S274191

IN THE SUPREME COURT OF CALIFORNIA

CORBY KUCIEMBA and ROBERT KUCIEMBA

Plaintiffs-Appellants

v.

VICTORY WOODWORKS, INC., a Nevada Corporation

Defendant-Respondent

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

VICTORY WOODWORKS, INC.'S ANSWERING BRIEF

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I. ISSUES PRESENTED

Robert Kuciemba claims he caught a virus at his San Francisco construction site in the course and scope of his employment. His spouse Corby Kuciemba claims she caught that same virus at home in Hercules from Mr. Kuciemba.

Ms. Kuciemba filed a civil action for negligence against Mr. Kuciemba's employer, Defendant Victory Woodworks, Inc. Mr. Kuciemba also sued his own employer for loss of consortium. In reviewing the propriety of the U.S. District Court's dismissal of Plaintiffs' First Amended Complaint, the U.S. Court of Appeals for the Ninth Circuit certified the following questions to the California Supreme Court:

A. 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?

B. 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

Most of the 10,898,548 Californians diagnosed with the COVID-19 virus since March 2020[1] have one thing in common: they live with someone who has a job. According to Plaintiffs, each

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[1] As of August 12, 2022. See https://www.nytimes.com/interactive/2021/us/california-covid-cases.html

of those persons could state a cognizable claim against a housemate's employer. Each newly diagnosed person could file a complaint against that employer, regardless of when, or even if, the employed housemate showed symptoms of the virus. No matter what steps an employer took to slow the spread of COVID-19, there could be a claim based on a plaintiff's diagnosis alone, so long as that person had any contact with a worker.

There are two barriers this Court has recognized to prevent that calamity from becoming a reality:

1. An employer has no legal obligation beyond worker's compensation to compensate anyone incurring a loss derivative of an employee's on-the-job injury; and

2. An employer owes no legal duty to prevent someone off-site from catching a virus from an employee who becomes infected on-site.

III. STATEMENT OF THE CASE

Plaintiffs live in Hercules, California on a residential block of contiguous homes bordering on several retail complexes. (Defendant Victory Woodwork's Excerpts of Record (hereinafter "VWER") VWER_071.) Within walking distance of Plaintiffs' home is a Rite Aid, Big Lots, Post Office, McDonald's, Home Depot and Lucky's Supermarket. (VWER_046-49.) The City of Hercules has been under a Local Emergency Order because of COVID-19 since March 20, 2020. (VWER_106-110.)

On May 6, 2020, Mr. Kuciemba started working for defendant Victory Woodworks at a construction site in San Francisco, an industry deemed essential by California and San

Francisco. (Appellant's Corrected Excerpts of Record (hereinafter "ER") ER-87 ¶16; San Francisco Order of the Health Officer [hereafter "SF Order"] VWER_085 §16(f)(v)). Each morning, whether by BART train, carpool or otherwise, Mr. Kuciemba made the long commute from his home in Hercules to his construction job in San Francisco.

Ms. Kuciemba would stay behind in Hercules. There is no allegation that she ever visited her husband's jobsite in San Francisco. What she did and who she met throughout the week was her prerogative.

At the end of his shift, Mr. Kuciemba would return home during the afternoon rush hour. Whatever stops he made during his commute, how he spent the other two-thirds of his day, where he chose to relax on the weekends, and who he saw during non-work hours was his prerogative.

After Defendant no longer employed him, Ms. Kuciemba began experiencing unidentified symptoms of the COVID-19 virus on July 11 or 12, 2020. (ER-157 ¶18, 89 ¶24.) Mr. Kuciemba began experiencing symptoms within the same timeframe. Plaintiffs tested positive on July 16, 2020, and were both hospitalized. (ER-89 ¶24.)

Mr. Kuciemba claims the only place on the planet where he could have contracted the COVID-19 virus was at his jobsite (ER-157 ¶17.) Ms. Kuciemba claims the only place on the planet she could have caught the virus was at home from her husband. (ER-159 ¶24, 90 ¶30.) Plaintiffs blamed Mr. Kuciemba's infection on the arrival at the San Francisco project of Victory Woodworks

employees from a project in Mountain View, where he believed COVID-19 had been present. (ER-88 ¶19) Somehow, Plaintiffs are convinced Ms. Kuciemba could not have infected her husband, and that Ms. Kuciemba could not have contracted the virus from any other source but her husband.

Mr. Kuciemba filed a workers' compensation claim against his employer for his workplace illness. (VWER_062-72.) Ms. Kuciemba filed a civil claim for negligence and premises liability against Defendant, alleging that there were twelve things it could have done better in managing the jobsite to protect her from the virus her husband contracted at work. (ER-89-90 ¶27.) Mr. Kuciemba sued Defendant as well for his loss of his wife's consortium. Plaintiffs sought tort damages, punitive damages and attorney's fees. The complaint was removed to federal court on diversity grounds and assigned to the Hon. Maxine Chesney.

A. <u>Original Complaint Dismissed</u>

Plaintiffs were unequivocal in their original complaint as to the basis of their claims: Mr. Kuciemba was infected with COVID-19 through exposure to his co-workers on the jobsite, and Ms. Kuciemba contracted that same disease from her husband at home. (ER-157 ¶¶17-18, ER-159 ¶24.)

In response, Defendant filed a motion to dismiss on grounds that 1) Plaintiffs' claims were subsumed by the workers' compensation remedy; 2) Defendant did not owe a duty to prevent non-employees off-site from contracting COVID-19; and 3) Plaintiffs claims were not plausible when measured against the federal standard applicable to a motion to dismiss under Federal

Rule of Civil Procedure 12(b)(6) requiring the District Court "to draw on its judicial experience and common sense" in evaluating the complaint. (*Ashcroft v. Iqbal* (2009) 556 U.S. 662 at 679.) Moreover, under the federal standard "it is within [the court's] wheelhouse to reject, as implausible, allegations that are too speculative to warrant further factual development." (*Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060, 1076.)

Plaintiffs' opposition repeatedly stressed that Mr. Kuciemba caused his wife to become infected by the same virus he contracted at work. (VWER_028:23-25.) "[T]he virus entered the employee's body at work and then passed on to the non-employee member." (VWER_031:21-24.)

During oral argument, Judge Chesney posed "the easy question" to counsel for Plaintiffs: if Mr. Kuciemba was infected with the virus at work but asymptomatic, would he still be considered injured? Counsel responded, "Yes. I would argue my position is first if he was asymptomatic, he's in fact injured because they now have a pathogen living in their body that they did not have before." Counsel also conceded that an infected, though asymptomatic, worker would be "injured," but not capable of making a civil recovery. (ER-108:19-109:6.)

Because Ms. Kuciemba would have no injury unless Mr. Kuciemba's worksite illness infected her, and Ms. Kuciemba had neither visited nor been injured on her husband's worksite, the District Court dismissed the complaint based on the workers' compensation exclusive remedy, but provided Plaintiffs leave to amend. (ER-095-96.)

B. Amended Complaint Dismissed

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

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

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

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

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

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

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

communicable diseases on-site did not extend to non-employees exposed to that virus by an employee away from the job. (ER-06.) Even if take-home liability existed, the District Court ruled Plaintiffs' allegation that Ms. Kuciemba contracted COVID-19 from Mr. Kuciemba's clothing failed to allege a factually plausible claim. (ER-06.) (*Kuciemba v. Victory Woodworks, Inc.* (N.D. Cal. May 10, 2021) 2021 U.S. Dist. LEXIS 88997.)

C. Ninth Circuit Certification

Plaintiff filed a notice of appeal from the District Court's ruling on June 3, 2021, and the matter was argued before the U.S. Court of Appeals on March 10, 2022. In response, that court issued a request for certification on two grounds.

