Case No. S274191

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CORBY AND ROBERT KUCIEMBA,
Plaintiffs and Appellants,

vs.

VICTORY WOODWORKS, INC.,
Defendant and 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.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes and Statutes

Articles, Texts and Miscellaneous

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THE STATE OF CALIFORNIA

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INTRODUCTION AND SUMMARY OF ARGUMENT

A. Importance of Issues and How they Arose

The Civil Justice Association of California (CJAC) welcomes the opportunity to address as *amicus curiae*[1] the two issues this case presents:

1. If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?; and
2. Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

Both questions were certified by a three-judge panel of the Ninth Circuit (*Kuciemba v. Victory Woodworks, Inc.* (9th Cir.

[1] By separate accompanying application, amicus asks the Court to accept this brief for filing.

2022) 31 F.4th 1268) to this Court, which accepted them verbatim and invited briefing on them. In its order of certification, the Ninth Circuit panel provided a thumbnail sketch of the essential facts informing the issues to be addressed:

> In response to the COVID-19 pandemic, San Francisco issued a shelter-in-place order in March 2020, effectively shuttering many local businesses. These restrictions were relaxed two months later when San Francisco issued a revised order (the "Health Order") allowing certain essential industries, including the construction industry, to reopen. Although these businesses were permitted to reopen, the Health Order imposed stringent conditions on their operations in order to limit the spread of COVID-19.
>
> After the Health Order was issued, Robert Kuciemba began working for Victory Woodworks, Inc. ("Victory"), a furniture/ construction company, at a jobsite in San Francisco. Mr. Kuciemba and his wife, Corby Kuciemba (collectively "the Kuciembas"), allege that they strictly complied with the City's various COVID-19 orders, followed all recommended safety precautions, and minimized their exposure to other people. The only person in their household to have frequent contact with others was Mr. Kuciemba, through his work at Victory's jobsite.
>
> According to the Kuciembas, Victory knowingly transferred workers from an infected construction site to Mr. Kuciemba's jobsite without following the safety procedures required by the Health Order. Mr. Kuciemba was forced to work in close contact with

> these employees and soon developed COVID-19, which he brought back home.
>
> Mrs. Kuciemba is over sixty-five years old and was at high risk from COVID-19 due to her age and health. She tested positive for the COVID-19 disease on July 16, 2020, and developed severe respiratory symptoms. Mrs. Kuciemba was hospitalized for more than a month after contracting COVID-19 and was kept alive on a respirator. *Id.* at 1270-1271.

The Ninth Circuit stated that the two issues arising from the aforementioned facts are of "*significant public importance* to the State of California" because they deal with "the scope of an employer's liability in tort for the spread of COVID-19, the application of the public policy exception to Cal. Civ. Code § 1714(a)'s general duty of care in the context of a pandemic, and—perhaps most sweepingly—whether California's derivative injury doctrine applies to injuries derived in fact from an employee's workplace injury." *Kuciemba, supra*, 31 F.4th at1271; italics added.

At the time of the Ninth Circuit's certification order, the federal district court (which had jurisdiction based on a transfer from state court to it on diversity grounds) had concluded that "the derivative injury doctrine applied and also that the employer Victory did not owe a duty of care to Mrs. Kuciemba." *Id.* at 1273. Accordingly, "[i]f either holding is correct, the district court's ruling must be affirmed and the

Kuciembas' First Amended Complaint must be dismissed. If neither holding is correct, the district court's ruling must be reversed and the Kuciembas' suit must be allowed to proceed." *Id.*; footnote omitted.

B. Interest of Amicus

CJAC is a long-standing nonprofit organization representing businesses, professional associations and financial institutions. Our primary purpose is to educate the public about ways to make our civil liability laws more fair, economic, certain and uniform. To this end, CJAC regularly petitions the government for redress of grievances when it comes to determining who gets paid, how much, and from whom when the acts of some occasion injury to others.

CJAC's efforts in this regard have included participation before the Court on the scope and application of the Workers' Compensation Act's (WCA) exclusive remedy and derivative injury doctrines as well the "duty" element of tort law. See, *e.g.*, *Hendy v. Losse* (1991) 54 Cal.3d 723 (exclusive remedy); *King v. CompPartners* (2018) 5 Cal.5th 1039 (exclusive remedy); and *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905 (duty).

Most of CJAC's members employ people in California and have workers' compensation to cover these employees for

their on-the-job injuries. They are also often sued by plaintiffs alleging various types of negligence, for which the threshold element of duty and its breach loom large. Understandably, protecting the broad ambit of exclusivity under the WCA and cabining the reach of the "duty" element in negligence actions are of utmost importance to our employer members' ability to conduct their businesses in a reasonably clear, certain and uniform litigation environment.

