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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

ALLEN RUDOLPH AND PAMELA RUDOLPH,
Plaintiffs and Appellants,

v.

RUDOLPH AND SLETTEN, INC.,
Defendant and Respondent.

APPEAL FROM ALAMEDA COUNTY SUPERIOR COURT
GEORGE C. HERNANDEZ, JR., JUDGE • CASE NO. RG17857580

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules of Court

Miscellaneous

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RESPONDENT'S BRIEF

INTRODUCTION

The question on appeal is whether a worker who has a remedy under workers' compensation for his injury can nevertheless pursue common law tort claims against his employer for the same injury. The answer, decreed by the Legislature, is no. Workers' compensation is the exclusive remedy. The opening brief phrases the issue as "whether the Workers' Compensation Act precludes common law tort claims against a company for injuries outside the course of employment." (AOB 11.) But this appeal presents no such issue because the only injury alleged is an indivisible one—a latent cancer—that plaintiff Allen Rudolph says came about from multiple asbestos exposures, *including workplace exposures.* Because

workplace exposures were a contributing cause of the disease, it is fully covered by workers' compensation.

The trial court correctly applied binding precedent—*Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 640 (*Melendrez*)—to sustain defendant Rudolph and Sletten, Inc.'s demurrer. On appeal, plaintiffs Allen and Pamela Rudolph argue this court should disagree with *Melendrez,* but their analysis is contrary to the balancing of interests that underlies the workers' compensation system. This court should follow *Melendrez* and affirm the judgment of dismissal.

The Workers' Compensation Act (the Act) provides benefits to workers like Rudolph who sustain injuries as a result of workplace conditions, without requiring them to show any fault by their employer, *and without regard to whether non-workplace conditions also contributed to the injury.* The trade-off for that no-fault remedy is that those benefits are the exclusive remedy that a worker may seek against his or her employer. That is the essential bargain underlying workers' compensation law.

The Rudolphs contend they should be able to sue Rudolph and Sletten for Allen's "childhood injury." They allege that Allen's father worked for Rudolph and Sletten and brought home fibers to the household on his clothing. But those exposures do not constitute a separate injury. As a matter of law, Allen did not suffer any injury until he developed mesothelioma. That single indivisible injury is covered by workers' compensation.

The Rudolphs rely on cases involving the "dual capacity" exception to the exclusive remedy rule of workers' compensation,

but that exception has been dramatically curtailed by the Legislature. At one time, the dual capacity exception applied broadly to situations in which an employer injured a worker by breaching a duty outside the employment relationship. But the Legislature largely abrogated that exception in 1982, limiting it to very narrow circumstances. In its current form, the dual capacity exception permits workers to bring a separate tort action when they are injured on the job and then, *after the original workplace injury*, the employer aggravates the injury or causes a second injury while acting in a capacity other than as employer. That is not what happened here. Rudolph and Sletten did not aggravate Allen's mesothelioma or cause an additional injury after he developed mesothelioma. The dual capacity doctrine thus does not apply here.

Finally, the Rudolphs argue that a separate lawsuit is justified by the apportionment rules for workers' compensation proceedings and by Proposition 51. Not so. The Act calls for apportionment of benefits between disabling workplace injury and nonworkplace injuries when they separately combine to create a permanent disability, but the Act *prohibits* apportionment of an occupational disease like mesothelioma. A worker with an occupational disease can obtain full benefits from the last employer, who is left to seek contribution from others. Such proceedings within the workers' compensation system have nothing to do with the exclusivity rule that bars claims against employers in a civil tort action. Similarly, Proposition 51 has no bearing on this case. It requires allocation of fault among joint tortfeasors in civil cases, but it has no application to a single employer subject to the no-fault

system of workers' compensation, and it does not abrogate the workers' compensation exclusivity doctrine.

The trial court committed no error by applying these established legal principles. The judgment should be affirmed.

STATEMENT OF THE CASE

A. Factual background: Allen Rudolph claims he was exposed to asbestos in childhood and later while working for Rudolph and Sletten, Inc., causing him to develop mesothelioma.

The Rudolphs, husband and wife, allege that Allen was exposed to asbestos from many sources. (1 AA 110.) The claimed exposures began during his childhood, when his father wore home work clothes from two different employers in the construction industry: Williams & Burrows (1957-1960) and his father's contracting business, Rudolph and Sletten (1960-1970). (*Ibid.*) They further allege that Allen was directly exposed to asbestos fibers during his own work in the construction industry, while employed by Rudolph and Sletten. (1 AA 14, 110.) They attribute exposures to a variety of other sources as well. (1 AA 10-32.)

The Rudolphs allege that these exposures cumulatively caused Allen to develop peritoneal mesothelioma (1 AA 107, 110; RJN 6), a rare cancer of the lining of the abdominal cavity (see *Chevron U.S.A. v. Workers' Comp. Appeals Bd.* (1990) 219 Cal.App.3d 1265, 1268, fn. 3 (*Chevron*)).

B. Procedural history

1. The Rudolphs sue Rudolph and Sletten and many others. Rudolph and Sletten files a demurrer based on workers' compensation exclusivity.

The Rudolphs sued 23 defendants, including Rudolph and Sletten. (1 AA 10-32.) Rudolph and Sletten filed a demurrer, arguing that workers' compensation exclusivity bars the claims against it because, according to the complaint, Allen's employment with Rudolph and Sletten contributed to causing his mesothelioma. (1 AA 35, 44-45.) The demurrer noted that a published Court of Appeal opinion has already applied the exclusive remedy doctrine to this exact factual scenario, where a worker sues his employer alleging that he suffered both on-the-job asbestos exposures and household asbestos exposures, both contributing to the subsequent development of mesothelioma. (See 1 AA 46, citing *Melendrez, supra,* 240 Cal.App.4th at p. 632.)

The Rudolphs responded by amending their complaint, changing the allegation that Allen was "employed" with Rudolph and Sletten to a more vague allegation that Allen was "working" for Rudolph and Sletten. (Compare 1 AA 14 with 1 AA 110.)

Rudolph and Sletten filed another demurrer on the same grounds as the first (1 AA 136) and the Rudolphs opposed, arguing that their amendment prevented the court from determining that workers' compensation applies (2 AA 232, 235). They also cited an unrelated trial court proceeding in which the trial court had

purportedly declined to follow *Melendrez* (see 2 AA 233), and they cited the Court of Appeal's unpublished summary denial of a writ petition in that case to support their argument that the trial court should not follow *Melendrez* (*ibid.*).

2. The trial court sustains the demurrer without leave to amend and enters judgment. The Rudolphs appeal.

The trial court sustained the demurrer to the amended complaint, explaining its reasoning in a five-page single-spaced minute order. (2 AA 420-425.)[1] The order stated that the workers' compensation exclusivity rule barred the Rudolphs' complaint because the complaint alleged Allen was exposed to asbestos while working for Rudolph and Sletten, and that the exposure contributed to causing his disease. (2 AA 420.)

