S274191

IN THE SUPREME COURT OF CALIFORNIA

CORBY KUCIEMBA and ROBERT KUCIEMBA

Plaintiffs-Appellants

v.

VICTORY WOODWORKS, INC., a Nevada Corporation

Defendant-Respondent

On Grant of Request to Decide Certified Questions from the United States Court of Appeal for the Ninth Circuit Pursuant to California Rules of Court, Rule 8.548
Ninth Circuit No. 21-15963

VICTORY WOODWORKS, INC.'S NOTICE OF ERRATA IN ANSWERING BRIEF

Hinshaw & Culbertson LLP
William Bogdan (124321)
50 California Street, Suite 2900
San Francisco, CA 94111
Telephone: 415-362-6000
Facsimile: 415-834-9070
wbogdan@hinshawlaw.com

Respondent Victory Woodwork's Answering Brief in the above-referenced case was filed in this Court on August 22, 2022.

Upon review of the Brief, Counsel for Respondent noticed areas of errata that needed correction as follows:

Page 2 – Table of Contents:

As stated in the Brief: IV. The Labor Code Bars a Claim for A non-employee's injury that is derivative of an employee'son-the-job illness

Corrected: IV. The Labor Code Bars a Claim for A non-employee's injury that is derivative of an employee's on-the-job illness

Page 8 – Table of Authorities:

As stated in the Brief: Labor Code § 3802

Corrected: Labor Code § 3208

Page 14 – 15:

As stated in the Brief: Because Ms. Kuciemba caught from Mr. Kuciemba the very illness her husband incurred on the job, *Snyder* was inapplicable.

Corrected: Because Ms. Kuciemba caught from Mr. Kuciemba at home the very illness her husband incurred on the job, *Snyder* was inapplicable.

Page 17:

As stated in the Brief: **THE LABOR CODE BARS A CLAIM FOR A NON-EMPLOYEE'S INJURY THAT IS DERIVATIVE OF AN EMPLOYEE'SON-THE-JOB ILLNESS**

Corrected: **THE LABOR CODE BARS A CLAIM FOR A NON-EMPLOYEE'S INJURY THAT IS DERIVATIVE OF AN EMPLOYEE'S ON-THE-JOB ILLNESS**

Page 20:

As stated in the Brief: For workers' compensation purposes, any disease arising out of employment constitutes an injury under Labor Code section 3802.

Corrected: For workers' compensation purposes, any disease arising out of employment constitutes an injury under Labor Code section 3208.

Page 30:

As stated in the Brief: *Snyder* did not contract the derivative injury rule, but rather recognized that a premises owner merely owes a duty to keep a visitor safe on its property:

Corrected: *Snyder* did not contradict the derivative injury rule, but rather recognized that a premises owner merely owes a duty to keep a visitor safe on its property:

Page 40:

As stated in the Brief: All the culpable conduct related to the employer, not the third party, thus making the connection attenuated.

Corrected: All the culpable conduct related to the employee, not the third party, thus making the connection attenuated.

Page 49:

As stated in the Brief: On the contrary, the SF Order provides that punishment for any violation . . .

Corrected: In addition, the SF Order provides that punishment . . .

Page 50:

As stated in the Brief: Thus, Plaintiffs may not seek damages under the SF order.

Corrected: Thus, Plaintiffs may not seek damages under the SF Order.

Page 52:

As stated in the Brief:

. . . has developed myriad effective preventative measures to contain the product COVID-19, however, remains …

Corrected: . . . has developed myriad effective preventative measures to contain the product. COVID-19, however, remains …

Attached hereto as **Exhibit "1"** are the pages of the brief with the corrections described above highlighted in redline.

Dated: November 11, 2022 **HINSHAW & CULBERTSON LLP**

By: */s/ William Bogdan*
William Bogdan
Attorneys for Defendant-Respondent
VICTORY WOODWORKS, INC., a Nevada Corporation

EXHIBIT “1”

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Statutes

Other Authorities

B. Amended Complaint Dismissed

In light of Judge Chesney's ruling, Plaintiffs changed tack in the amended complaint. They excised any mention of Mr. Kuciemba's infection, serious COVID-19 symptoms, positive COVID-19 test, or subsequent hospitalization. (Compare ER-157 ¶¶18-19 with ER-089 ¶¶24-25.) Instead, they claimed for the first time that despite his hospitalization for COVID-19, Mr. Kuciemba might really have only been asymptomatic (ER-86 ¶7, ER-09:2-11.) Despite the lack of support in the record, and inconsistent with the etiology of the virus, Ms. Kuciemba claimed to have somehow been made ill by her husband's clothing. (ER-88 ¶22.)