CJAC has read the briefs of the parties filed here and agrees with the district court's order of dismissal in this case and its conclusions: (1) the derivative injury doctrine of the WCA precludes this action; and (2) no duty should be imposed on the employer to protect the spouse of an employee from contracting COVID-19 from an asymptomatic infected employee spouse.

ARGUMENT

I. THE EXCLUSIVE REMEDY OF THE WORKERS' COMPENSATION ACT AND ITS COROLLARY, THE DERIVATIVE INJURY DOCTRINE, PREEMPTS PLAINTIFFS' LAWSUIT AGAINST HER SPOUSE'S EMPLOYER FOR NOT TAKING SUFFICIENT PRECAUTIONS TO PREVENT HER FROM BECOMING INFECTED IN THEIR HOME BY COVID-19 EXPOSURE TO HIM.

A. The Exclusive Remedy of Workers' Compensation Needs Continued Protection from Judicial End-Runs Around It.

The linchpin to the exclusive remedy provisions of the WCA is the "compensation bargain" under which the employer assumes liability for personal injury or death without regard to fault in exchange for limitations on the amount of that liability. Workers' compensation assures "[t]he employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16 (*Shoemaker*).

As a scholarly article explains, "principles of economic scarcity" are central to the WCA's "compensation bargain." "There is not enough value received from the individual worker to support two compensation systems. . . [T]he exclusive-remedy provision is critical to the basic legal

structure for industrial accidents"[; and] "a system that contemplates *both* the tort action against the employer and . . . compensation [from the WCA] is beyond rational defense." Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law* (1982) 812-813; italics added.

Workers' compensation, as this Court has explained, "balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer." *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 474. This critical "balance" is jeopardized by "continual efforts to make end-runs around the exclusivity provisions of the workers' compensation system." *United States Borax & Chemical Corp. v. Superior Court* (1985) 167 Cal.App.3d 406, 411 (*Borax*).

As *Borax* presciently stated in reversing the trial court's judgment and holding instead that a civil action for wrongful death and emotional distress brought by the family of a worker killed in an industrial accident was barred by the

exclusiveness of workers' compensation:

> What is particularly disturbing about [some] . . . [lower] courts' ruling[s] is that [they] appear to be part of a trend of refusing to recognize the exclusive jurisdiction of the Workers' Compensation Appeals Board. In these days of ever shrinking judicial resources, the plaintiffs' bar would be well advised to heed these rules and to concentrate its energy on securing swift and simple compensation for the injured employee in the forum which has exclusive jurisdiction over the claims. [Plaintiffs'] . . . efforts [to end-run the exclusivity provisions] [sh]ould be more appropriately addressed to the Legislature in which is vested the plenary power to create and enforce the workers' compensation system. *Id*.

The WCA is not, however, the exclusive remedy just for employees. Under its corollary, "the derivative injury doctrine, the WCA is also deemed the 'exclusive remedy for certain *third party claims deemed collateral to or derivative of*' an employee's work-related injuries." *Snyder v. Michael's Stores, Inc*. (1997) 16 Cal.4th 991, 997 (*Snyder*); italics added.

Judicial recognition of the importance to protecting the "compensation bargain" and "exclusiveness" of workers' compensation from new court-created exceptions, was reiterated in *King v. CompPartners, Inc.*, *supra*, 5 Cal.5th 1039: "[Labor Code] section 3600 provides a workers' compensation remedy for an injury linked '*in some causal fashion*' to employment. This causation requirement differs

markedly from ordinary tort principles, in that '[a]ll that is required is that the employment be one of the contributing causes without which the injury would not have occurred.' [Citation.]" *Id.* at 1052; italics added. Because of this, "industrial causation has been shown in an array of scenarios where a work injury contributes to a subsequent nonindustrial injury." *Id.*

The general direction of this Court's decisions on the subject of WCA exclusivity has been to reject attempts to circumvent that barrier. This is consistent with legislative amendments to the WCA which restrictively list specific exceptions to exclusivity, implying no others exist. See *Continental Casualty Co. v. Superior Court* (1987) 190 Cal.App.3d 156, 162: "Curtailing the exceptions to exclusivity benefits both employers and employees within the system, by keeping down the costs of compensation insurance and preserving the low cost, efficiency and certainty of recovery which characterizes workers' compensation."