The court rejected the Rudolphs' "formalistic" argument based on the change of wording in the amended complaint. (2 AA 420-421.) The court invoked the sham pleading doctrine, which permits a court to consider the material factual allegations in an original pleading when those allegations are omitted from an amended complaint without explanation. (*Ibid.*)

The trial court found the reasoning of *Melendrez* persuasive and controlling, and rejected plaintiffs' reliance on the unpublished materials from the unrelated proceeding. (2 AA 422-423.) The

[1] The order is attached to this brief for the court's convenience, pursuant to California Rules of Court, rule 8.204(d).

court noted that in this case, as in *Melendrez*, the injured plaintiff claimed a single indivisible injury—mesothelioma—that was allegedly caused by occupational and nonoccupational exposures. (*Ibid*.) The court concluded that under well-settled law, because workplace exposures contributed at least in part to Allen's disease, workers' compensation benefits were available and provided the exclusive remedy against Allen's employer for that injury. (*Ibid*.) After sustaining the demurrer without leave to amend, the trial court entered a judgment of dismissal in favor of Rudolph and Sletten. (2 AA 437-438.)

The Rudolphs appealed. (2 AA 439.) The register of actions reflects the voluntary dismissals of other defendants. (2 AA 462-463.)

LEGAL ARGUMENT

I. Standard of review: The Rudolphs bear the burden of proving the trial court committed legal error in sustaining the demurrer.

When a complaint alleges facts indicating that the Act provides benefits for the plaintiff's alleged injury, no civil action against plaintiff's employer will lie, and the complaint is subject to a general demurrer unless it states additional facts negating the general rule that workers' compensation is the exclusive remedy. (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700.)

Plaintiffs bear the burden of demonstrating that the trial court erred in sustaining the demurrer. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court's ruling on demurrer should be upheld if supported on any ground, even one the trial court did not specifically adopt. (*People ex rel. Harris v. Delta Air Lines, Inc.* (2016) 247 Cal.App.4th 884, 894.)

Rudolph and Sletten agrees that a de novo standard of review applies in determining whether the Rudolphs have met their burden of demonstrating error. (See AOB 28.) Ordinarily, when this court concludes the trial court properly granted a demurrer, it reviews for abuse of discretion the trial court's denial of leave to amend. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) However, the Rudolphs do not argue on appeal that the trial court should have granted them leave to amend. Accordingly, this court should affirm if it concludes that the Rudolphs have not met their burden of showing error.

II. The trial court correctly ruled that workers' compensation is the Rudolphs' exclusive remedy against Rudolph and Sletten.

A. The Workers' Compensation Act covers injuries caused by employment, even if the employment was only one of several contributing causes.

The California Constitution gives the Legislature power to create a system of workers' compensation. (Cal. Const., art. XIV, § 4.) Under that authority, the Legislature enacted the Act—a comprehensive statutory scheme governing compensation for injuries incurred in the course and scope of employment. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 810.)

Employers are liable under the Act for any injury "arising out of and in the course of employment," without regard to negligence on the employer's part. (Lab. Code, § 3600, subd. (a), emphasis added.) The two-pronged requirement—arising out of and in the course of employment—is the " 'cornerstone of the workers' compensation system.' " (*Vaught v. State of California* (2007) 157 Cal.App.4th 1538, 1544.) Courts liberally construe the workers' compensation laws to find coverage, and any reasonable doubts as to whether an injury arose out of and occurred in the course of employment are resolved in favor of awarding workers' compensation benefits *and limiting civil litigation*. (*Ibid.*; *Arriago v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.)

The Act allows employees to obtain workers' compensation benefits when their employment contributed to an injury, "even if another, nonindustrial cause also substantially contributed to the injury." (*Melendrez*, *supra*, 240 Cal.App.4th at p. 640.) That rule has been part of California law for decades and appears in multiple California Supreme Court opinions. (See, e.g., *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 298-299 [the causation requirements of workers' compensation law are less restrictive than that used in tort law: " 'for the purposes of the causation requirement in workers' compensation, it is sufficient if the connection between work and the injury be *a* contributing cause of the injury' " (emphasis added)], quoting *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 1809; *LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651, fn. 1 [" ' "All that is required is that the employment be *one* of the contributing causes" ' " (emphasis added)], quoting *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 734, fn. 3; *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 418-419 (*McAllister*) ["the decedent's employment need only be *a* 'contributing cause' of his injury" (emphasis added)], quoting *Employer etc. Ins. Co. v. Ind. Acc. Com.* (1953) 41 Cal.2d 676, 680.)

The Supreme Court applied the contributing cause standard in the context of occupational disease over 70 years ago, finding that the Act provides coverage for a disease that was caused at least in part by workplace exposures. In *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, 82, the Supreme Court held that in the case of "progressive occupational diseases," an employee may

obtain workers' compensation benefits "*if the disease and disability were contributed to by the employment furnished by the employer*." (Emphasis added; see also *McAllister*, *supra*, 69 Cal.2d at pp. 418-419 [lung cancer covered by workers' compensation where it resulted both from occupational exposures and employee's history of cigarette smoking].) The Supreme Court further held that the worker could obtain full benefits for the disease from one or more successive employers. (*Colonial,* 29 Cal.2d at pp. 85-86; *Graphic Arts Mutual Ins. Co. v. Time Travel Internat., Inc.* (2005) 126 Cal.App.4th 405, 410 (*Graphic Arts*).)

The Legislature codified this rule in 1951 by enacting Labor Code section 5500.5, which provides for coverage under the Act for occupational diseases that are caused at least in part by workplace exposures. (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 374-375.) In 1973 and in 1977 the Legislature amended section 5500.5 so that the only employers responsible for providing workers' compensation benefits would be those who exposed the worker to a hazardous substance within one year before the injury manifested, or the last employer to do so if more than one year elapsed between the last exposure and manifestation. (*Id.* at p. 375; see also Lab. Code, § 5500.6.)

As a result, workers with occupational diseases need not pursue all past employers for benefits, but may obtain full benefits from those employers who most recently contributed to the injury-producing exposure. (See *Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 325-326; *Graphic Arts*, *supra*, 126 Cal.App.4th

at pp. 410-411; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 240 (*Western Growers*).)

B. Workers' compensation is the exclusive remedy against employers for covered injuries, with narrow exceptions not applicable here.

When the Act provides benefits for a worker's injury, it provides the worker's *exclusive remedy* against the employer. (*Wright v. State of California* (2015) 233 Cal.App.4th 1218, 1229; Lab. Code, § 3602, subd. (a) [where an injury qualifies for compensation under the Act, "the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer"]; see also § 3602, subd. (c) ["In all cases where the conditions of compensation set forth in [Labor Code] Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted"].)

The exclusive remedy rule is critically important to the "compensation bargain" underlying the Workers' Compensation Act. Under that bargain, the employer assumes full responsibility for occupational injuries without regard to fault, in exchange for limitations on the amount of that liability. (*Melendrez*, *supra*, 240 Cal.App.4th at p. 638; *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 141-142.) The employee receives relatively swift and certain payment of benefits without needing to prove fault, but gives up certain tort damages, such as punitive damages. (*Ibid.*)

To preserve the integrity of that bargain, the Legislature has strictly limited the exceptions to the exclusive remedy rule. Labor Code section 3602, subdivision (a) provides that the only permissible exceptions are those specifically described in section 3602, section 3706, and section 4558. (Lab. Code, § 3602, subd. (a).) The exceptions authorize lawsuits against employers in the following situations: (1) certain "dual capacity" situations in which an employee is injured on the job and, after the injury, the employer causes further injury while acting in a capacity other than as employer; (2) willful physical assaults by employers; (3) injuries aggravated by the employer's fraudulent concealment of the existence of the injury; (4) injuries caused by products the employer sells to a third party, who then sells the product to the employee; (5) failure to secure payment of workers' compensation through insurance or otherwise; and (6) removal of safety guards on power presses. (See Lab. Code, §§ 3602, subds. (a) & (b), 3706, 4558.)

