Supreme Court of California
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Electronically FILED on 9/13/2022 by Tayuan Ma, Deputy Clerk

FILED WITH PERMISSION

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

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I. INTRODUCTION

Defendant's Answering Brief suggests that if this case proceeds that millions of California businesses will fold in the face of crushing, unending COVID-liability. Plaintiffs contend that limiting a duty of care to members of an employee's household strikes a careful balance between providing injured persons with a remedy while also addressing concerns about the scope of liability. Defendant ignores that if this case does not proceed, then individuals like Mrs. Kuciemba, who alleges that

Defendant's negligence was directly responsible for her life-threatening COVID infection, will have no remedy.

Regarding the First Certified Question (Workers' Compensation), Defendant cannot distinguish *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991 and *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal. App. 5th 66, which together outline how the derivative injury doctrine does not apply to third parties who suffer their own, separate injuries. *See's Candies* correctly applied *Snyder* to a nearly identical case. Contrary to defendant's misreading of *Snyder,* what matters is whether Mrs. Kuciemba must prove, as a matter of law, that Mr. Kuciemba was injured, in order for Mrs. Kuciemba to state a claim. The case law makes clear that she does not.

As for the Second Certified Question (Duty of Care) Defendant completely ignores that the critical foreseeability factors all weigh in Mrs. Kuciemba's favor. Public policy also favors protecting vulnerable individuals like Mrs. Kuciemba, who would otherwise be left without a remedy. While other jurisdictions may have ruled against plaintiffs in similar cases, those cases are distinguishable on factual and policy grounds.

As any litigator is aware, the fact that a defendant owes a duty of care is not the end of the story. The plaintiff must still prove every element of her case, which may well require expert testimony about complex scientific issues. This Court is not tasked with resolving this case on its merits. Instead, it must determine whether such cases can even be brought. Mrs. Kuciemba should have the chance to present her case before a jury of her peers.

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

II. ARGUMENT

A. Defendant and the district court misconstrued *Snyder* and the scope of the derivative injury doctrine.

Labor Code § 3600(a) states in relevant part: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided [...] shall, without regard to negligence, **exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment** and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur […]" (emphasis added).

Defendant cherry picks the phrase "in lieu of any other liability whatsoever to any person" to suggest that "all claims related to or causally linked to the employee's injury or illness" must be barred by the exclusive remedy. (Defendant's Answering Brief p. 19) However, Defendant cannot rely on these few words in isolation. "The words of a statute must be read in context, bearing in mind the nature and obvious purpose of the statute." *Diamond View Ltd. v. Herz* (1986) 180 Cal. App. 3d 612, 617.

In *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991 this Court interpreted the statute as a whole, and clearly described the limits on *Labor Code* § 3600's otherwise broad scope. As this Court recognized, "[n]either the statutes nor the decisions enunciating the rule suggest workers' compensation exclusivity extends to all third party claims deriving from some "condition affecting" the employee. Nor is a nonemployee's injury collateral to or derivative of an employee injury merely because they both resulted from the same negligent conduct by the employer. The employer's civil immunity is not for all liability resulting from negligence toward employees, but only for all liability, to any person, deriving from an employee's work-related *injuries*." *Id.* at 997 (emphasis in original). Moreover, "the "compensation bargain"

[…] between businesses and their *employees* and generally does not include third party injuries. The workers' compensation law "... imposes reciprocal concessions upon *employer* and *employee* alike, withdrawing from each certain rights and defenses available at common law ...." 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.'" *Id.* at 1004-1005 (emphasis in original, internal citations omitted). Thus, this Court made clear in *Snyder* that third party injuries that are legally independent of the employee's workplace injury are not barred by the exclusive remedy.

