

S219919

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Joshua Haver, individually and as successor-in-interest
to Lynne Haver, deceased, *et al.*,

Plaintiffs, Appellants and Petitioners,

v.

BNSF Railway Company,

Defendant and Respondent.

After a Decision by the Court of Appeal,
Second Appellate District, Case No. B246527

Los Angeles County Superior Court, Case No. BC435551
The Honorable Richard Rico

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND
AMICI CURIAE BRIEF OF INTERNATIONAL ASSOCIATION OF
DEFENSE COUNSEL AND FEDERATION OF DEFENSE &
CORPORATE COUNSEL IN SUPPORT OF DEFENDANT AND
RESPONDENT BNSF RAILWAY COMPANY**

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE:

Under rule 8.520(f) of the California Rules of Court, the International Association of Defense Counsel (IADC) and Federation of Defense & Corporate Counsel (FDCC) request permission to file the attached *Amici Curiae* Brief in support of defendant and respondent BNSF Railway Company.

**INTEREST OF *AMICI CURIAE*; HOW THE *AMICI CURIAE*
BRIEF WILL ASSIST THE COURT**

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The Federation of Defense & Corporate Counsel (“FDCC”) was formed in 1936 and has an international membership of 1,400 defense and corporate counsel. FDCC members work in private practice, as general counsel, and as insurance claims executives. Membership is limited to attorneys and insurance professionals nominated by their peers for having achieved professional distinction and demonstrated leadership in their respective fields. The FDCC is committed to promoting knowledge and professionalism in its ranks and has organized itself to that end. Its members have established a strong legacy of representing the interests of civil defendants.

This case requires the Court to review multiple factors under *Rowland*

v. Christian to determine whether to create a duty to nonemployees in take-home exposure asbestos cases. This brief focuses on two additional policy considerations not briefed by the parties: the existing burden on the courts from increased asbestos litigation in California, and the reduction in access to the courts created by budget shortages. The brief's detailed treatment of those additional public policy reasons, which explain how imposing liability in this case will negatively affect the judicial system, will provide the Court with additional information to assist the Court in deciding this case.

**NO PARTY OR COUNSEL FOR A PARTY AUTHORED OR
CONTRIBUTED TO THIS BRIEF**

The IADC and FDCC provide the following disclosures required by rule 8.520(f)(4) of the California Rules of Court: (1) no party or counsel for a party in this appeal authored or contributed to the funding of this brief, and (2) no one other than *amici curiae* or its counsel in this case made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the foregoing reasons, the IADC and FDCC request that the court permit the filing of the attached *Amici Curiae* Brief in support of defendant and respondent BNSF Railway Company.

March 12, 2015

Respectfully submitted,

SNELL & WILMER L.L.P.

By: 

Mary-Christine Sungaila

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**International Association of
Defense Counsel and Federation of
Defense & Corporate Counsel**

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DEFENSE COUNSEL AND FEDERATION OF DEFENSE &
CORPORATE COUNSEL IN SUPPORT OF DEFENDANT AND
RESPONDENT BNSF RAILWAY COMPANY**

INTRODUCTION

In the merits briefing, the defendant has already explained why the factors in *Rowland v. Christian* (1968) 69 Cal.2d 108 do not warrant extending a duty to nonemployee plaintiffs in take-home exposure asbestos cases such as this. We do not repeat these arguments. Rather, we describe how two additional policy concerns centered on the burden on defendants and

the consequences to the community from increased asbestos litigation and corresponding reduction in access to the courts, particularly in light of ongoing budget cuts, further militate against expanding duties to new categories of plaintiffs in asbestos cases.

LEGAL DISCUSSION

I

Additional Public Policy Considerations Weigh in Favor of Finding No Duty in Take-Home Asbestos Cases

A. Public Policy and the *Rowland* Factors

The parties agree, as they must, that this Court's application of the factors announced in *Rowland*, 69 Cal.2d at pp. 112-113 determines whether a duty should be found here. (See Haver Opening Brief at p. 4; BNSF Answer Brief at p. 8.) Courts evaluate these factors "at a relatively broad level of factual generality." (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.) Thus, the pertinent question is *not* whether the application of the *Rowland* factors "support[s] an exception to the general duty of reasonable care on the facts of the particular case, but whether carving out an entire category of cases from the general duty rule is justified by clear considerations of policy." (*Id.*; see also *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 33 [foreseeability and extent of burden on the defendant are primary *Rowland* factors]).