1. None of the Statutory Exceptions listed in the WCA to its "Exclusivity" Apply Here.

To be sure, some exceptions to the exclusivity of the WCA are expressly recognized by it. Section 3600, for instance, states the "conditions for compensation" under the

WCA are "in lieu of any other liability whatsoever to any person," subject to three narrow exceptions inapplicable here.

2. Mrs. Kuciemba's Injury Occasioned by Contracting COVID-19 while at Home from Exposure to Her Spouse Employee's Asymptomatic Infection of the Virus is "Derivative" of his Injury and subject to the WCA's Exclusivity Doctrine.

In addition to the aforementioned statutory exceptions to the exclusive remedy of workers' compensation, there are court-created exceptions based on statutes other than the WCA. *Shoemaker*, *supra*, 52 Cal.3d 1, for example, held that the exclusive remedy of the WCA did not apply to claims under a "whistle-blower" protection statute for damages arising from the termination of employment because the "whistle-blower" statute was more specific than the WCA. "[T]he Legislature's enactment of specific statutory protection for whistle-blowing activity, including a civil action for damages incurred from official retaliatory acts, defines the protected activity as a specific statutory exception to the provisions of the workers' compensation law; such conduct lies well outside the compensation bargain." *Shoemaker, supra*, 52 Cal.3d at 23.

Workers' compensation exclusivity, as the aforementioned opinions show, also encompasses any injury

"collateral to or derivative of" an injury compensable under the WCA. In *LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, for instance, a worker injured while operating a power press without a point of operation guard sued his employer under the power press exception to exclusivity in Labor Code § 4558 that included a claim for loss of consortium on behalf of his spouse. This Court granted the employer's petition for review to determine whether the spouse of an injured worker may claim damages for her own loss of consortium in a legal action brought by the injured worker against the employer pursuant to section 4558.

LeFiell's unanimous opinion by Justice Baxter explains that

> [T]he bar on civil actions based on injuries to employees extends beyond actions brought by the employees themselves. The employer's compensation obligation is "*in lieu of any other liability whatsoever to any person*" (§ 3600, italics added), including, but not limited to, the employee's dependents (§ 3602) for work related injuries to the employee. This statutory language conveys the legislative intent that "the work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency." [Citation]. *Id.* at 284.

Further, *LeFiell* clarifies that the "spouse's claim for loss of consortium is unquestionably *derivative of*, and *dependent*

on, the employee's industrial injuries. . . A cause of action for loss of consortium is, by its nature, dependent on the existence of a cause of action for tortious injury to a spouse. [Citation]" *Id.* at 285; italics added. *LeFiell* concludes with the statement that "derivative claims of dependent family members, such as a spouse's claim for loss of consortium . . ., remain barred under the workers' compensation law's exclusivity rule." *Id.* at 289. See also *Williams v. Schwartz* (1976) 61 Cal.App.3d 628, 632 (employee spouse's claim in action at law that she suffered emotional distress as a percipient witness to her husband's accident and injury at his work site dismissed as subsumed by the WCA). Likewise, the spouse's claim here against her husband's employer for viral injuries contracted at home from her husband employee is barred under the WCA's derivative injury doctrine.

The reach of the WCA's exclusivity is broader and more encompassing than in many other jurisdictions. *Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606 clarifies that, while other jurisdictions expressly exclude intentional torts from the exclusivity of their workers' compensation laws, in California "some injuries caused by intentional torts remain subject to the exclusive . . . remedy." *Id.* at 626.

Plaintiffs rely principally on two opinions to bolster their contention that the derivative injury doctrine does not foreclose Mrs. Kuciemba from asserting a separate action against the employer for contracting "take home" COVID-19 from her employee spouse: *Snyder, supra*, 16 Cal.4th 991 and *See's Candies, Inc. v. Superior Court* (2021) 73 Cal.App.5th 66 (*See's Candies*). *Snyder* is distinguishable on its facts; and *See's Candies* misstates *Snyder* and the meaning of the derivative injury doctrine.

Snyder holds that the derivative injury rule does not bar civil actions against employers of mothers by children who were harmed *in utero* through some event or condition that also affected their mothers from toxic exposure at the workplace. It bars attempts by the child to recover civilly for the mother's own injuries or for the child's legally dependent losses, but permits the *in utero* fetus who is exposed at the mother's work place to recover for his or her own injuries. The minor's action against the mother's employer did not demonstrate the minor's own recovery was legally dependent on injuries suffered by her mother because the child was injured by the employer on the premises, separately from the mother. The child did not catch the mother's injury. Thus, the exclusivity doctrine did not defeat the minor's cause of action

for her own injuries or her parents' claim for consequential losses due to the minor's injuries.

