos-related diseases. In fact, however, mesothelioma is virtually always the disease at issue in take-home cases.

Although it is certainly not a scientific survey, a search in Westlaw’s “allcases” database for all cases nationwide in which both the term “take-home” and “asbestosis” appears reveals only two cases in which a claim for damages was made in a take-home case for an asbestos-related disease other than mesothelioma. (*In re Asbestos Litigation (Reidel)* (Del. Super. 2007) 2007 WL 4571196 and *Riedel v. ICI Americas, Inc.* (Del. Super. 2009) 968 A.2d 17 [same plaintiff in both cases, seeking damages for asbestosis]; *Price v. E.I. DuPont de Nemours & Co.* (Del. Super. 2011) 26 A.3d 162 [seeking damages for pleural thickening and interstitial fibrosis].)

In contrast, a search in the same database for “take-home” and “mesothelioma” reveals 54 non-duplicative cases in which a plaintiff sought damages for mesothelioma resulting from a take-home exposure, including both this case and its companion case, *Haver v. BNSF Railway*, Supreme Court Case No. S219919.

The reason for the great disparity in asbestosis versus mesothelioma claims in take-home cases was discussed in *Dixon v. Ford Motor Co.* (Md. 2013) 70 A.3d 328. As explained by renowned scientist Laura Welch, M.D., it “takes much greater exposure to asbestos to produce the level of scarring that results in asbestosis than it does to produce mesothelioma, which is not as dependent on repeated exposure; once a cancer forms, it is there and does not get worse from further exposure.” (*Dixon*, at 333-334.)

Thus, while mesothelioma claims may well arise in the take-home context, other asbestos-related diseases rarely do so.

Second, Pneumo Abex asserts that an “avalanche” of asbestos litigation has already destroyed defendants and insurers and that refusing to carve out a duty exception in this case will exacerbate those problems. (OBM, p. 30.) That is simply fear-mongering and has no basis in fact. As explained in Jackson, *Taking Duty Home: Why Asbestos Litigation Reform Should Give Courts the Confidence to Recognize a Duty to Second-Hand Exposure Victims*, 45 Wake Forest L.Rev. 1157, Winter 2010 [“Jackson”],

the asbestos litigation “crisis” was not caused by payment of legitimate claims where there was an actual injury. (*Id.*, at 1159-1162.) Rather, the crisis arose from mass screenings and claims made for mere *exposure* rather than for actual *injury*. (*Ibid.*) As the article also explains, however, the enormous drag on defendants and the legal system caused by such exposure-only cases have been dealt with in various ways, and those problems have been ameliorated. (Jackson, at 1166-1171.)

More significant is the fact that even direct exposure mesothelioma claims are extremely rare and take-home claims are rarer still. As this Court acknowledged in *Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1135-1136, “malignant mesothelioma is a very rare cancer, even among persons exposed to asbestos.”

The Center for Disease Control conducted a study to assess the frequency of mesothelioma between 1999 and 2005, the results of which were published in April 2009. (See, *Malignant Mesothelioma Mortality – United States, 1999-2005*, MMWR Weekly, 58(15; 393-396, April 24, 2009, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5815a3.htm>.) In conducting that study, “malignant mesothelioma deaths were identified for 1999-2005 from death certificates” for people aged 25 years or older. (*Ibid.*) That study confirmed that the annual death rate for mesothelioma-caused deaths was stable at approximately 14.1 deaths per

year per million people. (*Ibid.*)

The CDC similarly confirmed that the total annual death rate in the entire country from mesothelioma averaged 2,647 people per year between 2001 and 2010.<sup>1</sup> That compares to an average annual nationwide death rate from fatal vehicle crashes of 36,394 people per year during that same time period.<sup>2</sup> The logical conclusion is that there is a far greater impact on the legal system from fatal vehicle accidents than from the small number of people diagnosed with mesothelioma.

There are other telling statistics that are important in this context.

