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May 11, 2022

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Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
The Supreme Court of California
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Re: *Kuciemba v. Victory Woodworks, Inc.*, Cal. S. Ct. No. S274191 (on request to answer certified questions filed by the U.S. Court of Appeals for the Ninth Circuit in *Kuciemba v. Victory Woodworks, Inc.*, 9th Cir. No. 21-15963)

To the Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rules of Court, rule 8.548(e), non-party See's Candies, Inc. respectfully submits that the Court should decline the questions certified by the U.S. Court of Appeals for the Ninth Circuit because the second of those issues, relating to whether an employer has a duty in tort to prevent take home illnesses suffered by non-employees, is the subject of a persuasive and case-dispositive decision of the California Court of Appeal which was not cited to or considered by the Ninth Circuit.[1]

[1] See's Candies was petitioner in *See's Candies, Inc. v. Superior Court of California for County of Los Angeles* (2021) 73 Cal.App.5th 66, review den. Apr. 13, 2022, a case cited by the Ninth Circuit in its certification request. That decision addressed the first issue certified by the Ninth Circuit relating to the derivative injury doctrine but not the second question relating to duty, noting: "We express no opinion on the question of duty apart from that it would appear worthy of exploration." (*Id*. at p. 94.)

The Ninth Circuit has asked this Court to resolve two questions: (1) "If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?" and (2) "Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?" Because the California Court of Appeal has persuasively resolved the second question and held that employers do not owe a duty to prevent the spread of communicable illness to members of an employee's household, the first question is moot and there is no need to certify either question.

Specifically, in *City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, rehg. den. Apr. 5, 2021, review den. June 30, 2021 (*City of Los Angeles*), the Second District Court of Appeal considered whether this Court's decision in *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 (*Kesner*) imposes a duty of care on employers to prevent the spread of communicable illnesses to an employee's family members. *Kesner* was not a "take home" disease case; instead, this Court imposed a duty of care in the unique situation in which an employee working for a manufacturer making commercial use of asbestos carries home asbestos fibers on their person or clothing, and then a non-employee household member is injured as a result of ingesting those fibers. (*Id.* at p. 1141.) The Court of Appeal in *City of Los Angeles* held that California law, and *Kesner* in particular, do not impose a similar duty of care on an employer to prevent the spread of communicable illnesses to an employee's family members.

In *City of Los Angeles*, the plaintiff and real party in interest (Wong) was the spouse of a city employee (Chen). Wong alleged that she caught typhus from Chen after he had first contracted typhus in his workplace as the result of unsanitary worksite conditions that the employer had failed to abate, despite direction to do so from Cal-OSHA. (*City of Los Angeles*, *supra*, 62 Cal.App.5th at p. 134.) Wong sued her spouse's employer under Government Code section 835 and more generally under *Kesner*, alleging that "the City owed her a duty of care for 'take-home' exposure to typhus." (*Id*. at pp. 141–142.)

The Court of Appeal rejected both theories of liability. First, the court held that the employer had no duty of care under section 835, and that it was entitled to statutory immunity for that claim. (*City of Los Angeles*, *supra*, 62 Cal.App.5th at pp. 141, 149.) Second, and most relevant here, the court rejected Wong's claim that, under *Kesner*, the employer owed her a common law "duty of care for 'take home' exposure to typhus." (*Id.* at pp. 141–144.) Though the court reached this conclusion in part because the employer was a public entity, it also independently held that because Wong had not alleged she was exposed to conditions of the property brought home by Chen, but rather contracted the illness *from him*, the employer could not be held liable in tort:

> In addition, the Supreme Court in *Kesner* pointed out that the plaintiffs' liability allegations were not premised on the wife's contact with the husband, but instead on the wife's contact with the hazardous condition from the defendant's premises that had been carried home on the husband's clothing. Here, by

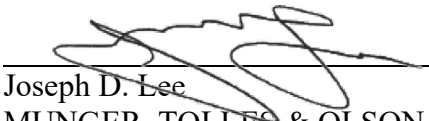
> contrast, Wong has not alleged that Chen brought home infected fleas or rodents, thus exposing Wong to the conditions of the property. Instead, Wong alleges that she contracted typhus from Chen, months after Chen first became ill. Thus, the basis for premises liability the Supreme Court relied upon in *Kesner*—that a private premises owner may be held liable for hazardous substances that have escaped the property and caused harm offsite—is not applicable here.

(*Id.* at pp. 143–144.) As the Court of Appeal recognized, *Kesner* emphasized this same distinction when it held that "'[i]t is not Lynne's [wife's] contact with *Mike* [asbestos worker] that allegedly caused her mesothelioma, but rather Lynne's contact with *asbestos fibers that BNSF used on its property*.'" (*Id.* at p. 142, quoting *Kesner*, *supra*, 1 Cal.5th at p. 1159, italics in *Kesner*.)

The *City of Los Angeles* court held that "because Wong had no contact with the subject property and she has not alleged exposure to any condition of the subject property, Wong has not alleged facts to support a finding that the City had a duty to her." (*City of Los Angeles*, *supra*, 62 Cal.App.5th at p. 144.) The Court of Appeal thus issued a writ of mandate directing that the defendant's demurrer be sustained. (*Id*. at pp. 144, 149–150.)

The Ninth Circuit's certification order addressed *Kesner*, but not *City of Los Angeles*, a case that came down after the District Court's ruling on the defendant's initial motion to dismiss and that the parties did not cite in their appellate briefs nor raise at the Ninth Circuit oral argument. *City of Los Angeles* resolves the second question certified by the Ninth Circuit, establishing that the employer did not owe a duty of care to prevent the spread of communicable disease to members of the employee's household, and this conclusion in turn moots the first issue certified by the Ninth Circuit relating to Worker's Compensation Act preemption. See's Candies respectfully submits that this Court should therefore decline the Ninth Circuit's certification request with citation to the *City of Los Angeles* case, as it has done in similar situations in which existing California appellate precedent sufficed to guide the Ninth Circuit. (See, e.g., *Patterson v. City of Yuba City* (review den. May 9, 2018, S247461); see also *Patterson v. City of Yuba City* (9th Cir. 2018) 748 F. App'x 120, 121, fn. 1 [noting that this Court denied the Ninth Circuit's certification request and relying on the Court of Appeal precedent cited by this Court "as a guide for how the California Supreme Court would decide this case[.]"].)

Very truly yours,



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2022, I electronically filed the foregoing **LETTER** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mark Thomas Freeman Mark Lain Venardi VENARDI ZURADA LLP 101 Ygnacio Valley Rd., Suite 100 Walnut Creek, CA 94596	Attorneys for Plaintiffs and Appellants Corby Kuciemba and Robert Kuciemba
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I also certify the document and a copy of the Notice of Electronic Filing was served via U.S. Mail on the following non-CM/ECF participants:

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/s/Joseph Lee
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