The district court erroneously held that the derivative injury doctrine applied 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). Defendant makes the same mistake as the district court when it suggests that third-party injuries

which are *factually connected* to a workplace injury must be barred by Workers' Compensation. ("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.") (Answering Brief at p. 26)

If Defendant and the district court were correct, then the fetus in *Snyder* would have had no recovery because her injuries "were the direct result of [the employer's] work-related negligence towards [the mother]". *Id.* at 998 discussing the Court of Appeal's flawed reasoning in *Bell v. Macy's California* (1989) 212 Cal. App. 3d 1442). The *Snyder* Court rejected a factual causation standard. "Even when the mother *is* injured, moreover, 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." *Id.* at 1000 (emphasis in original).

As Plaintiffs explained in detail in their Opening Brief and at oral argument before the district court, a claim is "derivative" when the non-employee spouse must prove legal causation, i.e. the Plaintiff must prove, as part of their prima facie case, injury to the employee spouse.

(ER-035-036). To illustrate, jury instruction CACI 3920 Loss of Consortium (Noneconomic Damages) states: "[Name of plaintiff] claims that [he/she/nonbinary pronoun] has been harmed by the injury to [his/her/nonbinary pronoun] [husband/wife]. **If you decide that [name of injured spouse] has proved [his/her/nonbinary pronoun] claim against [name of defendant],** you also must decide how much money, if any, will reasonably compensate [name of plaintiff] for loss of [his/her/nonbinary pronoun] [husband/wife]'s companionship and services […]" (emphasis added). Similar qualifiers exist in CACI 3921 Wrongful Death (Death of an Adult): **"If you decide that [name of plaintiff] has proved [his/her/nonbinary pronoun] claim against [name of defendant] for the death of [name of decedent]**, you also must decide how much money will reasonably compensate [name of plaintiff] for the death of [name of decedent]" (emphasis added). In contrast to these derivative claims, Mrs. Kuciemba has brought negligence and premises liability claims directly against the employer. While Mrs. Kuciemba's COVID infection as a fact causation matter stems from her husband and/or his clothing or personnel effects, Mrs. Kuciemba does not need to *legally prove* that Mr. Kuciemba was injured as part of her prima-facie case.

See's Candies, Inc. v. Superior Court of California for the County of Los Angeles (2021) 73 Cal. App. 5th 66 affirms these principles in the context of a workplace COVID infection. "In our view, moreover, there is little difference conceptually between a mother breathing in a poisonous gas and conveying it to her unborn child, and a wife breathing in viral particles that she then conveys to family members. In both cases, the employee is merely the conduit of a toxin or pathogen; whether the employee herself was harmed by the toxin or pathogen is not relevant to the claims of the injured family members." *Id.* at 85. The Court stated that even assuming "Mrs. Ek's infection constitutes an injury for purposes of the WCA, and that injury in turn caused Mr. Ek's injury, we nonetheless reject defendants' reading of *Snyder* to extend the derivative injury doctrine to any injury for which an employee injury was a but-for cause" *Id.* at 85. This is because the "*Snyder* court made clear however, that "logical" or "legal" dependence is not equivalent to *causal* dependence." *Id.* at 86 (emphasis in original).

Defendant strains to distinguish *See's Candies* and its correct analysis and application of *Snyder*. Defendant claims that the *See's Candies* Court misunderstood the *Snyder* opinion because 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." (Answering Brief at p. 31, emphasis in original). On the contrary, it is Defendant who misunderstands *Snyder* (where the word "situs" appears not once). The *Snyder* opinion did not turn on where the plaintiff is injured (a factual question), but whether the non-employee plaintiff must allege an injury to the employee in order to prove the non-employee's separate personal injury claim (a legal question). The district court made the same error. Ironically, in attempting to mischaracterize *Snyder*, Defendant touches on the central point of the holding, which is that the fetus was *independently injured* and could bring her own personal injury claim against her mother's employer regardless of her mother's injuries.

Contrary to Defendant's assertions, *See's Candies* contains an extensive, thorough analysis of *Snyder's* holding and analysis and the Court of Appeal correctly applied *Snyder's* principles. The Court of Appeal correctly observed that "although the case before us involves injuries allegedly suffered by family members of an employee, a construction of the derivative injury rule premised solely on causation would bar civil claims by *any* person injured as a result of the

employee's injury, family member or not", but such a broadly sweeping result is contrary to *Snyder's* holding. *See's Candies, Inc.,* 73 Cal. App. 5th at 89.

