

# Take-Home Toxin: Following Kesner's Lead and Creating a Consistent Framework for Determining Duty Toward Victims of Secondary Asbestos Exposure

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## Comment

### TAKE-HOME TOXIN: FOLLOWING *KESNER*'S LEAD AND CREATING A CONSISTENT FRAMEWORK FOR DETERMINING DUTY TOWARD VICTIMS OF SECONDARY ASBESTOS EXPOSURE

BRENDAN KELLY\*

The explosion of American industry throughout the twentieth century was accomplished largely on the back of asbestos,<sup>1</sup> a “wonder material” utilized for its unique and versatile characteristics.<sup>2</sup> Asbestos was used for everything from building skyscrapers to making home gardening products, and it was heavily relied upon during World War II because of its rare characteristics—“stronger than steel,” yet flexible, waterproof, fireproof, and easily mined.<sup>3</sup> However, as asbestos’s prevalence increased,<sup>4</sup> so too did awareness of its negative health consequences.<sup>5</sup> Ultimately, the value and utility of asbestos to industry were exceeded by the dangers it posed to human health.<sup>6</sup>

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1. See AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEP’T OF HEALTH & HUMAN SERVS., TOXICOLOGICAL PROFILE FOR ASBESTOS 1 (2001), <http://www.atsdr.cdc.gov/tox-profiles/tp61.pdf> [hereinafter ASBESTOS PROFILE] (“Asbestos is the name given to a group of six different fibrous minerals (amosite, chrysotile, crocidolite, and the fibrous varieties of tremolite, actinolite, and anthophyllite) that occur naturally in the environment.”).

2. See JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM 16 (2011) (explaining that asbestos is “literally a fiber made of rock,” and is “abundant, cheap to mine, and amazingly versatile”).

3. *Id.* at 17.

4. American use of asbestos rapidly increased from about 20,000 metric tons in 1900, to its peak of 803,000 metric tons in 1973. *Id.* at 16–17.

5. ASBESTOS PROFILE, *supra* note 1, at 17; see also BARNES, *supra* note 2, at 17 (“Exposure to asbestos can cause mesothelioma, . . . asbestosis, . . . [and] can produce pulmonary abnormalities . . .”); Martha Neil, *Backing Away from the Abyss: Courts May Be Starting to Get a Grip on Asbestos Litigation*, 92 A.B.A. J. 26, 29 (2006) (explaining that the health hazards of exposure to asbestos were well-recognized by the 1960s, and that some contend that “[some] companies knew of the risks as early as the 1930s”).

6. See BARNES, *supra* note 2, at 17 (describing the lethal diseases caused by asbestos).

Asbestos use dramatically declined in the 1980s and 1990s,<sup>7</sup> and while still technically legal in the United States, recent environmental regulations have created a path toward a total ban.<sup>8</sup> Despite this decline in usage and its potentially imminent prohibition, the delayed development of asbestos-related disease and illness means that its effects will continue to be realized well into the foreseeable future.<sup>9</sup>

Beginning in the early 1970s, asbestos litigation largely consisted of employees' claims asserting workplace exposure or consumer product liability claims against manufacturers.<sup>10</sup> However, in the last fifteen years, there has been an increase of so-called "secondary" or "take-home" exposure claims.<sup>11</sup> Recently, in *Kesner v. Superior Court*,<sup>12</sup> the Supreme Court of California ruled that employers and premises owners had a duty to prevent their on-site workers' household members from being secondarily exposed to asbestos through the workers' bodies and clothing.<sup>13</sup> There, the court consolidated two conflicting cases from the First and Second Districts of the California Court of Appeal.<sup>14</sup> In resolving the district split, the *Kesner* court focused primarily on the foreseeability of secondary exposure and limited employer liability to an employees' household members, as opposed to a wider-reaching group of plaintiffs.<sup>15</sup>

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7. *Id.* at 18 fig.2.1.

8. Gregory Korte, *Obama Signs Bipartisan Chemical Safety Bill*, USA TODAY (June 22, 2016), <https://www.usatoday.com/story/news/politics/2016/06/22/obama-signs-bipartisan-chemical-safety-bill/86241008/> ("The Frank R. Lautenberg Chemical Safety for the 21st Century Act is the first major update to environmental legislation in two decades, overhauling the process for regulating toxic chemicals, [and] allowing the Environmental Protection Agency to ban substances like asbestos . . .").

9. See William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take-Home" Cases*, 39 AM. J. TRIAL ADVOC. 107, 119–20 (2015) (stating the pool of potential asbestos-related plaintiffs is likely to remain consistent for the next several decades or longer).

10. Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 589 (2007); see also Christopher J. O'Malley, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1107 (2008) (noting that early asbestos exposure court decisions "expand[ed] the scope of liability from employers to suppliers and installers of building materials" (alterations in original) (quoting Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 54 (2003))).

11. See, e.g., *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 441 (6th Cir. 2009); *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171, 176 (La. Ct. App. 2006); *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 441, 705 A.2d 58, 65 (1998); *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115, 116–17 (N.Y. 2005); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 351 (Tenn. 2008). The terms "secondary" and "take-home" can be used interchangeably.

12. 384 P.3d 283 (Cal. 2016).

13. *Id.* at 288.

14. *Haver v. BNSF Ry. Co.*, 172 Cal. Rptr. 3d 771 (Ct. App. 2014); *Kesner v. Superior Court*, 171 Cal. Rptr. 3d 811 (Ct. App. 2014).

15. *Kesner*, 384 P.3d at 291–93.

*Kesner* is the latest addition to an ever-growing list of state court decisions on the issue of secondary asbestos exposure.<sup>16</sup> State courts are generally split on whether the employer's duty should extend beyond the workplace.<sup>17</sup> A small majority of states that have ruled on the matter currently hold that employers are not liable for secondary exposure because they have no relationship with the victim.<sup>18</sup> Conversely, a growing minority of state courts have used reasoning similar to *Kesner* and found that because take-home exposure was foreseeable, employers had a duty to prevent it.<sup>19</sup>

This Comment will explore the legal history of this area of law, and it will explain how the *Kesner* decision adds to it. First, it will examine the rise of asbestos regulation by the Occupational Safety and Health Administration ("OSHA"), which ultimately provided the basis for asbestos claims.<sup>20</sup> Second, it will present an overview of the conflict between the state courts on the issue of employer liability for secondary exposure, identifying the leading cases from states on each side of the divide.<sup>21</sup> Third, this Comment will explore Maryland courts' take-home asbestos decisions by identifying the prominent cases and delving into the reasoning used by the courts.<sup>22</sup> Fourth, this Comment will analyze the *Kesner* court's decision in further detail, highlighting the key rationale used by the court in reaching its holding.<sup>23</sup>

Additionally, this Comment will argue that the Supreme Court of California's holding in *Kesner* was correctly decided and can create a framework for future employer liability for secondary exposure decisions.<sup>24</sup> Finally, it will assert that the reasoning in *Kesner* can serve as a guide for Maryland, and other state courts that have similarly declined to find a duty based on the lack of relationship, to find employer liability for secondary exposure without upsetting established tort regimes.<sup>25</sup> Maryland's reservation about extending employer liability beyond employees is related to its apprehension about creating an indeterminate number of plaintiffs. This Comment will argue, however, that *Kesner* limits the potential plaintiffs who could exist, and the distinctive characteristics of take-home exposure cases will be definable in such a way that these decisions will not disturb Maryland's existing employer duty law.<sup>26</sup>

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16. See *infra* note 200.

17. See *infra* note 50 and accompanying text.

18. See *infra* notes 87–94 and accompanying text.

19. See *infra* notes 54–60 and accompanying text.

20. See *infra* Part I.A.

21. See *infra* Part I.B.

22. See *infra* Part I.C.

23. See *infra* Part I.D.

24. See *infra* Part II.A.

25. See *infra* Part II.B.

26. See *infra* Part II.B.

## I. BACKGROUND

Asbestos litigation has had a massive impact on American courts.<sup>27</sup> As general asbestos litigation has settled, a new area of claims has developed, referred to as take-home or secondary exposure claims.<sup>28</sup> This Part will first examine the rise of asbestos regulation by OSHA.<sup>29</sup> The OSHA regulations were important in providing a basis for initial asbestos claims against employers and have played a substantial role in more recent take-home decisions.<sup>30</sup> While literature and scientific evidence have provided warnings about the dangers of asbestos since the 1930s,<sup>31</sup> courts have largely marked OSHA's 1972 asbestos regulations as the watermark for when employees knew or should have known of the dangers of asbestos exposure.<sup>32</sup> Next, this Part will examine how states' varying notions of duty have colored secondary exposure decisions in different jurisdictions.<sup>33</sup> It will then examine the take-home decisions in Maryland and discuss other related case law in the state.<sup>34</sup> Finally, this Part will examine the California Supreme Court's decision in *Kesner*.<sup>35</sup>

### A. *Asbestos History: 1972 OSHA Regulations and the Rise of Asbestos-Related Litigation*

The first federal uniform regulations regarding exposure to asbestos were published by OSHA in 1972.<sup>36</sup> These regulations set permissible exposure concentrations, established appropriate work practices, and required the use of air-purifying respirators in the workplace.<sup>37</sup> More importantly for the purposes of this Comment, OSHA promulgated standards to protect nonemployees from exposure to asbestos traveling outside of a workplace on employees' clothing.<sup>38</sup> These standards included requirements that employers provide special clothing to be used only at the workplace and separate clothes

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27. See *infra* note 265 and accompanying text.

28. See *infra* note 50 and accompanying text.

29. See *infra* Part I.A.

30. See *infra* Part II.

31. See *Kesner v. Superior Court*, 384 P.3d 283, 292 (Cal. 2016) (explaining the history of take-home knowledge prior to the 1972 OSHA regulations).

32. *Id.* at 292–93.

33. See *infra* Part I.B.

34. See *infra* Part I.C.

35. See *infra* Part I.D.

36. 29 C.F.R. § 1910.1001(h) (2016); Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11318 (June 7, 1972).

37. Standard for Exposure to Asbestos Dust, 37 Fed. Reg. at 11,321.

38. *Id.*

lockers to prevent contamination of street clothes.<sup>39</sup> The regulations also required employers to notify third party launderers of any asbestos contamination and to transport contaminated clothing in “sealed impermeable bags, or other closed, impermeable containers.”<sup>40</sup> In short, they established workplace procedures for handling asbestos and provided employers with at least constructive knowledge of the danger that existed from asbestos exposure away from the jobsite.

Shortly after OSHA released these regulations, *Borel v. Fibreboard Paper Products Corp.*<sup>41</sup> marked the beginning of a wave of asbestos-related litigation that would flood the American judicial system.<sup>42</sup> In *Borel*, the plaintiff alleged that the defendants—various building materials manufacturers for whom he had worked as a contractor—should be held negligent, grossly negligent, and strictly liable because they knew that asbestos carried health risks but failed to warn the plaintiff of these dangers.<sup>43</sup> The jury found all but two of the defendants were negligent, none of the defendants were grossly negligent, and the plaintiff himself had acted contributorily negligent.<sup>44</sup> For strict liability, the jury found that all defendants were liable and determined that the total damages should be \$79,436.24.<sup>45</sup> The Fifth Circuit affirmed the jury verdict, holding that the defendants breached their duty by failing to warn the plaintiffs about the foreseeable dangers associated with asbestos.<sup>46</sup> This decision seemed to alert plaintiffs and trial lawyers alike to the potential value in asbestos-related suits.<sup>47</sup> When combined with the ubiquity with which asbestos was being used in certain industries, asbestos-related claims increased rapidly.<sup>48</sup>

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39. *Id.*

40. *Id.*

41. 493 F.2d 1076 (5th Cir. 1973).

42. See, e.g., *In re Johns-Manville Corp.*, 2004 Bankr. LEXIS 2519, at \*12 (Bankr. S.D.N.Y. Aug. 17, 2004) (explaining that the “intermittent trickle of asbestos litigation became a rushing tide as a result of *Borel v. Fibreboard Paper Prods. Corp.*”).

43. *Borel*, 493 F.2d at 1086.

44. *Id.*

45. *Id.* “Since four defendants originally named in the complaint had previously settled, paying a total of \$20,902.20, the trial court gave full credit for the sums paid in settlement and held the remaining six defendants jointly and several[ly] liable for the balance of \$58,534.04.” *Id.*

46. *Id.* at 1103 (“Here, there was a duty to speak, but the defendants remained silent.”).

47. See *supra* note 42 and accompanying text.

48. See *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 203 (3d Cir. 2004) (“The story of [the defendant] sounds a familiar refrain in the asbestos world. . . . By the mid-1970s, [the defendant] was receiving a few hundred asbestos-related claims per year. That number grew to 19,000 annual cases by 1990, and jumped again to over 79,000 cases by 2002.”).

