How See's Candies Changed Employer Liability To Third Parties

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The California Supreme Court recently denied See's Candies' request to review an appellate court decision that the derivative injury doctrine does not shield employers from civil liability to third-parties for "take-home COVID" cases.

In *See's Candies v. Superior Court*, Matilde Ek and her three daughters filed a wrongful death suit against Ms. Ek's employer, See's Candies, claiming that she contracted COVID at work due to See's failure to implement adequate safety measures. Ms. Ek claimed that while quarantining in her home, she transmitted the virus to her husband, Arturo Ek, who passed away about a month later.

Generally, under the concept of California workers' compensation exclusivity, an employee who is injured at work is limited to the exclusive remedies afforded by the workers' compensation system. While employers are liable for industrial injury or death without regard for fault, employers are shielded from civil liability which includes a wider range of damages potentially available in tort.

See's Candies took the position that the plaintiffs' claims should be barred under the "derivative injury doctrine," which holds that workers' compensation exclusivity not only applies to claims by injured employees, but also to third-party claims which are derivative of the employee's injury. Courts have used the derivative injury doctrine to bar claims by an employee's spouse for loss of consortium and a spouse's emotional distress as a result of witnessing an employee's injury.

In reviewing the trial court's order overruling See's demurrer, the Court discussed *Snyder v. Michael's Stores, Inc.*, a 1997 decision which found that the derivative injury principle did not bar an employee's daughter from claiming injuries sustained from toxic carbon monoxide exposure while in utero. See's argued that unlike *Snyder*, where the fetal injury happened independent of the injury to the mother, Mr. Ek's injury was necessarily caused by the workplace injury to Ms. Ek. However, the Court opined that third-party injuries are not subject to the derivative injury doctrine merely because they are *caused* by an employee's injury. In making this conclusion, the Court considered the scenario in which an employee passes COVID to a third-party, without ever experiencing symptoms themselves, which is conceptually analogous to a mother breathing in a poisonous gas and conveying it to her unborn child, like in *Snyder*.

The Court also considered that applying the derivative injury rule premised solely on causation would effectively bar all civil claims by any person injured as a result of an employee's injury, whether family member or not, and that the legislature did not intend for the rule to have this broad of an application.

While the Court of Appeal opened up potential liability for third-party take-home COVID cases, it did not discuss the issue of how far an employer's duty of care extends. While *See's Candies* may pave the way for negligence claims by third-party family members and even non-family members, non-employee plaintiffs face an uphill battle in proving that they were owed a duty of care. This issue will soon be addressed by the California Supreme Court in its review of *Kuciemba v. Victory Woodworks, Inc.*, a case which bears similarities to *See's Candies*. In the meantime, an employer's liability is like a box of chocolates…. so employers should be mindful of their workplace safety protocols and take necessary measures to provide a safe work environment to their employees.