IADC COMMITTEE NEWSLETTER

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

SEPTEMBER 2023

IN THIS ISSUE

Michael Fox and Anshul Agrawal of Duane Morris LLP report on a recent California Supreme Court decision limiting employers' liability for take-home exposure to COVID-19.

California Supreme Court Finds Employers Have No Liability for Take-Home Exposure to COVID

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If an employee contracts COVID-19 at the workplace and brings the virus home to other members of their households, can these household members bring negligence claims against this employer for failing to prevent the spread of the virus? In *Kuciemba v. Victory Woodworks, Inc.*, the California Supreme Court answered this question in the negative, indicating that allowing such causes of action would be an "intolerable burden on society,"[1] thus, declining to expand its standard allowing for claims based on take-home asbestos exposure.

Kuciemba involved a construction worker who became infected with COVID-19 after his employer violated a county order prescribing safety guidelines to prevent the spread of the virus at construction jobsites.[2] He carried the virus home and transmitted it to his wife, who was hospitalized due to the infection for several weeks and, at one point, was kept alive on a respirator.[3]

The wife sued her husband's employer in state court, asserting claims for negligence and negligence per se. Following removal, the United States District Court for the Northern District of California granted the employer's motion to dismiss, concluding *inter alia*: that (1) the wife's claims were barred by the exclusive remedy provisions in the California Workers' Compensation Act (WCA), and (2) even if they were not barred, the employer's duty to provide a safe workplace did not extend to non-employees like the wife.[4]

On appeal, the Ninth Circuit certified these two issues as questions for the California Supreme Court. On the first issue of whether the wife's claims were barred by the WCA's exclusive remedy provisions, the Ninth Circuit noted "the need for clear guidance from California's highest court."[5] On the second issue of whether the employer owed a duty to a non-employee like the wife, the Ninth Circuit discussed *Kesner v. Superior Court*, in which the California Supreme Court concluded that defendant-employers did owe a duty of care to third-party household members to protect them from take-home asbestos exposure.[6] However, the *Kesner* decision specified that "this duty extends no further" than asbestos exposure.[7] The Ninth Circuit recognized the potential analogies between workers bringing home asbestos and bringing home COVID-19, but emphasized the potential for a distinction between the public policy concerns in these two cases—concluding that California's

[1] *Kuciemba v. Victory Woodworks, Inc.*, 531 P.3d 924 (Cal. 2023).
[2] *Id.* at 931.
[3] *Id.*
[4] *Id.*
[5] *Kuciemba v. Victory Woodworks, Inc.*, 31 F.4th 1268, 1272 (9th Cir. 2022). Until this case, the highest California court to address this issue was the California Court of Appeal. *See See's Candies, Inc. v. Superior Court of Cal. for Cnty. of Los Angeles*, 73 Cal. App. 5th 66 (Cal. Ct. App. 2021).
[6] *Kuciemba*, 31 F.4th at 1273 (citing *Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016)).
[7] *Kesner*, 384 P.3d at 299.

courts should be given the first opportunity to decide whether such a distinction exists.[8]

1st Certified Question: 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?

The derivative injury rule within workers' compensation law states that when a third party asserts a claim which is "collateral to or derivative of" an employee's workplace injury, workers' compensation benefits provide the exclusive remedy for that claim—barring the third party from bringing any tort claims for this injury.[9] However, a third party would not be barred from bringing a tort claim for an injury which is legally independent from an employee's injury, even if both injuries were caused by the employer's same negligent conduct.[10]

To decide whether the wife had derivative claims, the California Supreme Court referenced its previous decision in *Snyder v. Michael's Stores*, which established that the derivative injury rule applies only when a third party's *cause of action* derives from an employee's injury, meaning "only when proof of an employee's injury is required as an element of the cause of action."[11] Here, in the wife's case, the California Supreme Court pointed out that to support her negligence claim, she did not need to establish that her husband developed COVID-19 or suffered any cognizable injury. Rather, she only needed to establish that he was exposed to the virus at the workplace and carried it home to her. As a result, her negligence claim was "not legally dependent on any actual injury to [her husband]."[12]

The Court also noted that derivative injury claims usually seek recovery for economic or intangible losses suffered by third-party plaintiffs as a result of an employee's workplace injuries, indicating that the rationale barring these claims should not be extended to bar claims for actual physical injuries or death suffered by third-party plaintiffs.[13]

2nd Certified Question: Does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

