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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ALLEN RUDOLPH et al., Plaintiffs and Appellants, v. RUDOLPH AND SLETTEN, INC., Defendant and Respondent.	A152601 (Alameda County Super. Ct. No. RG17-857580)

Applying the workers' compensation exclusivity doctrine, the trial court sustained Rudolph and Sletten, Inc.'s (R&S) demurrer to Allen and Pamela Rudolph's (collectively, plaintiffs) amended complaint without leave to amend and entered judgment for R&S.

We affirm.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' complaint against R&S—a general contracting company started by Allen's father—alleged products liability, negligence, fraudulent concealment, and loss of consortium claims. The complaint alleged Allen developed mesothelioma from

[1] We refer to Allen Rudolph by his first name for clarity and convenience, intending no disrespect. We deny plaintiffs' request for judicial notice of portions of the legislative history of the Workers' Compensation Act, and for judicial notice of a declaration from Allen's treating physician because these documents are unnecessary to our resolution of the issues on appeal. (*California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 150.)

asbestos exposure. According to the complaint, Allen was exposed to asbestos as a child, when his father—who was employed by R&S—wore home his work clothes, and also as a teenager and young adult, when Allen "work[ed] as a laborer at" R&S and while he was "employed in various capacities by" R&S. R&S demurred, arguing the workers' compensation exclusive remedy doctrine (exclusivity doctrine) barred the complaint.

Plaintiffs filed an amended complaint alleging the same claims. Instead of alleging Allen was exposed to asbestos while "employed" by R&S, plaintiffs averred Allen was exposed to asbestos while he "work[ed] in various capacities" for R&S. R&S demurred. Relying on *Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 640 (*Melendrez*), R&S argued that because Allen's "occupational exposure to asbestos during his employment with . . . R&S . . . was a substantial contributing factor in the development of his mesothelioma, Plaintiffs' *exclusive* remedy against R&S is Workers' Compensation, notwithstanding Plaintiffs' additional claim against R&S that Allen's cancer was also caused by his non-occupational exposure to asbestos as a child from the work clothing of his father[.]"

Plaintiffs' opposition argued the exclusivity doctrine did not apply because the operative complaint did not allege Allen "was an 'employee' of R&S," nor that he was covered by workers' compensation insurance. In addition—and relying on comments made at a hearing in a different trial court case in another county—plaintiffs claimed *Melendrez* was distinguishable and wrongly decided. In reply, R&S argued plaintiffs were bound by the allegation in the original complaint that Allen was employed by R&S, and that *Melendrez* was controlling authority.

In a thorough written order, the court sustained the demurrer without leave to amend. First, the court determined plaintiffs were bound by the original complaint's allegation that Allen was employed by R&S. Next, the court concluded 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." Third, the court concluded *Melendrez* established "as a matter of law that the exclusivity

doctrine bars" plaintiffs' claims. It explained: *Melendrez* held 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" ' [citations] 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."

After discussing *Melendrez* in detail, the court concluded it "obviously" applied to plaintiffs' claims premised "on the person and/or clothing of [Allen's] father. [Allen'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 [Allen's] takehome exposure occurred while he was a child, before his employment with R&S, and his workplace exposure occurred in a subsequent decade."

The court continued: "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, [Allen] 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 [Allen'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 . . . plaintiff in each suffered the same indivisible injury of mesothelioma, and his workplace and nonworkplace exposures both causally contributed to that single injury."[2]

The court entered judgment for R&S.

DISCUSSION

"Generally, the right to recover workers' compensation benefits is the exclusive remedy for an employee against an employer for a workplace injury." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 699.) " '[W]hen a complaint affirmatively alleges facts indicating that [the Workers' Compensation Act (Lab. Code, § 3200 et seq.)] applies, no civil action will lie, and the complaint is subject to a general demurrer unless it states additional facts that negate application of the exclusive remedy rule.' " (*Id.* at p. 700.) "In reviewing a dismissal following the trial court's sustaining of a demurrer, we take the properly pleaded material allegations of the complaint as true; our only task is to determine whether the complaint states a cause of action." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 995 (*Snyder*).)

Plaintiffs contend the exclusivity doctrine does not apply "to injuries arising outside the course of employment," and that Allen "was not acting in the course and scope of employment when exposed to asbestos as a child." This argument is foreclosed by *Melendrez, supra,* 240 Cal.App.4th 632. In that case, the decedent was exposed to asbestos while employed at Ameron International Corporation (Ameron); the decedent was also exposed to asbestos at home, while using Ameron's scrap pipe. (*Id.* at pp. 635–637.) The trial court granted summary judgment for Ameron, concluding the Workers' Compensation Act was the plaintiffs' exclusive remedy against Ameron. (*Id.* at p. 636.)

[2] The court also rejected plaintiffs' reliance on comments made by a trial court judge at a hearing in a different case, finding the comments were not authority and had no persuasive value.

On appeal, the plaintiffs argued the exclusivity doctrine applied only if Ameron established the decedent's "separate exposure to asbestos" while working with the scrap pipe at home "met the conditions of workers' compensation coverage: i.e., that the exposure arose out of and in the course of [the decedent's] employment." The plaintiffs claimed "Ameron failed to meet this burden, because in using the pipe at home [the decedent] was not performing any service growing out of or incidental to his employment. Thus, the contribution to his mesothelioma caused by his home exposure to asbestos is not covered by workers' compensation." (*Melendrez, supra,* 240 Cal.App.4th at p. 637.)