*B. Duty as a Determinant: How State Courts' Conception of Duty Affects Employer Liability for Take-Home Asbestos Exposure*

While courts have been relatively clear regarding liability for workplace exposure to asbestos,<sup>49</sup> the question of an employer's liability for take-home asbestos exposure is distinctly muddled.<sup>50</sup> The inconsistency derives largely from the variance in the states' conceptions regarding the determination of duty.<sup>51</sup> There are a growing number of states which have ruled on employer or premises-owner liability in secondary exposure cases and their courts have used two primary approaches to determine an employer's duty to an injured party:<sup>52</sup> the foreseeability of harm or the relationship between the employer and the injured party.<sup>53</sup> This Part will explain these two theories and examine how they affect employer or premises-owner liability for take-home asbestos exposure.

*1. Foreseeability of Harm*

Many jurisdictions which have tackled the issue of secondary exposure determined duty through the lens of foreseeability of harm. Specifically, state appellate courts in Tennessee,<sup>54</sup> Louisiana,<sup>55</sup> Washington,<sup>56</sup> New Jersey,<sup>57</sup> California,<sup>58</sup> and Illinois,<sup>59</sup> as well as the Sixth<sup>60</sup> and Eleventh<sup>61</sup> Circuits of the United States Court of Appeals, have all used foreseeability in determining whether the employer had a duty to prevent secondary exposure.

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49. *See Borel*, 493 F.2d at 1103 (holding that the tort principle assessing liability for foreseeable harm caused by negligence extends to occupational diseases like asbestosis).

50. *See infra* notes 54–61, 87–95 and accompanying text; *see also Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 361 (Tenn. 2008) (“Courts across the country have disagreed as to how these broad principles of tort law should be used to determine whether an employer owes a duty to persons who develop asbestos-related illnesses after exposure to asbestos fibers on its employees’ clothing.”).

51. *Satterfield*, 266 S.W.3d at 361.

52. *Id.*

53. *Id.*

54. *Id.* at 374–75.

55. *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171, 189–90 (La. Ct. App. 2006).

56. *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 Wash. App. LEXIS 2392, at \*7 (Wash. Ct. App. Aug. 13, 2007).

57. *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006).

58. *Kesner v. Superior Court*, 384 P.3d 283, 288 (Cal. 2016).

59. *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1099 (Ill. 2012).

60. *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 444 (6th Cir. 2009) (applying Kentucky law).

61. *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1304 (11th Cir. 2017) (applying Alabama law).

Courts have predominantly used the 1972 OSHA regulations<sup>62</sup> to determine whether employers or premises owners had at least constructive knowledge of the effects of secondary asbestos exposure beyond the worksite or premises.<sup>63</sup> In *Satterfield v. Breeding Insulation Co.*,<sup>64</sup> the Supreme Court of Tennessee recognized that the OSHA regulations were promulgated prior to when the secondary exposure contamination had occurred.<sup>65</sup> Therefore, they found that the defendant should have known that exposure to asbestos created a substantial health risk.<sup>66</sup> Because the company “used materials containing asbestos in its manufacturing . . . [and knew] that high volumes of asbestos fibers were being deposited on its employees’ work clothes,” the court held that the defendant had a duty to prevent the foreseeable injury.<sup>67</sup>

Likewise, in *Bobo v. Tennessee Valley Authority*,<sup>68</sup> the United States Court of Appeals for the Eleventh Circuit interpreted Alabama negligence law to conclude that foreseeability was the critical factor in determining whether a defendant owes a duty to a plaintiff.<sup>69</sup> The plaintiffs in this case were the daughters of the deceased Barbara Bobo, who died of mesothelioma resulting from secondary exposure to asbestos.<sup>70</sup> Bobo’s husband was exposed to asbestos dust during his work as a laborer for the Tennessee Valley Authority (“TVA”) from 1975 to 1997 and brought the asbestos home on his work clothes.<sup>71</sup> Bobo would wash the asbestos-laden work clothes twice each week, unknowingly inhaling dangerous concentrations of asbestos fibers.<sup>72</sup> The court pointed to the 1972 OSHA regulations, as well as OSHA regulations later enacted, in determining that TVA knew or should have known that for health reasons, it should prevent asbestos fibers from leaving the worksite on employees’ clothes.<sup>73</sup> The court explained that it was foreseeable that Bobo would be endangered by take-home asbestos, and thus TVA violated their duty to her.<sup>74</sup>

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62. See *supra* notes 36–40 and accompanying text.

63. See e.g., *Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 537–39, 69 A.3d 1028, 1037–39 (2013); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008); *Chaisson v. Avondale Indust. Inc.*, 947 So. 2d 171, 183 (La. Ct. App. 2006); see also *Bobo*, 855 F.3d at 1299. But see *Martin*, 561 F.3d at 445 (noting that the plaintiff’s expert testimony indicated that the first studies of “bystander exposure” were published in 1965).

64. 266 S.W.3d 347 (Tenn. 2008).

65. *Id.* at 353.

66. *Id.* at 374–75.

67. *Id.* at 369, 375.

68. 855 F.3d 1294 (11th Cir. 2017).

69. *Id.* at 1303.

70. *Id.* at 1297–98.

71. *Id.* at 1298.

72. *Id.*

73. *Id.* at 1299, 1305.

74. *Id.* at 1305.

Conversely, in *Martin v. Cincinnati Gas & Electric Co.*,<sup>75</sup> the Sixth Circuit assessed what the defendants should have known regarding the risks of asbestos exposure that took place between 1937 and 1963.<sup>76</sup> After initially determining that the defendant had no actual knowledge of the danger of secondary exposure, the court explored whether the defendant should have known.<sup>77</sup> The plaintiff submitted an expert report and a treatise positing that the secondary exposure was “scientifically knowable since the 1950’s.”<sup>78</sup> However, the court reasoned that this was insufficient to prove that the defendant should have known the dangers of secondary asbestos exposure. The court distinguished this case from other cases where the court had found constructive knowledge because those cases occurred after the promulgation of the 1972 OSHA regulations.<sup>79</sup> Similarly, in *Simpkins v. CSX Transportation, Inc.*,<sup>80</sup> the Illinois Supreme Court recognized that “every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act . . . [and that duty] extends to remote and unknown persons.”<sup>81</sup> However, since the exposure in this case occurred prior to the OSHA standards’ promulgation, the court noted that the plaintiff’s allegation of foreseeability was conclusory and did not contain sufficient facts to prove that the defendant knew or should have known of the risk.<sup>82</sup> As a result, the court remanded the case for further fact-finding.<sup>83</sup>

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75. 561 F.3d 439 (6th Cir. 2009) (applying Kentucky law).

76. *Id.* at 444.

77. *Id.* at 444–45.

78. *Id.* at 445 (quoting a report included in the record).

79. *Id.* at 446, n.3.

80. 965 N.E.2d 1092 (Ill. 2012).

81. *Id.* at 1097 (quoting *Widlowski v. Durkee Foods*, 562 N.E.2d 967, 968 (Ill. 1990)).

82. *Id.* at 1099.

83. *Id.* The Illinois high court appeared to be overturning lower court conceptions of duty based on relationships. *See* *Estate of Holmes v. Pneumo Abex, LLC*, 955 N.E.2d 1173, 1178 (Ill. App. Ct. 2011) (finding that there was no duty because the defendant did not have a legal relationship with the victim of secondhand asbestos); *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 931, 938–39 (Ill. App. Ct. 2009) (concluding that the defendant owed no duty for lack of a legal relationship).

Courts that have applied a foreseeability test to determine duty have done so in a fact intensive way.<sup>84</sup> Under the foreseeability test, the determinate of liability largely depends on when the exposure took place.<sup>85</sup> After OSHA promulgated its 1972 regulations, courts largely accepted that the risks of asbestos exposure were sufficiently known.<sup>86</sup> Thus, in courts integrating foreseeability into their liability analysis, any exposure after 1972 will most likely lead to liability for the employer or premises owner.

## 2. Relationship Between the Plaintiff and the Defendant

Unsurprisingly, states that have consistently found the employer not liable for secondary asbestos exposure have analyzed duty through the prism of the parties' relationship. State courts in Maryland,<sup>87</sup> Pennsylvania,<sup>88</sup> Georgia,<sup>89</sup> New York,<sup>90</sup> Michigan,<sup>91</sup> Texas,<sup>92</sup> Iowa,<sup>93</sup> Ohio,<sup>94</sup> and Arizona<sup>95</sup> have all found that the defendant did not have a duty under either a negligence or a premises liability claim because there was no relationship between the employer or premises owner and the secondarily exposed party.

Many courts have cited policy concerns in their decisions not to extend the duty of an employer past the employee.<sup>96</sup> In *Adams v. Owens-Illinois, Inc.*,<sup>97</sup> the Maryland Court of Special Appeals held that the defendant "owed

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84. See, e.g., *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1305 (11th Cir. 2017) (explaining "[t]he record show[ed] that TVA knew about OSHA regulations that were adopted to protect not only workers but also their families"); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 445–46 (6th Cir. 2009) (emphasizing that reports at the time of the exposure were insufficient to establish that the employer could or should have foreseen the dangers of secondary exposure to asbestos); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008) (noting that the employee worked for the employer after 1972 and analyzing the steps the employer took to minimize exposure outside the workplace).

85. See *supra* note 84 and accompanying text.

86. See, e.g., *Kesner v. Superior Court*, 384 P.3d 283, 292 (Cal. 2016); *Satterfield*, 266 S.W.3d at 353.

87. *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 411, 705 A.2d 58, 66 (1998).

88. *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 540, 542 (E.D. Pa. 2014) (applying Pennsylvania law).

89. *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005).

90. *In re N.Y.C. Asbestos Litig.*, 840 N.E.2d 115, 122 (N.Y. 2005).

91. *In re Certified Question from Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206, 222 (Mich. 2007).

92. *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 425 (Tex. App. 2008).

93. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 698–99 (Iowa 2009).

94. *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448, 452–53 (Ohio 2010).

95. *Quiroz v. Alcoa Inc.*, 382 P.3d 75, 82 (Ariz. Ct. App. 2016).

96. See, e.g., *Van Fossen*, 777 N.W.2d at 698–99 (holding that if employers were to bear an unlimited general duty to exercise reasonable care on matters involving asbestos, the "universe of potential persons to whom the duty might be owed is unlimited").

97. 119 Md. App. 395, 705 A.2d 58 (1998).

no duty to strangers based upon providing a safe workplace for employees.”<sup>98</sup> The court hypothesized that if they allowed employer liability to reach an employee’s wife, it might create a precedent that could extend liability to anyone who comes in close contact with the employee, drastically expanding the scope of liability.<sup>99</sup>

In *Gillen v. Boeing Co.*,<sup>100</sup> this question of whether an employer or premises owner owed a duty of care to an employee’s spouse regarding asbestos exposure reached the Pennsylvania appellate courts for the first time.<sup>101</sup> In Pennsylvania, notions of duty in a negligence case are “rooted in public policy,” which requires weighing certain factors.<sup>102</sup> While the most prominent factor is the relationship between the parties, courts do look to others, including the overall public interest in the proposed solution.<sup>103</sup> In looking to the relationship between the plaintiff and the defendant, the court found that since the exposure did not occur on the defendant’s premises, the plaintiff and the defendant were essentially “legal strangers” under the law of negligence.<sup>104</sup> The court further reasoned that imposing liability for take-home exposure to a party that the defendant was not in contact with would make liability “essentially . . . infinite.”<sup>105</sup> Mirroring the Maryland court’s reasoning in *Adams*, the court here cited precedent in explaining that they must draw lines and create boundaries in order to prevent unlimited liability to an unlimited number of plaintiffs.<sup>106</sup>

Additionally, in *Quiroz v. Alcoa Inc.*,<sup>107</sup> the Arizona intermediate appellate court decided as a matter of first impression that there is no duty in take-home exposure cases.<sup>108</sup> The court explicitly stated that duty does not turn

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98. *Id.* at 411, 705 A.2d at 66.

99. *Id.* The court specifically expressed wariness at the idea of extending liability to “other family members, automobile passengers, and co-workers.” *Id.*

100. 40 F. Supp. 3d 534 (E.D. Pa. 2014).

101. *Id.* at 537–38.

102. *Id.* at 538 (quoting *R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2001)).