The Court of Appeal in *Campbell*, 206 Cal.App.4th at p. 29, for

example, held, after considering the *Rowland* factors, that premises owners, as a matter of law, owe no duty to protect their workers' family members from take-home asbestos exposure. The court pointed to the difficulty of line-drawing between "those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed." (*Id.*) The court observed that including all family members would be too broad, as some would not be in personal contact with the employee; limiting the class to spouses would leave out others that may have significant physical contact with the employee; while defining the class to include those who have frequent personal contact with employees would force the court to define how frequent and how personal contact must be, and could expand the class of secondarily exposed potential plaintiffs to commuters, those performing laundry services, and others. (*Id.* at pp. 32-33 citing to *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822.) The *Campbell* court observed "that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope. One of the consequences to the community of such an extension is the cost of insuring against liability of unknown but potentially massive dimension. Ultimately, such costs are borne by the consumer. In short, the burden on the defendant is substantial and the costs to the community may be considerable." (*Id.*; see also *In re New York City Asbestos Litig. (Holdampf v.*

A.C.&S., Inc.) (N.Y. 2005) 840 N.E.2d 115, 119 (quoting *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055 [“[C]ourts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.”])

The *Campbell* court concluded that “strong public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure.” (*Campbell*, 206 Cal.App.4th at p. 32.) The court determined that two factors in particular – the extent of the burden to the defendant and the consequences to the community if the court imposes on a particular defendant a duty of care toward the plaintiff – weighed heavily against imposing such a duty. (*Id.*)

Here, two additional public policy considerations beyond those already identified by the parties militate against expanding liability: the intersection between the state’s already burgeoning asbestos docket and the state court budget crisis, which together could significantly limit the community’s access to justice.

B. The Impact on the Courts and the Community from an Even More Greatly Expanded Asbestos Docket Favors Declining to Impose a Broader Duty

1. The lingering burden of asbestos litigation in the court system.

Asbestos litigation in its many forms has crowded court dockets for

decades and “has been, by all accounts, a blight on the American judicial system.” (Henderson & Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring* (2002) 53 S. C. L. Rev. 815, 816; see also Behrens, *What’s New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501, 501-502 [“Asbestos litigation is the ‘longest-running mass tort’ in U.S. history.”].) Indeed, the United States Supreme Court in *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597, described the litigation as a “crisis.” (See also *In re Combustion Eng’g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200 [“For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.”].) Asbestos “dockets in both Federal and State courts continue to grow long; long delays are routine; trials are too long; the same issues are litigated over and over again; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and further claimants may lose altogether.” (Judicial Conference Ad Hoc Comm. on Asbestos Litig., Report to The Chief Justice of the United States Supreme Court and Members of the Judicial Conference of the United States (1991) at pp. 2-3.)

While asbestos litigation began in the 1970s, there are few signs of it slowing down. (Corriere, *Improving Asbestos Case Management in the Superior Court of San Francisco* (November 2010) DataPoints: Business

Intelligence for the California Judicial Branch at p. 1

<<http://www.courts.ca.gov/documents/asbestos-final1112.pdf>> (as of February 25, 2015) (“hereinafter Corriere”).) The RAND Institute for Civil Justice reported that 730,000 asbestos claims had been filed nationally through 2002 and that nearly as many claimants had yet to come forward at that point. (Carroll et al., *Asbestos Litigation* (RAND Institute for Civil Justice, 2005) at p. xvii.) The Congressional Budget Office has estimated that, nationwide, another 1.7 million claims will be made over the next three decades. (Congressional Budget Office, Cost Estimate: S. 1125 Fairness in Asbestos Injury Resolution Act (October 2003).) Other accounts have suggested that without reform, the number of claims yet to be filed in the United States could reach as high as 2.6 million. (See Welch, Center to Protect Workers’ Rights, in testimony before the Senate Judiciary Committee (June 2003).)¹