First, the Court of Appeals remained unconvinced that *See's Candies, Inc. v. Superior Court* (2021) 73 Cal.App.5th 66 (*See's Candies)*, issued after *Kuciemba* had been dismissed, had correctly concluded that take-home COVID claims were not barred by the exclusive remedy. *See's Candies* assumed *Snyder* would apply to off-site COVID infections brought home from a worksite, despite the fetal injury in *Snyder* having arisen under "very different facts." (*Kuciemba v. Victory Woodworks, Inc.* (9th Cir. 2022) 31 F. 4th 1268, 1272.) As a result, the Ninth Circuit felt "clear guidance from California's highest court" was needed. (*Ibid.*)

Second, the Ninth Circuit observed that there was no controlling California precedent resolving the issue of whether an employer owed a worker's household a duty of care to protect them from a virus. The public policy factors justifying liability for asbestos take-home liability in *Kesner* were distinct from those

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

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

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

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

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

This interpretation also applied to the dependents of the worker as well, whether they sought recovery for a worker's wrongful death, (*Treat v. Los Angeles Gas etc. Corp.* (1927) 82 Cal.App. 610), emotional distress from observing the worker's injury, (*Williams v. Schwartz* (1976) 61 Cal.App.3d. 628 (*Williams*), loss of consortium from the worker's injury,) *Williams v. State Comp. Ins. Fund* (1975) 50 Cal.App.3d 116 (*State*)), or physical harm as a result of that worker's injury, (*Salin v. Pacific Gas & Electric Co.* (1982) 136 Cal.App.3d 185, *rev'w denied* 12/1/82 (*Salin*).) In each of these decisions, courts deferred to the Legislature and held that the language of the Labor Code required that any claim by the household against the employer was subsumed by the workers' compensation scheme, often referred to as the "derivative injury rule." *Williams, supra,* 61 Cal.App.3d at pp. 632-633; *State, supra*, 50 Cal.App.3d at pp. 119-120; *Salin, supra*, at 192. If a worker's injury injures a family member, no injured party could seek a civil remedy against the employer.

Such was the state of the law at the time the U.S. District Court dismissed the *Kuciemba* action. Never had a California court permitted a spouse injured from an employee's on-the-job injury to maintain a civil claim against the worker's employer. Here, as originally plead, all of Plaintiffs' claims found their genesis in the injury Mr. Kuciemba alleged he incurred on his jobsite. By specifying that the employer's obligation to pay benefits was *in lieu of any other liability whatsoever to any person,* the Legislature has deemed any claim by Ms. Kuciemba against Defendant be preempted. As a result, the Kuciemba amended

complaint was dismissed.

A. Labor Code Section 3600 *et seq.* Provides the Exclusive Remedy for Damages resulting from a Workplace Injury

Plaintiffs' personal injury allegations are derivative of the COVID-19 illness Mr. Kuciemba allegedly contracted at his place of employment, and are not the proper subject of a third party civil liability lawsuit. As explained below, the statutory workers' compensation exclusivity scheme is broad, and preempts all claims related to or causally linked to the employee's injury or illness.

The Workers' Compensation Act (WCA) at Labor Code section 3600 *et seq*., "offers protection with one hand even as it removes access to civil recourse with the other." (*Gund v. County of Trinity,* (2020) 10 Cal.5th 503, 527.) The Legislature enacted the statutory scheme to balance two competing goals: (1) to offer employees "relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury" regardless of fault, and (2) to limit the amount of liability faced by employers by requiring employees to "give[] up the wider range of damages potentially available in tort." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund,* (2001) 24 Cal.4th 800, 811 (*Vacanti*)). To that end, where a "remedy is available as an element of the compensation bargain[,] it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer." (*King v. CompPartners, Inc.,* (2018) 5 Cal.5th 1039, 1052 (*King*)).

In order to adopt the construction that best effectuates the law's purpose, this Court walks a well-trodden path to determine

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

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

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

remedy for injury or death of an employee against the employer . . .," whether the claim concerns "compensation, or concerning any right or liability arising out of or incidental thereto." (Labor Code § 5300(a).)

For more than a century, California workers have been guaranteed a "no-fault" recovery system of workers' compensation from their employers for injuries sustained in the course and scope of employment. Workers and their families trade the uncertainties of litigating workplace claims for the streamlined statutory process to gain prompt compensation under a strict liability system. In exchange, employers sacrifice the ability to contest responsibility for a workplace injury in favor of protection from the prospect of excessive civil liability, because the Legislature decreed that workers' compensation is the exclusive remedy for all workplace injury claims.

Under the well-settled "derivative injury" rule, the compensation bargain encompasses harm to the individual employee and harm "collateral to or derivative of a compensable workplace injury." (*Vacanti*, *supra*, 24 Cal.4th at p. 814.) Thus, where a worker contracts a disease at work, pursuant to Labor Code section 3600 an employer's compensation obligation is "*in lieu of any other liability whatsoever to any person.*" (*Id.* at 814. (original italics).)

Consistent with this broad statutory language, the California Supreme Court has liberally construed the scope of the derivative injury rule. The exclusive remedy precludes "third party cause[s] of action" against the employer that "would not have

existed in the absence of injury to the employee." (*Snyder, supra,* 16 Cal.4th at p. 998.)

The derivative injury rule is crucial to advancing the policies underlying the statutory scheme. Courts must rigorously apply the rule to ensure that "the work-connected injury engenders a single remedy against the employer"—no matter who that injury affects. (*State, supra,* 50 Cal.App.3d at p. 122.) The rule enforces the compensation bargain that is "[a]t the core of the WCA" by "limit[ing] an employee's remedies against an employer for work-related injuries to those remedies provided by the statute itself," (*King*, *supra*, 5 Cal.5th at pp. 1046, 1051), and has been declared by this Court to be "the cornerstone of the workers' compensation system." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 732-733.)

As was obvious from their original complaint, Ms. Kuciemba's civil claims derived entirely from her husband's work-related illness. Until *See's Candies* discussed below, California courts had consistently barred similar claims based on the exclusive remedy whenever a dependent suffered an injury derived from the worker's injury in the course and scope of employment.

In *Williams, supra*, Mr. Williams was killed when a bridge collapsed, causing him to fall and be crushed by his truck, all in full view of his wife. After receiving workers' compensation benefits from her husband's employer as a result of his death, she filed a civil suit against the employer, seeking a separate recovery for her own mental anguish suffered after she witnessed the accident, on the theory that the employer had negligently inflicted

emotional distress under *Dillon v. Legg* (1968) 68 Cal.2d 728 (*Dillon*).

The *Williams* court affirmed the employer's successful demurrer on grounds that the exclusive workers' compensation remedy barred her civil negligence claim. The appellate court acknowledged that the wife's negligent infliction claim was not merely collateral to her husband's injury, but rather sought redress for the personal harm she suffered when she witnessed her husband's workplace injury. As a result, "the loss is hers alone." (*Williams*, *supra*, 61 Cal.App.3d. at p. 632.) *Williams* determined that because the wife's civil claim was derivative of her husband's on-the-job injury, her civil claim was subsumed by the workers' compensation scheme. (*Ibid.* at 632.)

Williams recognized that workers' compensation exclusivity precludes not just collateral actions, but "any other liability whatsoever to any person . . . for any injury sustained by [an employee] arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death . . . (Lab. Code § 3600)." (*Id.* at 632.) As such, when an employee's injuries or death are compensable under the WCA, "the right of the employee or his dependents, as the case may be, to recover such compensation is the exclusive remedy against the employer." (*Id.* at 633.) "In the most explicit terms, section 3600 declares the exclusive character of the employer's workmen's compensation liability in lieu of any *other* liability to *any* person." (*Ibid.* [italics in original].)