103. *Id.* The court also looks to “the social utility of the actor’s conduct; . . . the nature of the risk imposed and foreseeability of the harm incurred; . . . [and] the consequences of imposing a duty upon the actor.” *Id.* (quoting *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166, 1168–69 (Pa. 2000)). While the test includes foreseeability, the court made clear that it “‘is not alone determinative of the duty question’ and ‘is not necessarily a dominant factor’ in the duty assessment under Pennsylvania law.” *Id.* at 540 (quoting *Seebold v. Prison Health Servs., Inc.*, 57 A.3d 1232, 1249 & n.26 (Pa. 2012)).

104. *Id.* at 538 (quoting *Riedel v. ICI Ams. Inc.*, 968 A.2d 17, 26–27 (Del. 2009)).

105. *Id.* at 540.

106. *Id.* (quoting *Toney v. Chester Cty. Hosp.*, 36 A.3d 83, 91 (Pa. 2011) (per curiam)).

107. 382 P.3d 75 (Ariz. Ct. App. 2016).

108. *Id.* at 77.

on the foreseeability of the harm, but rather, duty exists where there is a relationship between the parties or it is based on public policy considerations.<sup>109</sup> In this case, Ernest V. Quiroz was exposed to asbestos from his father's work clothes during the fourteen years that he lived in his house.<sup>110</sup> Quiroz later died from mesothelioma, and his decedents brought a negligence action against Reynolds Metal Company (Quiroz's father's employer), alleging it was negligent in not preventing the secondary exposure to the work-site asbestos.<sup>111</sup> The Arizona court affirmed the trial court's grant of Reynolds's motion for summary judgment, emphasizing that there was no relationship between the parties.<sup>112</sup> The court also addressed the public policy considerations<sup>113</sup> but found them insufficient in finding a duty.<sup>114</sup> Specifically, the court expressed wariness about creating a duty which would spawn infinite liability and result in a proliferation of claims.<sup>115</sup> Ultimately, they found that the potential drawbacks of creating a duty of care for take-home exposure outweighed any potential benefits and declined to impose one.<sup>116</sup>

Finally, in *In re Certified Question from the Fourteenth District Court of Appeals of Texas*,<sup>117</sup> the Michigan Supreme Court acknowledged the existence of an asbestos-litigation crisis as a result of the "elephantine mass of asbestos cases' lodged in state and federal courts."<sup>118</sup> With this in mind, the court found that recognizing a cause of action based solely on exposure, without defining a more specified duty, would "create a potentially limitless pool of plaintiffs" and further exacerbate the problem.<sup>119</sup> The court relied on this concern as a major reason for finding that the defendant owed no duty to the nonemployee plaintiff.<sup>120</sup>

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109. *Id.* at 77–78.

110. *Id.* at 77.

111. *Id.*

112. *Id.* at 78. The court discussed both a special relationship, which is based on contract, family relations, or conduct undertaken by the defendant and a categorical relationship, recognized by common law, such as landowner-invitee. *Id.* It explained that clearly neither applied in this case. *Id.*

113. Arizona courts use the following list of public policy factors: "[t]he reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Id.* at 80 (quoting *Bloxham v. Glock Inc.*, 53 P.3d 196, 200 (Ariz. Ct. App. 2002)).

114. *Id.* at 80–81.

115. *Id.*

116. *Id.* at 81.

117. 740 N.W.2d 206 (Mich. 2007).

118. *Id.* at 219 (quoting *Norfolk & W. R. Co. v. Ayers*, 538 U.S. 135, 166 (2003)).

119. *Id.* at 220 (quoting *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 694 (Mich. 2005)).

120. *Id.* at 221–22.

Whether based on policy concerns about increased litigation from secondary exposure plaintiffs, or simply an adherence to common law conceptions against extending liability, states that have not found that employers or premises owners owe a duty of care outside of employees or invitees regularly find in favor of defendants in secondary exposure cases.<sup>121</sup> In treating this decision as a matter of law rather than engaging in factual inquiries, the decisions under this duty regime have been markedly more unified than those decisions in jurisdictions that rely on foreseeability.<sup>122</sup>

### C. Maryland's Take-Home Jurisprudence

In Maryland's first secondary exposure case, *Adams v. Owens-Illinois*,<sup>123</sup> the Court of Special Appeals heard an appeal of nine consolidated asbestos cases.<sup>124</sup> Only one of the consolidated claims dealt with secondary exposure, and it was brought by the Estate of Mary Wild against Bethlehem Steel Company.<sup>125</sup> Mary Wild died of asbestosis allegedly contracted as a result of handling and washing her husband's clothing that contained asbestos.<sup>126</sup> The trial court found that Bethlehem Steel was not liable and the appeal was brought on the grounds that the trial judge failed to properly instruct the jury on the employer's duty to maintain a safe workplace for its employees.<sup>127</sup> The appellants argued that the trial judge erred in not issuing Proposed Instruction 44 to the Jury. This instruction would have explained the duties that an employer owes their employees.<sup>128</sup>

The Court of Special Appeals found the trial court properly refused Proposed Instruction 44.<sup>129</sup> It reasoned that because Mary Wild was not an employee of Bethlehem Steel, it was not necessary to read instructions regarding

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121. *See supra* notes 87–95 and accompanying text.

122. *See supra* Part I.B.1.

123. 119 Md. App. 395, 705 A.2d 58 (1998).

124. *Id.* at 398, 705 A.2d at 60.

125. *Id.* at 399–400, 705 A.2d at 60–61.

126. *Id.* at 407, 705 A.2d at 65.

127. *Id.* at 410, 705 A.2d at 66. The trial judge instructed the jury that “[u]nder Maryland law, to establish a cause of action in negligence against Bethlehem, the plaintiffs must prove the existence of all four of the following elements: [duty, breach, causation, and harm].” *Id.*

128. Proposed Instruction 44 stated:

An employer has the duty to use reasonable care and diligence to furnish his employees with a reasonably safe place to work. An employer has the affirmative duty in a master-servant relationship to provide his employee with a reasonably safe place in which to work and to warn and instruct his employee concerning the dangers of the work known to him which are not obvious and cannot be discovered by the exercise of reasonable care by the employee.

*Id.*

129. *Id.* at 411, 705 A.2d at 66.

Bethlehem's duty to employees.<sup>130</sup> The court emphasized that the trial judge's instruction that Mary Wild needed to show that Bethlehem owed her a duty and that they breached that duty, were sufficient.<sup>131</sup> It reasoned further that if it found Bethlehem liable for Mary Wild's exposure to asbestos while handling her husband's clothing, Bethlehem would owe a duty to all others who came in close contact with her husband, including other family members, car passengers, and co-workers.<sup>132</sup> Thus, the court made clear that Bethlehem's duty to provide a safe workplace for employees did not extend to "strangers" with whom it did not have an employment relationship.<sup>133</sup>

The Maryland Court of Appeals addressed the issue of take-home exposure in *Georgia Pacific, LLC v. Farrar*,<sup>134</sup> where the claim was brought based on a theory of products liability.<sup>135</sup> The plaintiff lived in a home with her grandfather—whose job included insulating pipes using asbestos-containing Georgia Pacific products—from infancy in the early 1950s until she married in 1974.<sup>136</sup> Though her grandfather wore street clothes to and from work, he stored his work clothes in his car during the week then brought them home every weekend to be shaken out and washed.<sup>137</sup> As the plaintiff got older, she regularly washed her grandfather's clothes.<sup>138</sup> Ultimately, she was diagnosed with mesothelioma and brought suit against Georgia Pacific (and various other companies).<sup>139</sup>

The trial court found that there was duty owed and entered a judgment against Georgia Pacific for over five million dollars in damages.<sup>140</sup> Georgia Pacific appealed, alleging that they had no duty to warn the plaintiff, but the Maryland Court of Special Appeals affirmed the trial court's decision.<sup>141</sup>

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130. *Id.*

131. *Id.*

132. *Id.* ("If liability for exposure to asbestos could be premised on Mary Wild's handling of her husband's clothing, presumably Bethlehem would owe a duty to others who came in close contact with [her husband], including other family members, automobile passengers, and co-workers.").

133. *Id.*

134. 432 Md. 523, 69 A.3d 1028 (2013). The Court of Appeals characterized this case as "another in a growing line of cases in which a household member contracted mesothelioma, allegedly from exposure to asbestos fibers brought into the home on the clothing of another household member who was exposed to asbestos-laden products in the course of his employment." *Id.* at 525, 69 A.3d at 1030.

135. *Id.* at 525, 69 A.3d at 1030.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 525–26, 69 A.3d at 1030.

140. *Id.* at 526, 69 A.3d at 1030.

141. *Id.*

However, the Maryland Court of Appeals reversed, holding that Georgia Pacific did not have a duty to warn the plaintiff.<sup>142</sup> In reaching this holding, the court focused on a list of factors used to determine whether a duty exists.<sup>143</sup> The court acknowledged that the first factor, foreseeability of harm, “may be the most important of those factors” but that it is not necessarily dispositive in determining liability.<sup>144</sup> In analyzing whether foreseeability was sufficient for liability in this case, the court stated that “the connection between lung disease and exposure to asbestos dust brought into the home on the clothing of workers was not generally recognized until at least [the 1960s].”<sup>145</sup> The court cited the OSHA safety regulations promulgated in 1972 and indicated that these regulations made the danger to household members foreseeable.<sup>146</sup> Since the exposures in this case took place in 1968–69, the court found that the Court of Special Appeals erred in assigning Georgia Pacific a duty to warn the plaintiff “of the danger of exposure to the dust on her grandfather’s clothes.”<sup>147</sup>

The Maryland Court of Appeals has not heard a take-home asbestos exposure claim based on an employer-employee relationship.<sup>148</sup> In *Doe v. Pharmacia & Upjohn Co.*,<sup>149</sup> however, the Court of Appeals dealt directly with the question of whether an employer has a duty to a family member of their employee in a context separate from asbestos exposure.<sup>150</sup> Similarly, in *Dehn v. Edgcombe*,<sup>151</sup> the Court of Appeals addressed whether a doctor

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142. *Id.*, 69 A.3d at 1030–31. Importantly, the court noted that the products liability actions required a showing of the same elements as a standard negligence action. *Id.* at 528, 69 A.3d at 1031–32.

143. *Id.* at 529, 69 A.3d at 1032 (identifying the factors as “[t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the 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 of 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” (quoting *Patton v. USA Rugby Football*, 381 Md. 627, 637, 851 A.2d 566, 571 (2004))).

144. *Id.* at 530, 69 A.3d at 1033.

145. *Id.* at 534, 69 A.3d at 1035. The court disagreed with the analysis of an earlier Court of Special Appeals decision, *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 692 A.2d 5 (1997). *Id.* The *Grimshaw* court, similarly dealing with a products liability claim, focused exclusively on foreseeability and found the manufacturer had a duty since it was “known in the industry since 1930 . . . that it is important for workers not to bring toxic substances home on their clothing and thereby expose their families to it.” *Id.* at 533–34, 69 A.3d at 1035 (quoting *Grimshaw*, 115 Md. App. at 194, 692 A.2d at 35).

146. *Id.* at 538, 69 A.3d at 1037.

147. *Id.* at 541, 69 A.3d at 1039.

148. The *Georgia Pacific* case was brought against the manufacturer of the asbestos-containing product, not the employer. See *supra* text accompanying note 139.

149. 388 Md. 407, 879 A.2d 1088 (2005).

150. *Id.*

151. 384 Md. 606, 865 A.2d 603 (2005).

owed a duty to his patient's wife.<sup>152</sup> These cases are cited in past secondary exposure decisions,<sup>153</sup> and they hold relevance here because they similarly deal with whether a duty exists to a secondarily harmed party. In *Pharmacia*, the plaintiff's husband was a laboratory technician working with two strains of HIV. For one of the strains, the employer's testing procedures were inadequate, meaning there was no way to know whether or not the employee had contracted HIV.<sup>154</sup> As a result, the employee unknowingly became infected with HIV.<sup>155</sup> The employee's wife then became infected with HIV through sexual contact with her husband.<sup>156</sup> As a result, Doe's wife brought a tort claim against Pharmacia, arguing that they owed her a duty of care based on the foreseeable risk of her contracting HIV from her husband.<sup>157</sup> The court acknowledged that it was foreseeable that the employee could pass the disease to his wife.<sup>158</sup> However, because Ms. Doe had no relationship with Pharmacia, it found that foreseeability alone was not enough in this context where extending the duty past the employer-employee relationship would risk creating a new indeterminate class of potential plaintiffs.<sup>159</sup> The court rejected Ms. Doe's argument that duty should be limited to spouses, reasoning "[t]he rationale for imposing a duty of care to Ms. Doe could apply to all sexual partners of employees."<sup>160</sup>

Similarly, in *Dehn*, the Court of Appeals refused to extend the doctor-patient duty to the patient's spouse.<sup>161</sup> In this case, the doctor told the patient that his vasectomy operation was successful and that he could engage in unprotected sex without impregnating his partner.<sup>162</sup> However, shortly thereafter, the patient's wife did in fact become pregnant as a result of the unprotected sex with the patient. The patient's wife sued the doctor for negligence.<sup>163</sup> She argued that the doctor's duty extended to her since it was

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152. *Id.* at 610, 865 A.2d at 605.