The Judicial Council of California’s Administrative Office of the Courts

¹ The remarkable resilience of asbestos claims can be traced in part to the evolving nature of the claims being brought. When asbestos litigation began, the plaintiffs were mostly those who had developed cancer or other serious conditions from contact with asbestos-laden products. (*What’s New in Asbestos Litigation?* 28 Rev. Litig. at p. 502.) From the late 1990s through the late 2000s, many of the claimants who had not yet fallen ill sought recovery for increased risk of developing illnesses. (*Id.*) Various legislative and judicial reforms limited these claims. (*Id.* at p. 505.) Litigation then refocused on plaintiffs with mesothelioma and other serious conditions against new target defendants. (*Id.*) While earlier litigation had targeted companies that made asbestos-containing products, when those companies went bankrupt, the new defendants were premises owners who were defending claims brought by independent contractors. (*Id.* at pp. 502-503.) The take-home asbestos cases here represent a new fourth generation of asbestos claims.

reports that the asbestos crisis is “worsening more rapidly than even the most pessimistic projections.” (Corriere at p. 1.) The Superior Courts of Alameda, Los Angeles, and San Francisco Counties, which have been “at the epicenter of California asbestos litigation since its emergence in the 1970s” attract nearly all of the asbestos filings in California. (*Id.* at pp. 1-2.) From 1970 to 1987, California handled 29% of all asbestos claims filed in the United States. (*Id.* at p. 2.) This number plunged from a high of 31% in 1988 to only 5% by 1992. But these “radical swings in litigation” were not caused by changes in the progression of asbestos-related illnesses. (*Id.*) Nor was the surge in cases driven by a significant increase in injuries to California’s residents. “Many of these plaintiffs lack any meaningful connection to California, having lived most of their lives outside of the state and alleging asbestos exposure that ostensibly occurred elsewhere.” (*What’s New in Asbestos Litigation?* 28 Rev. Litig. at p. 540.)

The influx of cases in California reflects in part “a migration of asbestos-related claims away from jurisdictions that have adopted reforms.” (*What’s New in Asbestos Litigation?* 28 Rev. Litig. at p. 533.) Mississippi, for example, passed legislation restricting the venue in which a plaintiff may bring suit, and established more stringent requirements for proof of causation on toxic tort claims. (*Id.* at pp. 534-35.) Texas, another state that had previously attracted large numbers of suits, adopted comprehensive tort

reform legislation in 2003, after which “asbestos and silica filings dropped dramatically from the thousands of cases to the hundreds.” (*Id.* at pp. 536-37.) Ohio, South Carolina, and Rhode Island have similarly improved their asbestos litigation climate through legislation or judicial decisions. (*Id.* at pp. 537-38.)

Large plaintiffs’ firms that manage asbestos claims are now moving from the asbestos hot-beds of Texas and Illinois to California. (Fielding, *Plaintiffs’ Lawyers Turn to L.A. Courts for Asbestos Litigation*, Daily J. (L.A.), (Feb. 27, 2009) at p. 1; see also Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?* (2007) 34 Pepperdine L. Rev. 883, 885 [“With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.”].) “Since plaintiffs’ lawyers have the ability to move cases around the country, looking for the most favorable venues, and since they have an incentive to do so because the choice of forum has a huge impact on the value of a case, it is no surprise that they have responded to [reforms] by looking for other favorable venues.” (Hanlon & Smetak, *Asbestos Changes* (2007) 62 N.Y.U. Ann. Surv. Am. L. 525, 599; Corriere at p. 2 [Asbestos cases are particularly conducive to venue shopping by plaintiffs because a typical asbestos case “involves multiple defendants, multiple insurance carriers, and countless locations of alleged exposure.”].)

“California is positioned to become a [new] front in the ongoing asbestos litigation war.” (*Id.* citing to York, *More Asbestos Cases Heading to Courthouses Across Region*, Los Angeles Business Journal (February 27, 2006).) As the *Haver* and *Kesner* cases themselves demonstrate, some firms are “steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also to Los Angeles,” which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases. (*Id.*; see also Weller et al., Policy Studies, Inc., *Report on the California Three Track Civil Litigation Study* (2002) at p. 28 [San Francisco Superior Court is “a magnet court for the filing of asbestos cases.”]; Chiantelli, *Judicial Efficiency in Asbestos Litigation* (2003) 31 Pepperdine L. Rev. 171, 171 [Chiantelli, a former San Francisco Superior Court judge, stating that “[l]ately, we have seen a lot more mesothelioma and other cancer cases than in the past.”].)

