IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S274191

CORBY KUCIEMBA, et al.,
Plaintiffs and Appellants,

v.

VICTORY WOODWORKS, INC.,
Defendant and Respondent.

United States Court of Appeals
for the Ninth Circuit
Case No. 21-15963

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

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APPLICATION TO FILE AMICUS BRIEF

Consumer Attorneys of California requests that the attached amicus brief be submitted in support of plaintiffs Corby and Robert Kuciemba. Counsel are familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief addresses the application of the San Francisco and Cal-OSHA workplace health and safety regulations as creating both a duty of care and the standard of care for landowners and employers such as defendant Victory Woodworks, Inc. No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST

Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals who are injured or killed because of the negligent or wrongful acts of others, including governmental agencies and employees. CAOC has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent plaintiffs injured or killed as the result of negligence, CAOC is

interested in the significant issues presented by the Ninth Circuit's certified questions as they affect foreseeable victims of landowners and employers who fail to comply with public health regulations and directives.

AMICUS CURIAE BRIEF

> Some courts and commentators use "negligence per se" to refer globally to the borrowing of statutory standards in negligence actions. Examined with care, however, it actually consists of two distinct, albeit occasionally overlapping, concepts. Statutes may be borrowed in the negligence context for one of two purposes: (1) to establish a duty of care, or (2) to establish a standard of care. (Citations omitted.)

(*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 fn 8 *(Elsner)*.)

Plaintiffs Kuciemba have alleged defendant failed to comply with San Francisco City and County's Order of the Health Officer No. CI9–07c and unnamed OSHA and Cal-OSHA regulations. (ER 156–158.) As a result, Mrs. Kuciemba contracted COVID, fell ill and was hospitalized.[1] (ER 157.)

Although Cal-OSHA did not issue COVID-specific regulations until after the Kuciembas were exposed to the virus, "[u]ndoubtedly, existing Title 8 regulations required employers to take steps to protect workers against COVID-19, and Cal/OSHA was conducting inspections pursuant to those regulations." (*Western Growers Ass'n v. Occupational Safety & Health*

[1] These allegations must be accepted as true. (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 786.)

Standards Bd. (2021) 73 Cal.App.5th 916, 938 *(Western Growers)* [finding Cal-OSHA acted properly in adopting emergency COVID regulations].)

Employer/landowners such as defendant had a duty of care arising from these San Francisco and Cal-OSHA regulations to foreseeable employee-household-member victims such as Mrs. Kuciemba.

I. The San Francisco health order and Cal-OSHA regulations establish an employer's duty to foreseeable victims injured by the employer's non-compliance.

The health order and regulations established defendant's duty and the standard of care to its employees. (*Elsner*, *supra*, 34 Cal.4th at p. 921.) "In this state a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute." (*Vesely v. Sager* (1971) 5 Cal.3d 153, 164 *(Vesley)*.) "Cal–OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." (*Elsner*, *supra*, at p. 921.) As the Kuciembas have established in their briefing, Mrs. Kuciemba's causes of action are "third party actions" within the meaning of the worker's compensation laws and *Elsner*. *(Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1004–1005.)

Although the statute the Court considered in *Vesley* has since been amended, its analysis remains good law. (See *Elsner*, *supra*,

34 Cal.4th at p. 928 fn. 8.) There, the defendant bar owner Sager had "continued to serve [a customer] alcoholic drinks past the normal closing time of 2 a.m. until 5:15 a.m. on April 9. After leaving the lodge, [the customer] drove down the road, veered into the opposite lane, and struck plaintiff's vehicle." (*Vesley, supra*, 5 Cal.3d at p. 158.) A provision of the Business and Professions Code as then existed criminalized the furnishing of alcohol "to any obviously intoxicated person." (*Id.* at 165.) As here, the question was: "Did defendant Sager owe a duty of care to plaintiff or to a class of persons of which he is a member?" (*Id.* at p. 164.) Yes, said the Court. The statute created the duty. "In the instant case a duty of care is imposed upon defendant Sager by Business and Professions Code section 25602 [now amended]." (*Id.* at p. 165.) Thus,

> it appears that plaintiff is within the class of persons for whose protection section 25602 was enacted and that the injuries he suffered resulted from an occurrence that the statute was designed to prevent. Accordingly, if these two elements are proved at trial, and if it is established that Sager violated section 25602 and that the violation proximately caused plaintiff's injuries, a presumption will arise that Sager was negligent in furnishing alcoholic beverages to O'Connell. (See Evid. Code, § 669.)
>
> (*Vesley, supra*, 5 Cal.3d at p. 165.)

Here, Mrs. Kuciemba was in the class of persons the health order was intended to protect (workers and their families) and the injuries she suffered resulted from an occurrence (contracting

COVID) the order was designed to prevent. Defendant's obligation to comply with the health and safety orders and regulations created a duty to Mrs. Kuciemba.

A. Mrs. Kuciemba was a member of the class of persons the health order was issued to protect.

"On March 4, 2020, Governor Newsom declared a 'State of Emergency' in response to the COVID-19 pandemic." (*Western Growers*, *supra*, 73 Cal.App.5th at p. 926.) Businesses "operated under injury and illness prevention programs (IIPP's), which required employers to 'establish, implement and maintain' programs to 'ensur[e] that employees comply with safe and healthy work practices.' (Citation.)" (*Ibid.*) In this context, San Francisco issued the subject health order.