153. *See, e.g.,* Georgia Pacific, LLC v. Farrar, 432 Md. 523, 528, 69 A.3d 1028, 1032 (2013); Hiatt v. AC&R Insulation Co., No. 2564, 2017 Md. App. LEXIS 100, at \*6, \*12, \*25 (Ct. Spec. App. Jan. 27, 2017).

154. *Pharmacia*, 388 Md. at 410–12, 879 A.2d at 1089–91.

155. *Id.*

156. *Id.*

157. *Id.* at 412, 879 A.2d at 1091.

158. *Id.* at 416–17, 879 A.2d at 1093.

159. *Id.* at 420, 879 A.2d at 1095.

160. *Id.* at 421, 879 A.2d at 1096.

161. 384 Md. 606, 623, 865 A.2d 603, 612 (2005). In a doctor-patient relationship, duty automatically is owed by the doctor to the patient. *See id.* at 615, 865 A.2d at 608.

162. *Id.* at 613–14, 865 A.2d at 607. It is noteworthy in this case that the defendant, Dr. Edgcombe, did not perform the vasectomy—he merely vouched for its effectiveness. *Id.* at 611, 865 A.2d at 606. While the court did identify this fact in its reasoning, the crux of its holding dealt with the idea that extending a duty to an employee's spouse could “expand traditional tort concepts beyond manageable bounds.” *Id.* at 627, 865 A.2d at 615.

163. *Id.* at 618, 865 A.2d at 610.

highly foreseeable that she would have sexual intercourse with her husband and would therefore be affected by the doctor's erroneous statement regarding the effectiveness of the procedure.<sup>164</sup> The court rejected this argument and found that there was no duty, again leaning on the policy of resisting the expansion of tort liability.<sup>165</sup> Specifically, the court said, "[t]he rationale for extending the duty would apply to all potential sexual partners and expand the universe of potential plaintiffs."<sup>166</sup>

*D. Kesner v. Superior Court: The California Court Extends Employer Duty Only to Household Members of the Employee*

*1. Background and Procedural History*

The Supreme Court of California consolidated two cases from separate districts of the Court of Appeals of California for review.<sup>167</sup> In *Kesner v. Superior Court*,<sup>168</sup> the First Appellate District Court of California ruled on whether an employer has a duty to prevent secondary exposure of asbestos to its employees.<sup>169</sup> The case concerned Johnny Blaine Kesner, who was diagnosed with peritoneal mesothelioma in 2011.<sup>170</sup> Kesner filed suit against several defendants, including Pneumo Abex LLC ("Abex"), to recover damages for his injuries.<sup>171</sup> The basis of the claim against Abex was that Kesner's uncle—an employee of the company<sup>172</sup>—was exposed to high levels of asbestos in the course of his work.<sup>173</sup> Kesner—who was very close with his uncle and stayed at his house about three days a week—alleged that he was exposed to asbestos through the dust on his uncle's clothing and that this

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164. *Id.* at 624, 865 A.2d at 614.

165. *Id.* at 627, 865 A.2d at 615.

166. *Id.*

167. *Kesner v. Superior Court*, 384 P.3d 283, 288–89 (Cal. 2016).

168. 171 Cal. Rptr. 3d 811 (Ct. App. 2014).

169. *Id.* at 812–13.

170. *Id.* at 813. Peritoneal mesothelioma is "the second most common type of mesothelioma," and it "occurs in the abdomen, on the surface of the omentum and visceral organs." *About Peritoneal Mesothelioma: A Form of Abdominal Mesothelioma*, MESOTHELIOMA APPLIED RESEARCH FOUNDATION, [http://www.cure-meso.org/site/c.duIWJfNqKiL8G/b.8578883/k.931C/Types\\_of\\_Mesothelioma\\_\\_Peritoneal\\_Mesothelioma.htm](http://www.cure-meso.org/site/c.duIWJfNqKiL8G/b.8578883/k.931C/Types_of_Mesothelioma__Peritoneal_Mesothelioma.htm) (last visited May 2, 2018). Peritoneal mesothelioma is often referred to as "abdominal mesothelioma." *Id.*

171. *Kesner*, 171 Cal. Rptr. 3d at 813. "Kesner's claims were resolved against all other defendants, all of which apparently were companies (or their successors) for which Kesner was himself employed and exposed to asbestos at their premises." *Id.* Pneumo-Abex was the real party of interest in this case. *Id.* at 811.

172. "Kesner's uncle was employed by Abex from 1973 to 2007." *Id.* at 812.

173. *Id.* at 813. "The uncle allegedly came home in his work clothes covered in asbestos dust." *Id.*

contributed to him contracting mesothelioma.<sup>174</sup> At trial, Abex moved for a nonsuit, citing *Campbell v. Ford Motor Co.*<sup>175</sup> for the proposition “that it had no legal duty to” Kesner.<sup>176</sup> The trial court agreed, granting Abex’s motion for nonsuit and entering a final judgment in its favor.<sup>177</sup>

On appeal, the First District of the California Court of Appeal reversed.<sup>178</sup> In reversing, the court distinguished this case from *Campbell* because *Kesner* was based on negligent manufacturing of an asbestos-containing product rather than premises liability.<sup>179</sup> Instead, the court cited the factors outlined in *Rowland v. Christian*<sup>180</sup> as determinative that Abex’s duty of care did extend to Kesner, as he was a long-term guest in the home of its employee, and therefore, his secondary exposure to asbestos was foreseeable.<sup>181</sup> The court noted this holding only established that a duty existed in this case, and the other aspects of the negligence claim must still be proven.<sup>182</sup>

In the second case, *Haver v. BNSF Railway Co.*,<sup>183</sup> the surviving family members (“Havers”) of Lynn Haver (“Lynn”) filed a wrongful death action against BNSF Railway Company (“BNSF”) on a theory of premises liability after Lynn died of mesothelioma brought on by secondary asbestos exposure.<sup>184</sup> Lynn’s former husband Mike Haver (“Mike”) was employed by the Santa Fe Railway.<sup>185</sup> Through the course of his work, Mike was directly exposed to asbestos which adhered to his clothing and was transmitted to their

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174. *Id.* Between 1973 and 1979, Kesner visited his uncle often, staying at his house an average of three days a week. *Id.* at 813 n.2.

175. 141 Cal. Rptr. 3d 390 (Cal. Ct. App. 2012).

176. *Kesner*, 171 Cal. Rptr. 3d at 813 (citing *Campbell*, 141 Cal. Rep. 3d at 405).

177. *Id.* at 813–14. The trial court held that “Abex owed Kesner no duty for his exposure to asbestos resulting from Kesner’s contact with its employee.” *Id.* at 814.

178. *Id.* at 814, 819.

179. The court asserted that the premises liability claim in *Campbell* was based on the defendant’s “passive involvement as owner of the plant in which an independent contractor was installing asbestos insulation,” whereas Kesner’s claim was not based on “a theory of premises liability but on a claim of negligence in the manufacture of asbestos-containing brake linings” by Abex themselves. *Id.* at 816.

180. 443 P.2d 561 (Cal. 1968). The factors are:

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 of 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 564.

181. *Kesner*, 171 Cal. Rptr. 3d at 817–19.

182. *Id.* at 819.

183. 172 Cal. Rptr. 3d 771 (Ct. App. 2014).

184. *Id.* at 772.

185. Santa Fe Railway was the predecessor to defendant BNSF Railway Company. *Id.*

home, where Lynn was also exposed to it.<sup>186</sup> As a result, Lynn suffered from throat cancer and progressive lung disease, which ultimately caused her death.<sup>187</sup> BNSF demurred, similarly relying on *Campbell* to argue that it had no duty to Lynn as a matter of law in a premises liability action.<sup>188</sup> The trial court sustained the demurrer without leave to amend.<sup>189</sup>

On appeal, the court affirmed the trial court's decision, concluding that BNSF owed no duty of care to Lynn.<sup>190</sup> In affirming, the majority rejected the Havers' arguments that the case at bar was distinguishable from *Campbell*,<sup>191</sup> that *Campbell* was incorrectly decided,<sup>192</sup> and that the decision in *Kesner*<sup>193</sup> compelled a finding of error on the part of the trial court.<sup>194</sup> In dissent, Judge Mink argued that the *Rowland* factors should have been applied and that this would have resulted in a finding that BNSF did owe a duty to Lynn.<sup>195</sup> Judge Mink pointed to the decisions of many out-of-state cases on liability for take-home asbestos exposure and asserted that while courts throughout the country are divided on this issue, the majority of courts which view duty primarily through the prism of foreseeability—as California does—find that there is a duty.<sup>196</sup> Additionally, Judge Mink argued that the majority incorrectly accepted the *Campbell* rationale that public policy considerations counsel against finding a duty so as not to inundate courts with

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186. *Id.* at 772–73.

187. *Id.* at 773.

188. *Id.*

189. *Id.* at 772.

190. *Id.* at 776.

191. The Havers asserted that *Campbell* was “limited to a plaintiff who was the relative of workers employed by an *independent contractor*,” and could not be applied where the workers were controlled directly by the property owner. *Id.* at 774. The court disagreed, asserting that the *Campbell* decision mentioned only “workers,” which meant both those employed by the property owner and those employed by independent contractors. *Id.* Additionally, the majority noted that the *Campbell* court made it “unequivocally clear that “[its] analysis [did] not turn on this distinction.”” *Id.* at 775 (quoting *Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390, 402 n.6 (Ct. App. 2012)).

192. The court cited similar rulings from other jurisdictions to find that the *Campbell* decision was correct and in line with traditional tort law. *Id.*

193. *See supra* note 179. The *Kesner* decision came after oral arguments in this appeal. *Haver*, 172 Cal. Rptr. 3d at 776.

194. The majority disregards *Kesner* since it was decided based on negligence, not premises liability. *Id.* at 776.

195. *Id.* at 777 (Mink, J., dissenting).

196. *Id.* Judge Mink stated that California and most states which find liability view duty through the prism of foreseeability, whereas those states that do not find liability focus on the relationship between the parties to determine duty. *Id.*

lawsuits.<sup>197</sup> Judge Mink suggested that the public policy considerations actually suggest imposing a duty, because society does not benefit by allowing wrongdoers to avoid consequences for their tortious conduct.<sup>198</sup>

The Supreme Court of California granted certiorari and consolidated the two cases to determine whether employers or landowners owe a duty of care to prevent secondary exposure to asbestos.<sup>199</sup>

## 2. *The Court's Reasoning*

In *Kesner v. Superior Court*, the Supreme Court of California held that employers have a duty to prevent exposure to asbestos carried by their employees to members of that employee's household.<sup>200</sup> The court initially established California law mandates a general duty on all persons to exercise reasonable care for the safety of others,<sup>201</sup> and this duty exists unless there is a statutory provision establishing an exception or where an exception is "clearly supported by public policy."<sup>202</sup> Since there is no such statutory provision, the court looked to the *Rowland* factors<sup>203</sup> to determine whether a public policy exception should be created.<sup>204</sup>

The court separated the *Rowland* factors into two categories: those that address the foreseeability of the relevant injury—"foreseeability, certainty, and the connection between plaintiff and defendant"—and those that measure whether public policy interests support excluding relief for certain types of plaintiffs or injuries—"moral blame, preventing future harm, burden, and availability of insurance."<sup>205</sup> The court started by analyzing the first category of factors and noted that foreseeability itself is the single most important fac-

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197. *Id.*

198. *Id.* (citing *In re Certified Question for Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d 206, 229 (Mich. 2007) (Cavanaugh, J., dissenting)).

199. *Kesner v. Superior Court*, 384 P.3d 283, 288 (Cal. 2016).

200. *Id.*

201. *Id.* at 289–90 ("Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." (quoting CAL. CIV. CODE § 1714(a) (West 2009))).

202. *Id.* at 290 (quoting *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1174 (Cal. 2011)).

203. *See supra* note 180.

204. *Kesner*, 384 P.3d at 290. The court also noted that the *Rowland* factors should be applied generally, stating that the determination to be made is "not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." *Id.* (quoting *Cabral*, 248 P.3d at 1175).

