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A Pair Beats Four of a Kind: Take-Home COVID and the 'Rowland' Duty Factors

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Insights for Employers

-- "How can they sue for that?"

-- "Only in California!"

-- "There's no way they can prove it."

-- "This is why we're thinking of pulling out of the state."

Repeatedly, people would make these and other more colorful comments whenever I would describe my case pending before the California Supreme Court: Because a construction worker swore the only place he could have contracted COVID-19 was at his jobsite, and his spouse two counties away swore the only place on the planet she could have contracted COVID-19 was from her husband, she sued her husband's employer for not protecting her from the virus at home.

The average person might scoff at how a plaintiff could make such a case, but resolution of the duty issue was akin to how comedian Norm McDonald described Germany taking on the entire planet in World War I: "You would think it would take five seconds for the world to win … but it was actually close."

The California Supreme Court in *Kuciemba v. Victory Woodworks Inc.* first held that the employee's workers' compensation exclusive remedy did not preempt his spouse's cause of action for her injury caused by his jobsite illness – even though the derivative injury doctrine seemed to preclude it.

The court then ruled that even though the employer did not create the virus, didn't use it in its business and had never been visited by the spouse, Mrs. Kuciemba was not required to prove a "special relationship" with the employer to establish a duty.

As a result, it was up to Victory Woodworks to establish an exception to the general duty rule under the seven-step test set forth in *Rowland v. Christian* 69 Cal.2d 108 (1968), an analysis where the California Supreme Court almost always finds that the defendant owes a duty. The seven steps are divided up into two categories:

Foreseeability—1) foreseeability of harm to the plaintiff, 2) degree of certainty that the plaintiff suffered injury and 3) closeness of the connection between the defendant's conduct and the injury suffered);

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Public policy—4) moral blame attached to the defendant's conduct, 5) policy of preventing future harm, 6) 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 7) availability, cost and prevalence of insurance for the risk involved.

The *Kuciemba* court found that all three foreseeability factors, usually deemed the most important duty factors, favored a duty to protect Mrs. Kuciemba. It was foreseeable that employees would contract the disease if the COVID health orders were not followed.

Workers infected on the job would be expected to take the virus home where they could infect others. Even though the connection between the employer's acts and the spouse's injury might be attenuated, the connection factor still favored the imposition of a duty.

Moreover, by its nature of simply operating a business, Victory Woodworks was in the position to potentially obtain superior knowledge about the virus as compared to employees, despite the ever-changing and often contradictory government *communiqués* at the start of the pandemic. On that basis, Victory would be considered more morally blameworthy as compared to plaintiffs, placing a fourth factor in favor of a general duty.

As to preventing future harm, the court felt this factor slightly favored Victory Woodworks. An employer could only do so much given the lack of total control of employees in the workplace, the absence of any control over employees and their cohabitants at home and people's honesty in admitting if, when, where and by whom they were exposed.

The insurance factor did not favor or disfavor the general duty rule, though the court noted that given the difficulty businesses have qualifying for first-party insurance coverage for pandemic losses, the prospect of coverage for third-party claims was even more daunting.

With the tally at four factors favoring duty and just one factor favoring an exception, it might have seemed time to fold. Fortunately, the law is not poker, and the *Rowland* analysis is not a mathematical equation. The burden factor could theoretically justify the creation of an exception, even if all the other factors weighed in favor of a duty.

Still, the court had only twice ruled previously that public policy justified an exception to what would otherwise constitute a duty. In *Elden v. Sheldon*, 46 Cal.3d 267 (1988), though the negligent infliction of emotional distress resulting from seeing a loved one killed was definitely foreseeable, the court ruled that unmarried cohabitants could not maintain a claim in light of the state's strong interest in promoting marriage and the need to limit the number of people owed a duty of care.

Likewise, though it would be foreseeable that someone might be struck by traffic while crossing the street unescorted from a parking lot to a church, public policy embodied in statutes prohibiting interference with traffic and the possibility that taking the recommended corrective action could actually increase the danger convinced the court in *Vasilenko v. Grace Family Church*, 3 Cal.5th 1077 (2017) to hold that a landowner did not have a duty to assist invitees in crossing a public street.

In that light, the *Kuciemba* court examined what was ultimately the most decisive factor: the burden on the defendant and consequences to the community. In contrast to the other factors considered in real-time, this factor uses a "forward-looking" analysis, predicting the potential effect that upholding the general duty rule would have.

First, the Supreme Court rejected any analogy between take-home COVID and the asbestos liability established in *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016). *Kesner* dealt with a finite number of plaintiffs, a limited number of defendants, a commercial product used for profit, the homestead as the only location of exposure, and a rare disease that almost always is traced to the workplace and requires exposure over a long period of time. COVID exposures can happen anywhere to anyone in 15 minutes or less.

Every employer who experienced just one case of COVID in the office would be subject to suit so long as any of its employees lived with someone who contracts the disease, regardless of whether that employee actually showed symptoms. To force employers to bear the consequences of the ubiquitous virus could wipe out entire businesses or impair delivery of the services society deemed essential to surviving the pandemic.

In addition, the Supreme Court acknowledged that these same consequences might result if a company achieved perfect compliance with COVID-prevention standards; even then, workers and their family members would likely still contract the disease, resulting in lawsuits against the employer despite the protocols implemented.

In addition, the Supreme Court determined for the first time that the consequences to the community, and specifically to the courts, would be too great to justify imposing a duty. The court realized that to rule otherwise would allow anyone infected to file suit so long as that person lived with someone who had a job.

COVID prosecutions could not be filed as class actions because proof would hinge on individual exposures where causation would be extremely difficult if not impossible to establish by a preponderance of the evidence. Courts could not even consider dismissing a claim until the parties completed extensive discovery and expert depositions. Thus, these consequences not only militated in favor of establishing an exception to the duty, they overwhelmed the other four factors which favored a duty.

California now falls in line with Wisconsin, Maryland, New York and Illinois, which also prohibit take-home COVID suits. As the nation slowly closes the door on the COVID catastrophe, society will not be burdened with the perpetuation of the pandemic in the courts for years to come.

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