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

OPENING BRIEF FOR PLAINTIFF'S-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. QUESTIONS PRESENTED FOR REVIEW

This Court accepted certification of two questions by the Ninth Circuit regarding the scope of California Workers' Compensation statutes and general tort liability principles in the context of the COVID-19 pandemic. The Ninth Circuit framed the certified questions as follows:

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?

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?

II. INTRODUCTION

Plaintiffs-Petitioners Corby Kuciemba ("Mrs. Kuciemba") and her husband Robert Kuciemba ("Mr. Kuciemba", collectively referred to as "Plaintiffs") allege that Mrs. Kuciemba contracted a severe case of COVID-19 ("COVID") due to the negligence of Mr. Kuciemba's

former employer, Defendant-Respondent Victory Woodworks, Inc. ("Defendant"). Defendant violated a COVID Health Order of the City and County of San Francisco (the "Health Order"), CDC Guidelines, and other regulations, by moving workers exposed to COVID at its Mountain View worksite to its San Francisco worksite without quarantining them, and thereafter by failing to take other day-to-day COVID safety precautions at that San Francisco worksite, as required by the Health Order. Defendant knew that its neglect and violation of the Health Order would expose not only the employees, but also members of each employee's household, to a highly contagious and dangerous virus in COVID, for which there was not yet a vaccine. Defendant still failed to take basic precautions. Defendant caused Mr. Kuciemba to contract COVID while at work at Defendant's location in San Francisco by failing to follow the Health Order and the CDC Guidance. Mr. Kuciemba then brought the virus home from work and unknowingly infected his wife Mrs. Kuciemba. Mrs. Kuciemba was infected either through "direct transmission" (from exposure to her infected husband) or "indirect transmission" (coming into contact with her husband's clothing or personal effects from, for example, doing laundry).

Mrs. Kuciemba became very ill, spent many weeks on a ventilator, required extended hospital treatment, and still suffers from significant aftereffects of COVID. This case involves the direct injury to Mrs. Kuciemba from being contaminated by the virus, and for Mr. Kuciemba's derivative damages arising from the direct injury to his wife.

Defendant moved to dismiss Plaintiff's First Amended Complaint on the grounds that (a) Mrs. Kuciemba's claims were barred by the exclusive remedy of Workers' Compensation and (b) that Defendant owed no duty to Mrs. Kuciemba. The district court granted Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint without leave to amend (Excerpt of Record ("ER") ER-004-006).[1] Plaintiffs timely appealed to the Ninth Circuit, which certified two questions to this Court. Plaintiffs respectfully disagree with the district court's ruling which misapplied California law.

Plaintiffs summarize their position regarding each Certified Question below:

Certified Question No. 1: If an employee contracts COVID-19 at

[1] All citations to the record refer to Plaintiffs-Appellants' Excerpts of Record filed with the Ninth Circuit. The Ninth Circuit filed the Excerpts of Record with this Court on April 21, 2022.

his workplace and brings the virus home to his [non-employee] spouse, does California's derivative injury doctrine bar the spouse's claim against the employer? Plaintiffs respectfully request that this Court answer "No" to the first Certified Question.

The district court held that Mrs. Kuciemba's negligence claim based on "direct transmission" of COVID was barred based on the exclusive remedy of Workers' Compensation. In summary, the district court held that because Mrs. Kuciemba's injuries were factually caused by Mr. Kuciemba's exposure to the virus at work, this means that her claims are "derivative" claims (rather than "direct" claims) which are subsumed by the Workers' Compensation system.

This holding does not comport with California law. First, a core tenet of California law is that "[f]or every wrong there is a remedy". *Civ. Code* § 3523. On a fundamental level, Mrs. Kuciemba would be denied any ability to pursue a claim for her own direct personal injuries to her body and mind, even though she has no Workers' Compensation remedy available to her as a non-employee. If this Court were to answer "Yes" to the First Certified Question, Mrs. Kuciemba would be denied a chance to present her case, and would have no civil legal remedy for her significant injuries despite Defendant's failure to

exercise ordinary care by following the Health Order. This would be a terrible result for an innocent person whose body and mind were ravaged by COVID because of Defendant's wrongdoing.

Second, the district court's ruling is contrary to this Court's holding in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991. *Snyder* holds that direct injury claims against an employer by a non-employee family member are not subject to Worker's Compensation. The pregnant mother in *Snyder* inhaled the toxic levels of carbon monoxide at work and then passed that toxic gas through the mother's body to her unborn child who was injured. This Court expressly held in *Snyder* that the direct physical injury to the infant plaintiff (a non-employee) in its mother's womb at work was distinct from the injuries to its mother (the employee), and that it was legally irrelevant that the mother (the employee) was also injured at work. Here, Mrs. Kuciemba is a *non-employee* alleging a direct claim for her *own* physical injuries because of Defendant's negligence. She is not alleging a derivative claim such as loss of consortium, or emotional distress, which would flow from *Mr. Kuciemba*'s injuries.

The district court's error was to equate Mrs. Kuciemba's claims for physical injuries (which under *Snyder* are *not* subject to the

exclusive remedy) in this case with "typical" derivative injury claims by a non-employee spouse (such as wrongful death/emotional distress/loss of consortium claims) based on physical injuries to the employee spouse which are subject to a workers' compensation bar.

Finally, Plaintiffs' position is supported by *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal. App. 5th 66 (review denied, April 13, 2022), the only published case addressing this identical issue. *See's Candies* is compelling because it features nearly identical factual and legal issues and the decision clearly and correctly applied the holding of *Snyder* in the context of the COVID pandemic.

Certified Question No. 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? Plaintiffs respectfully request that this Court answer "Yes" to the Second Certified Question.

The district court ruled that Defendant owed no legal duty to Mrs. Kuciemba. However, it is clear, under this Court's controlling precedent in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, that an employer owes a duty to protect members of the workers' households

from any pathogens that a worker may be exposed to at work. The duty at issue in this case is described in the very detailed Health Order and CDC Guidance. The district court erred by finding no duty exists even though the district court acknowledged that foreseeability, the most important duty factor, favored Plaintiffs. In this brief Plaintiffs provide a detailed analysis of various *Kesner* foreseeability and public policy factors that illustrate why Defendant owed a duty of ordinary care to Mrs. Kuciemba.

This case should be heard on the merits before a jury of Plaintiffs' peers rather than dismissed at the pleading stage leaving Mrs. Kuciemba with no remedy for her injuries. Plaintiffs respectfully request this Court answer "No" to the First Certified Question and "Yes" to the Second Certified Question.

III. STATEMENT OF THE CASE

A. The district court dismissed the Kuciembas' claims with prejudice, without leave to amend.

In this section, Plaintiffs provide an overview of this case's procedural history, with a more detailed discussion below.

This action was filed on October 23, 2020 in the Superior Court of California, County of San Francisco. (ER-154-165). Defendant is a Nevada Corporation. (ER-154). Pursuant to 28 U.S.C. § 1446,

Defendant removed this action to the Northern District of California on December 28, 2020 on the basis of diversity jurisdiction. (ER-170). Defendant filed a Motion to Dismiss on January 4, 2021. (ER-171). Plaintiffs opposed the Motion and the district court heard oral argument on February 12, 2021. (ER-172-173) The district court granted Defendant's Motion with leave to amend on February 22, 2021. (ER-095-096; 173)

Plaintiffs then filed a First Amended Complaint (at times referred to as "FAC") on March 18, 2021. (ER-84-094, 173).