The derivative injury rule would, in other words, bar the action if the minor sought damages for her mother's work-related injuries or that the minor's claim necessarily depended on her mother's injuries. This is in sharp contrast to the facts alleged here where Mrs. Kuciemba does not claim to have contracted COVID-19 at Mr. Kuciemba's work place as happened to the minor plaintiff in *Snyder*, but derivatively from Mr. Kuciemba when he came home from work infected with it and transmitted it to her.

Snyder recognizes the importance of this distinction: "[T]he 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.'" *Snyder, supra*, 16 Cal.4th at 998. That is the *Kuciemba* case.

See's Candies mistakenly elevates one of the reasons for *Snyder*'s opinion as the Supreme Court's holding: that just because "an employee's injury is the biological cause of a nonemployee's injury does not thereby make the nonemployee's claim derivative of the employee's injury." 73 Cal.App.5th at 70. No it doesn't, but this is not *Snyder*'s

holding; it is a reason for distinguishing and disapproving *Snyder*'s holding from the predecessor opinion of *Bell v. Macy's California* (1989) 212 Cal.App.3d 1442, which found a child's prenatal injury "was a collateral consequence of the treatment of the mother." *Id.* at 998.

Instead, *Snyder* holds that because the plaintiff minor child's *in utero* injuries "were not derivative of her [mother's], but the result of her *own exposure* to toxic levels of carbon monoxide [at her mother's workplace] . . . the exclusive remedy provisions of the workers' compensation law" do not apply." 16 Cal.4th at 995; italics added. Here, unlike the facts animating *Snyder*, Mrs. Kuciemba was not exposed to COVID-19 at her husband's workplace, but allegedly after he left work and infected her at home. Her injuries were, then, "derivative" of his infection and subject to exclusivity under the WCA.

II. THE COURT SHOULD NOT IMPOSE A "DUTY" ON EMPLOYERS TO PREVENT TRANSMITTAL OF THE COVID-19 VIRUS BY THEIR EMPLOYEES, WHO MAY HAVE CONTRACTED IT AT WORK, TO THIRD PARTY NONEMPLOYEE HOUSEHOLD MEMBERS.

Plaintiffs complain that the district court's decision dismissing their claims "does not comport with [the] law," specifically the maxim that "[f]or every wrong there is a remedy." Civ. Code § 3523; Opening Brief on the Merits

(OBM), p. 6. But this aspirational and "wholesome maxim of jurisprudence . . . can obviously have no application to any but legal wrongs for which the law authorizes or sanctions redress." *County of San Luis Obispo v. Abalone Alliance* (1986) 178 Cal.App.3d 848, 865 (*County of San Luis Obispo*). The proposition that courts should strain to provide remedies for every "wrong" in the moral sense flies directly in the face of this longstanding authority that only *legal* wrongs must be redressed.

California courts explicitly reject the concept of universal duty. "It must not be forgotten that 'duty' got into our law for the very purpose of combating what was then feared to be a dangerous delusion . . . *viz.*, that the law might countenance legal redress for *all foreseeable harm*." *County of San Luis Obispo, supra*, 178 Cal.App.3d at 865; italics added. "The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards." *Dillon v. Legg* (1968) 68 Cal.2d 728, 734.

"The threshold element of a cause of action for negligence and its variants is the existence of a duty to use due care toward an interest of another that enjoys legal

protection against unintentional invasion." *Paz v. State of California* (2000) 22 Cal.4th 550, 559. Whether this prerequisite to a negligence cause of action has been satisfied in this case is a question of law to be resolved by the Court. As this Court has stated: "To say that someone owes another a duty of care 'is a shorthand statement of a conclusion, rather than an aid to analysis . . .. Duty 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." *Id.*; [citation]. "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933.

A. There Should Be No Judicially Imposed "Duty" Upon Employers to Nonemployee Household Members Who Contract COVID-19 Because Employers Failed to Take All Necessary Steps Required by a Local Ordinance and State Regulations to Protect their Workers from Contracting COVID-19.

Plaintiffs urge the Court to infer from a San Francisco Ordinance and unspecified California Occupational and Safety Health Act (Cal/OSHA) regulations a "duty" for employers to protect their employees' household members from contracting COVID-19 that the employees may have

gotten from their own workplace exposure. This is the tort of *negligence per se*, for which a plaintiff must allege that (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to the plaintiff; (3) the death or injury resulted from an occurrence of the kind that the statute, ordinance, or regulation was designed to prevent; and (4) the plaintiff belonged to the *class of persons* for whose protection the statute, ordinance, or regulation was adopted. Evid. Code, § 669, subd.(a); italics added.