205. *Id.* at 291.

tor to consider when determining whether to create an exception to the general duty rule.<sup>206</sup> The court concluded that foreseeability weighed heavily in favor of finding a duty toward employees' household members because "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household."<sup>207</sup> The court further cited existing health regulations which highlighted the potential risks of asbestos contamination outside the workplace<sup>208</sup> as evidence that such harm through secondary exposure in the home was known and therefore foreseeable.<sup>209</sup>

In considering the second factor, the degree of certainty that the plaintiff suffered injury, the court stated that since mesothelioma was the cause of death for both the decedents, "their injuries are certain and compensable under the law."<sup>210</sup> The court leaned on foreseeability again in its analysis of the third factor<sup>211</sup>—the closeness of the connection between the defendant's conduct and the injury suffered—to reject BNSF's argument that the connection was too attenuated because it "relies on the intervening acts of a defendant's employee to transmit the alleged asbestos risk to the plaintiff."<sup>212</sup> The court reasoned the connection was not too attenuated because the workers returning home with asbestos dust on their clothing was "predictable and derivative of the alleged misconduct, namely, failure to control the movement of asbestos fibers."<sup>213</sup> Thus, the court found the closeness of the connection between the defendant's conduct and the injury suffered to weigh heavily in favor of a determination of duty as well.<sup>214</sup>

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206. *Id.*; see *supra* note 201.

207. *Kesner*, 384 P.3d at 291. The court further noted that foreseeability does not deal with a particular defendant's conduct, "but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. *Id.* (quoting *Cabral*, 248 P.3d at 1175).

208. *Id.* at 291–93 (requiring employers to "provide their asbestos-exposed employees with special clothing and changing rooms" (citing 29 C.F.R. § 1910.1001(b) (2016))). The court also noted that well before the 1972 OSHA regulations were promulgated, the "federal government and industrial hygienists recommended that employers take measures to prevent employees who work with toxins from contaminating their families by changing and showering before leaving the workplace." *Id.* at 292.

209. *Id.* at 290–91.

210. *Id.* at 293.

211. "In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct." *Id.* at 294 (citing *Bigbee v. Pacific Tel. & Tel. Co.*, 665 P.2d 947, 952 (Cal. 1983) (en banc)).

212. *Id.* at 293 (citing *Cabral*, 248 P.3d at 1177–80).

213. *Id.* at 294.

214. *Id.*

After determining that the three *Rowland* foreseeability factors weighed in favor of finding a duty to the secondarily exposed parties, the court addressed additional policy concerns.<sup>215</sup> First, the court identified an interest in preventing future harm.<sup>216</sup> The court clarified that the duty analysis looks to the time when the duty would have been allegedly owed, not to how it would prevent future harm from the present day forward.<sup>217</sup> Thus, the court asked “whether imposing tort liability in the 1970s would have prevented future harm from that point.”<sup>218</sup> The court found that it would,<sup>219</sup> and it determined this factor weighed in favor of finding a duty.<sup>220</sup> Second, in terms of moral blame attached to the defendant, the court asserted since the “commercial users of asbestos benefitted financially from their use of asbestos and had greater information and control” about and over it than those in the employees’ households, this factor also weighed in favor of finding a duty.<sup>221</sup>

The court merged its analysis of the policy factors regarding availability of insurance and the factor concerning balancing the burden to the defendant with the costs to the community of finding liability.<sup>222</sup> It dismissed the defendant’s argument that finding a duty would increase insurance costs and tort damages.<sup>223</sup> However, the court acknowledged the merit in the defendant’s contention that finding a duty would open the door to an uncontrollable pool of applicants and invite “voluminous and frequently meritless claims that will overwhelm the courts.”<sup>224</sup> It addressed this issue by limiting the employer’s or property owner’s duty only to members of a worker’s household.<sup>225</sup> “Household member[s]” are defined as “persons who live with the

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215. *Id.* at 294–99.

216. *Id.* at 295.

217. *Id.* For this reason, the court dismissed the defendant’s arguments that since the risk of mesothelioma through asbestos exposure has been eliminated through “extensive regulation and reduced asbestos usage,” there is not future risk of the injury at issue here. *Id.*

218. *Id.*

219. The court reasoned that the “numerous regulations” enacted at the time suggested that “legislatures and agencies readily adopted the premise that imposing liability would prevent future harm.” *Id.*

220. *Id.*

221. *Id.* at 295–96.

222. The court did note Abex’s contention that insurance for asbestos-related injuries is no longer available was misguided, as the proper inquiry was: whether insurance was available to the defendants at the time of exposure. *Id.* at 296.

223. The court asserted that since employers and premises owners are “best situated” to know the dangers of asbestos, they can minimize costs by taking reasonable precautions to avoid injuries. *Id.* at 297 (quoting *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

224. *Id.*

225. *Id.* at 298.

worker.”<sup>226</sup> The court’s rationale again reflected the importance of foreseeability, as it stressed that workers can be expected to return home each day and interact closely with household members, whereas a close contact with a carpool companion or a fellow bus rider is more difficult to anticipate.<sup>227</sup> While acknowledging that the latter contacts may have a legitimate reason to believe they were exposed to significant quantities of asbestos during their interactions with the worker, the court explained that duty rules inherently exclude some individuals who were harmed by the actions of potential defendants.<sup>228</sup> The court relied on limiting duty to this class of individuals to restrict the potential for a flood of claims which, in turn, would create extensive costs for the courts and the community.<sup>229</sup> The court determined that proper application of the *Rowland* factors supported the conclusion that Abex and BNSF had a duty of ordinary care to their employees’ household members to prevent take-home asbestos exposure.<sup>230</sup>

Lastly, the court clarified that this duty applies in both negligence and premises liability claims.<sup>231</sup> The court rejected BNSF’s argument by explaining that physical or spatial boundaries are not dispositive in defining the scope of a property owner’s liability.<sup>232</sup> Instead, the court emphasized that the duty of care encompasses a duty to avoid exposing people to potential injury offsite where the landowner’s property is maintained in a way that would lend itself to those injuries.<sup>233</sup> Since the risk of injury was caused by a hazardous condition created and maintained on BNSF’s property, and not, as BNSF tried to argue, by Lynn’s contact with Mike, the court determined that the premises liability claim was subject to the same analysis as the claim of general negligence.<sup>234</sup>

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226. *Id.*

227. *Id.*

228. *Id.* (“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.”).

229. *Id.*

230. *Id.*

231. *Id.* at 300.

232. *Id.* at 301. BNSF argued that “to hold that property owners owe a duty of ordinary care to persons who have never set foot on the premises ‘would take the “premises” out of premises liability and unsettle the tort law that applies to all property owners in this state.’” *Id.* at 300.

233. *Id.* at 301 (quoting *Barnes v. Black*, 84 Cal. Rptr. 2d 634, 637 (1999) (“[T]he duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner’s property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.”)).

234. *Id.* at 301–02.

## II. ANALYSIS

The California Supreme Court's decision in *Kesner* is one of the most recent to be added to the expanding group of take-home asbestos exposure cases.<sup>235</sup> State court jurisprudence in this area is wide-ranging, inconsistent, and, at times, contradictory.<sup>236</sup> However, the rationale that the court used in *Kesner* presents an opportunity for courts that have previously rejected finding a duty of care for take-home exposures to reevaluate those decisions. This Part will first explain why the *Kesner* court's decision was correctly decided.<sup>237</sup> It will examine the policy arguments both in favor of and against finding a duty and assert that the *Kesner* court was right in finding that the public interest in imposing a duty outweighed the interests underlying the reasons not to do so.<sup>238</sup> Additionally, this Part will highlight the two principle takeaways from the *Kesner* holding and how these takeaways provide a framework for consistency in future decisions in this area of law.<sup>239</sup>

Next, this Part will illustrate how the *Kesner* court's rationale can be applied in Maryland, where courts have held that an employer had no duty to prevent secondary exposure of asbestos to a third party, without requiring a reversal in long-standing tort principles.<sup>240</sup> This Part will highlight how Maryland courts have previously approached foreseeability and argue that it can apply a *Kesner*-esque analysis to future take-home cases.<sup>241</sup> Following *Kesner* will limit the existing policy concerns and free Maryland courts to focus on the foreseeability of the harm in their analysis. It will explain the significance of the "household member" qualification, which will be key in allowing Maryland courts to find a duty of care towards secondarily exposed plaintiffs.<sup>242</sup> Finally, this Part will argue that take-home asbestos cases are uniquely suited to allow courts to rely on foreseeability without contradicting existing employer liability precedents from other areas of law.<sup>243</sup>

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235. Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 546 (2009) (explaining that since the beginning of 2005, a "growing number of courts have decided whether premises owners owe a duty to 'take home' exposure claimants").

236. See *supra* note 50 and accompanying text.

237. See *infra* Part II.A.1.

238. See *infra* Part II.A.1.

239. See *infra* Part II.A.2.

240. *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 705 A.2d 58 (1998).

241. See *infra* Part II.B.

242. See *infra* Part II.B.2.

243. See *infra* Part II.B.3.

A. *In Kesner, the Court Correctly Held That Employers Owed a Duty to Household Members of Their Employees and Created a Path for Jurisdictions to Follow in Future Take-Home Cases*

Whether a person or entity has a duty to another is a question of law determined by judges, rather than juries.<sup>244</sup> The judiciaries in states that have dealt with the question of secondary exposure have focused primarily on one of two things in making their determination of whether the law mandates a duty: foreseeability of harm or the relationship between the parties.<sup>245</sup> In California, the Civil Code provides generally that everyone has a duty to exercise reasonable care towards others, unless there is a clear statutory provision, excepting duty, or public policy that mandates creation of an exception.<sup>246</sup> In analyzing the *Rowland* factors, the California Supreme Court properly balanced the two competing factors for determining the existence of a duty.<sup>247</sup> By placing an emphasis on the foreseeability of the danger and recognizing the inherent drawbacks of establishing a duty rule that would allow for increased plaintiffs, the court produced a framework for dealing with take-home exposure cases in a manner that is both fair and efficient.

1. *Foreseeability Equals Fairness: Creating a Duty Based on the Foreseeably Injured Household Member Protects Innocent Victims While Simultaneously Containing the Potential Plaintiff Pool*

In his revelatory book *The Costs of Accidents*, Guido Calabresi infused economic principles into the study of tort law in order to create what he

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244. DAN B. DOBBS, *THE LAW OF TORTS* 355 (2000).

245. See Meghan E. Flinn, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707, 713, 723–24 (2014) (highlighting foreseeability and the relationship between the parties but also noting that two jurisdictions have used a third method, wherein they applied the *Restatement (Second) of Torts* and determined liability based on whether the defendant actions constituted misfeasance or nonfeasance). Misfeasance is characterized by “an affirmative act,” whereas nonfeasance is merely an “omission of an act.” *Id.* at 724–25. This distinction is limited to two jurisdictions and will ultimately involve what amounts to a foreseeability or relationship analysis. Someone who acts affirmatively has a duty to others to use reasonable care, whereas someone who simply does not act has a duty only where a “special relation[ship]” exists between the parties. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965)).

246. See *supra* notes 201–202 and accompanying text.

247. See *supra* notes 180–181 and accompanying text.

thought could be a fairer, more efficient system.<sup>248</sup> One of Calabresi's positions centered on the idea of the "cheapest cost avoider."<sup>249</sup> The "cheapest cost-avoider" was "the person who could avoid an accident at lowest cost" and who "was liable whether or not that person took optimal care."<sup>250</sup> Admittedly, this proposal was created with the intention of placing the legal responsibility on the cheapest cost-avoider, thus holding the cost-avoider strictly liable for all harms.<sup>251</sup> This makes it a somewhat imperfect fit in the take-home asbestos realm.<sup>252</sup> However, the underlying foundation for the idea can be useful in explaining the significance of the employer's foreseeability of secondary exposure when determining liability.<sup>253</sup> In take-home asbestos cases, the employer or product manufacturer was the cheapest cost-avoider because once the risks of secondary asbestos exposure through the employees' clothing were known and therefore foreseeable, the employers were in the easiest, or cheapest, position to reduce the harm.<sup>254</sup> In *Kesner* specifically, the defendants could have minimized the danger by simply informing their employees that harmful asbestos dust could be carried on their clothing to places outside the workplace and providing changing rooms and workplace procedures to ensure that dust-laden clothes did not leave the site.

Additionally, the household members exposed to asbestos are often largely (if not totally) unaware of the inherent risks involved in secondary

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248. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); see also Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613, 627 (2005) (explaining that *The Costs of Accidents'* goal was to "identify criteria or goals against which any accident compensation system, including our current tort system, can be assessed").

249. See CALABRESI, *supra* note 248, at 135 n.1.

250. Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1292 (1992).

251. *Id.*

252. Making employers strictly liable for asbestos exposures to people whom they never interacted with would be unworkable for myriad reasons.