Defendant filed a renewed Motion to Dismiss on April 1, 2021. (ER-174). Plaintiffs opposed this renewed Motion and the district court heard oral argument on May 7, 2021. (ER-174). The district court dismissed the First Amended Complaint with prejudice on May 10, 2021 holding that (1) Mrs. Kuciemba's "direct" transmission claims were barred by the Exclusive Remedy of Workers' Compensation; and (2) her "indirect" claims were dismissed for lack of plausibility and in the alternative, Defendant owed no duty to Mrs. Kuciemba. (ER-004-006, 174-175). Plaintiffs timely appealed the dismissal of the First Amended Complaint on June 3, 2021. (ER-084-094, 173). The Ninth Circuit heard oral argument on March 10, 2022. On April 21, 2022, the

Ninth Circuit certified the two questions quoted above to this Court. This Court granted review on June 22, 2022.

B. Plaintiffs' original complaint alleged claims for negligence based on Defendant's violation of the Health Order. These violations caused Mr. Kuciemba to become infected with COVID. Mr. Kuciemba then "took home" the virus to his non-employee wife, Mrs. Kuciemba, who became severely ill.

Defendant operates construction sites in the State of California. Mr. Kuciemba, husband of Mrs. Corby Kuciemba, worked for Defendant at a San Francisco jobsite from May 6, 2020 to July 10, 2020. (ER-154-165) The 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 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).

These infected workers, who were then permitted to work at the San Francisco worksite without the required quarantine and safety precautions, first caused Mr. Robert Kuciemba to become infected with COVID, and then to unknowingly bring the virus home and infect his wife Mrs. Kuciemba. (ER-155-165, 157).

As a result of Defendant's negligence, Mrs. Kuciemba developed a severe respiratory infection requiring her to stay in the hospital for weeks and requiring her to be kept alive on a respirator. (ER-157). Mrs. Kuciemba seeks damages for her direct non-employee injury claims while Mr. Kuciemba only seeks loss of consortium damages due to his wife's injury claims. (ER-158).

The complaint contained the following causes of action: 1. Negligence; 2. Negligence Per Se; 3. Negligence – Premises Liability; 4. Public Nuisance – Assisting in the Creation of Substantial and Unreasonable Harm to Public Health and Safety that Affects an Entire Community of Considerable Number of Persons; and 5. Loss of Consortium. (ER-154-165).

C. Defendant filed a motion to dismiss the original complaint which was granted by the district court with leave to amend.

Defendant filed a Motion to Dismiss on January 4, 2021. (ER-171) Defendant's Motion primarily argued the following: (1) Plaintiffs' negligence causes of action were barred by the Exclusive Remedy of Workers' Compensation; and (2) Defendant owed no duty to Mrs. Kuciemba. (ER-171) Plaintiffs opposed the Motion, arguing in summary that the (1) the Workers' Compensation exclusivity does not apply to a non-employee spouse who received her own distinct and direct physical injuries; and (2) an analysis of the foreseeability and public policy factors under California law necessitate finding that Defendant owes a Duty to Mrs. Kuciemba. (ER-172). Plaintiffs discuss these arguments at length below.

The district court granted the Motion with leave to amend on February 22, 2021. (ER-095-096). The relevant portions of the District Court's Order are as follows: "[. . .] 2. The First, Second, Third, and Fifth Causes of Action, titled, respectively, "Negligence," "Negligence Per Se," "Negligence – Premises Liability," and "Loss of Consortium," are barred by the exclusive remedy provisions of California's workers' compensation statutes. See Cal. Labor Code §§ 3600, 3602." (ER-095-096).

D. Plaintiffs filed a First Amended Complaint which clarified certain factual allegations and

re-emphasized that Mrs. Kuciemba does not have a Workers' Compensation remedy because she was not employed by Defendant.

Plaintiffs amended their complaint on March 18, 2021 to address issues raised by the district court in its Order and at oral argument. (ER-084-094) The First Amended Complaint ("FAC") re-alleged nearly all of the original complaint's allegations, but also provided several key points of clarification, as well as additional facts that are consistent with the original complaint, the facts, and the law:

(1) The FAC eliminated references to the fact that Mr. Kuciemba himself suffered his own physical injuries from COVID requiring hospitalization. These facts were true at the time the Complaint was filed and remain true. However, Plaintiffs removed these facts in the FAC because as a matter of well-established California law, described in detail below, it is irrelevant that Mr. Kuciemba was injured at all; (ER-084-094)

(2) Pursuant to the Court's Order, the FAC eliminated the Fourth Cause of Action for Public Nuisance;

(3) The FAC cites to CDC publications that describe how asymptomatic persons who suffer no physical injury can still act as a reservoir for COVID. (ER-086);

(4) The FAC explains how COVID can be spread both directly through the transmission of droplets in a person's breath and indirectly from "fomites" (ER-086);

(5) The FAC explained the extreme precautions both Kuciembas had taken to minimize the risk of COVID and explaining why the most likely source of Mrs. Kuciemba's COVID infection was from either direct exposure to Mr. Kuciemba or indirect exposure through his clothing or personal effects, as opposed to some other, unknown point of exposure. (ER-087-089). These specific factual allegations were designed to eliminate the speculative arguments Defendant made in their original Motion to Dismiss regarding possible alternate sources of infection.

(6) The FAC re-affirms that Mrs. Kuciemba is seeking damages for her own personal injuries and that she has no Workers' Compensation remedy. (ER-090-091).

The FAC contained the following causes of action: 1. Negligence; 2. Negligence Per Se; 3. Negligence – Premises Liability; and 4. Loss of Consortium. (ER-090-092)

E. Defendants filed a renewed motion to dismiss which the district court granted without leave to amend.

On April 1, 2021, Defendant filed a Motion to Dismiss the FAC. (ER-174). Defendant again argued that (1) Plaintiffs' negligence causes of action were barred by the Exclusive Remedy of Workers' Compensation; and (2) Defendant owed no duty to Mrs. Kuciemba. Plaintiffs opposed the Motion with the same substantive arguments. (ER-174)

The district court heard oral argument on May 7, 2021. (ER-174) Following oral argument, the district court granted the Motion and dismissed the complaint with prejudice on May 10, 2021. (ER-004-006, 174-175). The relevant portion of the district court's order is as follows:

> "Having read and considered the parties' respective written submissions as well as the arguments of counsel at the above-referenced hearing, the Court, for the reasons stated in detail on the record at said hearing, as well as the hearing conducted February 12, 2021, rules as follows:
>
> 1. To the extent plaintiffs' claims are based on allegations that Corby Kuciemba contracted COVID "through direct contact with" Robert Kuciemba (see FAC ¶ 22), such claims are barred by the exclusive remedy provisions of

> California's workers' compensation statutes and, thus, are subject to dismissal. See Cal. Labor Code §§ 3600, 3602.
>
> 2. To the extent plaintiffs' claims are based on allegations that Corby Kuciemba contracted COVID "indirectly through fomites such as [Robert Kuciemba's] clothing" (see FAC ¶ 22), such claims are subject to dismissal for failure to plead a plausible claim.
>
> 3. To the extent the above-described claims are neither barred by statute nor deemed insufficiently pleaded, such claims are subject to dismissal for the reason that defendant's duty to provide a safe workplace to its employees does not extend to nonemployees who, like Corby Kuciemba, contract a viral infection away from those premises."
>
> (ER-005-006)

Plaintiffs timely appealed from this order. (ER-166-168, 175) The Ninth Circuit heard oral argument on March 10, 2022. On April 21, 2022 the Ninth Circuit certified two questions to this Court pursuant to Rule 8.548(a) of the California Rules of Court. *Kuciemba v. Victory Woodworks, Inc.* (9th Cir. 2022) 31 F. 4th 1268. This Court granted the Ninth Circuit's request on June 22, 2022.