In 2004, one San Francisco Superior Court judge stated that asbestos cases took up 25% of the court’s docket. (*What’s New in Asbestos Litigation?* 28 Rev. Litig. at p. 539; *Judges Roundtable: Where Is California Asbestos Litigation Heading?*, Harris Martin’s Columns-Asbestos (July 2004) at p. 3, [Judge Ernest Goldsmith speaking on a panel at a symposium hosted by the University of San Francisco School of Law].) Another judge noted that asbestos cases were a “growing percentage” of the court’s caseload and took

up a large share of the court's overburdened resources. (*Id.* [Judge Tomar Mason of the San Francisco Superior Court]; Anderson & Martin, *The Asbestos Litigation System in the San Francisco Bay Area: A Paradigm of the National Asbestos Litigation Crisis* (2004) 45 Santa Clara L. Rev. 1, 2 ["The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket."].) And as part of this new trend, the Superior Court of Los Angeles County has seen an increase in asbestos filings since 2007. (Corriere at p.1.) From 2006 to 2010, asbestos filings in the Los Angeles Superior Court increased by eighty percent. (Behrens, et al., *Asbestos Litigation 'Magnet' Courts Alter Procedures: More Changes on the Horizon*, Mealey's Litigation Report: Asbestos (May 16, 2012) Vol. 27, #8 at p. 5 ("hereinafter *Mealey's Litigation Report*").)

In San Francisco, asbestos cases are recognized as "complex," and "require exceptional judicial management to avoid placing unnecessary burdens on the Court and litigants." (Case Management Order (Cal. Super. Ct. S.F. Cnty. June 29, 2012) *In re Complex Asbestos Litig.*, No. GC-84-828684 at 1:23-2:4 <<http://www.sfsuperiorcourt.org/sites/default/files/images/Case%20Management%20Order%20Feb%202014.pdf>> (as of Feb. 25, 2015).) A search of San Francisco County's dockets through Westlaw reveals that 6,719 asbestos cases have been filed since January 1, 2000, with 96 filed

within the last 3 years.² The nature of asbestos cases, which generally involve large numbers of parties, place a disproportionate case management burden on court clerical staff. (Corriere at p. 3.) A fall 2009 study by the Superior Court of San Francisco County revealed that support staff spent more than 2,400 minutes per asbestos filing – four times longer than the statewide case weight for unlimited civil cases. (*Id.*) The study also found that asbestos cases consumed over 700 minutes of judge time per filing – almost twice as much as other limited civil filings. (*Id.*) Because asbestos cases have gone to trial at 10 times the rate of other unlimited civil cases, they have utilized jurors at 10 times the state-wide rate, meaning that half of all jurors serving San Francisco sat on an asbestos case, and half of all judicial officer time was devoted to asbestos jury trials. (*Id.*) Although San Francisco has adopted a case management strategy to process the high volumes of asbestos litigation and has seen a corresponding dramatic improvement in settlement rates, this program may have no effect on the rate of asbestos filings; to the contrary, it may encourage “still higher filing rates” precisely because the program gives rise to “a greater capacity to process these caseloads.” (*Id.* at pp. 4-5.)

² These numbers were obtained by using the “Dockets” function, narrowing the “Dockets by State” selection to California, narrowing the “State-Included” selection to San Francisco County, and choosing “Asbestos (NOS 368)” as the Key Nature of Suit. The “Filing Date” field was then narrowed to those filed after 1/1/2000 and 3/4/2012 respectively. This search was run on 3/4/2015.

2. California courts' unprecedented budget cuts

California courts are already struggling to do more with less. Following “unprecedented” and “startling” budget cuts, state courts have been forced to implement furlough days, court closures, and layoffs. (McCarthy, *Budget Cuts Hit Home* (August 2011) California Bar Journal <<http://www.calbarjournal.com/august2011/topheadlines/th5.aspx>> (as of Feb. 25, 2015).) For example, even as it experienced an increased asbestos case load, Los Angeles County was forced by mid-2012 to shutter fifty-six courtrooms due to fiscal constraints caused by reduced court funding. (*Mealey's Litigation Report* at p. 7 citing to News Release, Los Angeles Super. Ct. Public Info. Office, Los Angeles Superior Court's Presiding Judge Announces Courtroom Closures, Apr. 17, 2012.)