The vice of the negligence per se claim here is that neither the ordinance nor regulations relied upon discuss the responsibilities of essential service employers (of which Victory categorically belongs) to an employee's *household members*. These provisions only specify what employers should do with respect to their employees, not with respect to their employees' household members. Accordingly, these regulatory standards cannot properly serve as a basis for asserting negligence per se against employers for infectious viral harms that household members of employees may contract from their close family employee members who have been infected at work. "Neither legislative [nor regulatory] intent nor public policy . . . support such a broad extension of liability." *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14

Cal.4th 1066, 1087 (statutory reporting requirement only protected children in custodial care of person charged with reporting child abuse, and not all children who may in future by abused by same offender).

It does not suffice to answer that whatever duties can be found in these temporary regulatory guidelines applicable to employers for their employees – but do not expressly provide for protection by employers for their employees' household members – should nonetheless be carried forward to them anyway because it is "foreseeable" that employees who contract COVID-19 at work may carry the virus home and infect household members. "[T]here are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing v. LaChusa* (1989) 48 Cal.3d 644, 668. For this Court to nonetheless do as plaintiffs advocate in all their asserted negligence claims is to essentially impose a duty on employers to a huge universe of claimants, which the law strongly disfavors. See *Swickheimer v. King* (1971) 22 Cal.App.3d 220, 225 (statute providing for discipline of contractors who depart from plans is concerned only with licensing board and does not create a tort right of action against contractor).

The negligence per se claim asserted here is strikingly similar to civilly implied rights of action. These implied rights were once broadly recognized and applied, but have since (for reasons that are instructive here) been judicially restricted. In their early iteration, implied rights of action for damages were recognized from statutes that declared a public policy of the state of California.

In *Glenn v. Clearman's Golden Cock Inn, Inc.* (1961) 192 Cal.App.2d 793, for example, employees of a restaurant sued it alleging they were fired for joining a union. They relied on two statutes: a criminal one that prohibited anyone from coercing any person not to join a labor union; and a related statute declaring it the public policy of the state that "individual work[ers] have full freedom of association, self-organization, and designation of representatives of their own choosing to negotiate the terms and conditions of their employment." *Id.* at 796. From these two statutes the appellate court inferred an implied private right of action in the employees for damages, saying they provided "the necessary basis for civil liability for such termination of employment." *Id.* at 798. And as to what constitutes "public policy," *Glenn*, quoting an earlier appellate opinion, answered: "Whatever contravenes good morals or any established interests of society is against public policy." *Id.* at 796,

quoting *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184,188.

But *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305 (*Moradi-Shalal*), put the kibosh on continued judicial implication of private rights of action from public policy statutes that are silent as to remedies for their violation. *Moradi-Shalal* reversed this Court's earlier opinion in *Royal Globe Insurance Co. v. Superior Court* (1979) 23 Cal.3d 880, which had held that Insurance Code section 790.03 created an implied private cause of action against insurers who committed unfair practices enumerated in that provision.

Reversal of *Royal Globe* was warranted, *Moradi-Shalal* explained, because it "incorrectly evaluated the legislative intent underlying the passage of section 790.03" by construing it as covering third party claims against a defendant's insurer for engaging in unfair settlement practices. *Moradi-Shalal, supra*, note 109 at 292. *Moradi-Shalal* also took into consideration that commentators on *Royal Globe* suggested its "holding has had several adverse social and economic consequences." *Id.* at 301.

Among those adverse results were that *Royal Globe* promoted multiple litigation by the injured claimant: "an

initial suit against the insured, followed by a second suit against the insurer for bad faith refusal to settle;" and that it "may result in escalating insurance costs to the general public resulting from insurers' increased expenditures to fund coerced settlements, excessive jury awards and increased attorney fees." *Id.* *Moradi-Shalal* concluded that it did not prevent the Legislature from creating additional civil or administrative remedies, "including . . . [express] creation of a private cause of action for violation of section 790.03," which so far has not happened. *Id.* at 305.

