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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CORBY KUCIEMBA, an individual; ROBERT KUCIEMBA, an individual,

Plaintiffs,

vs.

VICTORY WOODWORKS, INC., a Nevada corporation; DOES 1-20, inclusive,

Defendants.

Case No. 3:20-cv-09355-MMC

DEFENDANT VICTORY WOODWORKS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM [FRCP 12(B)(6)]

Complaint Filed: October 23, 2020

Date: May 7, 2021
Time: 9:00 a.m.
Department: Courtroom 7 – 19th Floor

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, May 7, 2021, at 9:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 7 – 19th Floor before the Honorable Maxine M. Chesney of the above-entitled Court located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant Victory Woodworks, Inc. ("Victory" or "Defendant") will, and hereby does, move to dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). As a matter of law, Plaintiffs Corby Kuciemba and Robert Kuciemba's First Amended Complaint fails to allege a claim for relief upon which relief can be granted against Defendant.

This motion is based on this notice of motion and motion, the memorandum of points and authorities, request for judicial notice, and declaration of William A. Bogdan filed herewith, all other papers on file in this action, and on any further briefs, authorities, or argument that may be presented before or at the hearing on this motion.

Dated: April 1, 2021

HINSHAW & CULBERTSON LLP

By: */s/ William Bogdan*
WILLIAM BOGDAN
Attorneys for Defendant
VICTORY WOODWORKS, INC.

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I. ISSUE PRESENTED

Where an employee files a claim for workers' compensation benefits for allegedly contracting COVID-19 in the course and scope of employment, the employer does not owe a duty to every person off-site who claims in a civil suit that the employee exposed them to the virus. The allegation that a COVID-infected employee may have worn COVID-infected clothes does not change that calculus.

II. INTRODUCTION

Like Dorothy in the *Wizard of Oz* who was commanded to ignore the man behind the curtain, we are asked to ignore plaintiffs' original complaint, their concessions in their written opposition to the Motion to Dismiss the original complaint, and their admissions in oral argument on that motion. Plaintiffs' claims have always been centered on Mr. Kuciemba's work-inflicted illness resulting in Mrs. Kuciemba becoming sick. With the dismissal of that claim based on the workers' compensation exclusive remedy, the Kuciembas now believe their claims should move forward because there might be a chance that it was Mr. Kuciemba's clothing that infected her rather than his active viral infection. Setting aside that there is no scientific means to determine whether Mr. Kuciemba's overalls rather than Mr. Kuciemba himself sourced her virus, the amended complaint fails to cure the defects of the original pleading, and the amended complaint should be dismissed with prejudice.

III. STATEMENT OF FACTS

Plaintiffs were unequivocal in their original complaint as to the basis of their claims: Mr. Kuciemba was infected with COVID-19 by his co-workers on the jobsite, and Mrs. Kuciemba contracted the disease from her husband. (Ex. A, original complaint, 4:10-16, 6:2-4.) Their opposition to the Motion to Dismiss that complaint again stressed that Mr. Kuciemba's co-workers caused Mr. Kuciemba to become infected, and then resulted in him brining his illness home and infecting his wife. (Ex. B, plaintiffs' opposition, 6:24-25.) "[T]he virus entered the employee's body at work and then passed on to the non-employee member." (Ex. B 9:23-24)

Though there was never any doubt that Mr. Kuciemba believed he was struck ill on the job, the court during oral argument on the Motion to Dismiss posed "the easy question" to counsel for plaintiffs: if Mr. Kuciemba was infected with the virus at work but asymptomatic, would he still be considered injured though suffering no damage? Counsel responded, "Yes. I would argue my position

is first if he was asymptomatic, he's in fact injured because they now have a pathogen living in their body that they did not have before." Counsel also conceded that an infected but asymptomatic person would be "injured," but not capable of making a financial recovery. (Ex. C, transcript, 12:19-13:6) In the end, because Mrs. Kuciemba would have no injury but for Mr. Kuciemba's illness contracted in the course and scope of employment, this court dismissed the complaint based on the workers' compensation exclusive remedy.

Deprived of the cornerstone to their claims, plaintiffs have changed tack. Expunged from the amended complaint is any mention of Mr. Kuciemba's serrious COVID symptoms, his positive COVID test, or his resulting hospitalization. (Compare Ex. A 4:14-18 with Ex. D, first amended complaint, 6:4-8) Instead, plaintiffs have traded their evidentiary assertions in the original complaint for a series of mere possibilities: that of all the possible sources of exposure, it is now only "most likely" that Mr. Kuciemba was exposed in the workplace (Ex. D 5:2); that despite his hospitalization for COVID, Mr. Kuciemba might really have only been asymptomatic (Ex. D 3:11-15, 8:4-7); and that plaintiffs can't decide if it was Mr. Kuciemba or his clothing and personal belongings that transmitted the infection to his household (Ex. D 5:26-27), despite their earlier judicial admissions to the contrary.