The *Melendrez* court rejected this argument, holding the decedent's "exposure to asbestos in his employment with Ameron substantially contributed to his mesothelioma. Therefore, under the contributing cause standard applicable in workers' compensation law, his mesothelioma is covered by workers' compensation, and his separate exposure at home does not create a separate injury outside workers' compensation coverage. Thus, plaintiffs' lawsuit is barred by workers' compensation exclusivity." (*Melendrez, supra,* 240 Cal.App.4th at p. 637.) After discussing the purpose of the Workers' Compensation Act, *Melendrez* noted "courts have long applied a broad concept of contributing cause to bring injuries within workers' compensation coverage. In short, if a substantial contributing cause of an injury arises 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. 639–640.) The court continued: "It is undisputed that a substantial contributing cause of [the decedent]'s disease was his exposure to asbestos from the manufacture of Ameron's . . . pipe in the course of and arising out of his employment with Ameron. Although [the decedent] was also exposed to asbestos from working with scrap pipe at home, that exposure does not create a separate injury outside workers' compensation coverage that is compensable in tort law. Indeed, plaintiffs offered no evidence to show the extent to which [the decedent]'s home exposure to asbestos contributed to his mesothelioma separate and apart from his workplace exposure. The most that can be said is that his home exposure likely

contributed to the disease along with his workplace exposure. But under workers' compensation principles, the contribution of his 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 workers' compensation exclusivity." (*Id.* at pp. 641–642.)

Melendrez found support for its conclusion in the established "principle that 'the exclusivity provisions encompass all injuries "*collateral to or derivative of*" an injury compensable by the exclusive remedies of the [Workers' Compensation Act].' [Citation.] '[C]ourts have regularly barred claims where the alleged injury is collateral to or derivative of a compensable workplace injury.' " (*Melendrez, supra,* 240 Cal.App.4th at p. 642.) According to *Melendrez*, any injury the decedent "suffered from working with [the] pipe at home (that injury being an unknown contribution to his mesothelioma) was ' "collateral to or derivative of" ' the injury he suffered at work (the same mesothelioma also caused by his working with [the] pipe), and thus any injury suffered from home exposure to asbestos is 'compensable by the exclusive remedies of the [Workers' Compensation Act].' [Citation.] Plaintiffs' tort action thus 'is barred under the derivative injury and workers' compensation exclusivity rules.' " (*Ibid.*)

Here as in *Melendrez*, plaintiffs alleged Allen was injured—i.e., that he developed mesothelioma—and that his injury was caused by exposure to asbestos at home and at work. (See *Melendrez, supra,* 240 Cal.App.4th at pp. 641–642.) Thus, a substantial contributing cause of Allen's injury was his occupational exposure, and his injury "is covered by workers' compensation, even if another, nonindustrial cause also substantially contributed to the injury." (*Id.* at p. 640.) Under *Melendrez,* Allen's exposure to asbestos at home "does not create a separate injury outside workers' compensation coverage that is compensable in tort law. . . . [U]nder workers' compensation principles, the contribution of [Allen's] home exposure does not create a divisible, separate injury. . . . Thus, plaintiffs' civil action is barred by workers' compensation exclusivity." (*Id.* at pp. 641–642.)

Plaintiffs' efforts to distinguish *Melendrez* are unavailing. For example, plaintiffs note the decedent's asbestos exposures in *Melendrez* occurred concurrently, whereas Allen's home exposure occurred *before* his occupational exposure. Plaintiffs are incorrect. In *Melendrez*, some—but not all—of the decedent's asbestos exposure occurred during the same time frame. (*Melendrez, supra*, 240 Cal.App.4th at p. 636.) In any event, *Melendrez*'s reasoning does not hinge on the timing of the asbestos exposures, but rather on the well-settled principle that where an employee suffers an injury compensable by the Workers' Compensation Act, the exclusivity doctrine applies. *Melendrez* is directly on point.[3]

Nor are we persuaded by plaintiffs' contention that *Melendrez* contravenes well-settled precedent. Nothing in plaintiffs' briefs—neither their exhaustive summary of the Workers' Compensation Act, nor their extensive discussion of apportionment—establishes Allen's childhood exposure to asbestos exempts the amended complaint from the exclusivity doctrine. *Melendrez* does not contravene *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, which articulated a test to determine whether exposure to asbestos is a legal cause of a plaintiff's injury, nor *Synder, supra*, 16 Cal.4th 991, which considered the exclusivity rule in the context of fetal injuries. The cases upon which plaintiffs rely, including *Sturdevant v. County of Monterey* (1991) 228 Cal.App.3d 758 and *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223, do not alter our conclusion. Plaintiffs' remaining arguments are "unconvincing and do not merit further discussion." (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 149.)

The court properly sustained R&S's demurrer without leave to amend. Plaintiffs do not suggest how they would amend the complaint to state a valid cause of action.

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[3] As they did in the trial court, plaintiffs argue comments made by another trial court judge at a hearing in another case—in a different county, against a different defendant—establish *Melendrez* is distinguishable. Plaintiffs' reliance on " 'unpublished and unpublishable' " material violates the California Rules of Court. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 447.) In addition, the trial judge's comments have no precedential value. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 14:194.3, p. 14-82.)

"When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785.)

DISPOSITION

The judgment is affirmed. R&S is awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.

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