No. S274191

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CORBY KUCIEMBA, ET AL.
Plaintiffs/Petitioners,

v.

VICTORY WOODWORKS, INC.
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

ANSWERING BRIEF OF PLAINTIFFS-PETITIONERS TO AMICUS CURIAE BRIEFS IN SUPPORT OF DEFENDANT-RESPONDENT VICTORY WOODWORKS, INC.

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I. INTRODUCTION

Defendant's *amicus curiae* represent numerous industry groups, all of which are intent on seeing this case dismissed. *Amici* generally restate Defendant's meritless arguments and seek to distract this Court from the wrongful actions committed by Defendant against Plaintiff during the pre-vaccination height of the COVID pandemic.

First, *amici* argue that Plaintiffs must initially prove the existence of a "special relationship" before this Court can consider the traditional *Rowland* factors. This additional requirement only applies in "duty to protect cases", *e.g.* where the plaintiff was intentionally harmed by the actions of a third party and the defendant did nothing. The problem with *amici*'s argument is that they completely misconstrue the facts of this case to arrive at their desired result. Under *amici*'s retelling of the facts, Mrs. Kuciemba is suing Defendant because it failed to "protect" Mrs. Kuciemba from getting infected by Mr. Kuciemba. On the contrary, Mrs. Kuciemba is suing Defendant because of its negligent

failure to follow the binding Health Order, which resulted in her life-threatening COVID illness.

Second, *amici* argue that the *Rowland* factors necessitate against finding a duty of care in this case. Plaintiffs address three specific factors raised by *amici*:

(a) *Foreseeability*: *Amici* argue that "COVID is everywhere", means that Plaintiffs will never prove that Defendant was responsible for causing Mrs. Kuciemba's infection. Plaintiffs address this argument with the facts (which must be taken as true at this stage of the litigation) as well as scientific studies that show a higher risk of exposure to construction workers overall. Foreseeability, the most important duty factor, is easily met in this case.

(b) *Moral Blame: Amici* argue that it would be an injustice to sue "heroic" essential businesses that continued to work during the pandemic. Plaintiffs do not dispute the great sacrifices that essential workers and businesses performed during the early days of the pandemic. Plaintiffs *do* take issue with a Defendant who hid under the cloak of "essential business" and then proceeded to flout mandatory health orders. Such

actions are morally blameworthy.

(c) *Financial burden:* Defendant's *amici* claim that if this case proceeds, that it would result in a wave of litigation that would drown an untold number of businesses. These arguments are trotted out every time this Court hears a case of significance. This Court has continued to establish workable solutions that balance the needs of injured persons and the business community. There is no reason it cannot do so in this case. Defendant's *amici* tried and failed to persuade the Legislature to bar these kinds of cases through legislation. Having failed with the Legislature, *amici* would like a second bite at the apple and have this Court legislate.

Third, *amici* argue that the Health Order cannot serve as the basis of a *negligence per se* claim; but this argument makes no sense given that the Health Order clearly is intended to protect vulnerable individuals like Mrs. Kuciemba.

Finally, *amici*'s arguments regarding Workers' Compensation exclusivity largely mirror Defendant's position. We have briefed the Workers' Compensation issue at length in our Opening and Reply briefs. This Court should not consider the arguments raised by *amicus*

curiae See's Candies, Inc., which has previously asserted, and lost, this argument three times.

Plaintiffs respectfully request that this Court disregard the arguments of Defendant's *amici*.

II. ARGUMENT

A. *Amici* incorrectly assert that Plaintiffs must demonstrate the existence of a special relationship.

As described at length in Plaintiffs' Opening and Reply briefs, Defendant owed Mrs. Kuciemba a *duty of care* pursuant to *Civ. Code* § 1714(a), which states: "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 *standard of care* is set by the detailed requirements of the San Francisco Health Order.[1] Plaintiffs allege that Defendant's affirmative acts were

[1] Plaintiffs' *amicus curiae*, the Consumer Attorneys of California ("CAOC"), persuasively argues that the Health Order itself imposes a duty of care. In its response to the CAOC amicus brief, Defendant claims that Plaintiff "failed to make any argument regarding the applicability of a negligence *per se* theory" (Defendant's Answer to CAOC Brief p.4).