IV. LEGAL ARGUMENT

A. Standard on Contradictions Between Complaints

Plaintiffs cannot pretend that by filing an amended complaint they are writing on a clean slate. "A party cannot amend pleadings to directly contradict an earlier assertion made in the same proceeding." *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.* 744 F.3d 595, 600 (9th Cir. 2014). An amended complaint should only include "additional allegations that are consistent with the challenged pleading and that do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges* 655 F.3d 984, 995 (9th Cir. 2011).

The court is to use a keen eye in examining any attempt to preserve a claim by disavowing the assertions in the original complaint. At the very least, "when evaluating an amended complaint, '[t]he court may also consider the prior allegations as part of its "context-specific" inquiry based on its judicial experience and common sense to assess whether an amended complaint 'plausibly suggests

an entitlement to relief.''' *McKenna v. WhisperText*, No. 5:14-CV-00424-PSG, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015) (quoting *Cole v. Sunnyvale*, No. C-08-05017-RMW, 2010 WL 532428, at *4 (N.D. Cal. Feb. 9, 2010)).

In a similar vein, judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *Helfand v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997). "It is an equitable doctrine intended to protect the integrity of the judicial process by preventing a litigant from 'playing fast and loose with the courts.'" *Id.*

B. Mrs. Kuciemba's Claims Arising out of Mr. Kuciemba's Workplace Infection Are Still Subsumed by the Workers' Compensation Exclusive Remedy

Plaintiffs' original complaint was dismissed based on the workers' compensation exclusive remedy. To the extent Mrs. Kuciemba's claims are still based on Mr. Kuciemba's work-related injuries, they are barred, thus subjecting the amended complaint to the same fate. In the amended complaint, plaintiffs merely repeat their earlier arguments that Mrs. Kuciemba's claims are "direct" not "derivative," and that she could not make a financial recovery personally from workers' compensation carrier because she was never employed by Victory Woodworks. This court rejected these same arguments in dismissing the original complaint, based on California Labor Code §§ 3600 and 3602, as well as the decisions in *Williams v. R. J. Schwartz*, 61 Cal.App. 3d 628 (1976), Lefiell *Manufacturing Company v. Superior Court*, 55 Cal.4th 275 (2012), and *Salin v. Pacific Gas & Electric Co.*, 136 Cal.App. 3d 185 (1982), rev'w denied 12/1/82.

C. California Does Not Recognize "Take-home" Liability for Biological Pathogens

When at oral argument plaintiffs' counsel was asked whether there were additional matters plaintiffs could plead should the Motion to Dismiss be granted with leave to amend, counsel responded that "maybe if there's some more facts that really kind of bring clarity to the sequence of the infection and maybe possibly rule out, you know, other sources of infection . . . I would never say no in a situation like this." (Ex. C 51:19-52:4) Rather than fulfill that promise, plaintiffs without justification present an entirely new theory of transmission - - infection by fabric - - with no explanation as to why they forgot to make such a crucial allegation in the original complaint.

In reality, plaintiffs have come to the realization they have no cognizable theory of recovery unless they can somehow shoehorn their claims into the holding of *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016). Setting aside that they should be barred by their prior judicial admissions from making this new allegation, their newly created supposition actually defeats the underlying basis of their liability claim.

If Mrs. Kuciemba could contract COVID from clothing, then Mr. Kuciemba could have contracted it from his co-worker's clothing as well. If the means for COVID to enter the jobsite was the clothing of workers rather than the workers themselves, then no screening device or protective equipment would permit the employer to effectively prevent the virus from entering the project. As such, the alleged presence of COVID on the jobsite could not have been the result of any violation of the San Francisco Order of the Health Officer (SFOHO). Moreover, the Kuciembas could have come into contact with infected clothing either during Mr. Kuciemba's time off the job or Mrs. Kuciemba's many trips outside the home which she concedes were necessary for essential purposes. (Ex. D 4:24-26)

If somehow plaintiffs' new theory is to be considered, Victory Woodworks has already extensively briefed the inapplicability of "take-home liability" in its prior papers. For the ease of the court, the applicable arguments from those papers are modified here to meet plaintiffs' novel contentions.

1. *Kesner* and its Narrow Application to Asbestos

If the exclusive remedy does not subsume all their civil claims, Plaintiffs cannot establish that Victory owes a duty to keep everyone that employee comes in contact with free from COVID-19. Never has California authorized a civil suit against an employer by the spouse of a worker who allegedly becomes infected by a virus carried home from the jobsite.

