

S274191

**IN THE SUPREME COURT OF CALIFORNIA**

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**CORBY KUCIEMBA and ROBERT KUCIEMBA**

*Plaintiffs-Appellants*

*v.*

**VICTORY WOODWORKS, INC., a Nevada Corporation**

*Defendant-Respondent*

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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 ANSWERING BRIEF TO  
AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS**

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## I. INTRODUCTION

Amicus Curiae Consumer Attorneys of California (CAOC) seizes upon an argument raised for the first time in Plaintiffs' Reply Brief: that the San Francisco Order of the Health Officer ("SF Order") sets the standard of care for negligence *per se* and creates a duty on the part of the employer to third-parties in an employee's household. Because Plaintiffs waived any negligence *per se* argument for failing to raise the issue in the Opening Brief, CAOC may not make that argument in Plaintiffs' stead (See *Dignity Health v. Local Initiative Health Care Authority of Los Angeles County* (2020) 44 Cal.App.5th 144, 166 [an amicus must limit its argument to the issues properly raised on appeal], citing *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, at p. 572.)

## II. PLAINTIFFS HAVE WAIVED THE NEGLIGENCE PER SE ARGUMENT

Other than mentioning negligence *per se* in the list of the claims presented in their Complaints (Appellants' Opening Brief pp. 12, 13, 16), Plaintiffs failed to make any argument regarding the applicability of a negligence *per se* theory—that Ms. Kuciemba suffered injury from an occurrence of the nature which the SF Order was designed to prevent, or that she was one of a class of persons for whose protection the SF Order was adopted. Consequently, negligence *per se* was not discussed in Defendant's Answering Brief.

It was not until Plaintiffs' Reply Brief that they argued for the first time "that the specific terms of the San Francisco Health Order set the standard of care for purposes of negligence *per se*." (Appellants' Reply Brief p. 20) Yet even then, Plaintiffs failed to make any argument that Ms. Kuciemba

suffered an injury from an occurrence which the SF Order was designed to prevent, or that she was one of a class of persons for whose protection the SF Order was adopted.

Therefore, Plaintiffs have waived any argument related to negligence *per se*. “To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered.” (*Neighbors v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8; See also, *Greystone Homes, Inc. v. Midtec* (2008) 168 Cal.App.4th 1194, 1228, fn. 19 [Appellant cannot raise recovery on a negligence-based theory for the first time in reply brief].)

Having recognized that negligence *per se* was an issue by including it among the claims presented by their pleadings, Plaintiffs cannot establish any good reason why the issue was not even mentioned in their Opening Brief. Likewise, reference in an amicus brief to a waived argument does not cure the prejudice the new issue discussion causes the respondent. “[A]n amicus curiae accepts the case as he finds it and may not ‘launch out upon a juridical expedition of its own unrelated to the actual appellate record.’” (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12.)

### **III. CONCLUSION**

Amicus is silent as to any other basis upon which to establish a duty other than negligence *per se*. As established in *Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204, the *Rowland* factors do not come into play unless a duty has already been established. For this reason, the Court should disregard CAOC’s amicus curiae brief.

Dated: November 14, 2022

**HINSHAW & CULBERTSON LLP**

By: /s/ William Bogdan

William Bogdan

Attorneys for Defendant-Respondent

VICTORY WOODWORKS, INC., a Nevada

Corporation

**CERTIFICATE OF COMPLIANCE**

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Respondent is produced using 13-point Century Schoolbook type including footnotes and contains approximately 569 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 14, 2022

**HINSHAW & CULBERTSON LLP**

By:  /s/ William Bogdan

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Corporation

STATE OF CALIFORNIA  
Supreme Court of California

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