253. See Richard A. Posner, *Guido Calabresi's The Costs of Accidents: A Reassessment*, 64 MD. L. REV. 12, 15–16 (2005) (acknowledging that the "influential simplification" of "finding the 'cheapest cost avoider'" provides a useful way to consider "legal doctrines, procedures, and institutions as policy instruments analyzable in terms of the balance between the benefits and the costs that they produce" (quoting CALABRESI, *supra* note 248, at 135 n.1)).

254. See Levine, *infra* note 256; see also *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1305 (11th Cir. 2017) ("[Employer] was in the best position to protect people like [plaintiff] from take-home asbestos exposure by complying with the relevant regulations or internal policies that were designed for that purpose . . ."); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (noting that it would have been "relatively easy" for the employer in that case to provide warnings to workers about how to handle their asbestos-laden clothing and the dangers it posed outside the workplace).

exposure.<sup>255</sup> In a Comment for the *Washington Law Review*,<sup>256</sup> Rebecca Levine pointed to the fact that the employer is in the best position to prevent take-home exposure as support for her argument that a Washington court correctly found that the employer in that case did owe a duty to the secondarily exposed plaintiff.<sup>257</sup> Levine asserted that large employers engaged in interstate commerce can be expected to have “superior access to information regarding asbestos exposure . . . [and] relevant scientific data,” thus placing them in the best position to protect both their workers and their workers’ household members.<sup>258</sup>

The employers being in the best position to prevent the harm from occurring complements the “Calabresian” idea of holding the cheapest cost-avoider liable. Furthermore, it justifies the courts that have put a heavy emphasis on foreseeability. Because employers are in the best position to minimize the risks of secondary exposure, foreseeability should be the paramount indicator of liability. In *Kesner*, the defendants knew, or at least should have known,<sup>259</sup> that their employees’ clothes could endanger others outside the workplace. Specifically, it was foreseeable that employees’ household members would come into contact with the employees’ work clothes on a regular basis.<sup>260</sup> Indeed, the *Kesner* decision stated that any reasonable employer requiring employees to use asbestos during the mid-1970s would expect that asbestos fibers could attach to the employees’ clothing and harm people who lived with them.<sup>261</sup> In doing so, the court acknowledged that the defendants were “best situated” to prevent such injuries. By holding that the defendants have a duty of care towards non-employee household members, the court in-

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255. See, e.g., *Bobo*, 855 F.3d at 1298 (explaining it was “more likely than not that [the plaintiff] unknowingly inhaled dangerous concentrations of asbestos fibers as she ‘shook out’ [the employee’s] work clothes” (quoting *Bobo v. Tennessee Valley Authority*, 138 F. Supp. 3d 1285, 1297 (N.D. Ala. Sept. 29, 2015))); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008) (noting that [employer’s] employees left work each day “unaware of the dangers posed by the asbestos fibers on their contaminated work clothes”).

256. Rebecca Leah Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 WASH. L. REV. 359 (2011).

257. *Id.* at 389–90; see *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 Wash. App. LEXIS 2392, at \*7 (Wash. Ct. App. Aug. 13, 2007).

258. Levine, *supra* note 256, at 390.

259. See *supra* notes 207–209 and accompanying text.

260. See *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149 (N.J. 2006) (“It requires no leap of imagination to presume that . . . [the employee’s] spouse would be handling [the employee’s] clothes in the normal and expected process of laundering them so that the garments could be worn to work again.”).

261. *Kesner v. Superior Court*, 384 P.3d 283, 292 (Cal. 2016) (“A reasonably thoughtful person making industrial use of asbestos during the . . . [mid-1970s] would take into account the possibility that asbestos fibers could become attached to an employee’s clothing or person, travel to that employee’s home, and thereby reach other persons who lived in the home.”).

centivized employers to take precautionary measures to avoid these injuries.<sup>262</sup> The California Supreme Court heavily emphasized the fact that take-home exposures were foreseeable to the employer. This attention was warranted because it holds the party with the best opportunity to prevent the harm liable, providing the fairest analysis of tort liability.

Advocates of relationship-based duty for take-home exposure argue that the reliance on foreseeability will create an indeterminate pool of plaintiffs, resulting in unfair burdens to both employers and the judicial system.<sup>263</sup> The threat that courts will be flooded with asbestos-related claims has merit, as past Supreme Court decisions have made reference to both an “asbestos-litigation crisis”<sup>264</sup> and the “elephantine mass of asbestos cases.”<sup>265</sup> However, by clarifying that its holding only extends a duty to household members of the employee, the *Kesner* court wisely limits the pool of potential plaintiffs and weakens the viability of this counterargument.<sup>266</sup> The reasons against extending duty are premised on the idea that there would be nowhere to draw the line as to who can file a claim. Once the duty is extended to someone who is not an employee or who has never been on the property, there is no logical way to distinguish between that person and anyone else who may claim to have been secondarily exposed.<sup>267</sup> However, the *Kesner* court essentially created the line by limiting the duty to “persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time.”<sup>268</sup> Liability only extends toward those who can be expected to have regular close contact with the employee.<sup>269</sup> This easily distinguishes a son or daughter, or a husband or wife, from the

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262. *Id.* at 297.

263. *See id.* (acknowledging “[d]efendants’ most forceful contention is a finding of duty in these cases would open the door to an ‘enormous pool of potential plaintiffs’”); *see also* Yelena Kotlarsky, *The “Peripheral Plaintiff”: Duty Determinations in Take-Home Asbestos Cases*, 81 *FORDHAM L. REV.* 451, 485 (2012) (“The real concern for courts that make ‘no duty’ determinations in take-home asbestos cases lies in the perceived endless liability that defendants would face if the court found that a duty existed.”).

264. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

265. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). As a result of the burden on the courts, Chief Justice Rehnquist appointed the Ad Hoc Committee on Asbestos Litigation in 1990 to examine the effects of the crisis and create potential remedies. *See Levine, supra* note 256, at 374; *see also* AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 33 (1991) (explaining that the purpose was to “address the substantial number of asbestos personal injury cases and the complex issues they present”).

266. *See Levine, supra* note 256, at 392 (presciently stating that “[i]n order to control the number of take-home exposure claims, a court could limit the scope of the duty to household members or to immediate family members”).

267. *See, e.g., CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005) (noting that finding liability under these circumstances would “create an almost infinite universe of potential plaintiffs” (quoting *Widera v. Etco Wire & Cable Corp.*, 611 N.Y.S.2d 569, 571 (App. Div. 1994))).

268. *Kesner v. Superior Court*, 384 P.3d 283, 298 (Cal. 2016).

269. *Id.*

unlimited universe of potential plaintiffs who critics warned would be created. Claims brought by someone who frequented the same neighborhood bar as the employee on their way home, or a fellow passenger on the bus, would be outside the scope of liability imposed by the *Kesner* court.<sup>270</sup> *Kesner* strikes a “workable balance” between ensuring that reasonably foreseeable victims are compensated and “protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims.”<sup>271</sup>

*2. Striving for Clarity: Kesner Creates a Framework for Determining Duty That Will Create Consistency in This Fragmented Area of Law*

As the prevalence of take-home cases has increased, scholars and legal commentators have attempted to explain the different approaches that jurisdictions have taken to determining duty and to highlight the general direction in which courts across the country are moving.<sup>272</sup> There is still a great deal of inconsistency. Part II.A.1 explained why a heavier emphasis on foreseeability can create a fairer result for victims and minimize the policy concerns that have previously led to a reluctance of extending duty. Indeed, the more recent decisions in this area of law seem to indicate a trend toward finding a duty based on foreseeability.<sup>273</sup> The inherent factual nature of determining whether the risk of take-home exposure is foreseeable, however, can create inconsistency and confusion in itself.<sup>274</sup> As a result, there are two prominent criticisms made regarding foreseeability as the determinant of duty: (1) there is a lack of uniformity as to when a duty exists; and (2) in using facts to

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270. *Id.*

271. *Id.*

272. See, e.g., David M. Melancon, *Airing Asbestos Litigation's Dirty Laundry: "Take-Home Asbestos Exposure and the Ongoing Efforts to Determine the Scope of the Duty of Premises Owners and Employers*, FOR DEF., Apr. 2016, at 48, 54 (explaining the jurisdictional difference between using foreseeability of harm or the relationship of the parties in determining duty, and arguing that “decisions appear to be trending toward a finding of no duty,” while acknowledging that asbestos defense attorneys should be aware of the various rationales used by courts throughout the country); Behrens, *supra* note 235, at 545–49 (highlighting the varying state approaches and suggesting that courts consider the harmful impact of allowing duty to be stretched too far); Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 20–24 (2012) (noting that a majority of jurisdictions have found no duty, but there is a trend of courts dealing with post-1972 exposures increasingly being likely to find that there is a duty); Kotlarsky, *supra* note 263; Levine, *supra* note 256; Flinn, *supra* note 245.

273. See *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294 (11th Cir. 2017); *Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016).

274. Kotlarsky, *supra* note 263, at 459–60.

determine whether a duty exists, judges often take on the role of juries, further muddling an already inconsistent process.<sup>275</sup> In her article for the *Fordham Law Review*, Yelena Kotlarsky asserts that section 7 of the *Restatement (Third) of Torts*<sup>276</sup> provides a solution.<sup>277</sup> She argues that under a *Restatement* regime, Section (a) establishes a default duty, thus designating questions of fact—when the exposure took place, the nature of the relationship, et cetera—solely to the discretion of the jury.<sup>278</sup> Additionally, she asserts that Section (b), which allows a court to deny or limit liability in exceptional cases but requires them to articulate a countervailing principle or policy reason explaining the denial,<sup>279</sup> would allow state courts to maintain their autonomy and find no duty.<sup>280</sup> However, she believes that it would require those courts to be clearer in articulating their policy reasons for doing so and create more transparency across jurisdictions.<sup>281</sup> Thus, the *Restatement* solution would lead courts to consider their “no duty” decisions more seriously and likely lead to fewer “no duty” holdings.<sup>282</sup>

Kotlarsky’s reliance on the *Restatement* is well-founded and undoubtedly would have clarified some of the confusion and inconsistency surrounding this area of law prior to *Kesner*. However, the scope of the *Kesner* ruling may actually provide an even more coherent path forward, where a more mechanical, less fluid factual inquiry is possible. First, the court defines when an employer could have foreseeably known that there was a danger of secondary asbestos exposure outside the workplace.<sup>283</sup> Similar to other court

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275. See, e.g., *id.* at 460 (stating that when courts analyze foreseeability they “overstep their role by deciding questions of fact” and that they do not set a “clear standard for courts to follow in future cases that involve slightly different facts”).

276. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7. Section 7(a) states “[a]n actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” *Id.* § 7(a). Section 7(b) states “[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.” *Id.* § 7(b).

277. Kotlarsky, *supra* note 263, at 460–61.

278. *Id.* at 486.

279. See *supra* note 276 and accompanying text.

280. Kotlarsky, *supra* note 263, at 486–87.

281. See *id.* at 487 (explaining that “courts should state their true concerns unequivocally by holding that the possibility of adding to an already massive litigation militates in favor of finding that employers and premises owners generally owe no duty to third-party plaintiffs”).

282. *Id.*

283. See *supra* note 208.

rulings,<sup>284</sup> the *Kesner* court relies on the 1972 OSHA regulations<sup>285</sup> as a bright line demarcating when an employer had reasonable foreseeability of harms from take-home exposure.<sup>286</sup> The court rejected the defendants' argument that there was no scientific consensus regarding the risks of take-home asbestos at the time the exposures took place.<sup>287</sup> It specifically emphasized that the OSHA regulations reinforced the reasonable expectation and provided at least constructive knowledge that asbestos could be carried on the clothing of the employee and harm members of the employees' households.<sup>288</sup> Second, as noted above, the *Kesner* court limits employer liability only to their employees' household members.<sup>289</sup> The court stressed that an employee returning home at the end of every work day and interacting with members of their household was "not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior."<sup>290</sup>

The *Kesner* ruling potentially eliminates the two concerns that prompted a suggested reliance on the *Restatement*. Following the *Kesner* approach could minimize the factual analysis required to determine whether there should be liability. Judges would simply have to determine if the exposure occurred after the promulgation of the 1972 OSHA Regulations and whether the plaintiff was a household member of the employee. The answer to the first question can be gleaned with relative ease; the judge would simply have to determine when the employee worked for the employer. The question of whether the plaintiff is a household member is admittedly more difficult to discern and will require clarity following *Kesner*. There, the court defined household members as "persons who live with the worker."<sup>291</sup> This definition is ambiguous and could, in some cases, require further factual analysis.<sup>292</sup>

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284. See, e.g., *Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 537–39, 69 A.3d 1028, 1037–39 (2013); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 353 (Tenn. 2008); see also *Bobo v. Tenn. Valley Auth.*, 855 F.3d 1294, 1299 (11th Cir. 2017) (citing the 1972 OSHA regulations among other subsequent regulations in order to find that harm was foreseeable for exposures that took place from 1975–1997). But see *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 445 (6th Cir. 2009) (noting that plaintiff's expert testimony indicated that the first studies of the dangers of "bystander exposure" were published in 1965).