This Court subsequently applied *Moradi–Shalal* as a general statement of the rule concerning implied private rights of action. See *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565-566. Other courts of appeal have also treated *Moradi–Shalal* as applicable to the issue of implied private rights of action generally. See, *e.g.*, *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 377-378 (finding legislative intent to create private right of action after applying *Moradi–Shalal* analysis); *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 133 (in absence of intent to provide a private right of action, courts are not to create such a right); and *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 142, fn. 5 ("we conclude

Moradi–Shalal establishes the analytical framework applicable to all claims of implied private rights of action under statutes not expressly providing for private rights of action.").

No statute or regulation upon which plaintiffs here rely expressly creates a private right of action or gives rise to an analogous negligence per se action against employers for harm that befalls a household member who becomes infected by an employee who comes home after having contracted COVID-19 at work. All we have is a statute that established a temporary rebuttable presumption in favor of WCA coverage for employees who become infected at work. But as Victory points out, "[N]o exemption to this exclusive remedy was designated for third parties who catch COVID-19 from a worker, nor was a rebuttable presumption favoring those infected enacted." Answer Brief on the Merits (ABM), p. 33. Hence there should be no action at law allowed for household members to sue the employer for failing to prevent their co-habiting employees from contracting COVID-19 and transmitting it to them.

B. *Kesner* Does not Help Establish a Duty here because the Nature and Etiology of COVID-19 is Radically and Materially Different from that of Mesothelioma.

Kesner v. Superior Court (2016) 1 Cal.5th 1132 (*Kesner*) figures prominently in the briefing by parties and amici in

this case. Plaintiffs contend that *Kesner*'s holding and reasoning about asbestos exposure to workers applies by analogy to the transmission of COVID-19 from employees who may contract it at work and take it home and infect their household members: "[w]here it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the [employer's] premises to household members, employers have a duty to take reasonable care to prevent this means of transmission" *Kesner*, 1 Cal.5th at 1140; quoted in OBM at p. 43. But this argument ignores important material differences between the transmission of asbestos fibers that can harm individuals exposed to them and a virus such as COVID-19 that has manifested into a worldwide pandemic.

To begin with, COVID-19 is ubiquitous in comparison to asbestosis or mesothelioma. While *Kesner* found a duty for employers to take feasible steps to prevent asbestos from being carried home on the clothes of their workers and possibly get into the lungs of the workers' household members, it found the resulting expansion of liability sufficiently circumscribed by the number within the class of close family members in households that could be harmed as a result. "By drawing the line at members of a household, we *limit* potential plaintiffs to an identifiable category of persons

who, as a class, are most likely to have suffered a legitimate, compensable harm." *Kesner*, 1 Cal.5th at 1154; italics added.

But the size of the class of household members that would constitute potential plaintiffs if a duty is recognized in *Kuciemba* dwarfs the size of the class of potential plaintiffs for whom an employer's duty to household members of its employees was recognized in *Kesner*. According to one estimate, between 56.7 and 74.3 million adults at an increased risk for COVID-19 (based on CDC criteria) lived with or were themselves essential workers.[2] According to another estimate, between 7% and 9% of the first 200,000 deaths from COVID-19 resulted when an individual became infected on the job and then transmitted the virus to a family member.[3]

Second, the theory of asbestos take-home liability against an employer is inapplicable and inappropriate for a virus contracted by non-employees off-site. Mrs. Kuciemba

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[2] T.M. Selden and T.A. Berdahl, *Risk of Severe COVID-19 Among Workers and Their Household Members*, *JAMA INTERNAL MEDICINE*, published online Nov. 9, 2020, doi:10.1001/ jamainternmed.2020.6249.

[3] T. Hals, *"Take Home" Lawsuits over COVID Infections Could Be Costly for U.S. Employers*, *REUTERS*, available at < http:// www.reuters.com/article/idUSL1N2G61EX>.

claims she had no injury until she came in contact with her husband who supposedly contracted COVID-19 on the job. In contrast, mesothelioma is not contracted by contact with a contagious employee—the asbestos fibers cause the harm, not the injured employee. A take-home theory has never been applied to a pathogen.

Third, the nature of an infectious disease is radically different from the harm caused by asbestos exposure. Asbestos is a highly and long-regulated commercial product from an identifiable source used for financial gain. No one, however, benefits from COVID-19; it is not a product, but a nasty virus that exists everywhere and is capable of infecting people wherever and whenever they may be around others and breathe in the air, which is why it has been declared a pandemic.

Fourth, there is much scientific knowledge about asbestos, how its fibers are transmitted to others and how it can be regulated or controlled at the workplace from getting into the lungs of workers or carried on their clothing to be breathed in by others who can be harmed as a result. COVID-19 is a relatively new and constantly mutating virus that is still subject to scientific studies and evolving knowledge.