The only exception that merits further discussion in this case is the "dual capacity" exception, on which the Rudolphs rely. As explained in more detail below, the exception does not apply here.

C. Workers' compensation provides the exclusive remedy against Rudolph and Sletten because plaintiffs allege that Allen's employment contributed to his mesothelioma.

The Rudolphs' complaint alleged that Allen was exposed to asbestos while employed with Rudolph and Sletten, and that those

exposures contributed to his development of mesothelioma. (1 AA 14; see also 1 AA 110.) Those allegations bring Allen's disease within the coverage of the Act, under the contributing cause rule discussed above. (*Ante*, pp. 19-21.)[2]

The opening brief does not contest that Allen is entitled to workers' compensation benefits for his mesothelioma. Courts have long held that workers' compensation applies to latent diseases like mesothelioma, even though the latency period means that the injury often does not develop until years later, after employment has ended. (See, e.g., *Skip Fordyce, Inc. v. Workers' Comp. Appeals Bd.* (1983) 149 Cal.App.3d 915, 919 [discussing application of workers' compensation to death from lung cancer; workplace exposures occurred in the 1950s and disease developed in the 1970s]; *Scott Co. v. Workers' Comp. Appeals Bd.* (1983) 139 Cal.App.3d 98, 102-103 [workers' compensation applied to mesothelioma where workplace exposures took place prior to 1970 but disability did not arise until 1978].)

Because there is no dispute that Allen's injury is covered by workers' compensation, there should be no dispute that workers' compensation is the exclusive remedy, under the plain language of

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[2] The Rudolphs appear to have abandoned the argument that, by amending their complaint to excise language about employment, they took their allegations outside the coverage of the Act. (See 2 AA 421 [trial court order citing *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425-426: " 'Allegations in the original pleading that rendered it vulnerable to demurrer . . . cannot simply be omitted without explanation in the amended pleading"].) As the court noted, the Rudolphs' strategy was a "textbook example of a sham pleading." (2 AA 421.)

Labor Code section 3602. The Rudolphs advance several arguments why the exclusive remedy rule should not apply here, but as we now explain, their contentions lack merit.

D. Allen's childhood exposures do not constitute a separate injury that would support a separate lawsuit. As *Melendrez* explained, mesothelioma is a single injury; each exposure is not a separate injury.

The Rudolphs argue that Allen was not acting in the course and scope of his employment when he was exposed to asbestos as a child, and therefore his "childhood injury" is not covered by workers' compensation. (AOB 36-37, 48-50.) They argue that the trial court, by applying the exclusive remedy rule, deprived them of any remedy for Allen's childhood injury (AOB 48-50.)

As a matter of law, Allen's alleged exposures as a child do not constitute an "injury." California has a well-developed body of law addressing the issue of whether exposure to a toxic substance constitutes an "injury" in and of itself, prior to the development of any health problems resulting from the exposure. The answer is clear: exposure is not injury.

Starting with the law of workers' compensation, "[t]he law is express that there can be no compensable injury until there is disability." (*Chevron*, *supra*, 219 Cal.App.3d at p. 1271.) The Workers' Compensation Act broadly defines "injury" to include both injuries and diseases that arise out of the employment. (Lab. Code, § 3208.) An injury may be either (a) "specific," occurring as the

result of one incident or exposure that causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. (Lab. Code, § 3208.1.) For "specific" injuries, the date of injury is the date when the injury-causing incident occurred. (Lab. Code, § 5411 ["The date of injury, *except in cases of occupational disease or cumulative injury*, is that date during the employment on which occurred the alleged incident or exposure, for the consequences of which compensation is claimed" (emphasis added)].)

For cumulative injuries and occupational diseases, however, the date of injury is the date when the employee first experiences symptoms that result in a disability. (See Lab. Code, § 5412 ["The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment"]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 336 ["where an employee suffers from a cumulative injury or occupational disease, there is a 'date of injury' only at such time as the employee suffers an impairment of bodily functions which results in the impairment of earnings capacity"].)

Cases outside the workers' compensation context reach the same conclusion, i.e., that a person exposed to a potentially toxic substance does not suffer a separate actionable injury at the time of

exposure—injury occurs only if and when that person actually develops some adverse health condition. (See *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 540 (*Buttram*) [for purpose of determining applicability of Proposition 51, mesothelioma cause of action accrued on the date plaintiff was diagnosed with the disease, not date of exposure]; see also *id.* at p. 530 [for purpose of statute of limitations, cause of action for latent disease "does not accrue until the plaintiff discovers or reasonably should have discovered that he has suffered a compensable injury"]; *Vanhooser v. Superior Court* (2012) 206 Cal.App.4th 921, 930 [for purpose of determining whether a loss of consortium claim exists, "a spouse has not suffered a compensable harm or injury from asbestos exposure until he or she is diagnosed with or discovers actual injury from or symptoms of the asbestos-related illness"].)

In the specific context of asbestos-related cancer, the Supreme Court has noted the impossibility of identifying which particular asbestos fiber or fibers caused the cancer to begin forming. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 974.) Therefore, one cannot pinpoint any particular exposure as being injurious, which is why plaintiffs in such cases are allowed to prove causation by showing that exposures sourced to the defendant were a "substantial factor" in contributing to an aggregate dose that raised the risk of developing asbestos-related cancer. (*Id.* at pp. 976-977.)

These authorities confirm the conclusion reached by the Court of Appeal in *Melendrez* and the trial court here: a worker who is exposed to asbestos and develops mesothelioma has a single injury

that occurs when the mesothelioma develops, not a separate injury for each exposure. (See *Melendrez*, *supra*, 240 Cal.App.4th at p. 641; 2 AA 423; see also *Western Growers*, *supra*, 16 Cal.App.4th at p. 235 [worker with depression caused by multiple incidents "suffered from a single cumulative injury"].) Because workers' compensation covers that single injury, the exclusive remedy rule bars separate tort lawsuits. (*Melendrez*, *supra*, 240 Cal.App.4th at p. 641.)

The Rudolphs argue that *Melendrez* invented the concept, with which they are not familiar, that an occupational disease constitutes a single injury, rather than a series of separate injuries from each separate exposure. (See AOB 11-12 ["The 'single disease' rule is nowhere to be found in the Workers' Compensation Act itself, and *Melendrez* is the only California appellate opinion that has adopted this novel principle"].) Their description of the law is not remotely accurate. As we have just explained, *Melendrez* rests on a well-developed body of law, both inside and outside the context of workers' compensation, holding that "injury" from toxic exposure occurs when symptoms of an indivisible injury arise, not when each exposure occurs. (*Ante*, pp. 24-26.)

