

California Expands Duty of Care in Asbestos Cases to Members of Employees' Households

Kesner v. Pneumo Abex, LLC
No. S219534, 2016 WL 7010174 (Cal. Dec. 1, 2016)

EMPLOYERS OWE a duty to protect members of an employee's household from the dangers associated with exposure to asbestos fibers on the employer's premises, according to the California Supreme Court, resolving a split between two appellate courts addressing similar facts in the case of *Kesner v. Pneumo Abex, LLC*, No. S219534, 2016 WL 7010174 (Cal. Dec. 1, 2016).

The plaintiff in the first case, Johnny Kesner, alleged that his mesothelioma was caused by his exposure to asbestos fibers brought home by his uncle, George Kesner, who worked at a Pneumo Abex plant. According to his uncle, Johnny spent an average of three nights per week at his home from 1973 to 1979 and the two would roughhouse while George was wearing his work clothes. Lynne Haver, the plaintiff in the second case, alleged that her mesothelioma was caused by her exposure to asbestos fibers carried home by her husband, who worked for a predecessor of BNSF Railway Corporation, after she began living with him in 1973.

The Havers and Kesner alleged that Abex and BNSF, through the use or manufacture of asbestos-containing products, created a risk of harm to the household members of their employees by failing to exercise reasonable care in their use of asbestos-containing materials. The appellate court considering the Kesner case found there was a duty of care to household members who suffer take-home exposure to asbestos, whereas the appellate court considering the Havers' case found no duty.

The California Supreme Court began its analysis by noting that California Civil Code § 1714 establishes a general duty of each person to exercise reasonable care for the safety of others. It is only in certain cases, "clearly supported by public policy," where courts establish an exception to the general rule that one's failure to exercise ordinary care incurs liability for all the harms that result.

In determining whether policy considerations weigh in favor of such an exception, the Court weighed the factors that fall into two main categories: those that address the foreseeability of the relevant injury, and those that take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief.

The California Supreme Court found that proper application of the factors supported the conclusion that defendants had a duty of ordinary care to prevent take-home asbestos exposure. The Court concluded such exposure, and its resulting harms to human health, were reasonably foreseeable to large-scale users of asbestos by the 1970s.

Of particular import to the Court's analysis was the fact that OSHA published in June 1972 its first permanent regulations for employers using asbestos, which included setting a ceiling for employee exposure to airborne asbestos, preventing asbestos from traveling within a worksite, and requiring employers to prevent asbestos from traveling outside the workplace by,

for example, providing special clothing and changing rooms to prevent contamination of the employee's street clothes from his work clothes.

The Court indicated it was mindful of the fact that recognizing a duty to all persons who experienced secondary exposure could invite a mass of litigation that imposes uncertain and potentially massive and uninsurable burdens on defendants, the courts and society. But in the Court's opinion, this concern did not justify a categorical exemption from liability for take-home exposure. Accordingly, the Court held that the defendants owed the members of their employees' households a duty of ordinary care to prevent take-home exposure but that this duty did not extend to those outside of the employees' household.

Comment

The Court discussed decisions from other states analyzing whether a premises owner owes an obligation to household members in take-home asbestos cases. Ultimately, the Court distinguished those cases in which states found no duty, pointing to the underlying differences in the duty doctrine in the respective states, rather than a split on the ultimate policy issues.

California joins the ranks of New Jersey, Tennessee, Louisiana and Washington as states

that have recognized a premises owner's obligation to household members in take-home asbestos cases. Courts in Arizona, Delaware, Georgia, Illinois¹, Ohio, Michigan and Texas have, thus far, declined to find such a duty of care.

While this decision is disappointing for defendants and their insurers who face exposure due to the manufacture or use of asbestos products, given the political climate in California and the makeup of the California Supreme Court, the decision is not altogether surprising. Employers should be aware of the fact that they now may face an increase in California lawsuits from Plaintiffs who allege their exposure to asbestos came from someone who was required to work around asbestos at their place of employment and with whom the Plaintiff shared a household.

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¹ Although there is mixed case law in Illinois regarding the existence of a duty to members of an employee's household, the most recent appellate court decision, *Estate of Holmes v. Pneumo Abex LLC*, 2011 IL App (4th) 100462, and the most recent federal decision, *Neumann v. Borg-Warner Morse Tec LLC*, 168 F. Supp. 3d 1116 (N.D. Ill. 2016), both concluded there was no duty.

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