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IN THIS ISSUE

In December of 2016, the California Supreme Court handed down its decision in Kesner v. Superior Court, holding that employers and premises owners owe a duty of care to prevent take-home exposure to members of a worker's household, joining a growing minority of jurisdictions recognizing the existence of such a duty. This article discusses the two primary bases driving the court's holding and a strategy for limiting the reach of Kesner beyond California.

Limiting the Application of *Kesner* Beyond California: A Road Map

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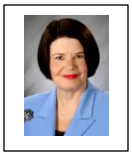

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In December of 2016, the California Supreme Court handed down its decision in *Kesner v. Superior Court*, holding that employers and premises owners owe a duty of care to prevent take-home exposure to members of a worker's household.[1] With this decision, the California Supreme Court overturned two intermediate appellate court decisions that had reached the opposite conclusion, and had been the law in California for the past several years.[2] More importantly, with *Kesner*, California joins a growing minority of jurisdictions recognizing the existence of such a duty. In order to limit the application of *Kesner* beyond California, it is important to understand the two primary bases driving the Court's holding.

Background

In *Kesner*, the California Supreme Court consolidated two appeals presenting the same legal question. In the first case, *Kesner v. Superior Court*, plaintiff, Johnny Blaine Kesner, Jr., claimed that he contracted mesothelioma after he was exposed to asbestos dust present on his uncle's clothing.[3] Plaintiff alleged that his uncle, George Kesner ("George"), brought those asbestos fibers home from his job at a brake shoe manufacturing plant.[4] Plaintiff further alleged that, from 1973 to 1979, he spent an average of three nights per week at George's home.[5] When plaintiff visited George, he sometimes slept near George, or roughhoused with George, while George wore his work clothes, resulting in plaintiff's alleged exposure.[6]

The second case, *Haver v. BNSF Railway Co.*, involved similar allegations as those raised in *Kesner*.[7] In *Haver*, the heirs of Lynne Haver brought a series of claims, including wrongful death, negligence and premises liability, against a major railroad.[8] In their lawsuit, the *Haver* plaintiffs alleged that Ms. Haver contracted mesothelioma from exposure to asbestos through her former husband, Mike Haver.[9] Plaintiffs alleged that Mr. Haver was exposed to asbestos while working at the railroad from 1972 to 1974 and that he carried home asbestos fibers on his person and clothing, thereby exposing Ms. Haver.[10]

Neither *Kesner* nor *Haver* had reached a jury when the California Supreme Court took the cases on appeal. The *Kesner* matter was dismissed prior to trial when the defendant moved for nonsuit citing *Campbell v. Ford Motor Co.*, which held that "a property owner has no duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's

[1] 1 Cal.5th 1132, 1154-55 (2016).
[2] *See Campbell v. Ford Motor Co.*, 206 Cal.App.4th 15 (2012); *Oddone v. Superior Court*, 179 Cal.App.4th 813 (2009).
[3] *Kesner*, 1 Cal.5th at 1141.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

business."[11] Relying on *Campbell*, the trial court in *Kesner* entered judgment against the plaintiff, holding that the defendant did not owe the plaintiff a duty to prevent his exposure to asbestos.[12] The plaintiff appealed, and the intermediate appellate court reversed the trial court.[13]

Similarly, *Haver* was dismissed at the pleading stage after the trial court, also relying on *Campbell*, granted the defendant's demurrer without opportunity to amend.[14] The intermediate appellate court affirmed the dismissal.[15] In its *Haver* opinion, the intermediate appellate court considered the Court of Appeal's decision in *Kesner*,[16] but ultimately distinguished it on the basis that *Kesner* involved a negligence claim while *Haver* involved a premises liability claim.[17]

The Bases Driving the Court's Conclusion

To understand the holding in *Kesner*—and, more importantly, how to combat the application of *Kesner* in other jurisdictions—it is important to analyze the bases underlying the court's conclusion. First, the court operated from the proposition that defendants owed a statutory duty to plaintiff, and that the issue before the court was whether an exception to that statutory duty should be created.[18] Second, in deciding whether to create such an exception, the court placed significant emphasis on the foreseeability of the injuries—a factor that does not necessarily weigh as heavily, if at all, in other jurisdictions.[19]

In framing the issue before it, the court in *Kesner* relied on California Civil Code §1714(a) which provides in relevant part:

> 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.