In *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016), the nephew of a worker involved in the manufacture of asbestos brake shoes died of mesothelioma. The uncle, who apparently did not contract mesothelioma, testified that his nephew would spend the night at the uncle's house and would roughhouse with or sleep close to his uncle. The nephew's successor in interest sued the uncle's employer for exposing the nephew to asbestos fibers carried home on his uncle's clothes.

Confronted with the issue of whether the employer owed the nephew a duty, the California Supreme Court had no occasion to address whether the worker's compensation exclusive remedy barred the claim. Mesothelioma is not an infectious disease, and the fact that the nephew contracted that illness had nothing to do with whether or not his uncle also contracted the disease on the jobsite.

Rather, the Supreme Court in *Kesner* faced a much different question. At issue was whether a company that uses a hazardous product as part of its commercial enterprise, and allows that product to be conveyed off-site by an employee, owed a duty to protect those in the employee's household from harm. The Supreme Court found that a such a duty was consistent with precedent recognizing "liability for harm caused by substances that escape an owner's property" where the company fails to exercise reasonable care in its use of asbestos-containing materials. *Id*. at 1159.

In re-acknowledging that duty, the Supreme Court made a key finding distinguishing that case from the *Kuciemba* suit: it was the household's contact not with an ubiquitous virus but with asbestos fibers, a hazardous product that the employer used in its manufacturing process and was required to restrict to the jobsite, which caused the harm. The California Supreme Court in *Kesner* stressed that it was not creating a new duty: commercial use of asbestos in business or on one's property already fell within the general duty to exercise ordinary care in one's activities under Cal. Civ. Code §1717. Asbestos is a product that the employer was duty bound to restrict to the premises, based on 40 years of government regulation and 80 years of industry knowledge. *Id*. at 1147. Thus, the Court viewed the issue not as whether to create a new duty, but rather whether an exception to an already existing duty should be established. *Id*. at 1143.

As demonstrated by the *Kesner* decision, foreseeability alone does not establish duty. *Id*. at 1148-1151. "A judicial conclusion that a duty is present or absent is merely a shorthand statement . . . rather than an aid to analysis. . . '[D]uty,' 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." *Dillon, supra,* 68 Cal.2d at 734. "Courts, however, have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act . . . ." *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750, quoting *Dillon,* 68 Cal.2d at p. 739.

Here, the Kuciembas are requesting the court to fashion a new duty for a virus of unknown origin: the obligation of employers to protect non-employees by guaranteeing that a worker will arrive home COVID-free. No employer can guarantee that employee or their belongings will enter or leave its premises uninfected. Nowhere in the San Francisco Order of the Health Officer, referred to repeatedly in Plaintiffs' complaint, does it state that use of the recommended best practices will provide all workers with immunity from COVID-19. Short of isolating at home and not participating in any essential industry, only a vaccine could produce such result.

Rather, the San Francisco Order is merely "best practices regarding the most effective approaches to slow the transmission of communicable diseases . . ." (Ex. E SFOHO p.5 §9) As best practices, essential industries are expected to comply with the recommendations "except to the extent necessary to carry out the work the Essential Business." (SFOHO p.18 §16k) The Order of the Health Officer nonetheless acknowledges that transmission of the disease may take place by those who are asymptomatic. (SFOHO p.6 §9)

One of the California Supreme Court's motivations for refusing to create an exception to the duty to protect non-workers from asbestos was the fact that "commercial users of asbestos benefitted financially from their use of asbestos." *Kesner*, 1 Cal.5th at 1151. In contrast, there is no commercial viability in the COVID-19 virus: it is not used in the commercial process, nor is it a byproduct of any industry.

The Supreme Court also relied upon the fact that asbestos comes from an identifiable source. "Indeed, liability for harm caused by substances that escape an owner's property is well established in California law." *Id.* at 1159. The Supreme Court recognized there are some natural substances, such as soil, animals, or fires, for which someone who controls a property may be responsible, but those must originate on the property for liability to be established. A fire originating off-site, or someone else's wandering cow, which happens to pass through a person's property does not make that property owner liable. Where these calamities, like asbestos, have an identifiable source on the liability, liability may follow.

Unlike the asbestos in *Kesner*, the virus did not originate on the construction site. Someone had to bring the virus to the property, quite likely someone who was asymptomatic. Moreover, asbestos

is of an industrial origin. The overwhelming odds are that any person suffering from mesothelioma did not contract it while drinking coffee in a café, riding on a BART train, or singing in a church choir. With COVID-19, everything a worker does during the two-thirds of the day spent off site, and what other household members do twenty-four hours a day, is likely, if not more likely, to be a source of infection.

Though an employer's goal may be to avoid having any worker exposed to the virus, that goal does not equate to a duty to render every employee COVID-free, particularly when those with the disease often show no symptoms. All the employer can do, and all that the SF Health Order requires the employer to do, is minimize the potential that an employee will be exposed to the virus. What the employer can't do, and what it has no duty to do, is control the actions of relatives off-site who may interact with (and possibly infect) the worker who returns home at the end of the day.