285. See *supra* notes 36–40 and accompanying text.

286. *Kesner v. Superior Court*, 384 P.3d 283, 292–93 (Ca. 2016).

287. *Id.* at 292. The exposures in the two consolidated cases here ranged from 1972–1974 and 1973–1979, respectively. *Id.* at 288–89.

288. *Id.* at 299 ("[T]he OSHA Standard affirmed the commonsense reality that asbestos fibers could be carried on the person or clothing of employees to their homes and could be inhaled there by household members.").

289. See *supra* note 268 and accompanying text.

290. *Kesner*, 384 P.3d at 294.

291. *Id.* at 298.

292. See *id.* at 305 (remanding the case to the trial court so the parties could submit additional evidence as to whether Johnny Kesner was a member of George Kesner's household). Johnny was George's nephew and played with him at least three times per week, but the court wanted more

Courts will need to create precedent through these decisions and establish a more concrete definition of what constitutes a household member in take-home asbestos cases. Once a court has established its definition, it would not require evidence or testimony designated for a jury's interpretation. The duty would exist if the plaintiff was exposed after 1972 and the employer's relationship with the employee fit into the respective states' definition of a household member. This would lead to more clarity, as states' use of *Restatement* § 7(b) to claim that the policy against overburdening their courts would no longer be applicable. The household member qualification would erase this concern. It is important to note this would only create a duty between the employer and the employee's household member; it would not guarantee liability.<sup>293</sup> Nevertheless, the *Kesner* court provides a framework through which courts can resolve the volatility in this area of the law in an efficient manner.

*B. Maryland Courts Can Apply the Kesner Rationale in Future Take-Home Cases Without Upsetting Established Principles*

The *Kesner* court's rationale can be used as a guide for Maryland—as well as other states that have previously been on Maryland's side of the jurisdictional split<sup>294</sup>—to find that employers have a duty to prevent secondary exposure of asbestos without disrupting the overall duty framework that these states use. Maryland courts have consistently focused on the lack of relationship between the employer and the secondarily exposed party in finding that employers do not have a duty.<sup>295</sup> This wariness of extending duty to an indeterminate number of plaintiffs is understandable.<sup>296</sup> However, by limiting the duty only to an employee's household members, the *Kesner* court minimized the number of potential plaintiffs while still allowing a path to recovery for those who were most foreseeably harmed.

This Subpart will examine the Maryland courts' acknowledgement of foreseeability as the primary determinant of a duty. It will show that Maryland courts have recognized that, following the promulgation of the 1972

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information about how long and often he stayed, to determine whether he did actually fall into the category of household member. *Id.*

293. See W PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984) (explaining that liability under a negligence claim requires proof of duty, breach, causation, and injury).

294. See *supra* notes 87–94.

295. *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395, 411, 705 A.2d 58, 66 (1998); see also *Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 69 A.3d 1028 (2013) (holding that the manufacturer of an asbestos-containing product did not have a duty to warn the product user's wife of the dangers of asbestos exposure inherent in the product).

296. See *supra* notes 263–265 and accompanying text.

OSHA regulations, the risks of secondary exposure were at least constructively known and therefore foreseeable.<sup>297</sup> Next, it will apply the *Kesner* court's "household member" qualification to argue that Maryland courts' long-standing rationale that relaxing the employer-employee relationship requirement for duty will lead to an unmanageable avalanche of claims is unfounded.<sup>298</sup> Finally, this Subpart will illustrate that take-home asbestos cases are inherently unlike other employer liability claims Maryland courts have ruled on, further bolstering the idea that following the *Kesner* court's reasoning will not upset the state's long-standing tort principles.<sup>299</sup>

*1. Foreseeability Is a Significant Factor in Determining Duty in Maryland and Should Be Given the Heaviest Consideration in Take-Home Cases*

Maryland courts balance the same foreseeability and policy factors as the California court did in *Kesner*.<sup>300</sup> In California, there is a "general duty of each person to exercise, in his or her activities, reasonable care for the safety of others."<sup>301</sup> Thus, California courts apply the seven factors to determine whether there should be an *exception* to this general duty.<sup>302</sup> Conversely, Maryland courts have no general presumption of duty and use the same factors to determine whether one *exists*.<sup>303</sup> This distinction is largely insignificant in the outcome of a court's duty determination. Indeed, Maryland courts have acknowledged for many years: "In cases involving personal injury, 'the principal determinant of duty [is] foreseeability.'"<sup>304</sup> Accordingly, Maryland courts confronted with take-home cases should engage in a *Kesner*-style analysis and look to the time when the alleged exposure took place in order to determine whether it was foreseeable.<sup>305</sup>

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297. See *infra* Part II.B.1.

298. See *infra* Part II.B.2.

299. See *infra* Part II.B.3.

300. The factors are: the foreseeability of harm to the plaintiff; the degree of certainty the plaintiff suffered the 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 of preventing future harm; the extent of the burden on 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. *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 416, 879 A.2d 1088, 1093 (2005). These are referred to in California courts as the *Rowland* factors. See *supra* note 180 and accompanying text.

301. *Kesner v. Superior Court*, 384 P.3d 283, 289 (Ca. 2016) (quoting CAL. CIV. CODE § 1714(a) (West 2009)).

302. *Id.* at 290; see *supra* note 180 and accompanying text.

303. *Pharmacia*, 388 Md. at 416, 879 A.2d at 1093.

304. *Id.* (quoting *Jacques v. First Nat'l Bank*, 307 Md. 527, 535, 515 A.2d 756, 760 (1986)).

305. See *supra* note 286 and accompanying text.

The 1972 OSHA regulations can serve as a bright line for determining whether employers knew or should have known about the risks of take-home asbestos exposure.<sup>306</sup> The *Kesner* court pointed directly to these regulations as “sufficient to provide notice of the reasonable foreseeability of such harm.”<sup>307</sup> Likewise, in *Georgia Pacific, LLC v. Farrar*, the Maryland Court of Appeals acknowledged 1972 as the year when employers generally knew of the risks of secondary exposure.<sup>308</sup> The court found that a product manufacturer was not liable, partially because the exposure in question happened between 1968 and 1969, prior to when the defendants would necessarily have been responsible for foreseeing the risks of take-home exposure.<sup>309</sup> Other jurisdictions have recognized 1972 as the year when employers were held responsible for having at least constructive knowledge of the risks of take-home exposure as well.<sup>310</sup>

A Maryland court could examine the facts of a secondary exposure case in the same way that the California court did. In *Georgia Pacific*, the Maryland Court of Appeals found that there was no employer liability because “at the relevant time,” there was no duty to warn the plaintiff.<sup>311</sup> However, if a case comes before the court where the secondary exposure took place after 1972, the analysis would be different—Maryland courts could find that sufficient information did exist “at the relevant time.”<sup>312</sup> Similar to the *Kesner* court, they could determine that the employer had either actual or constructive knowledge regarding the risk of secondary exposure.

In Maryland, the determination of whether a duty exists is essentially a policy question of “whether the plaintiff is entitled to protection from the defendant.”<sup>313</sup> While a finding of foreseeability is not a guarantee of duty in a Maryland court, it is the most significant hurdle for the plaintiff to clear.<sup>314</sup> Maryland courts should follow the *Kesner* court’s lead: treat the 1972 OSHA regulations as the breaking point (as the Court of Appeals tacitly did in *Georgia Pacific*) and determine that post-1972 exposures were foreseeable. If the courts adopt this reasoning, the “principle determinant of duty” would be met

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306. 29 C.F.R. §1910.1001(h) (2016).

307. *Kesner*, 384 P.3d at 293.

308. 432 Md. 523, 537–39, 69 A.3d 1028, 1037–39 (2013).

309. *Id.* at 541, 69 A.3d at 1039.

310. *See supra* note 284 and accompanying text.

311. *Georgia Pacific*, 432 Md. at 526, 69 A.3d at 1030.

312. *Id.*

313. *Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 415, 879 A.2d 1088, 1093 (2005).

314. *Georgia Pacific*, 432 Md. at 530, 69 A.3d at 1033; *see also The Maryland Survey: 2000-2001*, 61 MD. L. REV. 798, 1051 (2002) (explaining that Maryland courts have noted that in applying the foreseeability factor to the determination of duty, the test looks at how extraordinary it was that the negligent conduct caused the harm and that generally the defendant will only be held liable when he should have known that the plaintiff would suffer harm).

and the most significant hurdle would be cleared.<sup>315</sup> Therefore, a court should find a duty unless it identifies alternative policy reasons which, when balanced, ultimately outweigh the fact that the harm was foreseeable.<sup>316</sup>

*2. By Limiting Liability for Take-Home Exposure Only to Household Members, Maryland Courts' Concern About Creating an Indeterminate Pool of Plaintiffs Would Be Resolved*

In *Kesner*, the defendants' "most forceful contention" was that a finding of a duty to protect against secondary exposure to asbestos would open the door to "an enormous pool of potential plaintiffs."<sup>317</sup> Defendants argued that once the principle of liability extends beyond the bounds of the workplace, this "enormous pool" would include everyone from "acquaintances [and] service providers" to "fellow commuters on public transportation[] and laundry workers," resulting in uncertainty for employers and an oversaturation of courtrooms.<sup>318</sup> The *Kesner* court acknowledged the merits of this argument but convincingly determined a limit on the scope of the duty would solve the problem.<sup>319</sup> The court properly held that liability for secondary exposure to asbestos extended only to household members of the employee, thereby limiting the plaintiff pool.<sup>320</sup> This limitation is well-reasoned and will be crucial to addressing the policy concerns that Maryland courts have previously cited in finding that there was no duty.

The Maryland Court of Appeals has itself asserted that household members are a distinct class of their own.<sup>321</sup> In *Georgia Pacific, LLC v. Farrar*, the defendant attempted to illustrate the universe of potential claimants if the court accepted the plaintiff's argument:

[W]hether, if the [exposed] worker rides a bus home or stops at a bar or grocery store on the way home, the duty to warn would extend to the bus driver, other passengers on the bus, the bartender,

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315. See *supra* notes 304, 314 and accompanying text.

316. See John Bourdeau & Susan L. Thomas, *Negligence*, in MARYLAND LAW ENCYCLOPEDIA § 11 (2018), 16 M.L.E. Negligence § 11 (explaining that while foreseeability is often considered the most important factor in determining duty, courts also weigh public policy considerations and consider whether policy reasons support a cause of action); see also *Georgia Pacific*, 432 Md. at 530, 69 A.3d at 1033 (explaining that duty depends on "a number of factors that need to be balanced, [and] that the foreseeability of harm to [the plaintiff] . . . may be the most important of [the] factors, but that foreseeability of harm [is] not the only factor to be considered").

317. *Kesner v. Superior Court*, 384 P.3d 283, 297 (Ca. 2016).

318. *Id.* (alteration in original).

319. *Id.* at 297–98.

320. *Id.* at 298.

321. *Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 69 A.3d 1028 (2013).

other patrons in the bar, the cashier in the grocery store, or other customers.<sup>322</sup>

The court dismissed this argument, stating “[w]e are dealing only with household members, who constitute an identifiable class of individuals.”<sup>323</sup> Indeed, as the *Kesner* court noted, a household member is someone who is expected to have close and sustained contact with the worker for a prolonged period of time.<sup>324</sup> Maryland courts, while acknowledging that household members are identifiable, should create a specific definition and recognize the limits this would place on the potential class of plaintiffs.<sup>325</sup> The clerk at the sandwich shop where the employee gets his lunch, or the person sitting next to the employee on the bus home from work, would certainly not be entitled to a duty of care. The pool of household members would not be nearly as vast as the universe of potential plaintiffs the defendant in *Georgia Pacific* claimed would arise, and therefore the policy concerns that have influenced Maryland decisions in this area are minimized.

The Maryland Court of Special Appeals declined to extend liability in *Adams v. Owens-Illinois*.<sup>326</sup> A case with facts very similar to those alleged in *Kesner*, the court refused to find that the employer owed the employee’s spouse a duty of care.<sup>327</sup> The court explained that if it extended liability for secondary exposure based on a wife “handling . . . her husband’s clothing,” the defendant would be liable to anyone who was “in close contact with” the husband, “including other family members, automobile passengers, and co-workers.”<sup>328</sup> This could technically be true under *Kesner*’s household qualification but only if the automobile passengers and co-workers spent a significant amount of time and slept in the house with the employee. Because employees drive people other than household members in their cars and co-workers do not spend a significant amount of time or nights at each other’s homes, a court relying on *Kesner* would most likely have found employer liability towards no one but the wife.