Though the issue of an employer's liability for negligent

infliction of emotional distress was one of first impression in *Williams*, that court did not view the holding as novel: the workers' compensation system was always intended to encompass such claims. (*Id.* at 633-634.) A wife's derivative injury is precluded as part of the *quid pro quo* of the legislative scheme. The WCA imposes reciprocal concessions upon both the employer and employee, while withdrawing from each certain rights and defenses available at common law:

> [T]he employer assumes liability without fault, receiving relief from some elements of damage available at common law; the employee gains relatively unconditional protection for impairment of his earning capacity, surrendering his common law right to elements of damage unrelated to earning capacity; the work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals.

(*Id.* at 633.) Workers' compensation was thus the sole remedy against the employer for the employee's death as well as his wife's personal loss, even though she could not obtain a separate financial recovery for her own injury.

Similarly, a spouse's separate claim for loss of consortium is subsumed within the workers' compensation statutory scheme. Again, as with a negligent infliction claim, loss of consortium is not collateral to the employee's injury but is recognized as "a form of mental suffering and involves a deprivation of interests which are

personal to the spouse who brings suit and not merely collateral to those of the other spouse." (*Id.* at 632.) Nevertheless, loss of consortium resulting from an employee's on-the-job injury is still subsumed within the worker's compensation remedy. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 162-163.)

So wide-reaching is the workers' compensation exclusive remedy that a loss of consortium claim is even subsumed where the worker is permitted by statute to file a civil suit for his own work-related injury. As recognized in *Lefiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275 (*Lefiell*), though Labor Code section 4558 permits a worker to file a civil action against the employer where the company removes a safety guard from a power press, the workplace injury is still compensable under the workers' compensation system. (*Id.* at 286.) Because the availability of an independent civil remedy did not remove the employee's case from the workers' compensation scheme, a spouse's loss of consortium claim was still barred by the exclusive remedy. (*Id.* at 289.) Thus, although the employee could recover against the employer in a civil suit, his wife would be precluded from any separate recovery because of the exclusive remedy, either through workers' compensation or via a separate liability action.

Likewise, where a worker's injury is causally related to physical harm to family members at home, the injured relatives are barred from seeking a civil remedy against the worker's employer. (*See*, *Salin, supra,* at p. 191 ["[W]here, following a work-related injury or death, conditions of compensation exist, third parties who have suffered prejudice or damages by virtue of such

injury or death are barred from recovery against the employer."]; *See also*, *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 286, *citing Salin* at p. 190 ["[T]he exclusivity of workers' compensation prevails as to heirs in light of Labor Code section 3600, which provides that liability under the Workers' Compensation Act is 'in lieu of any other liability whatsoever to any person . . .'"].)

Plaintiffs incorrectly assume that the exclusive remedy cannot apply unless the injured spouse makes an independent financial recovery. (Opening Brief for Petitioner pp. 6, 14, 31; ER-91 ¶33.) Spouses, for example, make no separate recovery for loss of consortium or negligent infliction under a workers' compensation policy. Rather, "the work-related injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency." (*Snyder*, *supra,* at p. 997, *citing Williams, supra,* 50 Cal.App.3d at p. 122.)

Although Ms. Kuciemba's injury may be separate from her husband's injury, her causes of action are derivative from the illness he allegedly incurred in the course and scope of employment. Setting aside her implausible claim of infection by fabric discussed *infra*, she contended she was injured only because her husband was first injured on the job. Thus, her claims, and the claim of Mr. Kuciemba for loss of consortium, are barred by the exclusive remedy of Labor Code section 3600 *et seq*.

Even if Mr. Kuciemba was asymptomatic and did not suffer damage from the virus (a position entirely contradicted by the original complaint), Plaintiffs have already conceded, and the District Court expressly found, that he was injured by an infection

incurred at work, even though he may not have been damaged by that injury. In reality, however, even asymptomatic cases of COVID-19 may present risks later in life.[2]

In any event, without Mr. Kuciemba's illness contracted at work, Ms. Kuciemba could not seek a civil recovery in tort for the illness she contracted at home. Pursuant to the Legislature's guarantee under Labor Code section 3600 that an employer's compensation obligation for a workplace injury would be "*in lieu of any other liability whatsoever to any person,*" and the corresponding assurance under Labor Code section 3602(a) that "the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer," the language of the WCA preempts the Plaintiffs' civil claims so long as there is a causal link between the employee's illness and the spouse's claim.

B. ***See's Candies* Misreads *Snyder* to Usurp the Legislature's Mandate on the Exclusive Remedy Rule**

The facts of *See's Candies* mirror those presented here: an employee allegedly passed a jobsite infection to a family member

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[2] See Shabir, *What Does COVID-19 Do to the Lungs?* (Feb. 22, 2021 <https://www.news-medical.net/health/What-Does-COVID-19-do-to-the-Lungs.aspx> ["Whilst asymptomatic individuals who test positive for COVID-19 may not overtly show any signs of lung damage, new evidence suggests that there may be some subtle changes that occur in such patients, potentially predisposing asymptomatic patients for future health issues and complications in later life."]).

resulting in injury to both. In response to the argument that the WCA preempted the family's civil claims, the *See's Candies* court misread *Snyder*, *supra*, 16 Cal.4th 991, to conclude that the fact that a worker's injury is the biological cause of a nonemployee's injury "does not by itself make the [employee's] claim the 'legal or logical" basis of the [non-employee's] claim." (*See's Candies*, *supra*, 73 Cal.App.5th at p. 73.) In so ruling, the Court of Appeal effectively created a "virus exception" to the derivative injury rule, and refused to remain in step with the WCA, legislative intent, and long-standing interpretations of that text. (See, *Snyder*, *supra*, 16 Cal.4th at pp. 996-997, 998-999)

In reality, this Court in *Snyder* found the derivative injury rule inapplicable for a very different reason: the injury to the fetus was not the result of injury to the mother, and so the infant did not have to establish an employee injury in order to state a claim. Therefore, the exclusive remedy did not apply.

In *Snyder*, a fetus was exposed to fumes from a commercial cleaning product at a business during her mother's shift at work there. Her mother received brief treatment for nausea, headache and breathing difficulties. The infant eventually suffered birth defects directly related to the chemicals ingested on the premises. The unborn child did not "catch" birth defects from the employee, and the child's birth defects were independent of any injury to her mother.

The trial court sustained the employer's demurrer, holding that because a fetus was effectively a part of the mother's body, an injury to the fetus was nothing more than an injury to the mother,

bringing the claim within the exclusive remedy. The court of appeal reversed judgment, rejecting the notion that the fetus injured on the worksite should be treated as if her injury was the mother's injury. (*Id.* at 995.)

This Court affirmed the reversal, but in doing so reaffirmed the sanctity of the derivative injury doctrine. The infant in *Snyder* could recover in a civil action because her injury did not require her mother to have sustained an antecedent injury. Rather, the child's injury would have occurred whether or not the mother was injured. "Plaintiffs alleged simply that both Naomi [mother] and Mikayla [fetus] were exposed to toxic levels of carbon monoxide, injuring both. Mikayla sought recompense for her own injuries." (*Snyder*, supra, 16 Cal.4th at p. 1000; see also *Id.* at p. 995 [endorsing that the derivative injury rule did not apply "[b]ecause Mikayla's injuries were not derivative of Naomi's, but the result of her own exposure to toxic levels of carbon monoxide." (italics added)]).

Thus, *Snyder* focused on the child's status as a third party lawfully on the employer's premises, and her right to be free from injury just like any customer who visited the store. (*Id.* at 1006-1007.) The store merely owed the child the same duty it owed any customer: to conduct its business in a manner not harmful to invitees. Despite the child being *in utero* when exposed, that situation was no different than where a family member is injured while visiting an employee's jobsite. (*Id.* at 1005, citing *Robbins v. Yellow Cab Co.* (1948) 85 Cal.App.2d 811, 813-814 [exclusive remedy does not apply when wife is injured at the worksite while

picking up husband's paycheck].