Most significant to the issues relevant to this case, the rate of *take-home* mesothelioma deaths is far, far less than even the low rate of general mesothelioma deaths. As the CDC data discloses, during 1999, the latest year in which data is available, only 6.8 percent of the identified mesothelioma deaths could be attributed to housewives or homemakers.<sup>3</sup>

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1 See CDC, *Malignant mesothelioma: Number of deaths by sex, race, age group, and median age at death, U.S. residents age 15 and over, 2001–2010*, available at [http://wwwn.cdc.gov/eworld/Data/Malignant\\_mesothelioma\\_Number\\_of\\_deaths\\_by\\_sex\\_race\\_age\\_group\\_and\\_median\\_age\\_at\\_death\\_US\\_residents\\_age\\_15\\_and\\_over\\_20012010/799](http://wwwn.cdc.gov/eworld/Data/Malignant_mesothelioma_Number_of_deaths_by_sex_race_age_group_and_median_age_at_death_US_residents_age_15_and_over_20012010/799).

2 See NHTSA, FARS Encyclopedia, Summary, available at <http://www-fars.nhtsa.dot.gov/Main/index.aspx>.

3 See, <http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111h.pdf>, p. 164, bottom chart.

Based on those statistics, of the average 2647 people per year who die from mesothelioma throughout the entire country, only 180 people, *in the entire country*, die each year as the result of take-home exposures.<sup>4</sup>

Furthermore, focusing on the mesothelioma death rates in California demonstrates the virtual insignificance of any effect on California's legal system from refusing to carve out a duty exception in this case. Contrary to the implications in *Pneumo Abex's* arguments, California is not the state that is most significantly impacted by mesothelioma cases. As the CDC data also confirms, as of 1999, again the latest year for which data is available, California ranked 28th among the states for age-adjusted mesothelioma mortality rates.<sup>5</sup> And in 1999, there were only 259 mesothelioma-related deaths in California. (*Ibid.*) Combining that statistic with the calculated rate of 6.8% of those deaths occurring to housewives and homemakers demonstrates that less than 18 deaths per year are associated with mesothelioma in California take-home cases. Hardly a

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4 As the facts in this case confirm, the housewife/homemaker categorization in the CDC statistics does not encompass all the possible take-home mesothelioma cases. But logic dictates that that category represents, by far, the largest segment of take-home cases and gives at least a good thumbnail assessment of the ratio between all mesothelioma cases and take-home mesothelioma cases.

5 See, <http://www.cdc.gov/niosh/docs/2003-111/pdfs/2003-111h.pdf>, p. 163.

flood. Certainly not a limitless or boundless pool of potential new cases that will inundate California's court system.

Pneumo Abex's argument that "expanding" liability to take-home cases will create an "intolerable burden" (OBM, p. 3) on California's legal system is wholly undermined by the fact that prior to the decision in *Campbell v. Ford Motor Co.* (2012) 220 Cal.App.4th 994, California's courts *had already seamlessly incorporated such secondary exposure cases into their operations*. Indeed, several reported California appellate decisions over the years have dealt with take-home cases. (See, e.g., *Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1107-1108; *Hansen v. Owens-Corning Fiberglas Corp.* (1996) 51 Cal.App.4th 753; *Franklin v. USX Corp.* (2001) 87 Cal.App.4th 615; *Cossman v. DaimlerChrysler Corp.* (2003) 108 Cal.App.4th 370.) The existence of these decisions amply demonstrates that, before *Campbell* was decided, the California judicial system had no problem handling these cases and that it will not be overburdened by *continuing to do so*.

Pneumo Abex's alarmist arguments simply do not withstand scrutiny, and they certainly do not support establishing an exception to California's standard duty rule.

**B. Contrary to Pneumo Abex’s assertions, the occurrence of mesothelioma in North America is almost exclusively the result of asbestos exposure.**

Pneumo Abex also contends that it is unfair to expand liability for take-home asbestos exposures because as much as 40% of mesothelioma cases have nothing to do with asbestos exposure. (OBM, p. 30.)

There are three responses to this argument. First, whether exposure to asbestos caused the specific plaintiff’s mesothelioma is an issue of fact for the jury to determine, based on the evidence. Obviously, if the plaintiff was never exposed to asbestos, or was exposed to only trivial amounts of asbestos, the jury can and should conclude that the exposure did not cause the disease. That does not, however, warrant recognition of an exception to California’s standard duty principles.