Defendant claims that *Snyder* only applies to *in utero* cases where a fetus is injured on the business premises. *Snyder's* holding does not contain any such limitations. This Court held that "Section 3600 bars personal injury actions against an employer only 'for any injury sustained by his or her employees arising out of and in the course of the employment.' Mikayla's action is for her own injuries, not her mother's. The trial court therefore should have overruled Michael's Stores' demurrer." Moreover, this Court explained that its decision "clarified the scope of the derivative injury doctrine", *Snyder*, 16 Cal. 4th at 1000, meaning that the holding is applicable to more than just fetal injury cases.[1]

[1] Defendant claims the Ninth Circuit was "unconvinced that the *See's Candies* court conclusively addressed the issue." (Answering Brief at p. 33). The Ninth Circuit expressed no opinion on the merits, and it merely agreed with Plaintiffs that this case was appropriate for certification. Any alleged "uncertainty" in the Ninth Circuit's brief opinion has no precedential value. *E.g. See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal. App. 5th 66, 92 (noting that the Court of Appeal was not bound by the district court's ruling in this case).

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.

B. <u>Plaintiffs do not need to establish that a special relationship existed between Mrs. Kuciemba and Defendant because she alleges affirmative negligent conduct by Defendant itself.</u>

For the first time, Defendant argues that Mrs. Kuciemba must prove the existence of a "special relationship" with Defendant as a prerequisite to determining if Defendant owed her a duty of care. Defendant failed to raise this argument with the district court or the Ninth Circuit. Defendant misstates the law. The only duty analysis this Court should conduct is an application of the *Rowland* factors to determine if the general duty of ordinary care should not otherwise apply to Mrs. Kuciemba.

Although as a general principle, "a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous it also is well established that, as a general matter, there is no duty to act to protect others from the conduct of third parties." *Delgado v. Trax Bar & Grill* (2005) 36 Cal. 4th 224, 234–35 (internal citations omitted). This general no duty to protect rule exists because **"[t]he law does not**

impose the same duty on a defendant who did not contribute to the risk that the plaintiff would suffer the harm alleged. Generally, the person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another from that peril." *Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204, 214 (emphasis added). Therefore, "[a]n actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other. For example, a person who stumbles upon someone drowning generally has no legal duty to help the victim. The same rule applies to a person who stumbles upon a mugging, for as a general matter, there is no duty to act to protect others from the conduct of third parties." *Brown*, 11 Cal. 5th at 214 (internal citations and quotation marks omitted). **"Where the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect the plaintiff from harm, however, our cases have uniformly held the defendant owes no legal duty to the plaintiff**." *Brown*, 11 Cal. 5th at 216. (emphasis added).

An exception to this no duty to protect rule is that a "defendant may owe an affirmative duty to protect another from the conduct of third parties if he or she has a "special relationship" with the other

person." *Delgado*, 36 Cal. 4th at 235. Thus, for example, "Courts have found such a special relationship in cases involving the relationship between business proprietors such as shopping centers, restaurants, and bars, and their tenants, patrons, or invitees." *Delgado*, 36 Cal. 4th at 235. Alternatively, a duty to protect exists when the special relationship "between the defendant and the victim is one that gives the victim a right to expect protection from the defendant, while a special relationship between the defendant and the dangerous third party is one that entails an ability to control [the third party's] conduct. Relationships between parents and children, colleges and students, employers and employees, common carriers and passengers, and innkeepers and guests, are all examples of special relationships that give rise to an affirmative duty to protect. The existence of such a special relationship puts the defendant in a unique position to protect the plaintiff from injury. The law requires the defendant to use this position accordingly." *Brown*, 11 Cal. 5th at 216 (internal citations and quotation marks omitted).

In summary, the case law holds that the general no duty to protect rule and the "special relationship" exception only apply to cases where (1) a third party harmed the plaintiff, often with intentional conduct; (2)

the defendant took no action; and (3) the plaintiff alleges that the defendant, by virtue of some connection with the plaintiff and/or tortious third party, should have affirmatively taken action to protect the plaintiff.