IV. ARGUMENT

A. Mrs. Kuciemba's claims are not barred by the exclusive remedy of Workers' Compensation under the derivative injury doctrine because she is a non-employee who alleges a direct physical injury to her own body caused by Defendant's negligence.

The First Certified Question before this Court is: If an employee contracts COVID at his workplace and brings the virus home to his [non-employee] spouse, does California's derivative injury doctrine bar the spouse's claim against the employer? The answer is "No."

The district court held that Mrs. Kuciemba's "direct transmission" claims are barred by the exclusive remedy of Workers' Compensation. (ER-005-006). Plaintiffs respectfully disagree with the district court's ruling.

The relevant Workers' Compensation statutes, *e.g. Labor Code* §§ 3600-3602 generally bar an employee from litigating a civil action against an employer when the employee suffers a work-related injury. "Based on the statutory language, California courts have held worker's compensation proceedings to be the exclusive remedy for certain third-party claims deemed collateral to or derivative of the employee's injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee's wrongful death, by an employee's spouse for loss of the employee's services or consortium, and for emotional distress suffered by a spouse in witnessing the employee's injuries." *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.

4th 991, 997 (internal citations omitted). This application of Workers' Compensation exclusivity to certain third-party claims is generally referred to as the "derivative injury doctrine." *Id.* at 997.

To determine whether a third party's claim is a "derivative" or "collateral" injury, a Court must first look to whether a claim was legally dependent on the employee's work-related injuries. *Id.* at 999. In *Snyder*, this Court had the opportunity to apply this rule to two factual scenarios: (1) the facts of the case itself and (2) a similar fact pattern in a prior Court of Appeal matter, *Bell v. Macy's California* (1989) 212 Cal. App. 3d 1442 (disapproved by *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991) ("*Bell*").

In the *Bell* case, a "pregnant worker complained, during work, of severe abdominal pain. A nurse provided on premises by the employer misdiagnosed the worker's condition as gas pains and delayed calling for an ambulance. When the mother was finally taken to the hospital, she was found to have suffered a ruptured uterus, and her baby, delivered live by Cesarean section, had suffered consequential injuries including brain damage. Evidence accepted by the appellate court for purposes of the appeal from summary judgment in favor of the employer showed that the nurse's delay in calling an

ambulance caused a significant portion of the fetal injuries." *Snyder*, 16 Cal. 4th 991 at 997. The appellate court concluded that the derivative injury doctrine applied because "the child's prenatal injury was a collateral consequence of the treatment of [the mother]". *Id.* at 998.

However, this Court in *Snyder* rejected the Court of Appeal's analytical approach in *Bell* and explained how the fetus in *Bell* had suffered a distinct injury from any injuries its mother had suffered:

> **"The question the *Bell* court should have asked, therefore, was not whether [the daughter's] injuries resulted from the employer's negligent treatment of [the mother] or from "some condition affecting" [the mother] but, rather, whether [the daughter's] claim was legally dependent on [the mother's] work-related *injuries*.** From the appellate opinion, no evidence of such dependence appears. Although the fetal injuries resulted in part from the mother's ruptured uterus, the appellate court and the parties all assumed that "[the mother's] ruptured uterus was unrelated to her employment save only that it occurred during working hours and on Macy's premises." As to the nurse's delay in summoning an ambulance, the majority's recitation of the evidence indicates simply that the delay "caused significant injury to [the daughter]" ; **nothing in the majority opinion suggests [the daughter's] claim depended conceptually on injuries the delay caused to [the mother].** The majority, in other words, says nothing to contradict the dissent's assertion that "the nurse's negligence caused an injury to [the daughter] which was not dependent on or derived from any injury to the mother." *Id.* at 999 (internal citations omitted, emphasis in

original).

[. . .]

"Whether a toxin or other agent will cause congenital defects in the developing embryo or fetus depends heavily not on whether the mother is herself injured, but on the exact stage of the embryo or fetus's development at the time of exposure, as well as on the degree to which maternal exposure results in embryonic or fetal exposure. (See 7 Encyclopedia of Human Biology (1991) Human Teratology, pp. 411–418.) **Even when the mother *is* injured . . . the derivative injury rule does not apply unless the child's claim can be considered merely collateral to the mother's work-related injury, a conclusion that rests on the *legal* or *logical* basis of the claim rather than on the biological cause of the fetal injury**."

[…]

As we have emphasized above, however, the derivative injury doctrine does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses. [The daughter] does not claim any damages for injury to [the mother]. Nor does the complaint demonstrate [the daughter]'s own recovery is legally dependent on injuries suffered by [the mother]. For that reason, sections 3600 through 3602 did not defeat [the daughter]'s cause of action for her own injuries (the first cause of action) or her parents' claim for consequential losses due to [the daughter]'s injuries (the third cause of action)."

Id. at 1000. (Emphasis added).

This Court thus drew a line from the employer's negligence to

the child's separate, independent injuries and this Court found that for purposes of the direct injuries to the baby it was logically and legally irrelevant whether the mother was injured as well. As a result, the *Snyder* Court held that the child's claims were not subject to Workers' Compensation exclusivity.

With this analytical framework in mind, the *Snyder* Court then addressed the facts of the case before it. In *Snyder*, a minor child alleged that she suffered injuries because her mother was negligently exposed to toxic carbon monoxide at work, while pregnant with the child, and that this toxin passed through the mother to the child. *Snyder*, 16 Cal. 4th at 994. The child alleged a direct claim for injuries against the employer. *Id*. at 995. The trial court sustained a demurrer on Worker's Compensation grounds but the Court of Appeal reversed, holding that the daughter's injuries were "the result of her own exposure to toxic levels of carbon monoxide" and therefore the exclusive remedy of Worker's Compensation did not apply. *Id*. at 995. This Court affirmed the judgment of the Court of Appeal, holding that the child's separate injury claims were not barred by Workers' Compensation and that she could proceed against employer on her personal injury claims. *Id.* at 1008. In its holding, this Court easily distinguished between derivative

injury cases, and direct claims, by non-employee family members:

> **"[Employer's] demurrer should have been sustained only if the facts alleged in the complaint showed either that [the child] was seeking damages for [mother's] work-related injuries or that [the child's] claim necessarily depended on [the mother's] injuries.** (See *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060, 40 Cal.Rptr.2d 116, 892 P.2d 150 [complaint subject to demurrer only if it affirmatively alleges facts showing workers' compensation is exclusive remedy].) The facts alleged here did not so demonstrate. **Plaintiffs alleged simply that both [mother] and [daughter] were exposed to toxic levels of carbon monoxide, injuring both. [The daughter] sought recompense for her own injuries.** [. . .] [the daughter] does not claim any damages for injury to [the mother]. Nor does the complaint demonstrate [the daughter's] own recovery is legally dependent on injuries suffered by [the mother]. **For that reason, [*Labor Code*] sections 3600–3602 [i.e. the Workers Compensation exclusivity sections] did not defeat [daughter's] cause of action for her own injuries (the first cause of action) or her parents' claim for consequential losses due to [daughter's] injuries (the third cause of action)."**
>
> *Id.* at 796 (emphasis added).