Second, even if Pneumo Abex’s assertion was factually correct (and, as discussed below, it is not), it would be irrelevant. Whatever percentage of cases is attributable to asbestos exposure, the same percentage applies to both direct exposure and secondary exposure cases. Thus, recognizing the existence of a duty in secondary exposure cases creates no conflict with the already-established duty in direct exposure cases.

Finally, Pneumo Abex’s premise is simply without any substantial support in either the cases or in the scientific literature. First, numerous

medical authorities, including the American Cancer Society, confirm that asbestos exposure is the primary cause of mesothelioma. (See, e.g., *What are the risk factors for malignant mesothelioma?* American Cancer Society, <http://www.cancer.org/cancer/malignantmesothelioma/detailedguide/malignant-mesothelioma-risk-factors>; *Asbestos exposure: The primary risk factor for mesothelioma*, Mayo Clinic, available at <http://www.mayoclinic.Org/diseases-conditions/mesothelioma/basics/risk-factors/con-20026157>; *Mesothelioma: Causes and Symptoms*, Web M.D., available at <http://www.webmd.com/lung/mesothelioma-causes-and-symptoms?page=1#1>.)

In fact, the only other causes or potential causes of mesothelioma that have been identified are:

- Zeolites – which are minerals chemically related to asbestos and found in the rocks and soil of parts of Turkey;
- Radiation – there have been a few published reports of mesothelioma which has developed after people were exposed to high doses of radiation or after injection of thorium dioxide (Thorotrast), a radiographic contrast material used until the 1950s;
- SV40 virus – studies have raised the possibility that infection with this simian virus might increase the risk of mesothelioma; polio vaccines used from 1955 to 1963 may have been contaminated with

the virus. So far, that exposure has been shown to contribute to mesothelioma only in some lab animals like hamsters. Studies have not shown any increased risk in humans.

See, *What are the risk factors for malignant mesothelioma?* American Cancer Society, <http://www.cancer.org/cancer/malignantmesothelioma/detailedguide/malignant-mesothelioma-risk-factors>.

Thus, the medical evidence of any cause of mesothelioma in North America other than asbestos exposure is not well documented and, even if confirmed, would apply in only a minute number of cases. And any such possible alternative causes certainly do not justify carving out a duty exception; rather, those alternative causes can, at best, provide a basis for *defenses*, assuming the alternative exposures can be demonstrated.

California legal authorities echo the same finding, i.e., that asbestos exposure is virtually the only cause of mesothelioma in this country. (See, e.g., *Kellogg v. Asbestos Corporation Limited* (1996) 41 Cal.App.4th 1397, 1401 [“The only established cause of mesothelioma is exposure to asbestos dust.”]; *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 666 [“mesothelioma is a cancer specifically associated with asbestos exposure, and . . . the major cause of mesothelioma is exposure to asbestos.”]; *Skip Fordyce Inc. v. Workers’ Compensation Appeals Board* (1984) 149 Cal.App.3d 915, 928 [“mesothelioma is caused exclusively by asbestos

exposure.”].)

Thus, not only is the premise for Pneumo Abex’s argument invalid, it is illogical and irrelevant and should not be a factor in assessing whether a duty exists in the context at issue in this case.

## 2.

### **REFUSING TO CARVE OUT AN EXCEPTION TO LIABILITY FOR OFF-PREMISES EXPOSURE TO OTHER TOXINS WILL NOT CREATE LIMITLESS OR UNBOUNDED LIABILITY OR AN “AVALANCHE” OF NEW LITIGATION**

As part of its “avalanche” of litigation argument (OBM, p. 16), Pneumo Abex asserts that imposition of a duty in the take-home asbestos context will also create a massive surge of similar cases in other toxic tort litigation. Again, Pneumo Abex fails to support its hysterical assertions with any logical analysis or statistics.