This further illustrates the effectiveness of using foreseeability to determine liability. An employer would not be expected to know if the employee frequently comes into close contact with family members who are not members of the employee’s household, drives to and from work with other people,

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322. *Id.* at 535 n.2, 69 A.3d at 1036 n.2.

323. *Id.*

324. *Kesner*, 384 P.3d at 298.

325. *See supra* Part II.A.2.

326. 119 Md. App. 395, 705 A.2d 58 (1998).

327. *Id.* at 410–11, 705 A.2d at 66. A woman died of asbestosis she allegedly contracted from handling her husband’s work clothing. The woman’s estate sued her husband’s employer for negligence. *Id.* at 407, 705 A.2d at 65.

328. *Id.* at 411, 705 A.2d at 66.

or spends significant time with nonasbestos-exposed co-workers.<sup>329</sup> However, an employer can expect that an employee will return home each work day and have close contact with their household members.<sup>330</sup> The employer can expect that an employee's spouse might regularly clean their laundry, or a child might greet the employee with a hug and some rough-housing as soon as they walk in the door.<sup>331</sup> Additionally, consider the implications if courts do not create a duty to household members based on foreseeability. An employer would have no incentive to minimize the asbestos dust leaving the worksite, despite fully understanding the danger that the asbestos would pose to the people with whom that employee interacts regularly in their home. By drawing the line at household members, courts can protect a class of plaintiffs who are most likely to suffer a legitimate, compensable harm without exposing the employer or burdening the court system with an influx of claims. Separating the clearly foreseeable plaintiffs from the potentially foreseeable plaintiffs will allow courts to balance the competing policy issues in determining how far to extend liability.

3. *Distinguishing Duty: Identifying the Unique Nature of Take-Home Asbestos Exposure While Not Muddling Established Maryland Special Relationship Duty Law*

As previously discussed, Maryland courts focus on the relationship between the parties as a limitation on liability to third parties, rather than extending liability to any foreseeably harmed party.<sup>332</sup> However, the nature of secondary exposure cases is different than the other employer-employee cases which Maryland courts have previously relied on in refusing to extend take-home liability to employers. First, asbestos exposure typically causes harm only if it takes place over a prolonged period.<sup>333</sup> Second, Maryland

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329. See *Kesner v. Superior Court*, 384 P.3d 283, 298 (Ca. 2016) (noting “[p]ersons whose contact with the worker is more incidental, sporadic, or transitory do not, as a class, share the same characteristics as household members and are therefore not within the scope of the duty we identify here”). Additionally, this lack of knowledge or foreseeability can extend to all indeterminate plaintiffs, including those whom an employee might come into close contact with at a bar after work, while participating in a recreational sports league, or babysitting, among other things.

330. *Id.*

331. See *id.* (explaining that employees would have close contact with household members on a regular basis over many years).

332. See *supra* Part I.C.

333. See ASBESTOS PROFILE, *supra* note 1, at 1 (explaining that factors such as how much asbestos one is exposed to and how long the exposure lasts determine whether exposure will cause harm); James Barron & Jon Elsen, *No Asbestos Found in Air After Blast*, NY TIMES (July 19, 2007), <https://www.nytimes.com/2007/07/19/nyregion/19end-explode.html> (quoting New York City officials who explain that “developing an asbestos-related illness after being exposed for a short time—even at high levels—is very unlikely”); Michelle Tsai, *How Much Asbestos Is Too Much?*, SLATE (July 19, 2007, 7:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/ex-](http://www.slate.com/articles/news_and_politics/ex-)

courts have established a specific test that must be met in order to find liability in asbestos cases.<sup>334</sup> While this reliance on the special relationship between the employer and the employee may be appropriate in other third-party liability settings, it is misguided in the secondary exposure to asbestos realm.

Two cases that have dealt with this issue are *Doe v. Pharmacia & Upjohn Co.*<sup>335</sup> and *Dehn v. Edgcombe*.<sup>336</sup> These cases have been cited in a past Maryland take-home case as a reason not to extend liability.<sup>337</sup> In *Pharmacia*, the court's familiar concern was that if it found the employer had a duty toward the employee's wife, it would lead to a potentially limitless number of future claims from a vast range of plaintiffs.<sup>338</sup> However, the nature of the risk of illness through take-home asbestos exposure is markedly different from the risk of illness through HIV transmission. As the *Pharmacia* court rightly pointed out, any possible sexual partner could potentially be infected, which would create a "universe" of plaintiffs.<sup>339</sup> Yet, because HIV can be transmitted in a single sexual encounter, the potential for harm and the scope of potential plaintiffs are much greater. Asbestos, on the other hand, is typically harmful only if the exposure is consistent over a prolonged period of time.<sup>340</sup> The pool of people with whom an employee could be expected to have consistent, prolonged contact is inherently smaller. Thus, the universe of potential plaintiffs that the *Pharmacia* court was concerned about expanding would be significantly smaller in a take-home asbestos case as compared to the HIV transmittal case it was deciding.

Similarly, in *Dehn*, the Court of Appeals did not extend the doctor-patient duty to the patient's spouse.<sup>341</sup> The court rejected the plaintiff's argument that the clear foreseeability of the patient having unprotected sex with his spouse after the vasectomy imposed a duty on the doctor toward the spouse.<sup>342</sup> The court again resisted the expansion of tort liability.<sup>343</sup> However, as in *Pharmacia*, the number of foreseeable plaintiffs for the doctor here

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plainer/2007/07/how\_much\_asbestos\_is\_too\_much.html ("Usually, it takes years of continued exposure to high levels of asbestos—like those in an industrial environment—to cause health problems.").

334. See *infra* notes 345–353 and accompanying text.

335. 388 Md. 407, 879 A.2d 1088 (2005); see *supra* notes 149–160 and accompanying text.

336. 384 Md. 606, 865 A.2d 603 (2005).

337. *Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 528, 69 A.3d 1028, 1031–32 (Md. 2013).

338. *Pharmacia*, 388 Md. at 420–21, 879 A.2d at 1095–96 ("rejecting the plaintiff's claim against the employer on the rationale that 'extending the duty [to spouses] would apply to all potential sexual partners and expand the universe of potential plaintiffs'" (quoting *Dehn*, 384 Md. At 627, 865 A.2d at 615))).

339. *Id.* at 419–20, 879 A.2d at 1095–96 (quoting *Dehn*, 384 Md. at 627, 865 A.2d at 615).

340. See *supra* note 333 and accompanying text.

341. *Dehn*, 384 Md. at 622, 865 A.2d at 612; see *supra* notes 161–166 and accompanying text.

342. *Id.*

343. *Id.*

would be much higher under these circumstances than for any employer facing potential liability for secondary asbestos exposure. Here, the employee-patient could have sexual intercourse with one other person, one time, for potential liability to attach. This would effectively create an indeterminate number of potential plaintiffs. This, however, is not a risk inherent to asbestos exposure. Because of the nature of asbestos exposure, an employee's household members are the only ones with whom it is clearly foreseeable there would be enough contact for a potential exposure to occur.<sup>344</sup> The nature of asbestos exposure effectively contains the pool of potential plaintiffs in ways that distinguish these cases from the rationale used in previous Maryland special relationship decisions.

Another distinction that limits the risk of an indeterminate pool of plaintiffs in take-home asbestos cases is that Maryland courts have established specific causation requirements for asbestos claims.<sup>345</sup> In *Eagle-Picher Industries, Inc. v. Balbos*,<sup>346</sup> the Maryland Court of Appeals had to determine whether there can be liability where the decedents did not work directly with asbestos products but were present on the work site where they were used.<sup>347</sup> The court created the “frequency, regularity, and proximity” test, which evaluates the nature of the asbestos-containing product, the frequency with which it is used, the proximity of the plaintiff to where it was used (considering both distance and time), and the regularity of the plaintiff's exposure to it.<sup>348</sup> This test determined whether the asbestos exposure alleged could have caused the harm serving as the basis of the claim, and it became the standard used to establish causation in negligence cases alleging asbestos exposure in Maryland.<sup>349</sup> Most recently, the court relied on this test in another take-home exposure case, *Dixon v. Ford Motor Co.*<sup>350</sup> There, the court determined evidence the plaintiff's husband worked around asbestos products “on average, twice a week, 10 months a year, for 13 years” and that the plaintiff often dealt with her husband's dust-laden clothes and other accumulated asbestos fibers

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344. See *Kesner*, 384 P.3d at 298 (noting that household members are persons who “live with the worker and are thus foreseeably in close and sustained contact with [them] over a significant period of time”); *supra* note 333 and accompanying text (explaining that asbestos harm requires prolonged and sustained contact).

345. See *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992).

346. 326 Md. 179, 604 A.2d 445 (1992).

347. *Id.* at 210, 604 A.2d at 460. Because the decedents in *Balbos* were employees in a workplace where asbestos was used, but did not actually use the asbestos containing products themselves, the question for the court was not one of duty, but causation. *Id.*

348. *Id.*

349. *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503, 16 A.3d 159, 163 (2011).

350. 433 Md. 137, 70 A.3d 328 (2013).

was enough to meet the “frequency, regularity, and proximity test” and establish causation.<sup>351</sup> Additionally, in affirming the lower court’s decision to admit a plaintiff’s expert’s trial testimony,<sup>352</sup> the court stressed the exposure in this case was “continuous and cumulative in effect,” and the expert’s opinion was “not in the context of one or two incidental exposures” to the asbestos product.<sup>353</sup>

The requirement that there must be “frequency, regularity, and proximity” to asbestos is necessary to prevail on a take-home asbestos claim in Maryland. However, this requirement does not exist for other types of employer-employee liability claims. In *Pharmacia* and *Dehn*, for instance, the causation factor would never be in doubt.<sup>354</sup> In those cases, a third-party plaintiff could prove causation if they suffered harm after engaging in sexual intercourse with the employee or patient just one time. This would offer the employer or doctor very little protection against a negligence action if a duty was assumed. Conversely, the three-part test articulated in *Eagle-Picher v. Balbos* adds extra protection for employers in asbestos cases, in addition to the household qualification.<sup>355</sup> Thus, if a duty was found based on foreseeability and the plaintiff was a household member, the plaintiff would still need to show that they were frequently and regularly in proximity to the asbestos-laden clothing within the household.<sup>356</sup> The nature of a household member would presumably lead to a positive showing in this test.<sup>357</sup> Nevertheless, the “frequency, regularity, and proximity” test provides an extra layer of protection for employers and further distinguishes employer duty in the take-home asbestos realm from other types of employer duty in Maryland courts.

### III. CONCLUSION

In *Kesner v. Superior Court*, the Supreme Court of California held that an employer has a duty of care towards a household member of an employee who is secondarily exposed to asbestos after 1972.<sup>358</sup> The *Kesner* court created a framework that can be implemented by states that have focused on

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351. *Id.* at 151, 70 A.3d at 336.

352. The defendant took issue with the expert’s statement that “every exposure to asbestos is a substantial contributing cause” and argued that the trial court should have subjected that conclusion to a *Frye/Reed* analysis. *Id.* at 149, 70 A.3d at 334–35. A *Frye/Reed* analysis is required when the expert’s testimony involves a “novel scientific method” and there must be assurance provided that the expert’s opinion is acceptable within the relevant scientific community. *Id.* at 149–50, 70 A.3d at 335.

353. *Id.* at 151, 70 A.3d at 336.

354. *See supra* notes 335, 341 and accompanying text.

355. *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179, 604 A.2d 445 (1992).

356. *Id.*

357. *See supra* note 344 and accompanying text.

358. *See supra* note 200 and accompanying text.

foreseeability and those that have looked to the relationship between the parties, thus creating stability and clarity in a chaotic area of law.<sup>359</sup> In Maryland, courts have previously been reluctant to create a duty between an employer and a non-employee because of the risk of creating an indeterminate pool of plaintiffs.<sup>360</sup> However, the household member requirement articulated in *Kesner* helps resolve this issue by ensuring that an employer's duty exists only with those whom the employee had a predictably close and sustained relationship.<sup>361</sup> Additionally, the distinctive nature of secondary asbestos claims ensures that settled upon tort decisions within the state need not be affected.<sup>362</sup> Maryland courts would benefit from adopting the approach taken by the *Kesner* court in future take-home asbestos exposure cases.

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359. *See supra* notes 283–293 and accompanying text.

360. *See supra* notes 295–298 and accompanying text.

361. *See supra* notes 329–331 and accompanying text.

362. *See supra* Part II.B.3.