The mother in Snyder inhaled the toxic levels of carbon monoxide at work. The toxic carbon monoxide passed through the mother's body passed into her unborn child who was injured. This Court analyzed the injuries to the child, concluded that those were the child's own injuries not derivative of the mother's, and thus held Workers' Compensation exclusivity did not apply. It did not make a

difference whether the employee mother was in fact injured to any extent by the toxic gas that entered her body because the injury to the mother was separate and distinct from the injury to her unborn child.

The same reasoning applies to this case. Here, Mrs. Kuciemba alleges that the employer was required to follow a binding Health Order to prevent the spread of COVID. (ER-084-094, 87). The employer's negligence (e.g. its repeated violations of the Health Order) resulted in the direct transmission of the virus from Mr. Kuciemba, or the indirect transmission of the virus from his clothing or personal effects, to Mrs. Kuciemba. (ER-088-089). We can thus draw a line from the employer's negligence to Mrs. Kuciemba's personal injuries.

Under this Court's holding in *Snyder*, it is irrelevant whether Mr. Kuciemba was injured. Like the toxins in *Snyder*, the virus entered the employee's body, clothing, or personal effects at work, and then passed on to the non-employee family member. Like the daughter's claims in *Snyder*, Mrs. Kuciemba's claims are not predicated upon her husband suffering a physical injury, they are her own personal injury claims not covered by Worker's Compensation. In other words, even if Mr. Kuciemba was asymptomatic, no damage was done to his body whatsoever by the virus, and he incurred no distress as a result of the

infection to his body, Mrs. Kuciemba would still suffer completely separate and independent damages as a result of the *direct* damage that the virus wrecked on her body. This direct physical injury is also a significant difference between Mrs. Kuciemba's claims and the typical claim barred by the derivative injury doctrine. *See e.g.* the nonemployee spouse in *Williams v. R.J. Schwartz* (1976) 61 Cal. App. 3d 628 who witnessed her husband's death in a workplace accident and suffered severe emotional distress, but no direct physical injuries of her own.[2]

Plaintiffs respectfully disagree with the district court's ruling. At oral argument, the district court explained that it was inclined to apply the derivative injury doctrine because "at least as a factual matter, [Mrs. Kuciemba]'s claim is wholly dependent on [Mr. Kuciemba] getting sick at work and she got it from him." (ER-120).

[2] Defendant is expected to note that Plaintiffs' counsel stated at oral argument before the district court that an asymptomatic person is considered to have suffered an "injury". While it is true that Plaintiffs' counsel did state that an asymptomatic person suffered an "injury", counsel also consistently took the position that it was irrelevant whether the employee was injured or not (ER-108-109, 132-133). This position is consistent with the law. Furthermore, the First Amended Complaint clarifies Plaintiffs' position by noting that an asymptomatic person, according to the CDC, is not injured and completely healthy but just happens to serve as a vehicle for the virus. (ER-086,). Mr. Kuciemba did in fact suffer an injury by being infected with a virus in the same way that the mothers in *Snyder* suffered an injury by having a toxic gas enter her body. However, this Court did not find injury to the mother to be material in its analysis of the unborn baby's injuries because the baby's exposure to the toxic gas and subsequent injuries were logically and legally distinct from the injury to the mother.

The district court's reasoning is based in part on what the district court felt was ambiguous language within *Snyder's* holding. The district court noted that the *Snyder* Court had the opportunity to limit the derivative injury doctrine to three distinct categories of cases: loss of consortium, wrongful death, and emotional distress, but did not do so. (ER-012-013). Instead, according to the district court, this Court left open the possibility that some cases involving non-employees who are *physically injured* may also be barred by the exclusive remedy:

> "And I looked at all the different ways that *Snyder* – this is the California Supreme Court case -- characterized claims that they would find barred by workers' compensation. And they use the words "derivative," "derivative in the purest sense." Then they looked like maybe they were going one way, and then they're backing off "necessarily dependent." That's another phrase they use. Then they go to "legally dependent." Then they go on to say "dependent conceptually." Then at another point they say -- and these are all quotes – "legal or logical basis." So it's, quote-unquote, legal or logical; quote-unquote, dependent conceptually; quote, derivative; quote unquote, necessarily dependent; quote-unquote, legally dependent. As I say, they've used all these terms so that when you start looking conceptually and logically it seems to me that they've left this window open where they aren't sure what they want to do. And they're not prepared until they see a case that really makes the point, which ours does, how they're going to go on it."
>
> (ER-015)

In contrast, Plaintiffs' counsel raised the practical implications

of *Snyder's* holding at oral argument before the district court:

> "[I]f we look at the CACI instructions [for loss of consortium, wrongful death, or emotional distress], we will find that one of the legal elements of injury is you have to prove injury to the mother and the extent to which the injury to that mother or the husband or the worker that it – and it's tied in a legal sense, not a causal sense [. . .] So if Mrs. Kuciemba was suing for [loss of consortium, wrongful death, or emotional distress], what she would first have to prove is that extent of the injuries to Mr. Kuciemba and how *his* injuries affected her and how those are barred. But in this case, it doesn't matter whether he, you know, died on the job or never even felt anything because of COVID, because the injuries to Ms. Kuciemba are her own just like the child's injuries in *Snyder* was the child's own injury. And I think, Your Honor, this is where I see the disconnect between – between what you have kind of laid out for us and what *Snyder* is saying, because I think, Your Honor, you're focusing on the factual causation; whereas, *Snyder* actually laid a – what I see as a bright-line rule. And they're saying, **"We're looking at the legal causation. And what we're looking at is if we look at the elements of Ms. Kuciemba's claim do we see those elements and need to prove up Mr. Kuciemba's injuries? And the answer is no."** (ER-035-036). (emphasis added)

The district court ignored *Snyder's* common-sense distinction between factual and legal causation. Mrs. Kuciemba's claims are not barred by the exclusive remedy because her claims are *legally* distinct from her husband's. The district court completely overlooked this important point in its Order.

Further muddying the waters, according to the district court, is *Salin v. Pacific Gas & Electric Co.* (1982) 136 Cal. App. 3d 185, a bizarre outlier of a case whose holding was expressly called into doubt by this Court in *Snyder*. In *Salin*, an employee alleged that workplace stress drove him insane and caused him to attempt suicide after murdering his two young daughters. *Id.* at 187-189. The employee then bizarrely sued his employer for the wrongful death of the two daughters he murdered. *Id.* at 189-190. The Court of Appeal, applying the derivative injury doctrine, held that the civil wrongful death claim was subsumed by the Workers' Compensation system. *Id.* at 193. The Court cited *Labor Code* section 3600's language that injuries "proximately caused" by the employment must be adjudicated in the Workers' Compensation system, that the deaths of plaintiff's daughters was proximately caused by the employment, and therefore "had plaintiff's daughters survived the injuries he had inflicted upon them, or had otherwise been damaged due to his employment-related mental condition, *they* would have had no cause of action against PG&E." *Id.* at 191-192 (emphasis in original).

