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See's Candies are delicious, but a decision involving Woodworkers has delivered a sweet victory for California employers. *See's Candies are delicious, but who would have guessed that when California employers opened a box of those wonderful treats, it would be the truffle filled with wood that would be the sweetest of all?*

In the case of *See's Candies, Inc.* v. *Superior Court of Los Angeles County (2021) 87 CCC 21*, plaintiffs had filed a suit against See's Candies, Inc., alleging in part that employee, Matilde Ek, contracted COVID-19 while at work, due to defendant's failure to implement adequate safety protocols; subsequently, while Ms. Ek convalesced at home, her husband, Arturo Ek, was alleged to have caught the disease from her, and died from COVID-19 a month later.

See's Candies, Inc. filed a demurrer asserting that it could not be held liable for the death of an employee's spouse due to the "exclusive remedy" rule and that the claims are barred by the "derivative injury doctrine." In workers' compensation, the exclusive remedy rule essentially states that an employee can seek workers' compensation for a job-related injury, but that same employee cannot sue the employer directly for damages. This is also sometimes referred to as the "grand bargain."

The trial level court denied See's Candies a demurrer, and, in January 2022, the Court of Appeal of the State of California, Second Appellate District, declined to reverse. This allowed the plaintiff/employee to simultaneously pursue the lawsuit against See's Candies for the death of her husband while she also sought workers' compensations benefits related to her own COVID-19 illness.

The court explained that defendants' efforts to apply the derivative injury doctrine was inconsistent with the language of *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1000. In *Snyder*, plaintiff-minor sued her mother's employer for the alleged effects of toxic level carbon monoxide to which the mother was exposed while the plaintiff was in utero, with the claimed result of being born with cerebral palsy. The trial court granted defendant's demurer in *Snyder*, but the Court of Appeal reversed, noting that the exclusive remedy applied to employees, not the in-utero children of employees. As plaintiff sought damages for her own injuries, not her employee-mother's, her claim could not be barred by the exclusive remedy doctrine. In sum, the Supreme Court of California held that the worker's compensation act could only bar an employee's civil personal injury suit, but could not bar plaintiff's personal injury suit, stemming from her mother's work-related injuries.

The standard seeming to be that where a plaintiff's claim is "due to the employee's injury" (*Cole v. Fair Oaks Fire Protection Dist.*, supra, 43 Cal 3d at p. 163) the action is barred as "deriv[ing] from injuries sustained by an employee in the course of his employment." (*Williams v. Schwartz*, supra, 61 Cal. App. 3d at p. 634). More plainly stated, if the non-employee is seeking damages related to the employee's work-related injuries or the non-employee's claim is dependent on the employee's injuries, the employer should be protected by the derivative injury doctrine.

While the Court of Appeal in See's Candies, Inc. held that the derivative injury doctrine did not shield an employer from civil liability for a claim for wrongful death by a plaintiff employee, the court did not address whether the defendants owed a duty of care to nonemployees infected with COVID-19 as a result of an employee contracting the disease.

He will not see me stopping here

To watch his woods fill up with snow.

The woods are lovely, dark and deep.

Like a Robert Frost poem...the story does not stop here... and the woods bring a lovely finding for employers.

Two roads diverged in a wood, and the court took the one less traveled by…in other words, a road to a favorable outcome to defendants.

The case of *Kuciemba* v. *Victory Woodworkers* (2023) S274191, Robert Kuciemba had been working for Victory Woodworks, Inc. at a construction site in San Francisco for about two months when Victory transferred Mr. Kuciemba and a group of workers to another location where they may have been exposed to COVID-19. These workers may have been exposed to the virus, Mr. Kuciemba was infected with virus, he carried the virus home and transmitted it to his wife, Corby Kuciemba, either directly or through her contact with his clothing and personal effects. Subsequently, Mrs. Kuciemba was hospitalized for several weeks and was later put on a respirator. The Kuciemba's filed suit in superior court asserted claims for negligence, negligence per se, premises liability, and public nuisance. Mr. Kuciemba also claimed loss of consortium. Victory removed the case to federal court and moved to dismiss. The district court granted the motion to leave to amend. Plaintiff amended their claims. The district court granted a renewed motion to dismiss, this time without leave to amend. The district court concluded that the claims that Mrs. Kuciemba contracted COVID-19 through direct contact with Mr. Kuciemba were barred by the Workers' Compensation's exclusive remedy provisions and the claims that Mrs. Kuciemba contracted COVID-19 through indirect contact with infected surfaces were subject to dismissal for failure to plead a plausible claim and to the extent the claims were not barred by statute or insufficiently pleaded, they failed because Victory's duty to provide a safe workplace did not extend to nonemployees who contract a virus away from the jobsite. The Kuciemba's appealed

and the Supreme Court of California took the case to answer the certified questions presented.

The California Supreme Court agreed that if an employee contracts COVID-19 at the workplace and brings the virus home to a spouse, the derivative injury rule does not bar the spouse's negligence claim against the employer. However, and most importantly, the employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members. The Supreme Court concluded that recognizing a duty of care to nonemployees in such situations would impose an intolerable burden on employers and society in contravention of public policy. The Court further explained that employers could not fully control the risk of infection and that "imposing a tort duty not covered by workers' compensation could lead some employers to close down, or to impose stringent workplace restrictions that significantly slow the pace of work."

Additionally, the Court identified that finding a duty to prevent COVID-19 infections in household members was likely to overburden the judicial system. "Imposing on employers a tort duty to each employee's household members to prevent the spread of this highly transmissible virus would throw open the courthouse doors to a deluge of lawsuits that would be both hard to prove and difficult to cull early in the proceedings."

Life *is* like a box of chocolates, but at least this decision helps employers know what to expect with employee's household members suing for take home COVID-19 claims. While COVID-19 continues to plague us, at least the spread of liability has been stopped for California employers.