When then Presiding Judge of the San Francisco Superior Court Katherine Feinstein announced the layoffs of 200 superior court employees, which would close 25 courtrooms “indefinitely,” she warned that the layoffs would “for all practical purposes dismantle our court.” (*Budget Cuts Hit Home*.) Although the Asbestos Case Management system to handle the 850 pending cases remained active, there were significant challenges in providing access to trial departments, as only three civil departments were scheduled to be open after September 2011. (Pollack & Ghanaat, *California Asbestos Law Update* (August 2011) <http://www.burnhambrown.com/site/files/San%20>

Francisco%20Court%20Closures%20Likely%20To%20Affect%20Asbestos%20Cases.PO1.GH2.pdf. (accessed February 27, 2015).) Budget cuts also forced San Francisco Superior Court Presiding Judge Feinstein to propose scaling back the court's involvement in managing asbestos cases by the end of 2013. (*Mealey's Litigation Report* at p. 5.)

Although the Governor's proposed budget for 2015-2016 contemplates increased funding to California's courts, the funding struggle continues. (See Mintz, *California Courts Get Funding Boost in Gov. Brown's Budget*, San Jose Mercury News (Jan. 9, 2015) <http://www.mercurynews.com/crime-courts/ci_27289741/california-courts-get-funding-boost-gov-browns-budget> (as of March 3, 2015); Dolan, *New California Budget Fails to Ease Court Woes, Chief Justice Says*, Los Angeles Times (June 20, 2014) <<http://touch.latimes.com/#section/-1/article/p2p-80572845/>> (as of March 3, 2013).) By August 2014, the state had lost 53 courthouses and 204 courtrooms in the previous three-year period, including 83 courtrooms in Los Angeles. (California Bar Journal, *Closed Courthouses in California* (November 2014) <<http://www.calbarjournal.com/November2014/TopHeadlines/TH1.aspx>> citing to Judicial Council of California, August 2014 (as of March 3, 2015).) In short, there remains a "critical shortage of judges relative to the workload needs in California's trial courts." (Judicial Council of California Workload Assessment Advisory Committee, *The Need for New Judgeships in the*

Superior Courts: 2014 Update of the Judicial Needs Assessment (November 2014) <<http://www.courts.ca.gov/documents/jc-20141212-itemT.pdf>> (as of March 1, 2015.)

Recognizing a duty to nonemployees in “take-home asbestos” cases would not only put California in the minority of jurisdictions that have confronted this issue (see BNSF Answer Brief at pp. 45-48), but would invite a surge of additional cases to the state’s already strained dockets. The flood of new asbestos cases that would follow if this Court rules in favor of take-home asbestos plaintiffs could prove to be a crushing burden on the courts’ already strained resources.

CONCLUSION

For the foregoing reasons and those presented by the respondent, this Court should decline to extend a duty to plaintiffs.

March 12, 2015

Respectfully submitted,

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By: 

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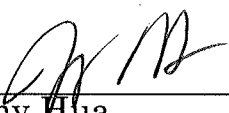
**International Association of
Defense Counsel and Federation of
Defense & Corporate Counsel**

CERTIFICATE OF WORD COUNT

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this brief, it contains 3,420 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).

March 12, 2015

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Defense & Corporate Counsel**

Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On March 12, 2015, I served, in the manner indicated the foregoing document described as **Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of International Association of Defense Counsel and Federation of Defense & Corporate Counsel in Support BNSF Railway Company** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.
- BY FACSIMILE: (C.C.P. § 1013(e)(f)), as indicated on service list.
- BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)), as indicated on service list.
- BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

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

Executed on March 12, 2015, at Costa Mesa, California.



Sandy Cairelli

Service List

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Superior Court of California County of Los Angeles Honorable Richard E. Rico 111 North Hill Street Los Angeles CA 90012	BC435551
Clerk Court of Appeal Second Appellate District, Division 5 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	B246527