



Significant Decision

No. 21-03

December 22, 2021

SEE'S CANDIES V. SUPERIOR COURT (EK)

COURT OF APPEAL DECISION [B312241]

FILED: DECEMBER 21, 2021

The derivative injury doctrine does not bar all injuries causally linked to an employee injury, and third-party injuries are not subject to the derivative injury doctrine merely because they are caused by an employee injury.

Significance: The derivative injury rules bars claims where it is legally impossible to state a cause of action without alleging a disabling or lethal injury to an employee. It does not bar claims with only a causal link to an industrial injury.

Facts: Mathilde Ek, an assembly line worker, alleged that she contracted COVID-19 at work and while convalescing at home passed the virus on to her husband and daughter. Her husband died, and Mrs. Ek sought damages for the employer's negligence in failing to implement adequate safety measures in the workplace. The employer demurred, contending that the claims were barred by the exclusive remedy rule because they necessarily derived from a workplace injury sustained by an employee. The Superior Court overruled the demurrer, and employer filed a Petition for Writ of Mandate at the Court of Appeal.

Holding: Petition denied. Third-party injuries are not subject to the derivative injury doctrine merely because they are caused by an employee injury, and the fact that an employee's injury is the biological cause of a nonemployee's injury does not thereby render the nonemployee's claim barred by exclusive remedy.

Discussion: The case involves the question of whether an employee who contracts COVID-19 in the workplace and then infects a family member at home can sue the employer in a civil tort case for the family member's illness or death despite the protections of the exclusive remedy rule and the derivative injury doctrine.

The California Supreme Court outlined the derivative injury doctrine in *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 998, stating that "the derivative injury rule governs cases in which the third party cause of action is derivative of the employee injury in the purest sense: It simply would not have existed in the absence of injury to the employee....[T]he rule applies when the plaintiff, in order to state a cause of action, *must* allege injury to another person – the employee."

In their demurrer and on appeal, the defense relied on *Snyder* and argued that Mr. Ek's illness would not have occurred but for Mrs. Ek contracting the virus at work and transmitting it to him. In other words, the defense claimed, Mr. Ek's injury would not have existed in the absence of injury to Mrs. Ek and should be barred under *Snyder*.

So where did the defense go wrong with this argument, seemingly fitting exactly within the *Snyder* definition? The problem lies in the way the rule has previously been interpreted. Prior cases applying the derivative injury doctrine to third party claims were limited to claims of wrongful death, loss of consortium, and emotional distress of a relative who witnessed an employee's workplace injury. Those barred actions were necessarily dependent on the existence of an employee injury *in a legal sense*: "One spouse cannot have a loss of consortium claim without a prior disabling injury to the other spouse."

But in this case, the court said, plaintiffs were not seeking damages for losses arising from a disabling or lethal injury to Mrs. Ek. Instead, they were suing for damages arising from Mr. Ek's death, "an event allegedly causally related to Mrs. Ek's alleged infection by the virus in the workplace, but...not derivative of that infection." The problem with the defense argument is that they tried to jam a dispute over causation into the jurisdictional question of where the case may be brought. Under this decision, the fact that an employee's injury is the "biological cause" of an injury to a third party does not by itself make the employee's injury the "legal or logical basis" of the third party's claim for purposes of the derivative injury rule:

[T]he mere fact that an employee's injury is the alleged cause of a nonemployee's injury does not make the nonemployee's injury "logically derivative" of the employee injury. Derivative injuries are the "economic" and "intangible" losses suffered by an employee's loved ones as a result of the employee's disability or death. This definition does not extend to separate physical injuries suffered by nonemployees, even when...an employee's injury was part of the causal chain leading to those injuries.

In an effort to further differentiate the question of causation from the question of jurisdiction, the Court of Appeal pointed out that a construction of the derivative injury rule premised solely on causation would bar civil claims by any person injured as a result of the employee's injury. The Court posed a provocative hypothetical:

[I]magine that a researcher in a laboratory studying dangerous pathogens inadvertently becomes infected due to the employer's lax safety protocols. That researcher then boards a bus home and infects all the passengers with a lethal virus. Under defendants' interpretation of *Snyder*, the passengers, whose illnesses would not have existed in the absence of injury to the employee, would be barred from asserting civil claims seeking tort remedies against the laboratory.

The Court derided this potential outcome, noting that the "compensation bargain" exists between businesses and their employees, and generally does not include third party injuries.

Perhaps curiously, the Court of Appeal seemed to be of the opinion that the question of whether an infected employee has sustained an industrial injury depends on whether the infected employee becomes symptomatic. Noting that even asymptomatic infected persons may transmit the virus, the Court pointed out that "viral transmission does not depend upon, and therefore under defendants' analytic model, is not caused by, any injury to the transmitting party." Does that mean that asymptomatic infections do not constitute an industrial injury? Obviously, this question was not directly before the Court but the dicta could prove important as subsequent case law develops.

Notably, the Court did not reach the important legal question of whether the employer owed a duty to the non-employee husband – an integral factor in the ultimate determination of the claim of negligence. The further and obvious question of causation in the first instance (*i.e., how can the plaintiff prove where and how her husband contracted the virus?*) also remains open. This case is not over.