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

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

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

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

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

same virus. (*See's Candies, supra,* 73 Cal.App.5th at p. 85.) In reality, the former merely concerns the manner in which the injury is caused, while the latter is indicative of a derivative injury because the worker's injury causes the household member to contract the same harm.

See's Candies revealed its misunderstanding of *Snyder* when it noted "We cannot conceive why the particular manner in which the fetus was injured should determine whether the employer should be shielded from full tort liability by the workers' compensation system." (*Ibid.*) The key to *Snyder* was not the *manner* of the harm, but the *situs* of the harm—the fact that the fetus was independently injured on the employer's property. "[T]he employer is not relieved of tort liability to such family members injured while visiting the work site." (*Snyder, supra,* at 1005.) *Snyder* reasoned that as long as the employee's injury was not the factual or legal cause of the fetus's injury, the exclusive remedy doctrine did not bar the third party claim, even if that third party was still in its mother's womb. (*Id.* at 1000.) It is for this reason that this Court held the exclusive remedy did not apply to the unborn child.

There is no indication that this Court in *Snyder* intended to create anything other than an *in utero* rule applicable to a fetus injured on the business premises. In support of this narrow rule, *Snyder* cited decisions from seven different states dealing solely with *in utero* injuries, none of which touched on the employer's liability to members of a worker's household. (*Id.* at 1001-1002.) Thus, this Court concluded "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, supra,* 16 Cal.4th at p. 1000.)

The creation of an *in utero* rule notwithstanding, *Snyder* reaffirmed that the exclusive remedy still applies whenever "the plaintiff, in order to state a cause of action, *must* allege injury to another person—the employee." (*Id.* at 998 (italics in original.)) Ms. Kuciemba's loss is a legally dependent loss under that analysis. As stated in *Snyder*, "the derivative injury rule governs cases in which 'the third party cause of action [is] derivative of the employee injury in the purest sense: It simply would not have existed in the absence of injury to the employee.'" (*Id*. at 998.)

The ruling in *Snyder* supports the conclusion that the exclusive remedy bars Ms. Kuciemba's civil claim under the derivative injury rule. Present here is precisely the allegation that was missing from *Snyder*: a cause of action that only exists as the result of an "injury to another person—the employee," *i.e.*, the injury to Mr. Kuciemba. Ms. Kuciemba's claims therefore squarely fall within the derivative injury rule as mandated by this Court because the loss that occurred is legally dependent on Mr. Kuciemba's illness.

California's comprehensive workers' compensation scheme allows recovery for an on-the-job COVID-19 infection without proof of the employer's negligence under certain circumstances. Labor Code sections 3212.86-3212.88 recognize that the burden of

proving that an employee contracted COVID-19 on the job is so difficult that the Legislature had to enact a rebuttable presumption to aid employees in establishing coverage. However, no exemption to the exclusive remedy was designated for third parties who catch COVID-19 from a worker, nor was a rebuttable presumption favoring those infected enacted.

The District Court's reasoning in dismissing *Kuciemba*, as fully discussed during oral argument and expressly incorporated into the dismissal order (ER-095-96; ER-005-06), is consistent with the language of the WCA and the *Snyder* decision. *See's Candies* not only departed from the text crafted by the Legislature to create a self-contained statutory scheme, but failed to consider the exclusive remedy in light of the analytic framework California courts had meticulously set forth in prior decisions. Instead, *See's Candies* took an *in utero* rule limited a fetal injury on the employer's property, and applied it to a grown adult at home who inhaled a virus from an employee injured at work, in effect creating a judicial amendment to the WCA.

In that light, the Ninth Circuit remained unconvinced that the *See's Candies* court conclusively addressed the issue. (*Kuciemba, supra,* 31 F. 4th at 1272.) Because *Snyder* dictates that where "the plaintiff, in order to state a cause of action, *must* allege injury to another person—the employee," the conclusion in *See's Candies* that the exclusive remedy does not preempt Plaintiffs' civil claims must be rejected.

V. AN EMPLOYER OWES NO DUTY TO THE HOUSEHOLDS OF ITS EMPLOYEES TO PREVENT INFECTION BY COVID-19

This Court should hold that an employer does not owe a duty to protect third parties from contracting the COVID-19 virus away from the employer's premises. The pronouncements in prior decisions regarding a person's lack of responsibility for a stranger's harm, and the rejection nationwide of efforts to hold employers liable for coronavirus infections in employees' homes, militate against any expansion of *Kesner* beyond asbestos to include a virus.

A. California Limits on Duties Owed to Third-Parties

In the words of this Court, "Duty is not universal; not every defendant owes every plaintiff a duty of care." (*Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204, 213 (*Brown*).) No duty exists unless an injured party's interests are entitled to legal protection against the defendant's conduct. (*Ibid.*)

Foreseeability alone does not create a duty. (*Kesner, supra,* 1 Cal. 5th at pp. 1148-1151.) More than a mere possibility of an occurrence is required to establish foreseeability because "with hindsight everything is foreseeable."(*Colonial Van & Storage, Inc. v. Superior Court* (2022) 76 Cal.App.5th 487, 503 (*Colonial Van*).) The determination that a duty exists is "merely a shorthand statement . . . rather than an aid to analysis . . . '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the

particular plaintiff is entitled to protection." (*Dillon, supra,* 68 Cal.2d at p. 734.) "Courts, however, have invoked the concept of duty to limit generally 'the otherwise potentially infinite liability which would follow from every negligent act . . .'" (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750, quoting *Dillon, supra,* 68 Cal.2d at p. 739.)

Civil Code section 1714(a) provides that "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property . . . ." However, the "threshold element" of a negligence claim is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 397 (*Bily*).

Here, Plaintiffs request the creation of a new duty: the duty of employers to protect non-employees from a virus of unknown origin by guaranteeing that a worker will arrive home free from infection. Just this past year, the California Supreme Court made clear in regard to a duty owed a third party that "whether to recognize a duty to protect is governed by a two-step inquiry." (*Brown*, *supra*, 11 Cal.5th at p. 209.) The first question is "whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect." (*Ibid.*) Only if a relationship is present does the court then "consult the factors described in *Rowland* to determine whether relevant policy considerations counsel limiting that duty." (*Ibid.*) Here, not only is a special relationship lacking

between the Ms. Kuciemba and Defendant—there was no relationship between them at all.

The virus was not the property of Mr. Kuciemba's employer, and did not originate on the construction site. An employer has no duty to control a virus off its premises, nor does Mr. Kuciemba's ability to leave the jobsite with an undetectable virus create such a duty. Simply because Mr. Kuciemba returns home from work does not make his personal home an extension of the jobsite, nor does it create a new duty of care on behalf of the employer to everyone and for everything that occurs in the household.

California courts have declined to impose a duty to protect against tortious harm committed by third parties on an employee's property. (*Colonial Van, supra* [no duty owed for harm in the household during a work-related meal despite defendant's special relationship as employer of homeowner and injured party.]) Defendant's relationship with Mr. Kuciemba ended once he left the jobsite. At that point it had no ability to control his conduct and it owed no duty to those living in his home. (See*, Brown*, *supra,* 11 Cal.5th at p. 216.)

In California, an employee/employer relationship in the workplace does not translate to a special relationship outside the workplace, as confirmed in *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451 (*Elsheref).* The facts of *Elsheref* are the corollary of those in *Snyder*: instead of a fetus injured at the mother's workplace resulting in birth defects, *Elsheref* involved a child born with birth defects as a result of the father's reproductive injury caused by a workplace exposure to chemicals. The child filed

suit against his father's employer, and his mother filed a claim for emotional distress. Summary adjudication was affirmed on appeal because the employer owed no duty of care to the employee's household. *Elsheref* established that a child injured at home from a work-induced condition affecting his father cannot seek a recovery against his father's employer.