Defendant again moved to dismiss on the same three grounds. In response, Plaintiffs argued that this Court's decision in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991 (*Snyder*) mandated that their claims were not preempted by workers' compensation. *Snyder* involved a child's civil claim for an *in utero* injury at her mother's worksite.

At oral argument, the District Court distinguished the facts of *Snyder* and disagreed that *Snyder* held that the exclusive remedy would not apply here. Ms. Kuciemba was injured at home as a result of her husband's injury (ER-15:7-25, 41:21-42:5.) Judge Chesney noted the fetus in *Snyder* was in effect a "tiny visitor" to the premises of the mother's employer, who suffered her own separate injury, unrelated to and different from that sustained by her mother. (ER-14:6-11, 47:7-48:1.) Thus the infant in *Snyder* could pursue a claim just as any other injured customer could. (ER-40:13-17, 106:1-4.) Because Ms. Kuciemba caught from Mr.

Kuciemba at home the very illness her husband incurred on the job, *Snyder* was inapplicable.

As to the question of duty, the District Court rejected the suggestion that the take-home liability theory applicable to asbestos in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 (*Kesner*) be expanded to encompass a virus claim. In contrast to asbestos, the tenuous connection between the employer's conduct and the COVID-19 infection off-site, lack of moral blame, cost to society, and minimal deterrence did not justify extending to family members in the home any duty Defendant owed to its employees while on the job. (ER-26:12-29:15, 37:2-5.)

Judge Chesney further observed that the fomite allegation did not present a plausible claim. The scientific literature did not support that Mr. Kuciemba could have the virus attach to his clothes or skin in San Francisco and then somehow infect his wife hours later at home in Hercules. (ER-18:3- 23.) Plaintiffs could not plead a speculative claim in the hope that science would someday catch up. (ER-23:1-6, 42:6-11.) Nevertheless, the court found that Mr. Kuciemba sustained a work-related injury even if he was asymptomatic, thus triggering the exclusive remedy. (ER-12:1-8, 41:17-20.)

Incorporating its reasoning and comments from oral argument into its written order, the District Court dismissed the First Amended Complaint in May 2021 without leave to amend. Judge Chesney ruled that Plaintiffs' claims were once again barred by the exclusive workers' compensation remedy. (ER-05.) The employer's duty to provide a safe workplace to its workers from

involving COVID-19, and also raised significant economic concerns. (*Id*. at pp. 1272-1273.) As such, in the interests of comity and federalism, the Ninth Circuit offered this Court the opportunity to decide the question whether the employer owed a duty to protect third parties who never entered its worksite.

This Court accepted both certified questions. (*Kuciemba v. Victory Woodworks, Inc*. (Cal. June 22, 2022) 2022 Cal. LEXIS 3511.)

IV. THE LABOR CODE BARS A CLAIM FOR A NON-EMPLOYEE'S INJURY THAT IS DERIVATIVE OF AN EMPLOYEE'S ON-THE-JOB ILLNESS

A worker's claims for physical or emotional injury incurred on the job are subject to the worker's compensation exclusive remedy. (Lab. Code § 3600 *et seq*.) Claims by that worker's family for physical injury, emotional injury, loss of consortium, and wrongful death where the worker's injury is part of the causal chain are also preempted by the exclusive remedy. This Court should reaffirm that, as the Legislature has directed, COVID-19 claims brought by third parties that derive from a worker's on-the-job infection are subject to the exclusive remedy.

Until 2021, California workers' compensation decisions uniformly held that the Legislature meant what it said in the Labor Code when it created the workers' compensation exclusive remedy: where a worker was injured in the course and scope of employment, the employer's obligation to provide benefits through worker's compensation was "in lieu of any other liability whatsoever to any person." (Lab. Code §3600 *et seq*.)

the Legislature's intent. The Court begins with the statutory language because it is generally the most reliable indication of legislative intent. If the words of the statute are unambiguous, the Court presumes the Legislature meant what it said, and the plain meaning of the statute controls. (See, *Miklosy v. Regents of the University of California* (2008) 44 Cal. 4th 876, 888, and cases cited therein.)