This case is clearly distinguishable from the "typical" fact pattern where the no duty to protect rule/special relationship exception arises. Plaintiffs allege that Mrs. Kuciemba was harmed by Defendant's *own negligent acts* as opposed to the acts of a third party. The First Amended Complaint alleges that Defendant knew or should have known that its employees at a Mountain View jobsite became infected, and/or exposed to persons infected with COVID, but knowingly transferred these workers to a San Francisco jobsite without requiring that the workers quarantine first, thus commingling its Mountain View and San Francisco workers. (ER-154-165) Defendant transferred these infected workers even though it was aware of a binding San Francisco County Health Order (ER-052-083), CDC Guidelines, and other regulations, that required and/or called for quarantining, mandatory screening protocols, having workers stay home if they are feeling sick or were exposed to infected individuals, and taking specific COVID precautions at work. (ER-154-165) 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). It is Defendant's own actions, including its violation of the San Francisco Health Order, that increased the risk of harm to Mrs. Kuciemba. Therefore, Mrs. Kuciemba does not need to establish a "special relationship" with Defendant as a prerequisite for finding a duty, she only needs to establish that Defendant owed her a duty of ordinary care, or put another way, whether the general duty of care does not otherwise extend to her. *See generally, Kesner v. Superior Court* (2016) 1 Cal. 5th 1132 (conducting a standard *Rowland* factors analysis to determine whether the general duty of ordinary care was owed without determining if a special relationship existed).

This case's factual and procedural posture is very different from *Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204, a recent case cited by Defendant. In *Brown*, the plaintiffs "trained in the Olympic sport of taekwondo. They traveled to compete at various events in California and throughout the country with their coach, Marc Gitelman. Gitelman took advantage of these opportunities to sexually abuse the young

athletes. This went on for years until the sponsor of these competitions, USA Taekwondo (USAT), banned Gitelman from coaching. Gitelman was ultimately convicted of multiple felonies for the sexual abuse of the minor athletes he trained." *Id.* at 210. USAT is the governing body of taekwondo and Gitelman was a USAT-registered coach. *Id.* at 210. The plaintiffs sued Gitelman, USAT and the United States Olympic Committee (USOC), the entity that oversaw USAT and "whose central function is to coordinate amateur sports throughout the country for athletes hoping to one day compete in the Olympics." *Id.* at 210.

The plaintiffs alleged that USAT and USOC were negligent in failing to protect them from Gitelman's abuse. *Id.* at 210. Both defendants successfully demurred. *Id.* at 211. The Court of Appeal reversed the judgment against USAT, holding the taekwondo governing body owed the plaintiffs a duty to protect them from Gitelman. *Id.* at 211.

The issue that eventually reached this Court was whether the Court of Appeal had used the correct analytical framework in determining when a duty to protect existed. Prior to *Brown*, there were multiple competing approaches. The Court of Appeal in *Brown* employed a two-part framework, requiring a plaintiff to "establish: (1)

that an exception to the general no-duty-to-protect rule applies *and* (2) that the *Rowland* factors support imposition of the duty." *Id.* at 212 (emphasis in original). In contrast, other Courts of Appeal had "held that a plaintiff can establish a duty to protect by satisfying *either* the special relationship doctrine or the *Rowland* factors. Under this approach, *Rowland* serves as an independent source of duty." *Id.* at 212. Still other courts used a third approach, applying only the *Rowland* factors to determine if a special relationship existed. *Id.* at 212-213. This Court ultimately agreed with the Court of Appeal's two-step analysis and affirmed the judgment. *Id.* at 213.

Brown is a classic example of the no duty to protect/special relationship fact pattern. The plaintiffs were sexually abused by a third party and they alleged that the national governing body USOC had done nothing to stop the abuse. This is very different from the present case, where the plaintiffs allege *affirmative negligent acts by the defendant itself.* Nothing in *Brown* suggests that a plaintiff must first establish a special relationship when the Defendant is alleged to have *personally* engaged in *affirmative acts of harm* against the plaintiff. In fact, the foundational reason for the no duty to protect rule is based on the "**the common law's distinction between misfeasance and nonfeasance,**

and its reluctance to impose liability for the latter […] There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive in action, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant." *Id.* at 215 (emphasis added).