This confusion is evident from conflicting and changing recommendations by the medical profession about the etiology of COVID-19 and what should or should not be done to curb its spread. See Michelle A. Jorden, et al., *Evidence for Limited Early Spread of COVID-19 Within the United States*, January-February 2020, 69, *MORBIDITY & MORTALITY WKLY. REP.* 680, 682-83 (2020). Experts initially instructed people not to wear masks,[4] and then changed their minds.[5] During this initial "no mask period" essential workers must have been exposed to elevated risks of contracting the virus.[6] Experts

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[4] Darragh Roche, *Fauci Said Masks "Not Really Effective in Keeping Out Virus," Email Reveals*, *NEWSWEEK* (June 2, 2021, 4:59 AM), https://www.newsweek.com/fauci-said-masks-not-really-effective-keeping-out-virus-email-reveals-1596703 [https://perma.cc/6YH2-SLFK] (chronicling history of vacillating advice on mask wearing).

[5] CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread, Ctr. Disease Control & Prevention (July 14, 2020), https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html [https://perma.cc/LH4U-TMUB].

[6] This is based on the assertion that COVID-19 is transmitted by, among other ways, "inhalation of very fine respiratory droplets and aerosol particles," and the lack of a universal mask mandate at the beginning of the pandemic in early 2020 would have exposed essential workers to higher risk of exposure. See generally SARS-CoV-2 Is Transmitted by

(continued…)

also initially believed that groceries should be disinfected,[7] but then changed their minds.[8] "Duty" for employers and others should not be premised on a frequent shifting base of expert knowledge about how to curb the spread of an infectious disease like COVID-19.

C. Application of the *Rowland* Factors Favors a Finding of "No Duty" Here.

Though inapplicable unless a special relationship between the employer and injured party creates a duty, *Rowland v. Christian* (1968) 69 Cal.2d 108 provides "a number of considerations" that courts should weigh when

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[6](...continued)
Exposure to Infectious Respiratory Fluids, Ctr. Disease Control & Prevention (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission.html [https://perma.cc/K4PB-HHVB].

[7] Leah Groth, *Do You Have to Disinfect Groceries? Here's What You Need to Know About Shopping and Coronavirus*, *HEALTH* (Apr.1, 2020), https://www.health.com/condition/infectious-diseases/coronavirus/do-you-have-to-disinfect-groceries [https://perma.cc/A5NN-XYCQ].

[8] Coronavirus Disease (COVID-19): Cleaning and Disinfecting Surfaces in Non-Health Care Settings, World Health Org. (May 16, 2020), https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-cleaning-and-disinfecting-surfaces-innon-health-care-settings [https://perma.cc/DKU6-9RCF].

deciding whether to depart from the general presumption of a duty. These considerations are:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Courts do not tell us the respective weight to be given to each factor, nor how many are necessary for a court to tip the scale against a finding of "duty." But amicus submits that a few of the considerations countenance the Court to find against "duty" under the circumstances of this case.

Foreseeability of Harm. While foreseeability of harm is sometimes referred to as the most important consideration, we also know that "foreseeability alone is not sufficient to create an independent tort duty." *Erlich v. Menezes* (1999) 21 Cal.4th 543, 552. Indeed, an undue emphasis on duty can, as a leading torts scholar presciently warned, result in dire consequences for society:

> If the foreseeability formula were the only basis of determining both duty and its violation, such activities as some types of athletics, medical services, construction enterprises, manufacture and

> use of chemicals and explosives, serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted. Duties would be so extended that many cases now disposed of on the duty issue would reach a jury on the fact issue of negligence. Leon Green, *Foreseeability in Negligence Law* (1961) 61 *COLUMB. L. REV.* 1401, 1417-18.

The "Close Connection" Between Defendant's Conduct and Plaintiffs' Injuries. While there may be a "close" or "special relationship" between employers and their employees, there is no "close relationship" between employers and the household members of their employees.

Moreover, Victory's discussion of this factor is persuasive. COVID-19 is a transmittable viral disease that morphs into new variants, not a product of industrial origin like asbestos. Everything a worker does during the time spent off-site, and what household members do twenty-four hours a day, is as likely to be a source of [the plaintiffs'] infections." ABM, p. 47.

Adverse Consequences to the Community and Defendant Employers. Amicus discussed the large universe of potential plaintiffs and employer defendants if duty were to be recognized for close household members infected by their employee housemates. See discussion *ante* at pp. 20-24. In addition, while employers can take concrete steps to curb

employees from carrying asbestos home on their bodies or clothes, there is nothing they can do to prevent COVID-19 exposure to their workers or control the actions employee household members off-site who may interact with workers who return home at the end of the day.