These authorities demonstrate that there was nothing novel or groundbreaking about *Melendrez*. Rather, it is the Rudolphs' position that is unprecedented. They cite no authority supporting the position that each exposure to asbestos can be treated as a separate injury, for workers' compensation or any other purpose. They rely on *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223 (*Weinstein*) (AOB 26), but that case did not

involve an occupational disease caused by multiple exposures—the worker in that cause suffered an occupational foot injury that the employer aggravated during post-accident medical treatment. (*Weinstein*, at p. 1226.) Because the employer's negligent medical treatment came *after* the industrial injury and caused *additional* harm, the employee could sue for the aggravation of the original injury under the narrow "dual capacity" exception discussed below. (At pp. 30-34, *post*). *Weinstein* does not remotely stand for the proposition that a single disease can be treated as multiple injuries.

As *Melendrez* pointed out, the Rudolphs' position would undermine the bargain that the Legislature struck when crafting the workers' compensation system. (*Melendrez*, *supra*, 240 Cal.App.4th at p. 644.) The Act gives the Rudolphs a remedy against Rudolph and Sletten for his mesothelioma *without regard to fault*. His disease would be fully covered by workers' compensation even if his work for Rudolph and Sletten played only a minor role, and other contributions were more significant. In exchange for that broad no-fault remedy, the Rudolphs must forgo a separate lawsuit against Rudolph and Sletten for enhanced tort damages. Allowing them to obtain workers' compensation benefits while still seeking tort damages against Rudolph and Sletten for the same disease "would contravene the purpose of the exclusive remedy rule." (*Ibid*.)

In the trial court, the Rudolphs sought to avoid the effect of *Melendrez* by citing a superior court ruling from another case, as well as a Court of Appeal order summarily denying a writ petition in the same case. (2 AA 233.) They continue to discuss those materials in their opening brief. (AOB 23, 69-70.) Their reliance on

those unpublished materials violates the rules of court. (See Cal. Rules of Court, rules 8.1105, 8.1115; see also Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 14:194.3, p. 14-82 ["Trial court decisions have *no* precedential value and are not citable authority"]; *TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 447-448, fn. 2 [noting the "impropriety" of citing unpublished and unpublishable superior court orders].) An order summarily denying a writ petition is not law of the case even in the action in which the petition was filed (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 200), let alone precedent for an unrelated lawsuit. The trial court did not err by declining to credit these "authorities," and following instead the reasoning of *Melendrez*.

As a fallback position to their attack on *Melendrez*, the Rudolphs attempt to distinguish the facts of that case from the case at bar. (AOB 67-70.) They note that in *Melendrez*, the worker developed mesothelioma as a result of workplace asbestos exposures and take-home asbestos exposures that occurred during the same timeframe. (AOB 66-67; see also *Melendrez*, *supra*, 240 Cal.App.4th at pp. 636-637.) The Rudolphs point out that Allen's take-home exposures occurred before his occupational exposures. (AOB 66-67.)

That is a classic distinction without a difference. The reasoning of *Melendrez* depends in no way upon the timing of the exposures. As noted, *Melendrez* relied on longstanding principles of workers' compensation law and the public policies underpinning those principles. (*Ante*, pp. 24-27.) Specifically, *Melendrez* turned on the contributing cause rule and the exclusive remedy rule.

(*Melendrez*, *supra*, 240 Cal.App.4th at pp. 639-642.) Those principles apply with equal force in this case, regardless of whether Allen's take-home exposures occurred before his workplace exposures, or at the same time. Either way, his injury would be covered by the Act, and the exclusive remedy rule would prohibit the Rudolphs from seeking tort damages for the same injury.

E. The "dual capacity" exception to the exclusive remedy doctrine does not apply. The Legislature has restricted that exception to narrow circumstances not present here.

The Rudolphs rely on a series of cases applying the "dual capacity" exception to the exclusive remedy rule. (AOB 26, 55-59.) They argue that Rudolph and Sletten owed Allen a duty not only as his employer in the 1970s and 1980s, but also as his father's employer in the 1960s. (AOB 17, 25, 50, 65, citing *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [employers owe a duty of care to household members].) They argue that, under cases applying the "dual capacity" exception, they can sue Rudolph and Sletten for breaching its duty to him as a member of his father's household, even if they cannot sue for breach of duty to him as an employee. (AOB 55-59.)

When the Supreme Court originally created the dual capacity exception, before the Legislature restricted it, "dual capacity" was legal shorthand for describing a situation in which an employer owes a duty of care independent of the employment relationship,

and injures the employee by breaching that duty. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 730; *Weinstein*, *supra*, 58 Cal.App.4th 1223, 1230.) The dual capacity doctrine was first enunciated by the Supreme Court in *Duprey v. Shane* (1952) 39 Cal.2d 781 (*Duprey*). (See *Sturtevant v. County of Monterey* (1991) 228 Cal.App.3d 758, 762 (*Sturtevant*) ["*Duprey* is regarded as the source in California's dual capacity doctrine"].) In *Duprey*, a nurse suffered on-the-job injuries and was treated by her employer, a chiropractor. (*Duprey*, *supra*, at pp. 784-785.) After that initial injury, the employer's negligent treatment caused further injury. (*Ibid*.) The Supreme Court held that even though the nurse's initial injury was industrial (and therefore covered by workers' compensation), she could bring a separate lawsuit against her employer for medical malpractice because her employer was acting in another capacity—as a doctor, not as her employer—when he caused the second injury. (*Id*. at p. 793.)

The Supreme Court later expanded the dual capacity doctrine beyond the medical-provider context in *Bell v. Industrial Vangas, Inc.* (1981) 30 Cal.3d 268 (*Bell*). There, an employee who worked for a company that sold flammable gas was injured in a fire while delivering the gas to a customer. The Supreme Court ruled that the employee could sue his employer in tort because it owed him a duty in two capacities—as an employer and as a product manufacturer—and the concurrent breach of both duties caused his injury. (*Id*. at pp. 272-273.)

The Legislature abrogated much of the dual capacity doctrine by amending Labor Code section 3602 in 1982. (*Singh v. Southland*

Stone, U.S.A., Inc. (2010) 186 Cal.App.4th 338, 368; *Hughes v. Western MacArthur Co.* (1987) 192 Cal.App.3d 951, 956, fn. 5.) The amendments were designed to supersede the Supreme Court's decision in *Bell* and limit the dual capacity doctrine to a narrow set of clearly defined circumstances represented by the facts in *Duprey*. (See *Perry v. Heavenly Valley* (1985) 163 Cal.App.3d 495, 501-502 & fn. 5 [reprinting in full a letter from Senator Boatwright, member of the Industrial Relations Committee, to the president pro tem of the Senate].)

The 1982 amendments limited the application of the dual capacity doctrine to situations in which an employer acting in a dual capacity causes further injury to an employee *after* an industrial injury. "The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer." (Lab. Code, § 3602, subd. (a); see also *Weinstein*, *supra*, 58 Cal.App.4th at p. 1229, fn.5 [1982 amendments limit the dual capacity exception "to cases in which the parties' dual capacity did not exist prior to the employee's *industrial* injury, but arose only *after* the injury" (emphasis added)].)