In analyzing an employer's potential liability for reproductive harm in the workplace, the *Elsheref* court discredited any attempt by courts to analogize an employer's duty to a worker's household with the medical profession's duty to a patient's family. In contrast to an employer's relationship with an employee, the "special relationship" between a doctor and a patient "may support affirmative duties for the benefit of third persons. Thus, for example, . . . [a] doctor must . . . warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others." (*Id.* at 461, *citing Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 436 (*Tarasoff).*) *Elsheref* expressly declined to recognize a similar relationship between an employer and employee in order to create a vicarious duty to third parties in the household.

Because healthcare providers continually deal with contagious diseases, professionals in that industry have been held liable for the spread of disease to non-patients. Unlike other fields, the medical industry is in the business of mastering pathogens; communicable diseases and the treatment of infections is its business. When treating an infected patient, a doctor is also in effect treating the patient's household, in the sense that what the

patient does or doesn't do in response to the doctor's diagnosis may affect whether the family catches the illness. (*Tarasoff, supra,* 17 Cal.3d at pp. 436-7.)

In *Tarasoff,* this Court relied on decisions from other jurisdictions recognizing that the special relationship between a doctor and the patient creates a duty to exercise reasonable care to protect others from dangers resulting from the patient's illness. These other courts held that a doctor is liable to persons infected by a patient if the doctor negligently fails to diagnose a patient's contagious disease, or having diagnosed the illness fails to warn members of the patient's family. (See *Hoffman v. Blackmon* (Fla.App. 1970) 241 So.2d 752 [tuberculosis]; *Wojcik* v. *Aluminum Co. of America* (1959) 18 Misc. 2d 740 [183 N.Y.S.2d 351, 357-358] [tuberculosis]; *Davis* v. *Rodman* (1921) 147 Ark. 385 [227 S.W. 612, 13 A.L.R. 1459] [typhoid]; *Skillings* v. *Allen* (1919) 143 Minn. 323 [173 N.W. 663, 5 A.L.R. 922] [sexually transmitted disease]; see also *Jones v. Stanko* (1928) 118 Ohio St. 147 [6 Ohio L.Abs. 77, 160 N.E. 456] [smallpox].) There being no special relationship, *Elsheref* found the employer owed no duty.

Because the Kuciembas seek to establish a new duty, the *Rowland* factors do not serve as an alternate basis for creating a new duty to protect a stranger. (*Brown, supra*, 11 Cal.5th at p. 221.) A special relationship depends on the particular facts and circumstances of the parties' association with one another, while the *Rowland* factors consider whether policy considerations justify limiting any resulting duty of protection. (*Id.* at 217.) Thus "application of one test does not obviate the need for the other."

(*Id.* at 221.) As this Court recognized:

> A defendant cannot be held liable in negligence for harms it did not cause unless there are special circumstances—such as a special relationship to the parties—that give the defendant a special obligation to offer protection or assistance. This rule reflects a long-standing balance between several competing interests. It avoids difficult questions about how to measure the legal liability of the stranger who fails to take affirmative steps to prevent foreseeable harm, instead leaving the stranger to make his or her own choices about what assistance to offer.

(Brown, *supra,* 11 Cal.5th at p. 220.)

Only once a special relationship is identified does a court consult the seven factors described in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland)*: foreseeability, certainty of injury, close connection with conduct, moral blame, deterrence, burden on the defendant and community, and insurance. Rather than use those factors tin the creation of a new duty, courts are to consider them solely to determine whether relevant policy considerations justify an exception to a pre-existing duty. *(Brown*, *supra,* 11 Cal.5th at p. 209.)

Although a special relationship was absent in the case before the *Elsheref* court, thus obviating the need apply the *Rowland* factors, the *Court of Appeal* nonetheless concluded the employer owed no duty even if *Rowland* was considered. (*Elsheref, supra,* 223 Cal.App.4th at p. 460-461) *Elsheref* assumed for purposes of

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

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

Although the special relationship between Defendant and Mr. Kuciemba ended once Mr. Kuciemba left the worksite, any concept of a vicarious special relationship favoring Ms. Kuciemba was rejected in *Ess v. Eskaton Properties, Inc.* (2002) 97

Cal.App.4th 120. In that action, the plaintiff claimed a skilled nursing facility caring for the plaintiff's sister knew of the close relationship the plaintiff had with the sister. On that basis, the plaintiff claimed the defendant owed the plaintiff a duty of care, and was liable for the emotional distress it caused her when her sister was harmed while in the defendants' care. In affirming a demurrer to plaintiff's complaint, the appellate court held that despite the foreseeability of harm to the sister, the defendant's actions were directed to her, not to the plaintiff. Because the plaintiff was not present at the time of the injury-causing event, the defendant owed her no duty of care.

B. California Does Not Recognize "Take-home" Liability for a Viral Pathogen

1. *Kesner* and Its Narrow Application to Asbestos

An employer owes no duty to keep everyone that an infected employee encounters off the job free from COVID-19. Never has a California court, or any court, imposed a duty of care on an employer to someone allegedly infected by COVID-19 by a worker who carried the virus home from a jobsite. Moreover, no court in the country has extended the take-home asbestos liability rule of *Kesner* to encompass a transmittable disease. At least seven times over, courts nationwide have held that the employer owes no duty to third-parties off-site for the COVID-19 virus contracted from an employee. (See *Estate of Madden v. Southwest Airlines Co.,* (D. Md. June 23, 2021, 1:21-cv-00672-SAG) 2021 U.S. Dist. LEXIS

1117266; *Kuciemba v. Victory Woodworks, Inc.*, (N.D. Cal., Feb. 22, 2021, No. 3:20-cv-09355-MMC)(*Kuciemba I*); *Kuciemba v. Victory Woodworks, Inc.*, (N.D. Cal. May 10, 2021) 2021 U.S. Dist. LEXIS 88997, *certified to Cal. Supreme Court* (9th Cir. 2022) 31 F. 4th 1268 (*Kuciemba II*); *Ruiz v. ConAgra Foods* (E.D. Wis. (6/8/22 No.22-2471) 2022 U.S. Dist. LEXIS 1117266 (*Ruiz II*), *appeal docketed; Iniguez v. Aurora Packing Company, Inc.* (Ill.Cir.Ct., Kane County, Mar. 31, 2021, No. 20 L 372) 2020 WL 4734941; *Kurtz v. Sibley Memorial Hospital* (Md.Cir.Ct., Montgomery County, Mar. 25, 2021, No. 483758V); *Lathourakis v. Raymours Furniture Co., Inc.* (NY.Sup.Ct., Mar. 8, 2021, No. 59130/2020.)

In *Kesner, supra,* (2016) 1 Cal.5th 1132, the nephew of a worker involved in the manufacture of asbestos brake shoes died of mesothelioma. The uncle, who did not contract mesothelioma, testified that his nephew would spend the night at the uncle's house and would roughhouse with or sleep close to his uncle. The nephew's successor-in-interest sued the uncle's employer for exposing the nephew to asbestos fibers carried home on his uncle's clothes. (*Id.* at 1141.)

At issue in *Kesner* was whether a company that uses a hazardous product as part of its commercial enterprise and allows that product to be conveyed off-site by an employee in violation of law, owed a duty to protect those in the employee's household from harm by that product. The Supreme Court found that such a duty was consistent with precedent that imposed "liability for harm caused by substances that escape an owner's property" where the company fails to exercise reasonable care in its use of asbestos-

containing materials. (*Id*. at 1159.) The defendant's hazardous material had entered the worker's home and caused his nephew harm as a result. (*Id*. at 1141.)