In *Snyder*, this Court addressed *Salin* in a footnote. After briefly reciting *Salin*'s facts, this Court criticized and questioned that holding

stating: "While we have no occasion here to rule on the correctness of the decision in *Salin,* we observe that sections 3600-3602 do not directly support the *Salin* court's extension of the derivative injury rule to third party injuries allegedly caused by an injured employee's post-injury acts." *Snyder*, 16 Cal. 4th at 999 fn 2. *Salin*'s holding is so broad that it would effectively swallow all direct injury claims by non-employees and runs counter to *Snyder's* careful and logical distinction between indirect claims by non-employees, which are barred by Workers' Compensation, and direct claims which are not barred by Workers' Compensation. This Court in *Snyder* thus effectively limited the *Salin* decision to its facts and this extreme case has no persuasive value. Following the decision in *Snyder*, *Salin* was cited in just two published opinions prior to the *See's Candies* decision discussed *infra*. The last time that *Salin* was cited was over 20 years ago in *Horwich v. Superior Court* (1999) 21 Cal. 4th 272, 286 where this Court merely cited its *Snyder* footnote that called *Salin*'s holding into doubt. This *Snyder* footnote is clearly the reason why no appellate court has relied on *Salin* in the ensuing decades. *Salin* may still be "on the books", but it is hardly good law. *E.g. See's Candies, Inc., infra,* 73 Cal. App. 5th 66, 88 ("the *Snyder* Court did not embrace *Salin,* but instead called its

validity into doubt.")

However, because the *Salin* decision has not been definitively overruled by this Court, the district court noted that "*Salin* espoused and held . . . that workers' compensation can bar claims that are factually dependent but not legally dependent on an injured worker." (ER-016).

Plaintiffs respectfully disagree with the district court's reading of *Snyder* or that *Salin* has any precedential value. The *Snyder* Court made clear that its holding about the derivative injury doctrine is based on *legal* causation. "As we have emphasized above, however, the derivative injury doctrine does not bar civil actions by all children who were harmed *in utero* through some event or condition affecting their mothers; it bars only attempts by the child to recover civilly for the mother's own injuries or for the child's **legally dependent** losses." *Snyder*, 16 Cal. 4th at 1000 (emphasis added).

Under the district court's analysis, the infant in *Snyder* would also have been barred by the exclusive remedy because she was exposed to toxic chemicals that her mother inhaled at work then passed through her body onto her unborn child. The holding in *Snyder* is not only the binding precedent, but it is also common sense because

Mrs. Kuciemba as a non-employee does not have any remedy under the Workers' Compensation system for her own physical injuries. As for the *Salin* case, it is a clear outlier case that has effectively been limited to what the district court accurately described as its "bizarre" facts. (ER-010). This Court has an opportunity to clarify any potential confusion regarding the scope of the derivative injury doctrine. This Court questioned the viability of the *Salin* case in *Snyder* but observed "we have no occasion here to rule on the correctness of the decision". *Snyder*, *supra* 16 Cal. 4th 999 at fn. 2. This case finally presents this Court with the opportunity to expressly overrule *Salin* and reaffirm the holding and key principles announced in *Snyder.*

Kesner v. Superior Court (2016) 1 Cal. 5th 1132 ("*Kesner*"), while not framed as a Workers' Compensation case, is also highly persuasive on these issues. In *Kesner*, workers were exposed to hazardous asbestos fibers and brought the fibers home to their households. The plaintiffs were exposed to the hazardous asbestos fibers through the workers, their clothing, and personal effects. For example, the wife of one of the workers alleged she contracted mesothelioma "through contact with [the worker] and his clothing, tools, and vehicle after she began living with him in 1973." *Id.* at 1141.

As described in detail below, this Court ultimately held that the employer owed a duty to members of its employees' households.

As the district court stated at oral argument, the issue of Workers' Compensation was never raised in *Kesner.* "And that never was a workers' comp claim case. It was never raised. I double-checked. Not only wasn't it discussed, it was never raised. And that's probably because she didn't catch mesothelioma from him. And, as pointed out, the employer has a duty not to let this stuff float around, you know, in the environment either on the work site or beyond. And he became – the husband became just the conduit of the material to the wife." (ER-112)

The district court's summary of *Kesner* is highly analogous to this case. Here, it is probable that Mr. Kuciemba's clothing or personal effects carried the virus and indirectly transmitted it to Mrs. Kuciemba. (ER-088-089) Or, in the alternative, it is probable that the virus was directly transmitted from Mr. Kuciemba to her husband. (ER-088-089) This is a factual issue that would need to be evaluated by expert testimony and is not appropriately resolved on a Motion to Dismiss. Regardless, in both circumstances, Mr. Kuciemba and/or his clothing or personal effects are merely serving as a conduit of the virus and his

own injuries are not relevant. In *Kesner*, under the same circumstances, this Court had no issue drawing a line from the employers' negligence to the *Kesner* plaintiffs' fatal injuries.

It is logical that the reason Workers' Compensation exclusivity was not raised in *Kesner* was because (1) the plaintiffs were not employees of the defendant; (2) the plaintiffs had their own distinct physical injuries; and (3) it was irrelevant whether the actual employees were injured because the employees merely served as a vehicle to transmit the toxic asbestos fibers to the plaintiffs. What mattered was the connection between the *employer defendant's* conduct and the non-employee plaintiffs' injuries. However, under the District Court's ruling and reasoning the *Kesner* plaintiffs would have been barred by Workers' Compensation exclusivity. The fact that neither the parties nor the courts in *Kesner* even raised Workers' Compensation exclusivity as an issue indicates this cannot be the law.

B. The *See's Candies* decision features nearly identical facts, and the Court of Appeal held that the derivative injury doctrine did not bar a take home COVID claim by a non-employee spouse.

After briefing for this matter concluded in the Ninth Circuit, the Second District Court of Appeal decided *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal. App.

5th 66 (review denied, April 13, 2022). *See's Candies* is compelling because it features nearly identical factual and legal issues and its holding clearly and correctly applied the principles this Court discussed in *Snyder*.

In *See's Candies,* an employee contracted COVID allegedly due to the employer-defendant's negligence. The wife employee "took home" the virus, and her non-employee husband died. The employer argued on demurrer that the employee-wife's wrongful death action was barred by the exclusive remedy of Workers' Compensation, lost and then sought a writ of mandate. *Id.* at 72. **The Court of Appeal denied the petition for a writ of mandate, holding that the derivative injury doctrine did not apply because the employee-wife was suing based on her injuries arising directly from her non-employee husband's death, not her own workplace injury.** *Id.* at 90.

The defendant in *See's Candies* argued that the derivative injury doctrine encompassed "any injury causally linked to an employee's injury. That is, if a nonemployee's injury would not have occurred but for an employee's compensable workplace injury, any civil claim by the nonemployee would be preempted by WCA exclusivity. This is

because the nonemployee's injury would not have existed but for the employee's injury." *Id.* at 84 (internal quotation marks omitted).