First, Pneumo Abex’s argument is wholly speculative, i.e., it provides no analysis as to how, or whether, other toxic substances can readily be transferred from a workplace to a home and increase the risk of disease to those living in or regularly visiting that home. One reason that there are *any* asbestos take-home cases is due to the nature and

characteristics of asbestos itself. In its friable, respirable form, asbestos consists of microscopic fibers that float in the air and land on surfaces, such as the clothes, hair and skin of the people working with it. When those people get into their cars, asbestos dust from their clothes, hair and skin are shed into the car, where they remain unless they are thoroughly cleaned with a HEPA-type filter vacuum. The same is true when those people go home: Asbestos fibers are shed into the home environment, especially when someone in the home shakes out the dirty work clothes of the person who has been working around the asbestos. Movement in the home re-entrains the fibers into the air and the people in the home breathe the fibers, thus creating a high-level exposure and increasing the risk of disease. (See, e.g., *Dixon v. Ford Motor Co.* (Md. 2013) 70 A.3d 328, 333.)

Thus, the take-home risk from asbestos is unique to the characteristics of asbestos that make it a danger to all those who work in and around the substance, and the people closely associated with them. Pneumo Abex's arguments fail to even demonstrate that similar take-home risks exist with respect to other possible toxins.

In fact, a review of the Federal Occupational Safety and Health Administration website discloses only a few toxic chemicals that create a

take-home exposure risk, including hexavalent chromium<sup>6</sup>, lead<sup>7</sup>, beryllium<sup>8</sup>, and, of course, asbestos<sup>9</sup>. A search of Westlaw’s “allcases” database reveals only four cases nationwide that discuss beryllium in the context of take-home exposures; and none dealing with take-home exposures for hexavalent chromium or lead.

Thus, once again, Pneumo Abex’s exaggerated arguments simply do not hold up to scrutiny and cannot justify carving out a duty exception limiting the rights of injured plaintiffs to recover compensation for their unwilling exposures to materials for which the employers/premises owners were responsible.

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6 See, *OSHA Factsheet: Hexavalent Chromium Hazards in Bridge Painting*, available at [https://www.osha.gov/Publications/OSHA\\_FS-3649\\_Bridge\\_Painting.pdf](https://www.osha.gov/Publications/OSHA_FS-3649_Bridge_Painting.pdf)

7 See, *OSHA QuickCard; If you work around lead, don’t take it home*, available at <https://www.osha.gov/Publications/OSHA3680.pdf>

8 See, OSHA Hazard Bulletin, *Preventing Adverse Health Effects from Exposure to Beryllium in Dental Laboratories* (May 14, 2002), available at [https://www.osha.gov/dts/hib/hib\\_data/hib20020419.html](https://www.osha.gov/dts/hib/hib_data/hib20020419.html)

9 See, OSHA, *Safety & Health Topics, Asbestos*, available at <https://www.osha.gov/SLTC/asbestos/hazards.html>

## CONCLUSION

Law, evidence and logic demonstrate that Pneumo Abex's fear-mongering has no legitimate basis. Not only is the judicial system not "broken" or overwhelmed because of asbestos cases, it is more than capable of handling the extremely limited number of additional take-home cases that will come *back* into the system as the result of this Court's disapproval of *Campbell* and the confirmation that a duty is owed to those who are injured by take-home asbestos exposures.

Dated: April 20, 2015

THE ARKIN LAW FIRM

By: \_\_\_\_\_  
SHARON J. ARKIN  
Attorney for amicus curiae  
Consumer Attorneys of  
California

**CERTIFICATE OF LENGTH OF BRIEF**

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this combined Reply Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is less than 4294 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: April 20, 2015

\_\_\_\_\_  
SHARON J. ARKIN

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address 225 S. Olive Street, Suite 102, Los Angeles, California 90012.

On **April 20, 2015**, I served the within document described as:

<b><u>APPLICATION TO FILE AMICUS BRIEF; AMICUS BRIEF</u></b>
--

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth in the attached service list with postage paid thereon and depositing them with the United States Postal Service at Brookings, Oregon.

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

**Executed on March 9, 2015 at Brookings, Oregon.**

\_\_\_\_\_  
SHARON J. ARKIN

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Owens-Illinois, Inc. : Amicus curiae	Eliot Steven Jubelirer Morgenstein & Jubelirer 1 Market Plaza Spear Street, 32floor San Francisco, CA 94105
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