In re-acknowledging that duty, the *Kesner* court made a key finding distinguishing that case from the Plaintiffs' lawsuit: it was not the family member's contact with the employee or that worker's contagious work-related illness that made him sick. Rather, it was the person's contact with asbestos fibers—a hazardous product that his uncle's employer used in its manufacturing process and was required to restrict to the jobsite—that caused the harm. (*Id*. at 1146-1147, 1156, 1159.) Mesothelioma is not an infectious disease, so an employee cannot transmit that illness to others. The fact that the nephew in *Kesner* contracted that illness from his uncle's workplace clothing had nothing to do with whether his uncle also contracted the disease on the jobsite. (See, *City of Los Angeles v. Superior Court* (2021) 62 Cal.App.5th 129, 143-144 (*City of Los Angeles)*.)

Kesner stressed that it was not creating a new duty. Asbestos had long been recognized as a product that the employer was duty-bound to restrict to the premises, based on decades of government regulation and 80 years of industry knowledge. (*Id*. at 1147.) Thus, the commercial use of asbestos in business or on one's property already fell within the employer's general duty to exercise ordinary care in one's activities under Civil Code section 1714. (*Id*. at 1143.) Because businesses had a long-standing duty to contain asbestos to their premises for the protection of strangers, the Court was justified in applying the *Rowland* factors to determine, not that a

duty existed, but whether to create an exception to that already existing duty. (*Ibid*.) Thus, this Court's analysis of duty ends once Plaintiffs fail to establish a special relationship with the household justifying the imposition of a duty.

2. The *Rowland* Factors Do not Favor Creating a Duty to Prevent an Employee's Transmittal of COVID-19 to the Household

Though no special relationship existed, Plaintiffs have nonetheless claim this Court is somehow mandated to consider the *Rowland* factors to determine if a duty exists. However, on balance Plaintiffs fail to find sufficient support in the *Rowland* factors to impose a duty on an employer to protect third parties from the coronavirus. Even if such a duty existed, the *Rowland* factors would compel a finding that an exception to that duty be established.

a. Absence of Moral Blame

One motivation in *Kesner* for failing to create an exception to the employer's duty of care for asbestos was the fact that "commercial users of asbestos benefitted financially from their use of asbestos." *(Kesner, supra,* 1 Cal.5th at p. 1151.) In contrast, the COVID-19 virus has no market viability: it is not used in the commercial process, nor is it a byproduct of any industry. The employer in *Kesner* made a conscious decision motivated by profit to use asbestos in the workplace. Here, Defendant had neither the intent nor desire to have COVID-19 enter its worksite, and derived no benefit from its presence.

b. Lack of Connection Between Conduct and Injury

Kesner contemplates as part of the *Rowland* calculus a consideration of causation: the connection between Defendant's conduct and Plaintiffs' harm. Here, it is uncertain whether the illness either Plaintiff suffered was actually caused by Mr. Kuciemba's presence on the jobsite. For example, it is well known that friable asbestos fibers are manifested as dust clouds that can be seen with the naked eye. These clouds often serve as the basis for worker allegations of exposure to that hazardous product. (See, *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1182 ["one big cloud of asbestos dust"]; *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 26 ["The dust formed a white cloud, which got into the hair and clothes"].) The COVID-19 virus, by contrast, is invisible. No one has ever described being infected by walking into a visible cloud of COVID-19. Not only did Mr. Kuciemba lack any real-time appreciation that he inhaled or was exposed to COVID-19, there is also no way Plaintiffs can demonstrate under the federal pleading standard that Mr. Kuciemba ever carried the virus home on his clothing (or that transmission by that means is even possible) now that years have passed since his initial exposure to the virus.

Additionally, if Ms. Kuciemba could contract COVID-19 from clothing, then Mr. Kuciemba could have contracted it from his co-worker's jacket laying on a workbench. If the means by which COVID-19 entered the jobsite was the clothing of workers rather than the workers themselves, then social distancing, screening

devices or protective equipment would never prevent the virus from entering the project. As such, the alleged presence of COVID-19 on the jobsite could not have been the result of any violation of the San Francisco Order of the Health Officer (SF Order). Mr. Kuciemba might just as likely have been exposed to the virus from others' clothing—if that is even possible—either during his time spent commuting, or while he was with Ms. Kuciemba after she picked up the virus on her clothing during her many trips for essential purposes outside the home. (ER-087 ¶17.)

Despite the lack of support for their belated allegation that Mr. Kuciemba was asymptomatic, that claim further erodes any connection between Defendant's conduct and Plaintiffs' harm. In mid-2020, there was no way to determine whether Mr. Kuciemba was already infected with the virus either when he started working at the San Francisco project in the midst of the pandemic in May 2020 or prior to the Mountain View workers arriving on that site. Stated another way, Plaintiffs cannot prove when, how or where Mr. Kuciemba became asymptomatic, for the very reason that he showed no symptoms until after his employment ended.

Kesner also relied upon the fact that asbestos comes from an identifiable source. "Indeed, liability for harm caused by substances that escape an owner's property is well established in California law."(*Id.* at 1159.) There are some forces of nature, such as soil, animals, or fires, for which someone who controls a property may be responsible, but those agents must originate on the property to establish liability. (See, *Ibid.*) A fire originating off-site, or damage caused by someone else's wandering horse, which

happens to pass through a person's property into a neighboring area does not make that intermediate property owner liable. However, where these calamities originate on a defendant's property, liability may follow. (See, e.g., *Davert v. Larson* (1985) 163 Cal.App.3d 407.)

Asbestos is of an industrial origin as opposed to a transmittable disease. The overwhelming odds are that any person suffering from mesothelioma did not contract it while drinking coffee in a café, riding on a BART train, or singing in a church choir. With COVID-19, everything a worker does during the time spent off-site, and what household members do twenty-four hours a day, is as likely, if not more likely, to be a source of the infection. There are countless potential (and untraceable) exposures Mr. Kuciemba encountered upon leaving his job, getting to his mode of transportation, commuting home, and interacting with others at his house.

c. Ineffective Deterrent Effect

While there is a positive deterrent effect from imposing a duty to contain asbestos on properties where it is used, no similar benefit would be derived from imposing a duty on every employer confronted with COVID-19. The ubiquitous nature of the virus, and the inevitability that almost anyone and everyone could contract the virus regardless of what steps any employer takes, militate against imposing a duty of care on a construction subcontractor, or any entity outside the medical field. "Thus, the stronger the probability that liability will be incurred when

performance is adequate, the weaker is the deterrent effect of liability rules. Why offer a higher quality product if you will be sued regardless . . .?" (*Bily*, *supra,* 3 Cal.4th at p. 404.)

The continued productivity of a healthy workforce is a far greater incentive to maximize efforts to slow the spread of COVID-19 than vexatious lawsuits, where an employer may be pressured to settle the case faced with burdensome discovery and potentially crippling damages. Relying on juries to correctly discern whether the defendant was negligent or the legal cause of the harm is not only a poor way to evaluate duty but may lead to liability that is both speculative and "morally and economically excessive." (*Id.* at 406.)

d. Adverse Consequences on Community and Defendant

Compounding the problem, Plaintiffs make no effort to cap potential civil liability that would result from the creation of a new duty to protect against exposures. There is simply no limit to how wide the net will be cast: the wife who claims her husband caught COVID-19 from the supermarket checker, the husband who claims his wife caught it while visiting an elder care home, the member of a sorority who claims a sister while serving on jury duty caught it from the court bailiff, all these people would have potential claims against entities deemed essential to society's ability to function. The financial burden that duty would impose on employers would be devastating. Even if that duty were limited to the employee's household, the expansion of liability would be too great in the wake of a replicating virus.

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

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

Plaintiffs suggest that somehow the SF Order creates a private right of enforcement for their infection. The SF Order directs that the sheriff and chief of police alone are to ensure compliance with and enforce the order. (VWER_092 § 18.) On the contrary, the SF Order provides that punishment for any violation is limited to a fine and/or imprisonment. *Ibid*. California law requires that there must be a "clear, understandable, unmistakable" indication of an intent to permit a private right of action under a statute. It is not enough that the statutory text

suggests such a right. (See*, Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597; *Mayron v. Google LLC* (2020) 54 Cal.App.5th 566.) Thus, Plaintiffs may not seek damages under the SF order.