Thus, after the 1982 amendments, employees of healthcare providers are still permitted to sue their employers for negligently causing further injury *after* an initial workplace injury. (See *Weinstein*, *supra*, 58 Cal.App.4th at p. 1226; *Sturtevant*, *supra*, Cal.App.3d at pp. 765-766.)

None of the dual capacity cases cited by the Rudolphs support their position. (See AOB 55-59, citing *D'Angona v. County of Los Angeles* (1980) 27 Cal.3d 661, 667 (*D'Angona*); *Duprey*, *supra*, 39 Cal.2d at pp. 786-789; *Weinstein*, *supra*, 58 Cal.App.4th at p. 1226; *Sturtevant*, *supra*, 228 Cal.App.3d at p. 761.)

D'Angona and *Duprey* preceded the 1982 amendments to Labor Code section 3602, so they obviously did not address the current state of the law. Moreover, both cases involved situations that would qualify under the limited version of the dual capacity doctrine that survived the 1982 amendments—they involved not a single, indivisible injury, but rather an employer who acted in a dual capacity and caused a further injury *after* the employee had already suffered a workplace injury. (See *D'Angona*, *supra*, 27 Cal.3d at p. 663; *Duprey*, *supra*, 39 Cal.2d at pp. 785-787.)

Weinstein and *Sturtevant*, which were decided after the 1982 amendments, also involved situations where the employer caused injury in a dual capacity *after* the original injury. (*Weinstein*, *supra*, 58 Cal.App.4th at p. 1226; *Sturtevant*, *supra*, 228 Cal.App.3d at pp. 765-766.) Indeed, *Weinstein* expressly noted that the plaintiff's dual capacity claim in that case was permissible under the 1982 amendments because the plaintiff alleged that the employer caused further injury while acting in a nonemployer capacity *after* the original injury. (*Weinstein*, at p. 1229, fn.5.)

In contrast to those cases, the Rudolphs do not allege that Rudolph and Sletten caused some additional subsequent injury distinct from his mesothelioma, or somehow aggravated his mesothelioma, by acting in a nonemployer capacity after he suffered

his industrial injury. To the contrary, the Rudolphs allege that Rudolph and Sletten contributed to Allen's cancer by acting in another capacity during Allen's childhood, long *before* he developed mesothelioma. That is exactly the sort of dual capacity claim the Legislature eliminated with the 1982 amendments. (Lab. Code, § 3602, subd. (a) ["The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his dependents to bring an action at law for damages against the employer"].) There can be no doubt that the childhood exposures occurred prior to Allen's industrial injury. Accordingly, under the plain language of the statute, those exposures do not permit him to bring an action at law against his employer for damages.

The Rudolphs try to shoehorn their case into the statutory language by arguing that Rudolph and Sletten was acting in a single capacity at the time of Allen's childhood take-home exposures, so in their view no dual capacity existed "prior to, or at the time of" that childhood injury. (AOB 59-62.) That argument suffers from two flaws. First, it assumes Allen suffered an injury when he was exposed to asbestos as a child. As already noted, however, the sole injury in this case occurred when Rudolph developed mesothelioma, not each time he was exposed to asbestos. (*Ante*, pp. 24-28.) Second, if Rudolph and Sletten injured Allen by acting in "another capacity," it clearly did so "*prior to* . . . the employee's industrial injury" (Lab. Code, § 3602, subd. (a), emphasis

added), which is the precise situation in which the statute says the dual capacity exception does *not* apply.

F. The Workers' Compensation Act mandates apportionment of a disability caused by multiple injuries. It does not permit apportionment of a single occupational disease with multiple causes.

The Rudolphs contend that the Act mandates apportionment when a single injury is caused by multiple factors. (AOB 38-48.) Their argument is wrong. The Act mandates apportionment of benefits awarded for a *disability* caused by multiple workplace and nonworkplace injuries, but does not require—or permit—apportionment of benefits in the case of a single indivisible occupational disease.

Labor Code section 4663 provides for "[a]pportionment of permanent *disability*," not apportionment of injury. (Lab. Code, § 4663, emphasis added; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 ["The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury"].) Thus, when an employee has become permanently disabled as a result of multiple injuries, or the combination of a workplace injury and a preexisting condition that caused some initial disability, the statute requires a determination of how much a role the workplace injury played in causing the disability. In that situation, "The employer shall only be liable for the percentage of permanent disability directly caused

by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664, subd. (a); see also *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 (*Brodie*).)

For example, if an employee suffers a broken leg while working for one employer or during recreational motorcycling, and later breaks an arm or rebreaks the same leg while working for another employer, resulting in permanent disability, the second employer must provide workers' compensation only for the percentage of the disability caused by the new injury. (See, e.g., *Brodie, supra*, 40 Cal.4th at pp. 1318-1319 [summarizing the facts of five consolidated workers' compensation proceedings where apportionment was at issue; all five involved disability resulting from multiple workplace injuries or a combination of workplace injuries and preexisting disabilities].)

Notably, the Rudolphs fail to mention the apportionment statute that governs the type of indivisible injury at issue here. Labor Code section 5500.5 expressly addresses apportionment for occupational diseases, and *prohibits apportionment* for that type of injury: "liability for the cumulative injury or occupational disease *shall not be apportioned* to prior or subsequent years." (Lab. Code, § 5500.5, subd. (a), emphasis added; see also 1 Eskanazi, Cal. Civil Practice, Workers' Compensation (2018) § 4:12 ["Liability for cumulative injury or occupational disease is, as a general rule, not apportioned"].) As noted, Labor Code section 5500.5 permits a worker with an occupational disease to obtain full workers' compensation benefits from the last employer that contributed to causing the disease. (*Ante*, pp. 20-21.)

Labor Code section 5500.5 permits apportionment of *disabilities* caused by occupational disease, but only to the extent the disability results from a combination of an occupational disease along with other independently disabling injuries or conditions. (Lab. Code, § 5500.5, subd. (a) ["evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated . . . may be admissible for purposes of apportionment"].) In such cases, after the worker has obtained benefits from one employer, that employer may petition the Workers' Compensation Appeals Board to require contribution from others, but the contribution proceedings cannot limit or restrict the employee's original recovery. (Lab. Code, § 5500.5, subd. (e); 1 Eskanazi, Cal. Civil Practice, Workers' Compensation, § 13:28.)

In sum, contrary to the Rudolphs' contention, the apportionment of a single disease like mesothelioma is not permitted within a workers' compensation proceeding. But even if it were, that could not justify creating a new common law exception to the exclusive remedy doctrine.

G. Proposition 51 allocation of fault has no application to this case.

The Rudolphs complain that the trial court's ruling "eliminates Proposition 51's statutory fault allocation." (AOB 50.) The argument is nonsensical. Proposition 51 allows a nonsettling defendant to seek an assignment of fault to another joint tortfeasor so that the "deep pocket" defendant does not end up shouldering the

full burden of noneconomic damages caused at least in part by another person or entity. (See Civ. Code, § 1431.2; *Buttram*, *supra*, 16 Cal.4th at p. 524 [Proposition 51 was enacted to limit liability for noneconomic damages based on each tortfeasor's own percentage of fault].) It does not allow a *plaintiff* to carve out separate aspects of fault that the plaintiff attributes to a *single* alleged tortfeasor (plaintiff's employer) as a means of escaping the statutory bar of workers' compensation exclusivity.