The language of the WCA could not express the Legislature's intent regarding the exclusive remedy any clearer. Payment of worker's compensation benefits by the employer is "*in lieu of any other liability whatsoever to any person"* pursuant to Labor Code section 3600. Thus, any claim by a worker, or those in contact with that worker, for an injury the worker incurred on the job would be prohibited from pursuing the employer through a civil claim. Re-emphasizing the point, the Legislature expressly prohibited within this statutory no-fault scheme any claims by an employee's dependents for harm arising out of work-related injuries to the employee: "the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer." (Lab. Code § 3602(a).) For workers' compensation purposes, any disease arising out of employment constitutes an injury under Labor Code section ~~3802~~3208.

The Workers' Compensation Appeals Board is the sole arbiter of claims presented by workers or their family members. Labor Code section 3601(a) provides that "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive

picking up husband's paycheck].

Snyder did not ~~contract~~ contradict the derivative injury rule, but rather recognized that a premises owner merely owes a duty to keep a visitor safe on its property:

> The employee's 'concession' of a common law tort action under sections 3600 to 3602 extends, as we have seen, to family members' collateral losses deriving from the employee's injury. Neither the statutory language nor the case law, however, remotely suggests that third parties who, because of a business's negligence, suffer injuries—logically and legally independent of any employee's injuries—have conceded their common law rights of action as part of the societal 'compensation bargain.'

(*Snyder, supra,* 16 Cal.4th at pp. 1004-1005.)

As characterized by Judge Chesney, the circumstance in *Snyder* was no different than if the child had been injured while visiting the premises in a stroller at the time of exposure. (ER-040.) In that light, she determined that Ms. Kuciemba's virus contracted from Mr. Kuciemba's worksite illness was both logically and legally dependent of an employee's workplace injury and therefore subject to the exclusive remedy. (ER-15:7-25, 41:17-42:1.)

See's Candies misconstrued *Snyder*, and determined without any support that "there is little difference conceptually" between a mother breathing in a gas that she conveys to her unborn child on the business premises, and a worker catching a virus at work, commuting home, then infecting family members off-site with that

argument that it could be foreseeable that children of workers exposed to chemicals could suffer birth defects, but noted that "[f]oreseeability of injury . . . is but one factor to be considered in the imposition of negligence liability." (*Id.* at 460.) Though moral blame and preventing future harm might favor finding a duty, the remaining *Rowland* factors weighed more strongly against a finding of duty. There was no close connection between the employer's conduct and the injury. All the culpable conduct related to the ~~employer~~employee, not the third party, thus making the connection attenuated. In addition, imposing the duty would saddle the employer of "uncertain but potentially very large scope." (*Ibid.*) Of additional concern was "the cost of insuring against liability of unknown but potentially massive dimension." (*Id.* at 461.) *Elsheref* concluded that based on the "overwhelming need to keep liability within reasonable bounds," a common law duty of care should not be imposed on the employer to third-parties off its property. (*Ibid.*)

Though Mr. Kuciemba had a special relationship with Ms. Kuciemba through marriage, no special relationship existed between Ms. Kuciemba and Defendant. Likewise, Defendant had no special relationship with Mr. Kuciemba beyond the time he was on the worksite, and even then the duty to provide an employee a safe place to work does not extend to third parties. See, *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52.

Although the special relationship between Defendant and Mr. Kuciemba ended once Mr. Kuciemba left the worksite, any concept of a vicarious special relationship favoring Ms. Kuciemba

of a replicating virus.

No employer can ensure that employees will enter or leave its premises uninfected by a virus. In recognition of that fact, nowhere in the SF Order does it require the employer guarantee all workers immunity from COVID-19. (VWER_079 §9, 081 §12.) Short of isolating at home and not participating in any essential industry, only repeatedly administered vaccines could produce such a result, and even then "break-through" infections and variants continue to confound the best minds trained to address the disease.

The SF Order is merely "best practices regarding the most effective approaches to slow the transmission of communicable diseases . . . ." (VWER_079 §9.) As best practices, essential industries are expected to comply with those recommendations "except to the extent necessary . . . to carry out the work of Essential Businesses." (VWER_091 §16k.) The SF Order nonetheless acknowledges that transmission of the disease can still take place by interactions with those who are asymptomatic. (VWER_079 §9.)

Plaintiffs suggest that somehow the SF Order creates a private right of enforcement for their infection. The SF Order directs that the sheriff and chief of police alone are to ensure compliance with and enforce the order. (VWER_092 § 18.) ~~On the contrary~~In addition, the SF Order provides that punishment for any violation is limited to a fine and/or imprisonment. *Ibid*. California law requires that there must be a "clear, understandable, unmistakable" indication of an intent to permit a

private right of action under a statute. It is not enough that the statutory text suggests such a right. (See, *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597; *Mayron v. Google LLC* (2020) 54 Cal.App.5th 566.) Thus, Plaintiffs may not seek damages under the SF ~~o~~Order.