The Court reasoned that Section 1714(a) "establish[ed] the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others."[20] Thus, unlike in other jurisdictions where the concept of duty is largely driven by case law, in California, duty is codified as a general rule. In order to deviate from this general rule, the *Kesner* court reasoned that it must find either a statutory provision creating an

[11] *Id.* at 1142 (*citing*, *Campell*, 206 Cal.App.4th at 34.)
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Kesner v. Superior Court*, 226 Cal. App. 4th 251, 171 Cal. Rptr. 3d 811, review granted and opinion superseded sub nom. Kesner v. S.C. (Pneumo Abex LLC), 331 P.3d 179 (Cal. 2014), and vacated, 1 Cal. 5th 1132, 384 P.3d 283 (2016).
[17] *Kesner*, 1 Cal.5th at 1142.
[18] *Id.* at 1142-43; *see also*, California Civil Code §1714(a).
[19] *Kesner*, 1 Cal.5th at 1145-49, 1162-63.
[20] *Id.* at 1142 (*citing Cabral v. Ralphs Grocery Co.* 51 Cal.4th 764, 768 (2011)).

exception to Section 1714, or, alternatively, that an exception to Section 1714 is "clearly supported by public policy."[21]

One additional dimension to this analysis worth noting is that the *Kesner* opinion repeatedly describes judicial decisions on the issue of duty as line-drawing exercises where courts make determinations as to whether carving out "an entire category of cases" from the general duty rule is "justified by clear considerations of policy."[22] To that end, a court deciding whether to create an exception to Section 1714 is not focused on creating a rule applicable only to the facts before it; rather, the court is weighing whether to create a bright line rule applicable to an entire category of cases.[23]

With this analytical framework in mind, it is clear why Section 1714 is essential to the court's holding. Section 1714 allowed the court to avoid deciding whether the *Kesner* or *Haver* defendants owed plaintiffs a duty of care since, according to the court, the California Legislature had already decided that issue. The court's only role was to decide whether there was sufficient basis to create an exception to a codified provision, a much more comfortable position for the court versus having to decide whether to establish the existence of a duty. By contrast, defendants were faced with the difficult task of seeking a judicial exception to a law that passed the bicameral process and, even more difficult, to do so in categorical terms.

With no statutory exception applicable in this case, the next issue was whether public policy clearly supported an exception to the general rule. In answering this question, the court addressed the second important premise: whether the injury was foreseeable.[24] The court concluded that "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household."[25]

According to *Kesner*, whether an injury is foreseeable depends on three factors: (1) "foreseeability of the harm to the plaintiff", (2) "the degree of certainty that the plaintiff suffered injury", and (3) "the closeness of the connection between the defendant's conduct and the injury suffered."[26] In its foreseeability analysis, the court looked at other jurisdictions, like New Jersey, holding that it is foreseeable that a household member would handle a worker's clothes in the normal laundry process.[27] The court also focused on regulations promulgated by the Occupational Safety and Health Administration in 1972 and standards issued by the U.S. Department of Labor in 1952,

[21] *Id.* at 1143 (citations omitted).
[22] *Id.* at 1143-44.
[23] *Id.* at 1143-44.
[24] *Id.* at 1145 ("The most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care articulated by [S]ection 1714 is whether the injury in question was foreseeable") (citations omitted).
[25] *Id.*
[26] *Id.* at 1143, 1145 (*citing*, *Rowland v. Christian* 69 Cal.2d 108, 113 (1968)).
[27] *Id.* at 1146 (*citing*, *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394 (2006)).

which the court found warned employers of the need to take measures to prevent toxins from traveling outside the worksite, and concluded that, for the timeframe at issue in this case (the 1970's), "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household."[28]

Combatting the Reach of *Kesner*

It is anticipated that *Kesner* will be used as authority for the viability of a take-home exposure claims, particularly in jurisdictions where the courts have not settled this issue. Defense counsel faced with the prospect of fending off *Kesner* should start by addressing the two principles discussed above. First, if the jurisdiction does not have a statutory provision analogous to California's Civil Code Section 1714, it is important to distinguish *Kesner* on that ground, highlighting that the *Kesner* court did not determine the existence of a duty; rather, it declined to draw an exception to a statute. In that regard, *Kesner* itself is not direct authority for the proposition that a duty of care exists. It merely stands for the proposition that under California statutes, individuals who are not members of the same household as the person alleged to have been the vehicle of take-home exposure are excepted from the general duty imposed by Section 1714(a). Further, since the framework under which the *Kesner* court was operating required that any exception drawn by the court be categorical, the difference between finding a duty and drawing an exception is more than just semantics.