Defendant's argument is confusing. Plaintiffs' original complaint contained a negligence *per se* cause of action, and Plaintiffs' counsel explained at oral argument that Plaintiffs intend to pursue the negligence *per se* theory. (ER-135). The trial court noted that

violations of the Health Order and that Defendant's actions were a substantial factor in causing Mrs. Kuciemba's infection. Defendant's general duty of care in a "take home COVID case" should only extend as far as individuals who reside within the same household. In ***Kesner v. Superior Court*** (2016) 1 Cal. 5th 1132, this Court relied on the *Rowland* factors to impose the same logical, commonsense limitations on the general duty of care in an asbestos "take home" case.

Not surprisingly, *amici* seek to distinguish *Kesner* and its application of the *Rowland* factors. *Amici* mischaracterize the facts so that this case could be framed as a "no duty to protect" case. According to *amici's* flawed view of the facts, Mrs. Kuciemba was infected with COVID due to the actions of a "third party" (Mr. Kuciemba) while Defendant stood by and did nothing to protect Mrs. Kuciemba from becoming infected. Therefore, according to *amici*, the two-step duty analysis in *Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204 must apply.

Amici cannot rewrite the facts of this case to fit their argument. Plaintiffs' First Amended Complaint alleges that Defendant's

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negligence *per se* went to breach, not to duty itself. (ER-135). Since the case was dismissed on no duty grounds, the issue of breach of duty was not before the Ninth Circuit.

affirmative misconduct, i.e. commingling a pool of COVID infected Mountain View employees with Mr. Kuciemba's San Francisco work crew, as well as other violations of the San Francisco Health Order, resulted in Mr. Kuciemba's COVID infection. Mr. Kuciemba contracted the virus as a result and then carried it home to Mrs. Kuciemba. (ER-155-165, 157) Thus, because Defendant's actions "created a risk of harm to the plaintiff", Defendant owed Mrs. Kuciemba, at minimum, an ordinary duty of reasonable care. *Brown*, 11 Cal. 5th at 214.

As discussed in Plaintiffs' Reply brief, this case is far different from the typical the "duty to protect" factual scenario where a third party's affirmative/intentional conduct directly results in the plaintiff's harm. The *Brown* analysis does not apply to a case where the defendant's affirmative misconduct creates a risk of harm to the plaintiff. As a result, this Court only needs to perform a *Rowland* analysis. Under the *Rowland* analysis, the Court should determine that Defendant owes an ordinary duty of care pursuant to *Civ. Code* § 1714(a), but for public policy reasons, the ordinary duty of care only extends as far as an employee's household members.

B. ***Amici's*** **analysis of the** ***Rowland*** **factors is flawed because they downplay key factors such as**

foreseeability and moral blame while exaggerating the burden on potential Defendants.

Amici argue that the *Rowland* factors weigh in their favor. Many of the *amici*'s arguments overlap, so we address *amici*'s arguments broadly.

1. *Amici* argue that the foreseeability factors favor Defendant because "Covid is everywhere", but this argument misstates the science and the facts of Plaintiffs' complaint.

Amici generally argue that the foreseeability factors weigh against Plaintiffs. The general thrust of *amici's* argument is that because it is impossible for a worker to know exactly where they were infected with COVID, that certain factors such as foreseeability and the "closeness of the connection" between the Defendant's conduct and the Plaintiff's harm cannot be established.

For example, *amicus curiae* Construction Employers' Association ("CEA") argues that it is "just as "foreseeable" that an individual will contract COVID-19 in any garden-variety interaction with another person, whether at home or out in public, as it is that a person will get COVID-19 at work and bring the illness home." (CEA Brief p. 16) *Amicus Curiae* U.S. Chamber of Commerce et al. argues that "unlike asbestos fibers, COVID-19 is *everywhere*, making it

impossible for an infected employee to determine whether she contracted the disease while riding the bus, shopping for groceries, getting a haircut, having dinner at a friend's house, or working at her place of business." (U.S. Chamber of Commerce Brief p. 31)

This Court has addressed these types of arguments before.

> [A]s to foreseeability, ... the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed.... For purposes of duty analysis, foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct. ... [I]t is settled that what is required to be foreseeable is the general character of the event or harm—e.g., being struck by a car while standing in a phone booth—not its precise nature or manner of occurrence.
>
> *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, 1145 (internal citations and quotation marks omitted, emphasis in original).