The Court of Appeal rejected this argument. The *See's Candies* Court extensively analyzed *Snyder*, noting that "[t]he *Snyder* Court made clear, however that "logical" or "legal" dependence [on a workplace injury] is not equivalent to *causal* dependence." *See's Candies, Inc.* 73 Cal. App. 5th at 86 (emphasis in original).

The Court of Appeal then observed that in claims for loss of consortium, wrongful death, and emotional distress claims from witnessing the workplace death of a spouse, "[w]hat unites these types of claims is not merely that they are causally linked to an injury occurring to another person, but also that they are based on losses arising simultaneously from that injury—the directly injured party is disabled or killed, which in turn deprives close relatives of the injured party's support and companionship. In other words, when a tortious event occurs, multiple parties may immediately be affected, and the law entitles the close relatives of the directly injured party to recover damages on top of what the injured party may recover. It is this aspect of wrongful death, loss of consortium, and bystander emotional distress claims that makes them "derivative" of the directly injured party's

claim. **Accordingly, it is legally impossible to state a cause of action for such claims without alleging a disabling or lethal injury to another person. This is reflected in the elements of the causes of action themselves**." *Id.* at 86 (emphasis added).

In short, the Court of Appeal in *See's Candies* interpreted the derivative injury doctrine in the same way that Plaintiffs did at oral argument before the district court. (ER-035-036) The district court in this case erroneously adopted a *causal* dependence test instead of a *legal* dependence test.

In light of this Court's holding in *Snyder* and the Court of Appeal's persuasive decision in *See's Candies,* this Court should answer "No" to the First Certified Question.

C. Defendant owed a duty of care to Mrs. Kuciemba.

The Second Certified Question before this Court is: 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? The answer is "Yes."

The district court held that Defendant owed no duty to Mrs. Kuciemba. Plaintiffs respectfully disagree with the district court's

ruling because the most important factor favoring a duty, "foreseeability", is in Plaintiffs' favor, and the other various "public policy" factors also favor Plaintiffs.

The relevant authority here is *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132, which has strikingly similar facts and equally applicable reasoning. In *Kesner*, this Court held that "the duty of employers and premises owners to exercise ordinary care in the use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. . . . Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." *Id.* at 1140.

Kesner involved individuals from the same household who were exposed to asbestos from workers who carried the toxic fibers home with them. These family members were subsequently diagnosed with

mesothelioma. *Id.* at 1141. This is nearly identical to the fact pattern in our case where Mr. Kuciemba was exposed to the COVID virus, either directly through his person, or indirectly through fomites such as clothing or personal effects, and unknowingly brought it home with him to his wife. The issue before this Court in *Kesner* was whether the employer owed a duty to these nonemployee family members living in the same household. To determine whether a duty existed (or put another way, whether the general duty of care should *not* otherwise extend to household members), this Court analyzed certain policy considerations collectively known as the *Rowland* factors (named after the seminal case of *Rowland v. Christiansen* (1968) 69 Cal. 2d 108).

Kesner held that the *Rowland* factors dictated the existence of a duty by the employer to protect against asbestos fibers that a worker may bring back to their household and that could be inhaled by the family members. Here, we have very similar facts where Mr. Kuciemba brought a virus from work into his household and that virus (directly through his body or indirectly through his clothing) infected and caused harm to his wife Mrs. Kuciemba. (ER-088-089). We summarize key portions of *Kesner's* application of the *Rowland* factors and how they apply to Plaintiffs' case.

1. ***Kesner's*** **analysis of the "foreseeability of injury factors" support the establishment of a legal duty in this case.**

The first three *Rowland* factors "foreseeability, certainty, and the connection between the plaintiff and the defendant—address the foreseeability of the relevant injury." *Kesner*, 1 Cal. 5th at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas. At oral argument, the District Court determined that the foreseeability factors favored Plaintiffs but believed foreseeability was outweighed by other public policy issues (ER-137).

Foreseeability: Foreseeability is the "most important factor to consider in determining whether to create an exception to the general duty to exercise ordinary care". *Id.* at 1145. This Court held in *Kesner* that "it was foreseeable that people who work with or around asbestos may carry asbestos fibers home with them and expose members of their household." *Id.* at 1145. Relevant to the Court's analysis was the existence of OSHA regulations that required employers to take precautions to prevent the spread of asbestos fibers. *Id.* at 1146.

In this case there is and was general public knowledge that COVID is highly contagious and easily transmitted between persons. Similar to *Kesner*, there were also specific regulations and guidance, including the Health Order and CDC Guidelines, that informed, guided,

and instructed employers about how to exercise ordinary care to prevent the spread of the virus. The Health Order describes the virus as "easily transmitted, especially in group settings, and the disease can be extremely serious." (ER-052) The Health Order explains that the virus can spread through "asymptomatic transmission". (ER-057) The Health Order was "designed to keep the overall volume of person-to-person contact very low to prevent a surge in COVID cases in the County and neighboring counties." (ER-053) Therefore, at the time that Defendants transferred the infected/exposed crew from the Mountain View site to the San Francisco site without quarantine, Defendant knew that COVID can be transmitted from an infected worker to members of the worker's household.[3]

Importantly, the "*Rowland* factors are evaluated at a relatively broad level of factual generality. Thus, as to foreseeability, we have

[3] Defendant is expected to argue that no duty exists because COVID is a respiratory disease like influenza but employers are not liable when an employee's spouse contracts the flu. Putting aside that a number of people in government, media, and the general public dismissed the virus as "just like the flu" to their peril, the COVID pandemic has resulted in an extensive number of binding government regulations, including the Health Order. There are no similar binding Health Orders that exist for the flu. Furthermore, the COVID pandemic has completely upended our modern society's way of life in a way not seen for generations especially prior to the introduction of the vaccine. This is no mere seasonal virus. Mrs. Kuciemba's injuries illustrate that it is a serious threat that cannot be taken lightly. Given how infectious and pernicious the virus is, it is foreseeable that Defendant's failure to follow the binding Health Order could result in a worker's spouse becoming infected with COVID.

explained that 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." *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal. 4th 764, 772 (emphasis in original, internal citations omitted). The fact that the analysis takes place at a broad level of generality partly explains why the District Court determined that foreseeability is met here.

Connection between the Plaintiff and the Defendant: This factor is closely related to foreseeability. The defense in *Kesner* argued that the connection between the defendants' conduct and the plaintiff's was indirect and attenuated because they required the intervening act of an employee to transmit the asbestos to his household. *Kesner*, 1 Cal. 5th at 1148. This Court disagreed and explained that "[i]t 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." *Id.* at 1148. The employee was part of the same causal chain

and this Court found that "[a]n employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace." *Id.* at 1148. This Court explained that **"[a]n employee's return home at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior. The risk of take-home exposure** to asbestos **is likely enough** in the setting of modern life **that a reasonably thoughtful [employer or property owner] would take account of it in guiding practical conduct in the workplace.**" *Id.* at 1149 (emphasis added).