Later in 2020, the California Occupational Safety and Health Standards Board made findings of emergency. "'COVID-19 continues to infect workers' and 'the proposed regulation will reduce the number of COVID-19 infections in the workplace,' which will thus 'reduce the financial costs caused by medical care and lost workdays, costs that may be borne by *employees, their families,* employers, insurers, and public benefits programs.'" (*Western Growers*, *supra*, at p. 937 [emphasis added].)

While the Cal-OSHA emergency regulations were not in effect at the time Mr. and Mrs. Kuciemba became infected, they reflect the conditions ongoing when San Francisco adopted its health order. Defendant does not contest the City and County's authority to issue the order. COVID is a highly-infectious disease

creating "serious health risks to the public" and "increased risk of workplace transmission." (*Western Growers*, *supra*, 73 Cal.App.5th at pp. 937–938.)

No one can dispute both workers and their immediate-household families were among the class of persons the health order and regulations were intended to protect. (See *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1154 *(Kesner)* [worker's household members foreseeable victims of secondary asbestos exposure from workers].) Workers are vectors for workplace contaminants and disease. "Iti s a matter of common experience and knowledge that dust or other substances may be carried from place to place on one's clothing or person, as anyone who has cleaned an attic or spent time in a smoky room can attest." (*Id.* at 1146.) At a minimum, workers and their immediate families are among the class of persons the health order and regulations were intended to protect

B. Mrs. Kuciemba suffered the type of harm the health order was issued to prevent.

Defendant cannot dispute the heath order was promulgated to minimize the spread of COVID-19. In *Western Growers,* the Court of Appeal described the emergency regulations Cal-OSHA ultimately issued as "emergency public health orders intended to curb the spread of COVID-19, and the illnesses, hospitalizations, and deaths that follow in its wake." (*Western Growers*, *supra*, 73 Cal.App.5th at p. 930.) As a result of defendant's failure to

comply with the health order, Mrs. Kuciemba contracted COVID and was hospitalized. (ER 157-158.) She suffered the type of harm the order and regulations were intended to prevent.

Because the health order and regulations were intended to curb the spread of COVID, Mrs. Kuciemba, like all members of workers' households, was in the class of persons the health order and regulations were intended to protect. She suffered the precise type of harm. Defendant owed this regulation-based duty to her.

II. The *Rowland* factors do not require a different conclusion.

Civil Code section 1714 imposes a duty of care on all persons to act reasonably under the circumstances. The parties have analyzed the duty issue in terms of the common-law based policy limitations on this general duty of care recognized in *Rowland v. Christain* (1968) 69 Cal.2d 108 *(Rowland)*. But where a statute or ordinance creates the duty, such as the health order or Cal-OSHA regulation, the Legislature or the issuing authority has made the policy determinations that duty should exist. If this were not enough, here the business community sought, but did not obtain, a "COVID-shield" statute from the Legislature. (A. Brackett, & D. Sullivan, "Employer Liability for 'Take-Home' COVID-19 Infections," *Reuters* (Mar. 18, 2022).[2]) This legislative refusal reflects the Legislature's policy determination that the duty plaintiffs urge should not be diluted or disturbed by the courts.

[2] https://www.reuters.com/legal/litigation/employer-liability-take-home-covid-19-infections-2022-03-18/ (as of Oct. 5, 2022).

Even if the *Rowland* factors are applied, nothing in them supports a limitation on the defendant's duty existing under section 1714 or under the health order and the regulations.

No question can exist that all three of the *Rowland* foreseeability factors weigh heavily in favor of duty. (*Kesner*, *supra*, 1 Cal.5th at p. 1145.) "A reasonably thoughtful person" would know that failing to comply with health orders intended to minimize the risk of worker infection could expose worker household members. (*Ibid.*)

> "It is well established ... that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person." (Citation.)
>
> (*Kesner*, *supra*, 1 Cal.5th at p. 1148.)

None of the other *Rowland* factors – "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" support a limitation on duty, either. (*Rowland*, *supra*, 69 Cal.2d at p. 113.) The "policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible. (*Kesner*, *supra*, 1 Cal.5th at p. 1150.) No basis exist to excuse defendants.

"[T]here is moral blame attached to the defendants' failure to take steps to avert the foreseeable harm." (*Peterson v. San Francisco Cmty. Coll. Dist.* (1984) 36 Cal.3d 799, 814.) Moral blame also attaches, "where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue." (*Kesner*, *supra*, 1 Cal.5th at 1151.) Defendant was charged with an obligation to take certain preventative measure while Mrs. Kuciemba (and her husband) had no means to control defendant's compliance.

In refusing to enact a COVID-shield statute, the Legislature determined the burdens on the defendant and the costs to it and the community were not so high as to create an exception to the general duty of care. The courts ought not to impose a common-law duty exception where both the obligation and the failure to immunize violators were acts of the legislative and executive branches. The *Rowland* factors should not operate to excuse defendant's liability to the very persons the health order and regulations were intended to protect from the harm Mrs. Kuciemba suffered.

CONCLUSION

In mid-2020, the COVID health crisis was raging. Public officials from the governor down knew it and adopted rules and regulations to protect workers and their families. Mrs. Kuciemba was in the class of persons intended to be protected and suffered

the harm the rules were intended to protect against. None of the *Rowland* factors supports limiting defendant's duty to her. The Court should so hold.

Respectfully submitted,

Dated: October 7, 2022 By: /s/ Alan Charles Dell'Ario

Attorney for Consumer
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CERTIFICATE OF COMPLIANCE

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Dated: October 7, 2022 By: /s/ Alan Charles Dell'Ario

STATE OF CALIFORNIA
Supreme Court of California

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