The problem for *amici* is that they are trying to improperly argue causation as part of the duty analysis. "Foreseeability with respect to the analysis of duty must be distinguished from foreseeability in the context of determining negligence (i.e., breach of

duty) or causation. The failure to distinguish the variety of roles played by the concept of foreseeability in tort has caused confusion. . . [T]he question of foreseeability in a "duty" context is a limited one for the court, and readily contrasted with the fact-specific foreseeability questions bearing on negligence (breach of duty) and proximate causation posed to the jury or trier of fact. . . . [F]oreseeability in evaluating negligence and causation requires a "more focused, fact-specific" inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct." *Laabs v. S. California Edison Co.* (2009) 175 Cal. App. 4th 1260, 1272–73 (internal citations omitted).

Thus, the key question is whether it is reasonably foreseeable that a Defendant's failure to follow a binding health order would result in its workers becoming exposed to COVID. The answer is yes. *The district court has already determined that Defendant's conduct was foreseeable.*

Amici also ignore that the reason the Health Order existed was because of the *foreseeable risk of infections occurring at the workplace*. Scientific studies of workplace COVID infections have borne this conclusion out. "Over one year into the COVID-19 pandemic,

workplace settings remain a high-risk environment for SARS-CoV-2 outbreaks, presenting great risk to the health and well-being of employees, their families, and surrounding communities."[2] Construction workers are particularly at risk. "The U.S. construction sector has been adversely impacted by the COVID-19 pandemic. For instance, in the early stage of COVID-19 pandemic in 2020, a significant number of construction workers reportedly tested positive for COVID-19, and the risk of COVID-19 infections among construction workers were about *five time*[s] more likely to be hospitalized as a result of COVID-19 then workers in other industries."[3] (emphasis in original). This makes sense given that construction sites "are a melting pot" of various workers who "often must, work together at the same time in the same confined spaces to ensure the work is coordinated" and performed safely. (CEA Brief, p. 22).

Prior to January 2021, the California Department of Public Health reported a total of 108 outbreaks and 1,319 cases in the

[2] *COVID-19 Prevention and Control Measures in Workplace Settings: A Rapid Review and Meta-Analysis,* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8345343/

[3] *Safety and Health Implications of COVID-19 on the United States Construction Industry*, https://www.cdc.gov/niosh/construction/pdfs/safety-and-health-implications-of-covid-19-on-the-united-states-construction-industry_choi-and-staley-2021.pdf

construction industry.[4] An analysis of COVID outbreaks between January 21, 2020-June 30, 2020 in Ontario, Canada noted that the construction industry itself had 12 outbreaks or 6% of the overall number of outbreaks in the province.[5] In short, it is highly foreseeable that Mr. Kuciemba was *more likely* infected at work, than at some other location, when the employer failed to follow mandatory health orders to protect its workers from COVID.

As this Court noted in *Kesner*, there was a scientific debate about the risks of take-home asbestos during the relevant timeframe of the case. But the plaintiffs were not required to prove a scientific consensus to establish foreseeability in the context of the duty analysis. *Kesner*, 1 Cal. 5th at 1147-1148. The fact that "[t]he risks of exposure that prompted OSHA to require precautions against take-home exposure were sufficient to provide notice of the reasonable foreseeability of such harm." *Id.* at 1148. The same reasoning applies to the Health Order in this case.

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[4] *COVID-19 Outbreaks by Month of Onset*, https://data.chhs.ca.gov/dataset/covid-19-outbreak-data/resource/cf208dba-89a2-4278-8b47-bfaf98317275 (at p. 2)

[5] *COVID-19 Workplace Outbreaks by Industry Sector and Their Associated Household Transmission, Ontario, Canada, January to June 2020*, https://journals.lww.com/joem/fulltext/2021/07000/covid_19_workplace_outbreaks_by_industry_sector.5.aspx

Amici's argument that Mr. Kuciemba could have been infected anywhere also does not reflect the reality on the ground in summer 2020. For example, according to the Health Order restaurants were "delivery or carry out" only (ER-064). Bars and nightclubs were closed. (ER-054) Even outdoor activities, which had recently become permissible, were restricted. (*E.g.* ER-061, prohibiting use of certain outdoor recreational areas and facilities with high-touch equipment or that encourage gathering). All Plaintiffs need to establish is that, more likely than not, that Mr. Kuciemba was infected at work. Given the facts of this case, i.e. the presence of infected workers at the San Francisco jobsite, and the higher risk of exposure for construction workers in general, a jury could find that, more likely than not, that Mr. Kuciemba was infected at work. There is no evidence of an "intervening force", i.e. another source of infection, and at the Motion to Dismiss stage, the Court must assume that the facts alleged are true.