The nature of infectious diseases is radically different from asbestos. Every winter, millions of people worldwide get the flu. Some people take no precautions and get the flu. Some people get a flu shot, but get the flu. Some people get inoculated, wash their hands a lot, and wear a mask, yet still get the flu. Despite more than 100 years' experience with influenza and knowing how it is spread, thousands of people not only contract influenza but die from it, despite the best efforts of individuals, industry, and healthcare practitioners. Never has an employer in California been held liable to an infected spouse who caught the flu from her husband who brought it home from work.

Our nation's experience with the effects of COVID-19 is in its infancy; our limited understanding of the disease has only recently developed. Short of vaccination, to date isolation appears to be the most effective manner by which to avoid the disease. Compare this to asbestos where there are documented preventative measures developed over decades to prevent the escape of fibers from the jobsite, e.g. disposable Tyvek suits, changing rooms, showers, separate lockers, on-site laundry, etc. *See Id,* at 1152. For workers in essential industries, the only way to guarantee that a person carrying the COVID-19 virus would not leave the site would be to require all employees to actually live on site. While the creation of such a bubble may be financially viable for the professional athletes of the NBA, it is not an option for hourly workers with families.

Instead, essential industries do the best they can. As evidenced by the one industry most

militant about COVID-19 precautions, hospitals despite their best efforts still cannot prevent doctors and nurses from succumbing to the disease.

In sum, asbestos is a manufactured product fashioned purposefully by industry for financial gain. COVID-19 is a virus which suddenly evolved through a mishap of nature and benefits no one. Asbestos and its health effects have been studied for over a century, and industry has developed a myriad of effective preventative measures to contain the product, as evidenced by the ever-dwindling number of patients with asbestos-related diseases. COVID-19 remains a mystery, addressed by our best guesses of what might be effective, as evidenced by the dramatically increasing number of cases on a daily basis.

In the five years since the *Kesner* decision, no court in the nation has applied that holding to any substance outside the asbestos realm. In other words, except for the release of asbestos from a jobsite, no court has ever held the employer liable to off-site members of an employee's household for any manufactured or organic substance the employee might have brought home from work. There is nothing in the California Supreme Court's opinion in *Kesner* to suggest that a virus, secreted into the worksite through no act of the employer, should be treated the same as an industrial product used for profit.

2. Unwarranted Expansion of the *Kesner* funnel

During oral argument, the court analogized the *Kesner* limitation to liability for asbestos as a small funnel: the causal agent was an industrial product of limited use from an identifiable source, drastically limiting the number of plaintiffs who could present a claim. Liability for COVID would present an ever-expanding top to the funnel: a plethora of claims from myriad of exposures trying to push themselves through a tiny opening for industrial culpability.

In reality, however, plaintiffs make no effort to cap potential civil liability to just workplace exposures. There is no limit to how wide the net is cast: the wife who claims her husband caught COVID-19 from the barista, the husband who claims his wife caught it from the dental hygienist, the roommate who claims a co-tenant while on jury duty caught it from the court bailiff, all these people would have potential claims against entities deemed essential to society's ability to function.

Even if plaintiffs agreed to limit liability to just the employers of the afflicted, those employers

would have the right to file a cross-complaint for equitable indemnity against any (and every) entity or person who could have contaminated plaintiffs with COVID-19. Thus, Lucky's, Home Depot, the US Post Office and other essential businesses, both in plaintiffs' neighborhood and beyond, could find themselves embroiled in the Kuciembas' suit. In effect, an individual's recovery could drastically effect California's financial recovery at large as the economy attempts stagger back from the pandemic.

Here, plaintiffs are asking the employer to do what the global public health system and pharmaceutical industry failed to do: keep COVID-19 from invading the home. As a matter of public policy, requiring private industry to meet that standard sets the bar too high.

V. CONCLUSION

As noted at oral argument, plaintiff's take-home liability claim creates too large a funnel to function as a cognizable legal theory. Moreover, the theory requires an epidemiological wish list of non-existent scientific tests that will somehow establish that Mrs. Kuciembas' infection came from her husband's clothes rather than her husband himself, and that the virus on his clothes came from the jobsite as opposed from some other location. In addition, if Mr. Kuciemba was in fact asymptomatic, his eventual illness must have come from Mrs. Kuciemba, which at a minimum would vitiate his workers' compensation claim, and turn plaintiffs' entire theory on its head.

Victory Woodworks owes neither Mrs. Kuciemba nor Mr. Kuciemba any duty which would subject the company to civil liability. The Motion to Dismiss should be granted without leave to amend.

Dated: April 1, 2021

HINSHAW & CULBERTSON LLP

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