The First Amended Complaint alleges that Defendant was aware of its obligations under the San Francisco Health Order, that Defendant knowingly violated the Health Order, and that these violations were a substantial factor in causing Mrs. Kuciemba's harm. The First Amended Complaint clearly alleges an affirmative negligence case that requires a completely separate duty analysis from the cases involving the no duty to protect rule. The only duty analysis that this Court should perform is an application of the *Rowland* factors.[2]

[2] *Elsheref v. Applied Materials, Inc*. (2014) 223 Cal.App.4th 451 does not compel a different result. This pre-*Brown* case is easily distinguishable on its facts. A child was born with severe birth defects. The child's parents sought to impose tort liability against the father's employer for exposing the father to toxic chemicals during his employment. *Id.* at 455. The Court of Appeal, in the alternative, applied a *Rowland* analysis and a special-relationship analysis and determined that no duty existed. This approach was rejected in *Brown*. Moreover, the "special relationship" analysis was likely unnecessary given that the plaintiffs had abandoned this argument at appeal and *Elsheref* was not a "third party culpability" case. *Id.* at 461-462. Ultimately what mattered was the specific public policy considerations that surround

C. **The *Rowland* factors weigh in favor of a duty to Mrs. Kuciemba.**

Plaintiffs are not attempting to create a "new duty of care". Instead, Plaintiffs believe that the same commonsense limitations on the general duty of care (*Civ. Code* § 1714) that this Court described in *Kesner v. Superior Court* (2016) 1 Cal. 5th 1132 apply to this case. *See Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204, 217 ("The multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing duty, but instead as a means for deciding whether to limit a duty derived from other sources.") Importantly, Plaintiffs allege that the specific terms of the San Francisco Health Order set the *standard of care* for purposes of negligence *per se*. (ER-091-092).

Plaintiffs previously explained in their Opening Brief why each of the *Rowland* factors favor Plaintiffs. Defendant appears to concede that the foreseeability factor, the most important of the *Rowland* factors, favor Plaintiffs. Defendant only offers argument on several of the factors, which we address We address Defendant's arguments on the remaining factors.

"preconception claims" which in practice are only viable against medical providers or product manufacturers. *Id.* at 459-460.

Moral Blame: There is significant moral blame attached to Defendant's conduct. The City and County of San Francisco required Defendant to "strictly comply" with its Health Order. (ER-053). The Health Order explained the serious health risks associated with the virus: "is easily transmitted, especially in group settings, and the disease can be extremely serious. It can require long hospital stays, and in some instances cause long-term health consequences or death. It can impact not only those known to be at high risk but also other people, regardless of age." (ER-052). At the time there was no vaccine available, so the Health Order included very detailed protocols designed to prevent the spread of COVID including, but not limited to, (1) the establishment of a "daily screening protocol for arriving staff to ensure that potentially infected staff do not enter the construction site"; (ER-075); (2) immediately removing any individuals with a confirmed case of COVID from the jobsite (ER-076); (3) providing personal protective equipment to workers "including gloves, goggles, face shields, and face coverings as appropriate for the activity being performed (ER-076); (4) strictly controlling choke points and high risk areas where social distancing was not possible (ER-077); (5) Frequently cleaning and disinfecting "all high touch areas, including

entry and exit areas, high touch areas, rest rooms, hand washing areas, high touch surfaces, tools, and equipment"; (ER-077); and (6) posting a notice instructing workers to "not enter the jobsite if you have a fever, cough, or other COVID-19 symptoms. If you feel sick, or have been exposed to anyone who is sick, stay at home." (ER-077)

The First Amended Complaint alleges that Defendant, knew or should have known that its employees at a Mountain View jobsite became infected, and/or exposed to persons infected with COVID, but knowingly transferred these workers to a San Francisco jobsite without requiring that the workers quarantine first, thus commingling its Mountain View and San Francisco workers. (ER-154-165). Defendant's actions thus increased the risk of infection to its San Francisco workers, including Mr. Kuciemba. Defendant, as the employer, had superior resources and was in a far better position as a whole to prevent the spread of COVID within its own jobsite. As this Court in *Kesner* observed, 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,* 1 Cal. 5th at 1151. Defendant's decision to transfer the exposed Mountain View workers to the San Francisco

jobsite demonstrates a greater interest in profit over worker safety. Such conduct is morally blameworthy.