2. ***Amici* argue that Defendant is not morally blameworthy because it was performing an essential function during the pandemic, but this argument ignores that Plaintiffs' allege Defendant willfully flouted the Health Order.**

The CEA argues that Defendant cannot be held morally blameworthy because it was an essential business. "It contradicts logic and common sense to contend that an employer performing such vital

and necessary services is somehow morally blameworthy in doing so." (CEA Brief p. 26-27) CEA also argues that "while it may not excuse an employer's noncompliance, an employer is not morally to blame for making a mistake in complying with one of many safety recommendations that are the first of their kind, coming from different sources, constantly changing, and, in the case of Victory, were in place for less than two months by the time Ms. Kuciemba's spouse started work." (CEA Brief p. 26).

Amici misreads the allegations in the complaint. The First Amended Complaint alleges that Defendant knew or should have known that its employees at a Mountain View jobsite became infected, and/or exposed to persons infected with COVID, but knowingly transferred these workers to a San Francisco jobsite without requiring that the workers quarantine first, thus commingling its Mountain View and San Francisco workers. (ER-154-165) Defendant transferred these infected workers even though it was aware of a binding San Francisco County Health Order (ER-052-083), CDC Guidelines, and other regulations, that required and/or called for quarantining, mandatory screening protocols, having workers stay home if they are feeling sick or were exposed to infected individuals, and taking specific COVID

precautions at work. (ER-154-165). We are all grateful for the sacrifices performed by essential workers, such as Mr. Kuciemba, during the pandemic. But tortfeasors cannot simply hide under the cloak of "essential business" and then engage in willful noncompliance with a binding Health Order that put their essential workers in harm's way. Such posturing is hypocritical. There is nothing heroic about a business putting essential workers in harm's way so that it can make more money.

3. ***Amici* argue that permitting this case to go forward will create an "ocean" of claims, but this argument ignores Plaintiffs' proposed commonsense limitation on duty.**

Finally, *amici* predictably argue that allowing this case to proceed will open the metaphorical floodgates of litigation and drown employers in an "ocean" of claims. (U.S. Chamber of Commerce brief, p. 39). "[We] would be asking employers to control viruses that are often undetectable, widespread, instantaneously transmitted through normal human interaction, and easily brought into the workplace by third-party individuals (*e.g.*, another employer's employees) through no fault of an employer." (CEA brief p. 32) As discussed in Plaintiffs' Reply brief, such apocalyptic predictions are par for the course from

the business industry. Despite the typical predictions of doom and gloom, this Court has consistently fashioned workable solutions to balance the rights of injured plaintiffs against business needs.

The *Kesner* holding provides this Court with a template, which is to limit the extent of a duty owed to members of an employee's household. The U.S. Chamber of Commerce contends this limitation is not sufficient "given that many employees live in dorms, group homes, multi-generation living situations, and crowded apartments." (U.S. Chamber of Commerce brief p. 40). But the Chamber offers no alternative solution other than these claims must be summarily dismissed. Trial courts and/or the Legislature may need to draw additional lines and jurors may need to weigh facts to determine if an infected person is part of a "household". But such fact finding happens everyday in our court system. The industry's concern about litigation cost, standing alone, does not justify holding that Defendant owed no duty to Mrs. Kuciemba. *Kesner,* 1 Cal. 5th at 1152.

Business interests unsuccessfully made the same arguments with the Legislature. The industry tried, and failed, to pass a "COVID liability shield" in California. Proposed bill AB1313 stated: "A business shall not be liable for an injury or illness to a person due to

coronavirus (COVID-19) based on a claim that the person contracted COVID-19 while at that business, or due to the actions of that business, whether direct or indirect, if the business has substantially complied with all applicable state and local health laws, regulations, and protocols."[6] While *amici* acknowledge that when "there is a necessary balancing of interests at stake between employers, the household members of their employees and the complex system of workers' compensation, the Legislature is the most appropriate forum for doing so" (Brief for Civil Justice Association of California ("CJAC") at p. 43), they fail to acknowledge that they have tried to persuade that body to pass the "balancing" that the industry advocated for. Having failed to persuade the Legislature to enact a COVID shield law, they are trying to get this Court to create such a shield.