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

e. Distinctions from Asbestos

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

healthcare industry's aggressive implementation of COVID-19 precautions, many doctors and nurses still contract the disease.

Nor does Plaintiffs' infection-by-fabric theory hold sway. Prior to April 21, 2022, the Cal-OSHA Emergency Temporary standards set forth at 8 CCR section 3205(c)(7) mandated the cleaning of frequently touched surfaces and objects, and the cleaning and disinfecting of areas, material and equipment touched by anyone determined to have been infected with COVID-19. This reflected the since-discredited supposition that a surface could be contaminated with COVID-19 and serve in its transmission.[3] Cal-OSHA has since deemed those requirements unnecessary and has deleted them. Thus, Plaintiffs may only rely on their original theory that Ms. Kuciemba was infected by Mr. Kuciemba's workplace virus.

Plaintiffs claim the California Legislature has tacitly approved suits against employers by third parties infected by COVID-19 because it has yet to enact a law prohibiting such claims. Not so. The fact that the Legislature has not acted may be more of a recognition that there is no need for an exemption from liability that does not exist given the analysis above. Speculation as to what has motivated the Legislature to not enact any

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[3]Low Risk of Severe Acute Respiratory Syndrome Coronavirus 2 Transmission by Fomites: A Clinical Observational Study in Highly Infectious Coronavirus Disease 2019 Patients, *The Journal of Infectious Diseases* May 5, 2022 https://academic.oup.com/jid/advance-article/doi/10.1093/infdis/jiac170/6580684

provision adds nothing to the legal analysis. (See, *Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735 n.7.))

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

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

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

Most recently, the distinction between an employer's liability for a product and lack of duty owed for a disease was

driven home in *City of Los Angeles, supra,* 62 Cal.App.5th 129. In that action, a police officer's spouse alleged that she contracted typhus from her husband because conditions at the police station were so unsanitary, unhygienic, and unclean that OSHA declared the workplace unfit for human habitation. The trial court found that the spouse's claim of exposure to typhus was similar to take-home exposure to asbestos in *Kesner* and overruled the City's demurrer. (*Id*. at 136.)

The Court of Appeal issued a writ of mandate directing the trial court to vacate its order and sustain the demurrer, because the employer owed no duty to protect a household member from a disease an employee contracts in the course and scope of employment. Because the spouse alleged she contracted typhus from her husband, *City of Los Angeles* determined that the basis for premises liability in *Kesner* "that a premises owner may be held liable for hazardous substances that have escaped the property and caused harm offsite," was not applicable. (*Id.* at 144.) The spouse had no contact with the employer's property and did not allege exposure to any condition of the property. Thus, she failed to allege facts to support a finding that the employer had a duty to her, and the demurrer was sustained on that basis. (*Ibid.*)

Although the complaint was also deficient because the plaintiff failed to allege a violation of any specific statute by the city, the *City of Los Angeles* decision was by no means limited solely to government entities. Rather, the court in a dual holding addressed in great detail the dangers of imposing a duty on all employers by an injured family member, and why the *Kesner*

asbestos analysis did not translate to a contagious on-the-job illness. (*Id.* at 143.) Thus, that part of the decision is crucial to the *City of Los Angeles* court's holding and is not *dicta*. As this Court noted almost a century ago:

> It is well settled that when two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and each is of equal validity.

(Gilgert v. Stockton Port District (1936) 7 Cal.2d 384, 389, citing *Bank of Italy Nat. T.&S. Assn. v. Bentley* (1933) 217 Cal. 644, 650.)

D. Authorities from Other Jurisdictions Support the Rejection of an Employer's Duty to Third-Parties to Prevent COVID-19

As mentioned above, the take-home COVID theory of recovery has been rejected by courts in a number of states. For example, the *Kuciemba* scenario was analyzed under a far more liberal statutory scheme than California's in a series of decisions in the U.S. District Court for the Eastern District of Wisconsin in Estate of *Ruiz v. ConAgra Foods Packaged Foods, LLC* (E.D. Wis. 5/3/22) 2022 U.S. Dist. LEXIS 84302 (*Ruiz I*) and*, Ruiz v. ConAgra Foods Packaged Foods, LLC* (E.D. Wis. 6/8/22) 2022 U.S. Dist. LEXIS 105300 (*Ruiz II*), *appeal docketed*. In that action, Mr. Ruiz contracted COVID-19 at work, then allegedly transmitted the

virus to his wife at home who died a few weeks later. Mr. Ruiz then sued his employer for his wife's wrongful death and on behalf of her estate in a survival action for not protecting the household from his work-related infection.

The employer argued the claims should be dismissed for lack of duty under a standard far more expansive than California's rules on duty: Wisconsin has long followed the minority view of duty set forth in *Palsgraf v. Long Island Railroad* (1928) 248 N.Y. 339 (Andrews, J., dissenting) that "everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." (*Ruiz I*, *supra*, 2022 U.S. Dist. LEXIS 84302 at p. 8.)

The District Court recognized that, "In Wisconsin a duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person . . . restricted to what is reasonable under the circumstances." (*Ruiz II*, *supra*, 2022 U.S. Dist. LEXIS 105300 at pp. 8-9) On that basis, the *Ruiz* court opined that ConAgra owed a duty of care to prevent workers from getting and spreading the coronavirus to third parties under Wisconsin law. (*Ruiz I*, *supra*, 2022 U.S. Dist. LEXIS 84302 at pp. 8-9.)

Despite these findings, the *Ruiz* court was still troubled by the result, acknowledging that Wisconsin could very well recognize that public policy would bar recovery for COVID-19 even if a duty was found. (*Id. at* pp. 9-10) As such, the *Ruiz* court required an additional round of briefing to evaluate the public policy issue, an analysis it described as "separate and distinct from determining

whether a duty exists." (*Id.* at 10.)

After reviewing the supplemental papers and evaluating the decisions of other states, the *Ruiz* court granted the employer's motion to dismiss, holding that the employer owed no duty to the household because imposing liability under the circumstances would impose too great a burden on the company and "would enter a field with no reasonable or principled stopping point." (*Ruiz II*, *supra*, 2022 U.S. Dist. LEXIS 105300 at p. 2.) In so ruling, *Ruiz* rejected the notion that the analysis applicable to take-home asbestos could be applied to COVID-19 on three grounds. (*Id.* at p. 5.)

First, employers in asbestos cases are deliberately exposing employees to asbestos which is presumably a profitable component of the employer's business. "The employer has, in effect, created the danger." (*Ibid.*) Moreover, the employer's use of asbestos was the sole cause of the disease: asbestos would not circulate in the air but for the employer's manufacturing operations. The result in isolated instances would be that people contract mesothelioma. (*Ibid.*) In contrast, the coronavirus is in circulation everywhere, not just on the employer's premises. The employer neither created nor profited from COVID-19. Millions of people had contracted the virus somewhere other than the ConAgra plant or from its personnel. ConAgra did not supply the virus, "it is alleged merely to have fostered an environment in which the virus transmitted or thrived." (*Ibid.*)

Additionally, despite the fact that the dangers of asbestos have been known for a century, with OSHA imposing regulations

50 years ago as a result, employers using that product let fibers escape the worksite to infect others. (*Ibid.*) In contrast, COVID-19 infected the plaintiffs in April 2020, just a month after the pandemic hit Wisconsin. Thus, "the novelty of the risk" also weakened the analogy to take-home asbestos. (*Ibid.*)

Finally, though mesothelioma typically requires high levels of asbestos exposure, the coronavirus could infect anybody in "a fleeting encounter—a short cab ride, an elevator, etc. . . ." *(Ibid.*) The dangers of asbestos exposure on the other hand were naturally limited to employees and a narrow class of people in frequent contact with the employees and their belongings, thus providing a natural curb on the pool of potential plaintiffs. "With COVID-19, by contrast, the pool of potential plaintiffs isn't a pool at all – it's an ocean." (*Ibid.*) A single employee could cause hundreds of other infections with relatively minimal contact and "create an almost infinite universe of potential plaintiffs." (*Ibid.*) The logical result of Ruiz's argument would be that "anyone exposed to someone who was exposed at the ConAgra plant would have a viable negligence claim." (*Id.* at 6.)

