Employee Relations
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Employers Owe No Duty to Prevent "Take-Home" COVID-19, California Supreme Court Holds

By Clifford J. Zatz

In this article, the author reviews a recent decision by California's highest court rejecting an employer's liability for negligence based on employee transmission of the coronavirus.

California employers will not face tort liability to employees' household members who contract COVID-19, the California Supreme Court has ruled. Answering questions certified by the U.S. Court of Appeals for the Ninth Circuit, and declining to follow its ruling in "take-home" asbestos cases,[1] the court in *Kuciemba v. Victory Woodworks, Inc*., held that "recognizing a duty of care to nonemployees in this context would impose an intolerable burden on employers and society in contravention of public policy."[2] California thus becomes the first state to reject, at the highest court level, the potentially limitless liability for negligence based on employee transmission of the coronavirus.[3]

BACKGROUND

Robert Kuciemba began working for Victory Woodworks at a construction site in San Francisco in May 2020, a few months into the COVID-19 pandemic. Just a week earlier, the city and county of San Francisco's health officer had issued an order prescribing health and safety guidelines to prevent the spread of the virus at construction sites. Without taking the required precautions, Victory later transferred to Kuciemba's jobsite a group of workers who may have been exposed

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to the virus. Kuciemba became infected, was hospitalized, and filed a workers' compensation claim. He allegedly carried the virus home from work and transmitted it to his wife, Corby. She was hospitalized for several weeks.[4]

The Kuciembas sued in California superior court – Corby for her own illness and Robert for loss of consortium. After removal, the federal district court dismissed the complaint under Rule 12(b)(6). It held that Corby's action was barred by the exclusive remedy provisions of the California Workers' Compensation Act and that Victory's duty to provide a safe workplace did not extend to nonemployees.

On appeal, the Ninth Circuit certified two questions to the California Supreme Court:

(1) If an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, does the California Workers' Compensation Act bar the spouse's negligence claim against the employer?

(2) Does an employer owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members?[5]

THE SUPREME COURT'S DECISION

The court answered both questions in the negative.

It first decided that Colby's action was not for a "derivative injury" limited to the workers' compensation system. Even though an employee's workplace exposure may be the but-for cause of the plaintiff's take-home injury, said the court, the tort action is barred as derivative "only if the plaintiff is required to prove injury to the employee as at least part of a *legal* element of the plaintiff's own cause of action."[6] A family member's suit for her own independent injury, the court pointed out, is not legally dependent on the employee's injury.[7] "Because Corby's negligence claim does not require that she allege or prove that Robert suffered any injury, it is not barred by the derivative injury rule."[8]

But while a take-home COVID-19 case may be brought in California as a tort action, it is now effectively dead on arrival in court.

Answering the Ninth Circuit's second certified question, the court held:

> We conclude that, although the transmission of COVID-19 to household members is a foreseeable consequence of an employer's failure to take adequate precautions against the virus in the workplace, policy considerations ultimately require an exception to the general duty of care in this context.[9]

As in its decision on the actionability of take-home asbestos disease, the court looked to the factors it had set out in *Rowland v. Christian*,[10] to determine whether a departure from the general duty of ordinary care was justified.[11] Of these factors, it viewed foreseeability of injury as the most important. Although the analogy to its asbestos decision in *Kesner* was "not perfect,"[12] the court concluded that this factor weighed in favor of a duty to prevent take-home disease:

> Regardless of alternative sources of exposures, or variations in the personal precautions employees undertake, it is plainly foreseeable that an employee who is exposed to the virus through his employer's negligence will pass the virus to a household member.[13]

Turning to the "policy factors" portion of the *Rowland* test, the court acknowledged the importance of compliance with health orders to prevent the spread of COVID-19. A finding of duty to third parties, it recognized, "could enhance employer vigilance."[14] At the same time, the court appreciated the unique challenges raised by COVID-19:

> However, there is only so much an employer can do. Employers cannot fully control the risk of infection because many precautions, such as mask wearing and social distancing, depend upon the compliance of individual employees. Employers have little to no control over the safety precautions taken by employees or their household members outside the workplace. Nor can they control whether a given employee will be aware of, or report, disease exposure.[15]

Exposing employers to tort liability under these circumstances, the court concluded, could lead to adverse consequences for the community. Employers might adopt precautions that would slow – or even shut down – essential services.[16] Distinguishing the much smaller pool of asbestos plaintiffs and defendants, the court emphasized that a duty to prevent take-home COVID-19 would extend to every California employer and that "the pool of potential plaintiffs would be enormous, numbering not thousands but millions of Californians."[17] Imposing such a duty "would throw open the courthouse doors to a deluge of lawsuits."[18] "[T]he dramatic expansion of liability plaintiffs' suit envisions," said the court, "has the potential to destroy businesses and curtail, if not outright end, the provisions of essential services."[19]

CONCLUSION

With our understanding of the virus and the necessary precautions changing almost weekly at the onset of the pandemic and the virus's rapid, multiplicative transmission, COVID-19 tested the bounds of traditional tort liability for employers. The California Supreme Court's decision

resolves, in the nation's most populous state, one of the most intriguing and potentially dangerous legal issues arising from the pandemic.

NOTES

1. Kesner v. Superior Court, 1 Cal.5th 1132 (2016).
2. Slip op. at 2 (July 6, 2023).
3. The court cited, "merely to note that their holdings are consistent with our conclusion," id. at 48, federal district court cases from Maryland and Wisconsin and an Illinois state trial court decision. Id. at 46-48.
4. Id. at 3.
5. Id. at 1.
6. Id. at 5-6 (emphasis in original).
7. Id. at 6-11.
8. Id. at 17.
9. Id. at 31.
10. Rowland v. Christian, 69 Cal.2d 108 (1968).
11. Slip op. at 29 (July 6, 2023).
12. Id. at 32.
13. Id. at 35.
14. Id. at 38.
15. Id.
16. Id. at 41.
17. Id. at 43.
18. Id. at 46.
19. Id.