Availability, cost, and prevalence of insurance for the risk involved. In response to the COVID-19 pandemic, insurers quickly took control of the insurance coverage message in the media: there will be no coverage for COVID-19 related losses.[9] Typical were statements by insurance executives that "[p]andemics are not insurable because they are too widespread, severe, and unpredictable to underwrite" and that "[c]ommercial property insurance policies that include business-interruption coverage generally are not intended to cover disease or pandemic-related losses." See *Ioanes* at fn. 9.

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[9] See, *e.g.*, Caroline Glen, *Insurers Are Telling Businesses Their Policies Don't Cover Coronavirus Shutdown. John Morgan Attorneys Say They're Wrong*, *Orlando Sentinel* (May 4, 2020), tps://www.orlandosentinel.com/coronavirus /jobs-economy/os-bz-coronavirus-insurance-denials-morgan-lawsuits-20200504-pbrpq6z7ofbevau67cpgq4nzqi-story.html; Ellen Ioanes, Does My Business-Interruption InsuranceCover Closing Because of COVID-19?, Barron's (June 17, 2020 5:30 AM), https://www.barrons.com/articles/does-my-business -interruption-insurance-cover-closing-becauseof-covid-19-51592386201.

In several states, legislation was introduced to require insurers to pay for lost policyholder revenue; and a congressional inquiry was held to push for such coverage without regard to the actual insurance policy terms at issue in individual cases. Insurers consistently maintained they would go broke and the insurance industry would be destroyed if carriers were forced to provide COVID coverage.[10]

In short, the availability and affordability of insurance liability coverage for businesses and employers do not appear to be in the cards anytime soon. Consequently, recognizing a duty here will leave businesses saddled with paying for their own defense, and perhaps ensuing settlements and judgments. This burden will likely put many of these potential defendants out-of-business and their employees out-of-work.

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[10] See, *e.g.*, Kate Smith, *Pandemic Partnerships*, *Best Rev.* (Aug. 2020), news.ambest.com/articlecontent.aspx?refnum=299433&altsrc=43 ("Even with pandemic excluded from most business interruption policies, COVID-19 is expected to cost the insurance industry more than $200 billion.").

III. THE LEGISLATURE IS THE MOST APPROPRIATE FORUM TO MAKE CHANGES TO THE DERIVATIVE INJURY DOCTRINE OF WORKERS' COMPENSATION OR FOR THE IMPOSITION OF A DUTY ON EMPLOYERS TOWARD HOUSEHOLD MEMBERS WHO MAY BECOME INFECTED WITH COVID-19 BY EMPLOYEES WHO CONTRACT IT AT WORK AND THEN INFECT THEIR HOUSEMATES.

Where, as here, there is a necessary balancing of interests at stake between employers, the household members of their employees and the complex system of workers' compensation, the Legislature is the most appropriate forum for doing so. "Such a balancing of interests, and more generally of the 'social costs and benefits' [citation], implicated by plaintiffs' contentions, is best left to the Legislature." *Sheen v. Wells Fargo Bank, N.A.*, *supra*, 12 Cal.5th 905, 916.

"[T]he Legislature is better situated than we are to tackle the 'significant policy judgments affecting social policies and commercial relationships' implicated in this case." *Id.* at 948. "The Legislature is generally in the best position to examine, evaluate and resolve the public policy considerations relevant to the duty question." *Verdugo v. Target Corporation* (2014) 59 Cal.4th 312, 342.

CONCLUSION

For all the aforementioned reasons, CJAC urges the Court to hold that (1) the derivative injury doctrine of the WCA precludes this action; and (2) no duty should be imposed on employers to protect the spouses of employees from contracting COVID-19 at home from an asymptomatic infected employee who may have been infected with the virus at work.

Dated: October 13, 2022

/s/ Fred J. Hiestand
Fred J. Hiestand
CJAC General Counsel

CERTIFICATE OF WORD COUNT

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Dated: October 13, 2022

/s/ Fred J. Hiestand
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PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On October 13, 2022, I served the foregoing document(s) described as: AMICUS BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT in *Kuciemba v. Victory Woodworks, Inc.*, S274191 on all interested parties in this action electronically as follows:

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[X](VIA E-SERVICE) I electronically served the foregoing documents via the TrueFiling website.

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

Executed this 13th day of October 2022 at Sacramento, California.

/s/ David Cooper
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