C. ***Amici*** **erroneously claim that the San Francisco Health Order cannot be used as the basis for a negligence *per se* claim.**

Amicus Curiae CJAC argues that the Health Order cannot be the basis for a negligence *per se* claim because "neither the ordinance nor the regulations relied upon discuss the responsibilities of essential

6 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1313

service employers (of which Victory categorically belongs) to an employee's *household members*." (CJAC brief at p. 28) CJAC cites no authority for this argument. In contrast, Courts have held that a plaintiff may rely on Cal-OSHA regulations to use as the standard of care for purposes of negligence *per se*. Such Cal-OSHA regulations apply to the public but do not necessarily state the "responsibilities" a contractor owe to the public. *See, e.g. Elsner v. Uveges* (2004) 34 Cal. 4th 915; *Strouse v. Webcor Constr., L.P.* (2019) 34 Cal. App. 5th 703, 716.

CJAC relies on *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal. 4th 1066, but that case is easily distinguishable. In *Randi W.* an administrative employee assaulted a public-school student. The student sued the employee's former employers who had recommended that the employee for the job. The plaintiff brought a negligence *per se* claim on the grounds that the former employers were under a statutory duty to report child sexual abuse. This Court rejected that claim on statutory interpretation grounds, noting that the statute in question only applied to "children in the custodial care of the person charged with reporting the abuse, and not all children who may at some future time be abused by the same offender." *Id.* at 1087.

Unlike the statute in *Randi W.*, the text of the Health Order shows it is clearly intended to benefit the public at large, which includes older, vulnerable individuals like Mrs. Kuciemba:

> Our collective effort has had a positive impact. But the danger to the health and welfare of all continues. As of the date of this Order, infection and hospitalization rates have not shown sustained decrease in all areas. Indeed, while hospitalizations for COVID-19 infected patients in San Francisco have been stable for several weeks, they have not shown a significant decrease over a 14-day period as health experts recommend before substantial easing of shelter in place restrictions. Also, while the search continues, there is not yet an effective treatment or cure for the disease. The vast majority of the population remains susceptible to infection. Testing ability, while improving, remains constrained, and San Francisco's health care system remains susceptible to being overwhelmed. The health officers of the coordinating jurisdictions are monitoring key indicators described in this Order, and several of those indicators do not yet support ending the protective requirements. Separately the health officers are issuing a document with benchmarks for those indicators they wish to see to further ease shelter in place restrictions. So, while San Francisco is working on building up its testing, case finding, case investigation, and contact tracing capacity, and its means to protect vulnerable populations and address outbreaks, it is imperative that San Francisco extend the duration of its stay-at-home order.
>
> (ER-052-053)

Thus, Mrs. Kuciemba can appropriately use the Health Order to set the standard of care for purposes of *negligence per se*.

D. ***Amici* do not offer any meaningful additional argument regarding Workers' Compensation exclusivity.**

Amici argue that Mrs. Kuciemba's claims should be barred by the exclusive remedy of Workers' Compensation. *Amici*'s arguments are not materially different from the arguments raised by Defendant in prior briefing and Plaintiffs have extensively briefed the Workers' Compensation issues in their Opening and Reply briefs.

Notably, *amicus curiae* See's Candies, Inc. ("*Amicus* See's Candies") urges this Court to reject *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal. App. 5th 66 (rev. denied April 13, 2022). As discussed at length in Plaintiffs' prior briefing, this case correctly applied the derivative injury doctrine in the context of a COVID "take home" case. *Amicus* See's Candies is attempting to relitigate an argument that it lost three times: first, at the trial court, again at the appellate court level, and finally, when this Court denied review of the *See's Candies* decision on April 13, 2022. *Amicus* See's Candies' arguments hold no weight.

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III. CONCLUSION

Plaintiffs respectfully request that this Court disregard the arguments set forth by Defendant's *amici* and allow Plaintiffs to pursue this case before a jury of their peers.

Respectfully Submitted,

Dated: November 16, 2022

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CERTIFICATE OF COMPLIANCE WITH CRC 8.204(c)(1)

I hereby certify that Plaintiffs-Petitioners' Opening Brief has been prepared using proportionally double-spaced 14-point Times New Roman typeface. According to the Microsoft Office 365/Microsoft Word processing software, this brief contains 4,086 words.

Dated: November 16, 2022

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court on November 16, 2022 through the TrueFiling system.

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Dated: November 16, 2022

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STATE OF CALIFORNIA
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