Ruiz found support for its conclusion in *Estate of Madden v. Southwest Airlines Co.,* (D. Md. June 23, 2021, 1:21-cv-00672-SAG) 2021 U.S. Dist. LEXIS 117266 (*Madden*), another U.S. District Court decision dealing specifically with an employer's liability to third parties for take-home COVID-19. In that case, Ms. Madden attended a mandatory group training session overseen by her employer Southwest Airlines in Baltimore, where her employer failed to follow COVID-19 safety protocols. She then drove home to

Pennsylvania, where she and her husband developed symptoms. When Mr. Madden died of the coronavirus shortly thereafter, Ms. Madden filed a wrongful death action against her employer.

The defendant claimed no duty existed because of the absence of a special relationship with the decedent. Analyzing Maryland law, the *Madden* court determined that the defendant did not have control of Ms. Madden nor a special relationship with her because once she left the training she was no longer acting in the course and scope of her employment. Likewise, there was no special relationship with Mr. Madden because he did not attend the training. (*Id*. at p. 7.) *Madden* agreed with the defendant's position that no duty existed due to the absence of a special relationship. (*Ibid*.)

Ms. Madden argued that the court needed to go beyond the special relationship question and apply a seven-factor approach similar to California's *Rowland* test, but to create a duty rather than determine an exception to a pre-existing duty. Without conceding that it need go beyond the special relationship test to determine duty, the *Madden* court noted Southwest would not owe Mr. Madden a duty even if the seven-factor test applied. (*Id*. at pp. 7-10) The court found four-and-a-half of the factors favored the imposition of a duty on the employer: foreseeability, close connection with conduct, moral blame, the relative burden to Southwest, and deterrence. (*Id*. at pp. 7-9) The court was ultimately persuaded, however, by the one-and-a-half factors that weighed against imposing a duty: certainty of injury and the extent of the consequences to the community of imposing a duty.

(*Id*. at pp. 8, 9-10.)

As to the degree of certainty of injury, the *Madden* court found that because COVID-19 was incredibly infectious and transmitted easily in a variety of settings, identifying the precise origin of someone's illness was extremely difficult. Moreover, the exact point of exposure is "exceedingly difficult to trace, even in circumstances where precautions are taken or where one point of exposure is known." (*Id.* at 10.) Though close contact could be a possible cause, "that is little guarantee that the particular infection originated from that contact as opposed to some other source, given how hard it is to completely isolate oneself from other, ubiquitous infection vectors." (*Id.* at 8.) This was particularly true because Mr. Madden did not participate in the training "thus is insulated by a another layer of causal uncertainty." (*Ibid.*; See also, *Iniguez v. Aurora Packing Company, Inc.* 2020 WL 4734941 (Ill.Cir.Ct., Kane County, Mar. 31, 2021, No. 20 L 372) [No special relationship existed because plaintiff was not an invitee or consumer of the employer's products or services].)

The tipping point for *Madden* was the broader societal consequences of imposing a duty that would significantly expand the field of potential liability. The absence of causation-based limitations would result in employers litigating countless third party exposures by virtue of contact with an employee during the pandemic. (*Madden, supra,* 2021 U.S. Dist. LEXIS 117266 at p. 10.) Any case could proceed so long as there was potential exposure at the workplace and subsequent contact with any foreseeable third party.

The court further recognized that people who claim to follow CDC isolation guidelines might in reality have close contact with people outside their homes. (*Ibid.)* Limiting the number of potential plaintiffs to those "at home" who live in an apartment building or venture out for groceries likewise would not stem the tide. Even a bathroom break while on the road home from the training may have resulted in dire consequences. *Ibid.* Thus "the prospect of an unstemmed and ill-defined tide of third party plaintiffs brining suit predominates the duty analysis," (*Id.* at 11.), leading the court to determine that Southwest owed Mr. Madden no duty even though mathematically more factors favored the imposition of a duty on the employer.

Buttressed by the holding in *Madden*, the *Ruiz* court determined ConAgra similarly owed no duty to the household. ConAgra at best was merely aware of a danger of the virus imported from elsewhere, unrelated to its business, thus creating a less tenable case for liability to a third party. ConAgra "did not create the virus or infect anyone; it simply knew (as everyone else did) that it was circulating." (*Ruiz II*, *supra*, 2022 U.S. Dist. LEXIS 117266 at p. 3.) The virus came from outside the plant and was transmitted to the decedent at home, places where the employer "had zero ability to control." (*Ibid.*) Even if Mr. Ruiz was exposed to the virus at work, there was no guarantee he would pass it on and cause someone's death. (*Ibid*) At best, the employer did not police its employees sufficiently enough to ensure that the virus could not spread between them. *(Ibid.)* The *Ruiz* court found that was not enough to impose liability even if Wisconsin law imposed

a duty of care to third parties to protect them from the coronavirus.[4] (*Ibid.*)

VI. CONCLUSION

As California businesses recover from the COVID-19 pandemic and continuously adapt to changing public health measures, employers and employees rely more than ever on the certainty of legal rules governing the workers' compensation system. The WCA—and the derivative injury rule encompassed within it—subjects any harm that is derivative of a workplace injury suffered by an employee to the statutory exclusive remedy provision. The position Plaintiffs advocate violates that well-established principle by attempting to judicially legislate a COVID-19 exception to the longstanding derivative injury rule. That exception would undermine the workers' compensation scheme and result in deeply destabilizing consequences for businesses across the state.

An expansion of the *Kesner* holding beyond asbestos would be just as debilitating. Employers would become liable not only to their workers' family and friends, but to anyone with whom those

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[4] The fact that *Ruiz* found that the plaintiff's claims were not barred by Wisconsin's exclusive remedy rule is of no import. *Ruiz* noted that California applies its rule "in lieu of any other liability whatsoever *to any person*" thus barring "*the employee or his or her dependents*" from pursuing a claim for work-related injuries. In contrast, the far narrower Wisconsin statute requires "*the employee*" to sustain an injury during the course of employment for preemption to apply. (*Ruiz I*, *supra*, 2022 U.S. Dist. LEXIS 84302 at p. 6.)

workers came into contact—none of whom were under the control of the employer accused of causing the harm. In effect, employers would become the insurers of anyone who could claim their infection came through an asymptomatic worker employed by the defendant.

Dated: August 22, 2022 **HINSHAW & CULBERTSON LLP**

By: */s/ William Bogdan*
William Bogdan
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VICTORY WOODWORKS, INC., a Nevada Corporation

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.260(b)(1) of the California Rules of Court, the enclosed brief of Respondent is produced using 13-point Century Schoolbook type including footnotes and contains approximately 13,339 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 22, 2022

HINSHAW & CULBERTSON LLP

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PROOF OF SERVICE

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

On August 22, 2022, I served the document(s) on the interested parties in this action as stated below:

VICTORY WOODWORKS, INC.'S ANSWERING BRIEF

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

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I declare under penalty of perjury under the laws of the United States and the State of California that the above is true and correct and was executed on August 22, 2022, at San Francisco, California.

Sherie McLean

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S274191**
Lower Court Case Number:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/22/2022
Date

/s/Sherie McLean

Signature

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