If the Rudolphs believe that full workers' compensation benefits should *not* be afforded for indivisible injuries such as mesothelioma, and that an employer whose nonemployment conduct contributes to such injuries should therefore be liable in tort for some portion of the injury, their remedy lies with an appeal to the Legislature. Under the Labor Code as currently written, workers' compensation provides full benefits for an occupational disease caused in part by workplace exposures, and the exclusive remedy doctrine bars lawsuits seeking additional damages for the same disease. The trial court committed no error in its straightforward application of those principles to this case.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

April 24, 2018

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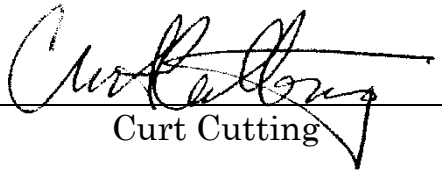
By: 
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

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Dated: April 24, 2018

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Rudolph Plaintiff/Petitioner(s) VS. Anning-Johnson Company Defendant/Respondent(s) (Abbreviated Title)	No. RG17857580 Order Demurrer to the First Amended Complaint Sustained

The Demurrer to the First Amended Complaint was set for hearing on 08/03/2017 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: Defendant Rudolph & Sletten, Inc. (R&S)'s demurrer to Plaintiffs' FAC based on the worker's compensation exclusivity doctrine is SUSTAINED WITHOUT LEAVE TO AMEND. (The court refers to "Plaintiffs" below in discussing their collective litigation positions, while using the singular "Plaintiff" to refer to Plaintiff Allen Rudolph's work history and illness.)

R&S's argument is straightforward: Plaintiffs' original Complaint alleged that Plaintiff was exposed to asbestos while employed by R&S, and that, before his employment by R&S, he was also exposed as a child to asbestos brought home by his father from his employment with R&S; Plaintiffs seek to recover damages for the single, indivisible injury of "malignant mesothelioma caused by [Plaintiff's] exposures to asbestos" (FAC, at p. 5:18); and the Court of Appeal held in Melendrez v. Ameron International Corp. (2015) 240 Cal.App.4th 632 that, because an employee was exposed to asbestos in the course of his employment by a defendant, and because that workplace exposure was a substantial contributing factor in the development of the employee's mesothelioma, the conditions of compensation in Labor Code section 3600 concurred, and " 'the right to recover compensation [was] ... the sole and exclusive remedy of the employee or his or her dependents against the employer' " (Melendrez, supra, 240 Cal.App.4th at p. 638, quoting Lab. Code, § 3602, subd. (a.)) even though the employee had undisputedly also been exposed to asbestos for which the same defendant was responsible by a means other than his employment, and even though that exposure was assumed to have also causally contributed to the development of his mesothelioma. (Id. at pp. 636, 641.) Melendrez establishes as a matter of law that the exclusivity doctrine bars Plaintiff's cause of action.

To avoid this straightforward conclusion dictated by the clear and broad reasoning of Melendrez, supra, 240 Cal.App.4th 632, Plaintiffs argue, first, that R&S cannot raise the exclusivity doctrine by demurrer because it is an affirmative defense, and Plaintiffs' current operative complaint does not expressly allege that he was employed by R&S or allege that R&S subscribed to workers' compensation or that workers' compensation insurance covered Plaintiff. By this remarkably formalistic argument, Plaintiffs ask the court to ignore the straightforward, express allegation of their original Complaint that, "[f]rom 1975 to the 1980s, [Plaintiff] Allen [Rudolph] was exposed to asbestos-containing construction products ...

while employed in various capacities by [R&S]." (Compl., at p. 5:17-19.) (The court of course grants R&S's request for judicial notice of the original Complaint and First Amended Complaint (FAC).) Although Plaintiffs responded to R&S's demurrer to the original Complaint based on the workers' compensation exclusivity doctrine ("exclusivity doctrine") by filing an FAC in which they sought to obscure the employment relationship by amending the foregoing allegation to state that "[f]rom 1972 to the 1980s, [Plaintiff] Allen [Rudolph] was exposed to asbestos-containing construction products ... while working in various capacities for [R&S]" (FAC, at p. 5:14-16), Plaintiffs do not contend that their original Complaint's straightforward, express allegation that Plaintiff was "employed in various capacities by [R&S]" was a mistake, or is untrue. They instead seek to elide that fact by simply omitting it from their FAC--presumably in order to force R&S to undergo the expense and delay of proving its defense on a motion for summary judgment rather than by demurrer.

The sham pleading doctrine exists to prevent such formalistic evasions. (See Shoemaker v. Myers (1990) 52 Cal.3d 1, 12-13 ["The general rule ... is that material factual allegations in a verified pleading that are omitted in a subsequent amended pleading without adequate explanation will be considered by the court in ruling on a demurrer to the later pleading."]); see also Pierce v. Lyman (1991) 1 Cal.App.4th 1093, 1109 ["[T]he rule also applies to unverified complaints."], quotation omitted; accord, Deveny v. Entropin, Inc. (2006) 139 Cal.App.4th 408, 425-26 [" 'Allegations in the original pleading that rendered it vulnerable to demurrer ... cannot simply be omitted without explanation in the amended pleading. The policy against sham pleadings requires the pleader to explain satisfactorily any such omission.' "], quoting Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter Gp. 2005) ¶ 6:708.]) Plaintiffs' unexplained omission of the Complaint's express allegation of employment, by the heavy-handed expedient of replacing the phrase "employed ... by" with the phrase "working ... for," is a textbook example of a sham pleading. Accordingly, in ruling on R&S's demurrer, the court reads into the FAC Plaintiff's prior allegation that he was exposed to asbestos while "employed in various capacities by [R&S]" for over 5 years.

Plaintiff's other formalistic attempt to delay a ruling on R&S's exclusivity defense is to argue that R&S cannot invoke that defense via demurrer because the FAC does not expressly allege that R&S subscribed to workers' compensation insurance or that such insurance covered Plaintiff. This means of evading the exclusivity doctrine is also not novel, and also foreclosed by precedent: A plaintiff who pleads causes of action that indicate an employer-employee relationship cannot resist a demurrer based on the exclusivity doctrine by merely pointing to a lack of proof that the employer had insurance; instead, the plaintiff must plead and prove a lack of insurance or other facts bringing the case within another exception to the exclusivity rule. (Singleton v. Bonnesen (1955) 131 Cal.App.2d 327, 330-31.)

That rule's purpose is obvious: It would undermine the bargain that has underlain the workers' compensation system for over a century to let employees evade the exclusivity doctrine, and force employers to litigate personal-injury cases based on workplace injuries through the summary-judgment stage (or, more realistically, to pay nuisance-value settlements), by the simple expedient of refraining from expressly alleging that the employer had workers' compensation insurance, even though the employee is unable to allege in good faith that the employer did not have such coverage.