Although every employer aspires to prevent workers from being exposed to the virus for the protection of their families at home, that goal does not create a duty to render every employee arriving home COVID-19 free, particularly when those with the disease often show no symptoms. All an employer can do, and all that the SF Order requires an employer to do, is to minimize the potential for exposure during the limited time the employee is on the worksite. What the employer is incapable of doing, and what it has no duty to do, is eliminate any potential exposure for the worker or control the actions of relatives off-site who may interact with (and possibly infect) the worker who returns home at the end of the day.

e. Distinctions from Asbestos

Even with a series of vaccinations and boosters, to date total self-isolation appears to be only way to avoid the COVID-19 virus entirely. Compare this to asbestos where there are documented preventative measures developed over decades to prevent the escape of fibers from the jobsite, e.g., disposable Tyvek suits, changing rooms, showers, separate lockers, on-site laundry, etc. (*See Kesner, supra,* 1 Cal.5th at p. 1152.) No COVID-19 regulation requires disposable coveralls, booties or decontamination

as to what has motivated the Legislature to not enact any provision adds nothing to the legal analysis. (See, *Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735 n.7.))

In sum, asbestos is a manufactured product fashioned purposefully on a jobsite by industry for financial gain. COVID-19 is a virus that suddenly evolved off-site through a mishap of nature and benefits no one. Asbestos and its health effects have been studied for over a century, and that industry has developed myriad effective preventative measures to contain the product. COVID-19, however, remains a complicated and evolving virus, addressed by a combination of science and our best guesses of what might be an effective deterrent at the time.

Whereas liability for asbestos is justified through regulation of the commercial market, imposing liability on employers for COVID-19 leaves the employer to carry society's responsibility to regulate and protect public health. A virus is simply not within the domain of a cabinet maker, and Defendant has neither the superior knowledge nor the diagnostic capabilities to isolate an employee's household from the COVID-19 virus. Here, Plaintiffs are asking the employer to do what the global public health system and pharmaceutical industry have failed to do: keep COVID-19 from invading the home. As a matter of public policy, requiring private industry to meet that standard sets the bar too high.

C. The Court of Appeal has Correctly Held that An Employer Owes no Duty for an On-the-Job Illness Transmitted to an Employee's Family

Most recently, the distinction between an employer's

PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of 18 and not a party to the within actions; my business address is 50 California Street, Suite 2900, San Francisco, California 94111.

On November 11, 2022, I served the document(s) on the interested parties in this action as stated below:

VICTORY WOODWORKS, INC.'S NOTICE OF ERRATA IN ANSWERING BRIEF

☒ **(BY TRUEFILING SERVICE):** By causing a copy of the attached document(s) to be transmitted to the electronic mail addresses as indicated below.

Mark L. Venardi, Esq.
mvenardi@vefirm.com
Martin Zurada, Esq.
mzurada@vefirm.com
Mark Freeman, Esq.
mfreeman@vefirm.com
101 Ygnacio Valley Road, Suite 100
Walnut Creek, CA 94596
Telephone: (925) 937-3900
Facsimile: (925) 937-3905

I declare under penalty of perjury under the laws of the United States and the State of California that the above is true and correct and was executed on November 10, 2022, at San Francisco, California.

Sherie McLean

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **KUCIEMBA v. VICTORY WOODWORKS**
Case Number: **S274191**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Malcolm Heinicke Munger Tolles & Olson LLP 194174	malcolm.heinicke@mto.com	e-Serve	11/11/2022 10:22:24 AM
Robert Dunn EIMER STAHL LLP 275600	rdunn@eimerstahl.com	e-Serve	11/11/2022 10:22:24 AM
Martin Zurada Venardi Zurada LLP	mzurada@vefirm.com	e-Serve	11/11/2022 10:22:24 AM
Sherie McLean Hinshaw & Culbertson LLP	smclean@mail.hinshawlaw.com	e-Serve	11/11/2022 10:22:24 AM
Fred Hiestand Attorney at Law 44241	fred@fjh-law.com	e-Serve	11/11/2022 10:22:24 AM
Alan Dell'ario Attorney at Law 60955	charles@dellario.org	e-Serve	11/11/2022 10:22:24 AM
Joseph Lee	joseph.lee@mto.com	e-	11/11/2022

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11/11/2022

Date

/s/Sherie McLean

Signature

Bogdan, William (124321)

Last Name, First Name (PNum)

Hinshaw & Culbertson LLP

Law Firm