Just like in *Kesner,* Plaintiffs allege that Defendant's failure to exercise due care and follow appropriate safety regulations designed to prevent the spread of COVID lead to the infection of Mr. Kuciemba and/or his clothing or personal effects, and subsequently his wife, Mrs. Kuciemba. (ER-088-090) Thus, the events are all causally related, and a direct line can be drawn from Defendant's conduct to Mrs. Kuciemba's injuries. On this factor, Defendant claims that *Kesner* is distinguishable because it was not the contact with the worker that allegedly caused the mesothelioma, rather the household's contact with asbestos fibers, a hazardous product that the employer used in its

manufacturing process and was required to restrict the job site. This is a distinction without a difference that ignores the broader holding of the Court. This Court expressly recognized in its holding that "[w]here it is reasonably foreseeable that **workers**, their clothing, or personal effects **will act as vectors** carrying asbestos **from the [employer's] premises to household members**, employers have a duty to take reasonable care to prevent this means of transmission" *Kesner*, 1 Cal. 5th at 1140 (emphasis added). This Court was not so much concerned about the method of transmission of asbestos fibers, the issue was whether a worker's subsequent transmission to household members was foreseeable based upon the Defendant's failure to control the movement of asbestos fibers. The fact that Mr. Kuciemba would come home to Ms. Kuciemba "at the end of the workday is not an unusual occurrence, but rather a baseline assumption that can be made about employees' behavior." *Id.* at 1149. Here, Defendant's failure to follow binding Health Orders, including but not limited to commingling workers it knew or should have known were exposed to the virus, with workers at Mr. Kuciemba's job site, was the cause of Mrs. Kuciemba's infection. (ER-088-090). Whether Mrs. Kuciemba contracted the virus

from Mr. Kuciemba's hands or clothing, or the virus was in water droplets exhaled by Mr. Kuciemba is irrelevant to the duty analysis.

Defendant is expected to argue that with COVID, everything a worker does during the two-thirds of the day spent off-site, and what other household members do twenty-four hours a day, is likely, if not more likely, to be a source of infection. But this is really an argument about causation and the Defense is prohibited from making this argument at the pleading stage; the Court must take Plaintiff's allegations as true for purposes of the Motion to Dismiss and not consider arguments about causation. The question of whether a legal duty exists as a matter of law, assuming that Plaintiffs' allegations are accepted as true, is properly before this Court. Under the *Kesner* analysis, Defendant did in fact owe a legal duty to Mrs. Kuciemba.

2. ***Kesner's*** **analysis of the "public policy concerns" support the establishment of a legal duty in this case.**

The remaining four *Rowland* factors "moral blame, preventing future harm, burden, and availability of insurance—take into account public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." *Id* at 1 Cal. 5th at 1145. These factors favored the *Kesner* plaintiffs and also favor the Kuciembas. This Court has explained that when applying these other *Rowland* factors, "we

have asked not whether they support an exception to the general duty of reasonable care on the facts of the particular case before us, but whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy." *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal. 4th 764, 772.

Moral Blame: The existence of a duty is stronger when "plaintiffs are particularly powerless or unsophisticated compared to the defendants are where the defendants exercise greater control over the risk that issue." *Kesner, supra,* 1 Cal. 5th at 1151. Thus, this Court found that commercial uses of asbestos received a financial benefit from asbestos but also "had greater information and control over the hazard than employees' households", meaning that "[n]egligence in their use of asbestos is morally blameworthy, and this factor weighs in favor of finding a duty." *Id.* at 1151. The same is true here. Employers, especially construction employers like Defendant, bring together many individuals from different households and therefore must exercise ordinary care to keep their employees safe from COVID, a highly transmissible virus, including following the binding Health Orders specifically enacted to prevent the spread of that virus. Employers have superior knowledge of potential infections among their workforce as a

whole and more resources to address potential infections than individual households, and therefore, can and must take affirmative steps to follow the requirement of the Health Order (i.e. ensure that potentially or actually infected workers stay away from work, and that workers who do appear for work have their temperature checked, wear masks, maintain social distancing, wash their hands, etc.) This is not to say that individuals have no responsibility to follow best practices, but that the employer, who receives a financial benefit from bringing their workers together and who can best control the spread of COVID at work, is more morally blameworthy for purposes of the duty analysis. This same reasoning remains true even though the virus is not a product manufactured by the Defendant; the Defendant is the party with superior knowledge and resources, and who has been ordered by the State of California to take specific, concrete steps to prevent the spread of COVID.

Preventing Future Harm: In *Kesner*, the Defense argued that it did not owe a duty because the future risk of harm from asbestos exposure was low due to current regulations that curtailed the use of asbestos. *Id.* at 1150-1151. However, this Court explained that the existence of regulations meant that "legislatures and agencies readily

adopted the premise that imposing liability would prevent future harm" and that there was a "strong public policy limiting or forbidding the use of asbestos." *Id.* at 1150-1151. The same reasoning is true here. The existence of the Health Order, and other regulations and guidance, is designed to prevent future infections and given the potential health risks, there is a strong public policy designed to curtail the spread of the virus, especially since the pandemic is severe and ongoing.

At oral argument, the District Court stated that "There's only so much you can do in containing illness. . . . If you don't take every possible step that you could possibly take – that's redundant but every possible step to contain COVID at the workplace, that's not a guarantee that you can really prevent the spread of it. It's kind of everywhere." (ER-026-27). But the point is not that an employer take *all* possible steps, only that the employer exercise *ordinary care* by taking *reasonable* steps, or at least the *legally mandated* steps, as outlined in the Health Order, to prevent harm.

Availability of Insurance/Burden on Defendant: This Court analyzed both of these factors together. Defendants in *Kesner* argued that allowing "tort liability for take-home asbestos exposure would dramatically increase the volume of asbestos litigation, undermine its

integrity, and create enormous costs for the courts and community." *Id.* at 1152. This Court disagreed noting that "[i]n general, preventing injuries to workers' household members due to asbestos exposure does not impose a greater burden than preventing exposure and injury to the workers themselves. Defendants do not claim that precautions to prevent transmission via employees to off-site individuals—such as changing rooms, showers, separate lockers, and on-site laundry—would unreasonably interfere with business operations." *Id.* at 1153. Furthermore, the court rejected the defense contention that finding a duty in these cases would open the door to an "enormous pool of potential plaintiffs" that creates an "unlimited duty [that] imposes great costs and uncertainty, and invites voluminous and frequently meritless claims that will overwhelm the courts." *Id.* at 1153. This Court stated that "[a]lthough defendants raise legitimate concerns regarding the unmanageability of claims premised upon incidental exposure, as in a restaurant or city bus, these concerns are not clearly justify a categorical rule against liability for foreseeable take-home exposure." *Id.* at 1154. **Thus, the Court adopted a logical and bright-line rule that limited take-home exposure liability to members of a worker's household which the Court defined as "persons who live with the worker and**

are thus foreseeably in close and sustained contact with the worker over a significant period of time." *Id.* at 1154-1155.

Defendant is expected to make similar arguments as the employer in *Kesner*. Defendant claims that imposing a duty on Defendant would result in tremendous financial burdens by creating an enormous pool of plaintiffs such as the wife who claims her husband caught COVID from the barista, the husband who claims his wife caught it from the dental hygienist, or the roommate who claims a co-tenant while on jury duty caught it from the court bailiff. But all of these potential plaintiffs involve *third party customers/visitors* which was not the focus of *Kesner* nor the situation before this court with Plaintiffs. The limit of liability and the scope of the duty on the employer is the take home liability to household members of the employee established in *Kesner*.