Connection between the Plaintiff's injury and Defendant's conduct: Defendant claims that *Rowland* involves "a consideration of causation" and that the closeness of the connection factor weighs against Plaintiffs because "it is uncertain whether the illness either Plaintiff suffered was actually caused by Mr. Kuciemba's presence on the jobsite." (Answering Brief p. 45)

Defendant misreads this factor. "The third *Rowland* factor, the closeness of the connection between the defendant's conduct and the injury suffered is strongly related to the question of foreseeability itself." *Kesner v. Superior Ct.* (2016) 1 Cal. 5th 1132, 1148 (internal citations and quotation marks omitted). As discussed at length in the Opening Brief, Plaintiffs have satisfied the foreseeability factor and therefore this factor should also weigh in favor of Plaintiffs.

As for Defendant's causation arguments, the problem for Defendant is that at the Motion to Dismiss stage, a Court must consider the pleading as true and should not "consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure". *Khoja v. Orexigent*

Therapeutics, Inc. (9th Cir. 2018) 899 F.3d 988, 998-999. Thus, all of Defendant's speculation regarding potential alternate sources of infection carry no weight. Plaintiffs have the burden of proof to establish that Defendant's conduct was a substantial factor in causing Mrs. Kuciemba's COVID infection. Establishing causation may require expert testimony. But causation arguments are inappropriate at this stage of the pleadings and have little relevance to the general duty of care analysis.[3]

When the facts of the First Amended Complaint are viewed in the light most favorable to Plaintiffs, there is a direct line from Defendant's negligent conduct to Mrs. Kuciemba's infection. Similarly, in *Kesner*, 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."

[3] To this point, Defendant challenges the validity of Plaintiffs' "indirect transmission" claim, i.e. Plaintiffs' alternate theory that Mrs. Kuciemba's COVID infection was caused by contact with Mr. Kuciemba's clothing or personal effects as opposed to his person, to suggest that . The district court dismissed this claim on the grounds it lacked plausibility. (ER-006). Plaintiffs appealed this part of the district court's order, but the Ninth Circuit did not rule on this issue pending the resolution of the two certified questions. Whether the "indirect transmission" claim was sufficiently plausible for federal pleading purposes is not before this Court.

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. The closeness of the connection between Defendant's wrongful conduct and Mrs. Kuciemba's injury is sufficiently foreseeable to warrant extending the ordinary duty of care to Mrs. Kuciemba.

Preventing Future Harm/Deterrent Effect: Defendant claims that imposing tort liability will have little deterrent effect because of 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". (Answering Brief p. 47) *Kesner* offers useful guidance here. In *Kesner*, which was originally filed in 2011, the Defendants argued that "the future risk of the particular injury at issue—mesothelioma resulting from exposure to airborne asbestos fibers—has largely been eliminated through extensive regulation and reduced asbestos usage" and that "imposing a duty to prevent secondary

exposure is unlikely to alter the behavior of current asbestos-using businesses." *Id.* at 1150. However, this Court explained that "whether or how the imposition of liability would affect the conduct of current asbestos users, **our duty analysis looks to the time when the duty was assertedly owed**. Just as we look to the availability of scientific studies to assess the foreseeability of injury due to take-home asbestos exposure at the time [the decedents] were exposed, the relevant question for this factor is whether imposing tort liability in the **1970s would have prevented future harm from that point."** *Id.* at 1150 (emphasis added).