Second, the *Kesner* court's emphasis on foreseeability becomes an important factor as not all jurisdictions emphasize foreseeability in analyzing duty. Indeed, the *Kesner* decision acknowledges that in some jurisdictions, a "different foundational principle" applies to the question of duty.[29] For example, the court notes that in some jurisdictions, like New York and Illinois, appellate courts have found that no duty exists if there is no prior relationship between the defendant and the plaintiff.[30] Other jurisdictions, like Pennsylvania and Michigan, consider foreseeability, but downplay it while "embracing a preexisting relationship between plaintiff and defendant as a prerequisite to the establishment of a duty."[31]

Although not discussed in *Kesner*, Delaware is another example of a jurisdiction that applies a different analytical framework to the question of duty. In Delaware, whether a duty of care exists depends on whether the negligent act is one of misfeasance or

[28] *Id.* at 1145-46.
[29] *Id.* at 1162.
[30] *Id.* (*citing, Matter of New York City Asbestos Litigation*, 5 N.Y.3d 486 (2005); *Nelson v. Aurora Equipment Co.*, 391 Ill.App.3d 1036 (2009)).
[31] *Id.* (citing, *Gillen v. Boeing Co.*, 40 F.Supp. 3d 534 (E.D. Pa. 2014); *In re Certified Question from Fourteenth District Court of Appeals of Texas*, 479 Mich. 498 (2007)).

nonfeasance.[32] If the negligent act is one of misfeasance (i.e., an affirmative act), then the actor owes a general duty to others "to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the [affirmative] act."[33] By contrast, if the negligent act is one of nonfeasance (i.e., an omission), then the actor owes no general duty to others unless "there is a special relation between the actor and the other which gives rise to the duty."[34] Hence, in a situation where the allegation is that the employer failed to warn or take action to protect household members from take-home exposure—an example of alleged nonfeasance— no duty would exist under Delaware law unless the claimant maintained a special relationship with the employer.[35]

Thus, since many jurisdictions, such as Delaware, Pennsylvania, New York, and Illinois, analyze the question of duty differently, the defense in jurisdictions that have not yet ruled on the viability of take-home exposure claims can distinguish *Kesner* on these grounds. In jurisdictions that do not emphasize foreseeability in their duty analysis (e.g., Delaware or any jurisdiction that follows the Restatement (Second) of Torts on this issue), then the argument should be that *Kesner* is inapposite. In fact, on this issue the *Kesner* court expressly distinguishes its own analysis from the analysis employed in jurisdictions like New York, Illinois and Pennsylvania.[36]

Third, even in jurisdictions that emphasize foreseeability, not all such jurisdictions agree on the foreseeability of take-home exposure injuries, especially when the alleged exposure occurred prior to 1972. For example, in *Georgia Pacific, LLC v. Farrar*, a product liability case (as compared to claims against an employer or premises owner), the Maryland high court held that a product manufacturer owed no duty to warn the plaintiff of the potential for take-home exposure, particularly where said exposure occurred from 1968 to 1969.[37] This holding, based in part on the court's belief that the 1972 OSHA regulations represented the "clear and most widely broadcast breakthrough" on the issue of take-home exposure,[38] is also based on the court's belief that "there was no practical way that any warning given by [the defendant] . . . could have avoided [the] danger."[39] Where applicable, defense counsel should rely on *Farrar* for the proposition that take-home exposure was not foreseeable prior to 1972.

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[32] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162,166-67 (Del. 2011) (citing, Restatement (Second) of Torts §284).
[33] *Id.* at 167 (quoting, Restatement (Second of Torts §302 cmt. a).
[34] *Id.* (quoting, Restatement (Second of Torts §302 cmt. a).
[35] *Id.* at 170 (finding that defendant owed plaintiff no duty of care because plaintiff, the wife of a former employee of defendant, and defendant did not share a special relationship).
[36] *Kesner*, 1 Cal.5th at 1162.
[37] *Georgia Pacific, LLC v. Farrar*, 432 Md. 523, 540-41 (2012).
[38] *Id.* 537-38.
[39] *Id.* at 541.

Finally, in actions in which there is no choice but to operate within the confines of *Kesner*, it is important to remember that *Kesner* addresses but *one* element of a negligence or premises liability claim. The *Kesner* court makes clear that the holding is cabined to the issue of duty only, stating: "Here we are tasked solely with deciding whether [the defendants] had a legal duty to prevent the injuries alleged by [the plaintiffs]."[40] Plaintiff must still establish the other elements of a negligence claim, including, breach of the duty, harm, and, most importantly, causation.[41] The *Kesner* opinion does not dispense with the need to prove these elements, nor does it lessen a plaintiff's burden of proof.

[40] *Kesner*, 1 Cal.5th at 1142.

[41] *Id.* at 1144, 1157-1158.

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