Plaintiff tries to avoid this rule by citing a footnote of what is very likely dicta in a California Supreme Court decision, Doney v. Tambouratgis (1979) 23 Cal.3d 91. Doney involved a physical assault, and the complaint "nowhere mentioned or suggested that plaintiff and defendant had an employment relationship with one another" (id. at p. 94)--making Doney obviously distinguishable from this case--although the Court discussed evidence from the trial suggesting that they might in fact have had such a relationship. (Id. at p. 95.) The Court held that the defendant could not rely on appeal on the exclusivity doctrine because he had not pled and proved it as an affirmative defense. (Id. at p. 96.)
The Doney Court stated that "generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute." (Ibid.) But it went on to note that "[a]n exception to this general rule of pleading and proof by the defendant appears in the situation where the complaint affirmatively alleges facts indicating coverage by the act," in which case, "unless the complaint goes on to state additional facts which would negative the application of the act, no civil action will lie and the complaint is subject to a general demurrer." (Id. at p. 97.)

For that proposition, the Court approvingly cited several cases including Singleton, supra, 131 Cal.App.2d 327, in which the Court of Appeal squarely held that a complaint alleging an employment

relationship triggers the exclusivity doctrine, even if the complaint does not affirmatively allege that the employer had workers' compensation insurance. The Doney Court then added in a footnote that the conditions of compensation include the employer having secured the payment of compensation via insurance, and that, "[b]ecause an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving "that the [act] is a bar to the employee's ordinary remedy" [Citation], we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had "secured the payment of compensation" (Lab. Code, § 3706) in accordance with the provisions of the act." (Id. at p. 97, fn. 8.)

This footnote does not help Plaintiff here--as the Court of Appeal later explained in Gibbs v. American Airlines, Inc. (1999) 74 Cal.App.4th 1, emphasizing Doney's approving citation of Singleton. The Gibbs Court harmonized the holding in Singleton and the footnote of what is likely dictum in Doney as follows:

The [Doney] court acknowledged that pleading and proof [of the conditions of workers' compensation] are not required "where the complaint affirmatively alleges facts indicating coverage by the act." ([Doney, supra, 23 Cal.3d] at p. 97.) [T]he court cited [Singleton, supra, 131 Cal.App.2d at p. 331] in support of this exception to pleading and proof requirements. (Doney, supra, at p. 97.)

Singleton affirmed judgment following an employer's demurrer where the plaintiff alleged injury to an employee within the course of employment but made no mention of workers' compensation insurance. (Singleton, supra, 131 Cal.App.2d at pp. 328-29.) Importantly, the Court of Appeal found it proper to presume that the employer complied with the law requiring its purchase of workers' compensation insurance. (Id. at p. 331.) A plaintiff's action against an employer upon allegations of a work-related injury is barred unless the plaintiff also alleges that the employer has failed to secure the payment of workers' compensation through mandated insurance. (Ibid.)

In Doney, an employer-employee relationship and work-related injury were never alleged in the pleadings. Under such circumstances, the defendant must plead and prove the "conditions of compensation" necessary to workers' compensation exclusivity. (Doney, supra, 23 Cal.3d at pp. 97-98.) The Supreme Court's central focus was upon defendant's failure to plead and prove that the plaintiff's injury arose within the course of employment, but the court also stated that the defendant must prove that he is an insured employer. [Lengthy quotation of Doney, supra, 23 Cal.3d at p. 98, fn. 8]

In summary, the Supreme Court said that workers' compensation insurance coverage is presumed where the plaintiff alleges facts establishing an employment relationship and work-related injury, but must be pleaded and proved by the defendant where the complaint does not allege an employment relationship and work-related injury. The Doney court does not offer a rationale for the distinction, and the court's footnote directive on proof of insurance may be dictum. Whether dictum or not, proof of insurance was not required in this case because Gibbs alleged facts establishing an employment relationship with American Airlines and injuries arising from the course of her employment at the airline. A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that other¬wise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage. (Doney, supra, 23 Cal.3d at pp. 97-98; Singleton, supra, 131 Cal.App.2d at p. 31.)

(Gibbs, supra, 74 Cal.App.4th at pp. 12-14.) Plaintiff's opposition does not acknowledge or address Gibbs, supra, and the court's research indicates that no subsequent decision has questioned or distinguished Gibbs's holding on this issue.

Accordingly, Gibbs controls here and dictates that, by pleading an employment relationship and an injury arising from that relationship, Plaintiffs' complaint triggers a presumption of workers' compensation insurance coverage that Plaintiffs must affirmatively plead facts to negate in order to survive a demurrer. Plaintiffs have not done so or indicated that they can. Accordingly, Plaintiffs cannot rely on the fact that the action is at the pleading stage to evade or delay the application of R&S's clearly applicable exclusivity defense.

Turning to the merits of that defense, the court readily concludes that the rule of Melendrez, supra, applies here and bars Plaintiff's cause of action against his former employer as a matter of law. The

decedent in Melendrez was exposed to asbestos in the course of his employment by Ameron, which manufactured asbestos-containing pipes, and that workplace exposure was a substantial contributing cause of his mesothelioma, which meant that the conditions of compensation in Labor Code section 3600 concurred and the exclusivity doctrine applied. (Melendrez, supra, 240 Cal.App.4th at p. 638.) This was true even though the decedent had undisputedly brought home with him scrap pieces of the asbestos-containing pipe that Ameron employed him to make, for use in home-improvement projects--an activity that the Court of Appeal assumed had also exposed the decedent to respirable asbestos and thus also causally contributed to the development of his mesothelioma. (Id. at pp. 636, 641.)

Although "a triable issue of fact exist[ed as to] whether Melendrez's exposure to asbestos at home arose out of and in the course of his employment with Ameron" (id. at p. 639), that factual dispute "[was] not material to the viability of Ameron's defense of workers' compensation exclusivity." (Ibid.) The defense necessarily applied as a matter of law, the Court of Appeal explained, for two reasons:

1) "Given the purposes of workers' compensation, courts have long applied a broad concept of contributing cause to bring injuries within workers' compensation coverage" by holding that, 'if a substantial contributing cause of an injury arose out of and in the course of employment, the injury is covered by workers' compensation, even if another nonindustrial cause also substantially contributed to the injury" (id. at pp. 639-40); and

2) Decedent's injury of mesothelioma was indivisible, and thus Plaintiffs could not sue for some distinct injury or portion of the disease attributable only to the at-home exposure: Melendrez's "expos[ure[] to asbestos from working with scrap pipe at home ... does not create a separate injury outside workers' compensation coverage that is compensable in tort law" because, even assuming "that his home exposure likely contributed to the disease along with his workplace exposure," the principles of worker's compensation dictate that "the [causal] contribution of his home exposure does not create a divisible, separate injury"; instead, his single, indivisible injury-"mesothelioma caused by asbestos exposure-is entirely covered by workers' compensation." (Id. at pp. 641-42.)

The analysis and holding of Melendrez obviously apply to Plaintiff's claim here that he may base a tort cause of action against R&S based on his exposure, at home, to asbestos brought there from R&S's premises on the person and/or clothing of his father. Plaintiff's only colorable argument to distinguish Melendrez is that, in that case, the occupational and non-occupational exposures occurred during the same period of time (i.e., Mr. Melendrez was exposed at home to asbestos from the pipe scraps during the same years he was exposed in the workplace to asbestos from manufacturing those same, and other, pipes), whereas here Plaintiff's takehome exposure occurred while he was a child, before his employment with R&S, and his workplace exposure occurred in a subsequent decade.