Mrs. Kuciemba became infected with COVID in July 2020. At this point, there were no vaccines available and individuals were still ordered to shelter in place with the exception of participating in certain essential activities. The relevant question is whether imposing liability in 2020 would have prevented future harm from that point. The *Kesner* court cited the existence of asbestos regulations which "readily adopted the premise that imposing liability would prevent future harm" and that there was no countervailing state policy approving the use of asbestos. *Id.* at 1150-1151. Indeed, San Francisco and the State of California continued to issue Health Orders designed to prevent the spread of

COVID after July 2020 and there is no state policy that *encourages* individuals and businesses to act in a way that might increase the spread of the virus. The contrary is true. While the virus may have reached endemic status today, imposing liability in July 2020 would likely have prevented future harm, and prevented others from completely disregarding the binding Health Orders designed to protect the public.

Burden on Defendant: Defendant repeats a time-worn phrase that permitting liability would be financially devastating. However, that is not the proper focus of the duty analysis. "[W]e begin by observing that the relevant burden in the analysis of duty is not the cost to the defendants of compensating individuals for past negligence. To the extent defendants argue that the costs of paying compensation for injuries that a jury finds they have actually caused would be so great that we should find no duty to prevent those injuries, the answer is that shielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration in determining the existence of a duty. Rather, our duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care." *Id.* at 1152. The short reply to Defendant's concern is that the anticipated added cost of following the Health

Orders imposed by state and local governments and the CDC guidance is not extreme; after all individuals and businesses have adapted to the new COVID landscape over time. But businesses that choose profit over safety and which ignore or violate these Health Orders should not be insulated from liability.

As discussed before, Plaintiffs believe that the most logical way to control the scope of liability is to adopt the *Kesner* Court's **logical and bright-line rule that limited take-home exposure liability to members of a worker's household which this 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 (emphasis added).

Defendant argues that 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." (Answering Brief p. 52) But the Health Order *required* Defendant to consider the virus as part of Defendant's "domain". All Plaintiffs are asking is that Defendant, and others like it, simply follow the binding Health Orders that were designed to protect the public. 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.

The *Rowland* factors on balance favor Plaintiffs. This Court should answer "Yes" to the Second Certified Question.

D. <u>The out of state cases are distinguishable.</u>

Defendant cites several out-of-state cases where the plaintiffs alleged that a person in their household contracted COVID at work and brought the virus home to the plaintiff. Each of these cases ended with a dismissal. Putting aside that these out-of-state cases are trial court/district court decisions with no precedential value, a key commonality is that none of the cases appear to have involved a strict, binding, and extremely detailed Health Order like the San Francisco order that governed Defendant's conduct here. Defendant was required to strictly comply with the Health Order, and its failure to comply with the Health Order directly led to Mrs. Kuciemba's devastating infection.

The cases also refer to each state's distinct policy choices which are not applicable here. For example, in *Estate of Madden v. Southwest Airlines Co.* (D. Md. 2021) 2021 WL2580119 "Maryland's third-party duty case law and its emphasis on limiting the class of prospective

future plaintiffs heavily informs the Court's balancing. In fact, it is the dispositive weight on the scale in favor of finding “no duty” here, despite the fact that the narrow majority of factors, including foreseeability, favor imposition of a duty. Maryland courts have made their priorities with regard to third-party duties clear, and the prospect of an unstemmed and ill-defined tide of third-party plaintiffs bringing suit predominates the duty analysis.” *Id.* at *8.

Similarly, in *Ruiz v. ConAgra Foods Packaged Foods LLC* (E.D. Wis. 2022) 2022 WL2093052 the State of Wisconsin “enacted, and the governor signed, a law providing that businesses are immune from civil liability resulting from the novel coronavirus unless the act or omission involves reckless or intentional misconduct, which isn't really alleged here. Wis. Stat. § 895.476(2). Although the plaintiffs filed this lawsuit one day prior to the February 27, 2021, effective date of the statute, the statute would otherwise grant immunity dating back to March 1, 2020, which predates the infection at issue here. Thus, although the immunity statute does not strictly apply to this case, a court considering public policy must nevertheless take heed of the fact that Wisconsin's political branches have expressly stated that public policy does not favor lawsuits arising out of workplace exposure to the coronavirus.” The

Legislature of this State has not enacted a similar ban.