The district court was also concerned about a potential expansion of liability:

> "And then if you start expanding so that if they slip up with the employee that everybody in the employee's household -- this can be five children, the wife, a nephew that's living there during college, who knows, and all of a sudden you have a major expansion of their liability, all based on something that originally they were not required to cover. And I think, as a policy in this situation, that starts to run somewhat farther afield."

(ER-027)

Like in *Kesner*, such concerns in this case do not call for a categorical rule that *no duty is owed*, rather the same commonsense bright line rule/limitation that an employer's duty extends but is limited to members of a worker's household. As this Court explained, such a rule keeps the "potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm. . . . This rule strikes a workable balance between ensuring that reasonably foreseeable injuries are compensated and protecting courts and defendants from the costs associated with litigation of disproportionately meritless claims." *Id.* at 1155.

Defendant is also expected to argue that *Kesner* should be limited to its facts. While the *Kesner* case was about asbestos, this Court did not expressly state in the opinion that its reasoning can never be extended beyond asbestos cases, nor has it subsequently limited *Kesner* only to asbestos cases. As discussed at length above, the principles discussed in *Kesner* equally apply to cases involving COVID. *Kesner* is highly persuasive authority.

3. The *City of Los Angeles* case involving typhus is distinguishable because it

involved a government agency, not a private employer.

Defendant may argue that no duty of care exists because of the holding in *City of Los Angeles v. Superior Court* (2021) 62 Cal. App. 5th 129. However, that case is clearly distinguishable.

In *City of Los Angeles*, the plaintiff was married to an LAPD officer who worked at an allegedly unsanitary building owned by the City. *City of Los Angeles*, *supra*, 62 Cal. App. 5th at 134. The officer was diagnosed with typhus in June 2019. Wife claimed that the City building became "infested with rats and mice which carried fleas infected with the typhus virus", and that the City failed to maintain, clean and remove the unsanitary conditions ultimately caused the officer's typhus infection. Wife also claimed that exposure to her husband caused Wife's own typhus infection in October 2019. *Id.* at 134.

Wife then sued the City of Los Angeles pursuant to *Gov't Code* § 835 and a common law negligence claim. The trial court overruled the City's demurrer, citing this Court's decision in *Kesner. City of Los Angeles, supra*, 62 Cal. App. 5th at 136.

The Court of Appeal ultimately determined that the City did not owe a duty to wife. "The City contends that the court's reliance on

Kesner was inappropriate, in part because *Kesner* involved private companies rather than public entities. We agree." *City of Los Angeles, supra*, 62 Cal. App. 5th at 143. The Court of Appeal explained how "[D]irect tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care, and not on the general tort provisions of Civil Code section 1714." *Id. at* 143. Thus, *Kesner* was distinguishable because that decision relied on the more expansive general duty principles of *Civ Code* § 1714 applying to *private property* instead of the narrower dangerous condition on *public property* statute, *Gov't Code* § 835.

In *dicta*, the Court of Appeal further distinguished *Kesner* by claiming that the wife of the police officer would have lost even under general premises liability principles due to a lack of duty. The Court of Appeal explained that in *Kesner*, liability was premised 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, [wife] has not alleged that [husband] brought home infected fleas or rodents, thus exposing [wife] to the conditions of the property. Instead, [wife] alleges that she contracted typhus from [husband], months after [husband] became ill." *Id.* at 144-145. Thus, the City

owed no duty to wife because she had not alleged exposure to any condition on the subject property. *Id.* at 144.

The Court of Appeal's analysis on this point is a gross misreading of the holding and application of *Kesner*. First, *City of Los Angeles* does not address the bulk of the *Kesner* decision which analyzed and weighed the various foreseeability and public policy factors to find that the employer held a duty of care *for negligence purposes* to avoid take-home liability. This Court emphasized that "[a]n employee's role as a vector in bringing asbestos fibers into his or her home is derived from the employer's or property owner's failure to control or limit exposure in the workplace." *Kesner, supra*, 1 Cal. 5th at 1148.

Second, the language from *Kesner* quoted by *City of Los Angeles* refers to a section of the opinion where this Court determined that a property owner, *for premises liability purposes*, could owe a duty of care to a person who has not stepped foot on the premises. In that section of the opinion, this Court emphasized that "[w]e have never held that the physical or spatial boundaries of a property define the scope of a landowner's liability" and that "liability for harm caused by substances that escape an owner's property is well established in

California law." *Id.* at *Kesner, supra*, 1 Cal. 5th at 1158. This Court emphasized that the duty applied when it was "reasonably foreseeable that **workers, their clothing, *or* personal effects will act as vectors"** for transmitting the dangerous condition. *Id.* at 1159 (emphasis added). Thus, a worker, by himself, could serve as the vector for transmitting a virus (or disease caused by bacteria, in the case of typhus). The Court of Appeal ignored this key point when it held that wife needed to be in physical contact with typhus-infected rats or fleas, even though her husband acted as a vector for the typhus disease. The reality is that the *City of Los Angeles* court simply did not need to consider the full context of the *Kesner* opinion to render a decision. It did not perform an extensive *Rowland* factors analysis because Kesner involved *private property* and City of Los Angeles involved *public property*. Indeed, the *City of Los Angeles* Court did not have to perform this analysis because, unlike *Kesner* which involved a private defendant, the City of Los Angeles was a public defendant and *Gov't Code* § 835 foreclosed plaintiff's claims. *City of Los Angeles, supra*, 62 Cal. App. 5th at 142-144.

Thus, *City of Los Angeles* does not control because this present case involves a private corporation, not a public entity, and the *City of*

Los Angeles Court did not conduct an extensive analysis on the duty question; it merely conducted an analysis of *Gov't Code* § 835.

In summary, this Court in *Kesner*, conducted a thorough policy-based analysis and ultimately determined that the factors weighed in favor of extending the employer's duty to members of employee's household. The same policy considerations apply here, meaning that Defendant owes a duty to Mrs. Kuciemba to exercise ordinary care by following Health Orders with respect to her husband's employment to avoid exposing her to 'take home' COVID.[4] This Court should answer "Yes" to the Second Certified Question.

V. CONCLUSION

Mrs. Kuciemba has clearly stated viable claims against Defendant and should be allowed to pursue her claims before jurors.

[4] As a final note, the California Legislature has had over two years to pass COVID liability limitations. Unlike other jurisdictions, it has not done so. In fact, the Legislature enacted *Labor Code* § 77.8 which created a broad workers' compensation presumption for certain essential workers wherein a COVID infection is deemed to have arisen in the course and scope of the workers' employment. *Compare Tenn. Code Annotated* 29-34-801 (generally no liability for COVID claims against business entities except proof of clear and convincing evidence of gross negligence or willful misconduct); *NRS* 439.366 (similar liability restrictions); *Idaho Code* 6-3401 (same); *Ch. 64 Acts of 2020* (Mass.) (civil immunity for healthcare providers and facilities absent gross negligence or other reckless or willful misconduct).

Plaintiffs respectfully request that this Court answer "No" to the First Certified Question and "Yes" to the Second Certified Question.

Respectfully Submitted,

Dated: July 22, 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 11,491 words.

Dated: July 22, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court on July 22, 2022 through the TrueFiling system.

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Dated: July 22, 2022

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Supreme Court of California

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