Under Melendrez, however, this distinction makes no difference. The fulcrum of Melendrez's reasoning is that mesothelioma is a single, indivisible injury to which all asbestos exposures over a person's lifetime causally contribute. Here, Plaintiff alleges that he was exposed to asbestos while working for R&S, and that such exposure causally contributed to the development of his mesothelioma. Accordingly, he cannot recover damages for that single, indivisible injury from R&S in tort, even if it was negligent in a separate way that also causally contributed to that injury and that was outside the course and scope of his later employment (i.e., by failing to prevent Plaintiff's father, its employee, from taking home and exposing members of his household to respirable asbestos from his work). Whether the workplace and non-workplace exposures happened concurrently during the same years, as in Melendrez, or sequentially during a plaintiff's childhood and adult working life, as alleged here, makes no difference: The dispositive similarity between this case and Melendrez is that the decedent/plaintiff in each suffered the same indivisible injury of mesothelioma, and his workplace and nonworkplace exposures both causally contributed to that single injury.

In McAllister v. Workers Comp. Appeals Board (1968) 69 Cal.2d 408, which the Melendrez court found "particularly instructive" in the mesothelioma context (240 Cal.App.4th at p. 640), the Supreme Court held that a fireman's widow was entitled to collect workers' compensation benefits based on his fatal lung cancer, which was caused in part by his inhalation of smoke during 32 years of work as a fireman, notwithstanding the fact that he had also smoked a pack of cigarettes a day for 42 years. (McAllister, supra, 69 Cal.2d at p. 418.) Noting that it "[could] not doubt that the more smoke decedent inhaled--from whatever source--the greater the danger of his contracting lung cancer," and that "[h]is smoking increased that danger, just as did his employment," the Court stated that, "[g]iven the present state of medical knowledge, we cannot say whether it was the employment or the cigarettes which

"actually" caused the disease; we can only recognize that both contributed substantially to the likelihood of his contracting lung cancer," but that was sufficient, because "the decedent's employment need only be a 'contributing cause' of his injury." (Ibid.)

In Melendrez, supra, the Court of Appeal held that, "under workers' compensation principles, the contribution of [the decedent's] home exposure does not create a divisible, separate injury. The injury--mesothelioma caused by asbestos exposure--is entirely covered by workers' compensation. Thus, plaintiffs' civil action is barred by [the] exclusivity [doctrine]." (Id. at pp. 641-42.) After distinguishing decisions involving discrete, non-workplace injuries, the Court of Appeal reiterated that "the employee [had] contract[ed] a single disease which, because it ha[d] an industrial cause, is covered by workers' compensation, even though it also ha[d] a contributing, nonindustrial cause." (Id. at p. 644.) It noted that the plaintiffs "offered no authority to support severing such an injury in two--one covered by workers' compensation, and the other not--based on the contributing causes," and that "such a splitting of Melendrez's disease would contravene the purpose of the exclusive remedy rule, which ' "conveys the legislative intent that 'the work-connected injury engender[ ] a single remedy against the employer, exclusively cognizable by the compensation agency.' " ' "

At no point in its lengthy analysis did Melendrez refer to, let alone rely on, the fact that the industrial cause and the nonindustrial cause happened to occur in the same time period. That circumstance is incidental to Melendrez's analysis and holding, because that analysis focused not on chronology but on causation. The indivisible nature of Plaintiff's single injury in this case, and the fact that all his asbestos exposures causally contributed to that injury, make the chronology of those exposures immaterial: Because Plaintiff's occupational exposure while employed by R&S was a contributing factor, the indivisible injury of his mesothelioma is covered by workers compensation, and the exclusivity doctrine applies.

Plaintiffs also argue at some length that "Melendrez's single injury theory contradicts well-settled law" (Opp. at pp. 11-17), but this portion of their brief must be intended to create a record for potential appellate review: This court of course cannot decline to follow the holding of a published and clearly applicable Court of Appeal decision on the theory that it is wrongly decided.

(Plaintiffs cite comments in a hearing by a Superior Court Judge in Los Angeles purporting to distinguish Melendrez in a case evidently involving facts similar to these (takehome exposure via the plaintiff's father before the plaintiff's own direct exposure via his employment) on the basis that the exposures did not occur in the same time period or via the same product (Clancy Decl., ex. 5). That court's statement in a hearing is of course not authority, and while it may be cited for its persuasive value, it has none, for it does not address the actual analysis in Melendrez. As explained above, that analysis turned not on such details as the time period or physical vehicle of exposure, but on the fundamental fact that some of the plaintiff's exposures arose from his employment, and causally contributed to the same single, indivisible injury--mesothelioma--at issue here. Plaintiffs here also note the Court of Appeal's single-sentence order summarily denying the defendant's petition for writ of mandate in that Los Angeles case to challenge the trial court's denial of its motion for summary judgment (id., exs. 7-8), but "[a] summary denial of a petition for a writ of mandate is not a precedent ...." (De Bottari v. Melendez (1975) 44 Cal.App.3d 910, 914, fn. 3.) (De Bottari added a proviso to the statement that a summary writ denial is not a precedent--"except when the sole possible ground of denial was on the merits"--but the Supreme Court later disapproved that purported exception to the general rule regarding the legal status of summary denials of writ petitions. (Kowis v. Howard (1992) 3 Cal.4th 888, 896-99.))

In a final, somewhat-cursory attempt to avoid the exclusivity doctrine, Plaintiffs contend that they have pled facts bringing their case within the "fraudulent concealment" exception to the doctrine. That exception applies when an employer conceals the existence of an employee's injury and its connection with the employment, and that concealment aggravates the injury. (Lab. Code, § 3602(b)(2).) It is plainly inapplicable here, as Plaintiffs do not allege that R&S knew of Plaintiff's injury--i.e., mesothelioma--during his employment, let alone that R&S concealed Plaintiff's mesothelioma from him. Plaintiffs' opposition only identifies allegations suggesting that R&S may have concealed from Plaintiff the fact that he had been exposed to asbestos, and/or the hazards of such exposure. But if Plaintiffs mean to suggest that Plaintiff's exposure to asbestos, by itself, constitutes a compensable injury, regardless of whether or when it resulted in an illness, they cite no authority for that radical proposition. The injury underlying Plaintiffs' causes of action is not asbestos exposure but mesothelioma, and the FAC does not allege that R&S knew of or concealed that injury.

Dated: 08/03/2017

facsimile

Judge George C. Hernandez, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On April 24, 2018, I served true copies of the following document(s) described as **RESPONDENT'S BRIEF** on the interested parties in this action as follows:

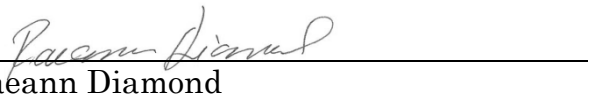
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 2018, at Burbank, California.



Raeann Diamond

SERVICE LIST
Rudolph et al v. Rudolph and Sletten, Inc.
Court of Appeal No. A152601

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