Another common thread is that the plaintiffs did not either clearly limit the potential class of claimants and/or did not propose any limits at all. In *Estate of Madden v. Southwest Airlines Co.* (D. Md. 2021) 2021 WL2580119 it appears that the plaintiffs sought to limit the class of potential foreseeable persons to "adherence to regulatory guidance and following safety protocols", which the district court observed was "of little practical use, given the many circumstances in which contact both falls within the guidelines and implicates an exceedingly broad cross-section of the public at large." *Id.* at *7; *Iniguez v. Aurora Packing Co., Inc.* (Ill.Cir.Ct. 2021) No. 20 L 372, 2021 WL 7185157, at *2 ("Is [the policy of limiting liability via the Workers' Compensation Act] then served by extending a common law duty with unlimited liability to a pool of potential claimants mediated only by the travels and uncontrolled contacts of employees outside of their workplace?"); *Ruiz v. ConAgra Foods Packaged Foods LLC*, (E.D. Wis. 2022) No. 21-CV-387-SCD, 2022 WL 2093052, at *7 ("The plaintiffs have not proposed any principled way to limit liability to a narrow subset of potential third parties without opening the door to potentially unlimited liability. Although Mrs. Ruiz was the spouse of

the employee, she could also have been a neighbor, a houseguest, or someone Mr. Ruiz drove with in a vehicle. She could be someone who caught the virus from someone who caught it from Mr. Ruiz.”)[4]

Here, Plaintiffs believe the most logical limitation is the same as in *Kesner*: “persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time.” *Kesner*, 1 Cal. 5th at 1155. “Persons whose contact with the worker is more incidental, sporadic, or transitory do not, as a class, share the same characteristics as household members and are therefore not within the scope of the duty we identify here. 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.

California courts have not shied away from grappling with complex legal issues merely because the defense claims such matters will expand their potential liability.[5] This open-mindedness was

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[4] *Lathourakis v. Raymours Furniture Co. Inc.* (NY.Sup.Ct., Mar. 8, 2021, No. 59130/2020) was not a “take home” case, but involved a worker who directly sued her employer. The case was dismissed on Workers’ Compensation exclusivity grounds.

[5] *E.g. Kesner*, 1 Cal. 5th at 1155; *Tarasoff v. Regents of University of California* (1976) 17 Cal. 3d 425, 462 (Clark, J., dissenting) (“Thus, in

expressed by the Court of Appeal in *See's Candies,* which observed that the "unique factual and legal issues presented by the ongoing pandemic will not inexorably lead to unlimited liability." *See's Candies, Inc. v. Superior Court of California for the County of Los Angeles* (2021) 73 Cal. App. 5th 66, 93. This Court is capable of fashioning commonsense, workable solutions that will protect wronged individuals like Mrs. Kuciemba, while balancing the interests of California businesses that are recovering from the pandemic.

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effect, the majority informs the therapists that they must accurately predict dangerousness—a task recognized as extremely difficult—or face crushing civil liability."); *Regents of Univ. of California v. Superior Ct.* (2018) 4 Cal. 5th 607, 633 ("UCLA and some amici curiae place considerable weight on this factor, arguing it would be prohibitively expensive and impractical to make university professors and administrators the "insurers" of student safety."); *Delgado v. Trax Bar & Grill* (2005) 36 Cal. 4th 224, 257 (Kennard, J., dissenting) ("As to the burden on defendant, it is substantial. In the absence of a prior similar incident or some other indication of a reasonably foreseeable risk of a criminal assault, a business owner can only guess when, where, and how a criminal assault might occur, and what protective measures among an infinite number of possible precautions should be taken.")

III. CONCLUSION

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

Respectfully Submitted,

Dated: September 12, 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 7,288 words.

Dated: September 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court on September 12, 2022 through the TrueFiling system.

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Dated: September 12, 2022

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Supreme Court of California
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