California Civil Code Section 1714 articulates a general duty to exercise reasonable care for the safety of others, but courts recognize exceptions to this general duty when supported by compelling policy considerations.[14] Here, amicus for the employer argued that even the general duty should not apply, because unlike other toxins, such as the asbestos in *Kesner*, the SARS-CoV-2 virus was not used by the employer in its business nor did it produce any commercial benefit for Victory. The

[8] *Kuciemba*, 31 F.4th at 1273.
[9] *Kuciemba*, 531 P.3d at 932 (collecting cases).
[10] *Id.* at 933.
[11] *Id.* at *934 (citing *Snyder v. Michael's Stores, Inc.*, 945 P.2d 781 (Cal. 1997)).
[12] *Id*.
[13] *Id.* at 936.
[14] *Id.* at *939.

California Supreme Court rejected this argument, emphasizing that the general duty is not premised on a defendant actually using hazardous materials, nor is the duty limited to "business-specific activities."[15]

Even though the employer had a "default duty to use due care in its operations to avoid foreseeable injuries", the California Supreme Court ultimately recognized a public policy exception to this default duty in the COVID-19 context. The Court articulated how employers do not have full control over the spread of COVID-19 at their workplaces—since it is heavily dependent on individual employees' compliance with precautionary measures in the workplace, as well as the precautionary measures they take outside the workplace. The Court reasoned that imposing a tort duty could lead employers to impose such stringent restrictions that the pace of work would slow down. Slowed operations, or even shutdowns, of essential businesses would be particularly detrimental to the public, which led the Court to conclude that imposing this tort duty would result in too many negative consequences to the community.[16]

The Court also noted how recognizing this tort duty would result in significantly increased litigation, placing major financial burdens on employers, not to mention the burdens on the judicial system. *Kesner* addressed this concern by limiting the duty to prevent take-home asbestos exposure to employees' household members only. However, *Kuciemba* explained that this approach cannot be applied so seamlessly to the COVID-19 context. In the asbestos context, the mechanism of injury requires frequent and sustained contact with asbestos fibers on workers' clothing and effects, which likely only household members would experience. By contrast, transmission of the SARS-CoV-2 virus can occur in as little as 15 minutes of contact with a worker, which many more people beyond household members can experience.[17] And more significantly, the asbestos context involves a much smaller pool of potential litigants. The potential defendants are only companies who use asbestos in the workplace, and the potential plaintiffs are only those household members who develop the rare cancer mesothelioma from asbestos exposure. By contrast in the COVID-19 context, the potential defendants are all workplaces in general, and the potential plaintiffs are all household members who contract COVID-19, a much more prevalent disease than mesothelioma.[18]

Conclusion

Kuciemba is the highest court decision to date addressing the extent of an employer's duty to prevent non-workplace or take-home exposures to ubiquitous viruses in the wake of a growing body of law addressing analogous exposures to toxins.[19] Courts

[15] *Id.* at *941.
[16] *Id.* at *946-947.
[17] *Id.* at 948.
[18] *Id.* at 949.
[19] Following the California Supreme Court's definitive answer on the certified questions, the Ninth Circuit affirmed the district court's dismissal. *Kuciemba v.*

applying Maryland, Illinois, and Wisconsin state law have reached similar conclusions, noting that recognizing a duty would lead to a dramatic increase in litigation,[20] placing these significant burdens on defendant-employers would lead to negative social consequences, [21] and allowing third parties to recover from employers for the transmission of COVID-19 "would enter a field that has no sensible stopping point."[22] In addition to such policy-based limitations on a duty to prevent exposure, how the courts would appropriately address the exposure and causation elements of a plaintiffs' tort claim based on a virus (as opposed to a toxin such as asbestos) seems another intractable difficulty for such actions. Thus, whether these courts' decisions have application beyond exposure to widespread viruses like COVID-19 remains to be determined.

Victory Woodworks, Inc., 74 F.4th 1039 (9th Cir. 2023).

[20] *Estate of Madden v. Southwest Airlines, Co.*, 2021 WL 2580119 (D. Md. June 23, 2021)).

[21] *Iniguez v. Aurora Packing Co.*, 2021 WL 7185157 (Ill. Cir. Ct. Mar. 31, 2021)).

[22] *Ruiz v. ConAgra Foods Packaged Foods LLC*, 606 F. Supp. 3d 881, 883 (E.D. Wis. 2022)).

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