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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TERRY BAZZINI et al., Plaintiffs and Appellants, v. TECHNICOLOR, INC., et al., Defendants and Respondents.	B205947 (Los Angeles County Super. Ct. No. EC042347)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael S. Mink, Judge. Affirmed.

Gonzalez & Robinson, Joseph D. Gonzalez and Keith A. Robinson for Plaintiffs and Appellants.

Mitchell, Silberberg & Knupp, Hayward J. Kaiser and Paul Guelpa; Greines, Martin, Stein & Richland, Timothy T. Coates and Lillie Hsu; Alfredo Ortega for Defendants and Respondents.

I.

INTRODUCTION

In this lawsuit, plaintiff and appellant Terry Bazzini and his wife, plaintiff and appellant Phyllis Bazzini, sued Mr. Bazzini's ex-employer, defendant and respondent Technicolor, Inc., for personal injuries. (Lab. Code, § 3602, subd. (b)(2).) Plaintiffs alleged they were not limited to workers' compensation remedies because Technicolor fraudulently concealed that Mr. Bazzini's exposure to chemicals could eventually lead to his bladder cancer and second-hand exposure by Ms. Bazzini could harm her. We affirm the summary judgment entered in favor of Technicolor.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts.*[1]

Mr. Bazzini worked for Technicolor from 1968 to 2005 in various capacities developing and printing motion picture film. During this employment, he used a number of chemicals. While working, Mr. Bazzini consulted a dermatologist at various times for skin rashes and dermatitis on his arms, hands and elbows caused by his contact with the chemicals. Throughout his employment, Mr. Bazzini also complained to his supervisors about the skin conditions. Technicolor supervisors advised Mr. Bazzini it was safe for him to work in close proximity to the chemicals and told Mr. Bazzini that if he washed off the chemicals and blew his nose, the chemicals would not hurt him. Technicolor's method of treating contact dermatitis was to provide employees with cortisone cream. Technicolor did not provide Mr. Bazzini with protective

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[1] In light of the burden of review, we view the facts in the light most favorable to plaintiffs as they opposed the summary judgment motion brought by Technicolor. (*Davis v. Nadrich* (2009) 174 Cal.App.4th 1, 3, fn. 1.)

devises that would have prevented the chemicals from touching Mr. Bazzini's skin and Technicolor did not refer Mr. Bazzini to a physician.

In 2005, Mr. Bazzini was diagnosed with bladder cancer. His urologist was the first person to tell him that the cancer was caused by exposure to chemicals. Mr. Bazzini contended his exposures to chemicals while he worked at Technicolor led to his skin conditions, which were precursors to his cancer. He did not know that the chemicals he had used were carcinogenic.

Ms. Bazzini did not work at Technicolor. She contended she was exposed to the chemicals when Mr. Bazzini came home from work and touched her without showering, and when Mr. Bazzini's unwashed clothes hung in their shared closet. Ms. Bazzini contended that as a result of this exposure, she developed urinary infections and red spots on her bladder wall.

B. *Procedure.*

a. *The second amended complaint.*

In their second amended complaint, plaintiffs alleged Technicolor knew and concealed from Mr. Bazzini that the chemicals he handled during his employment were hazardous. Plaintiffs further alleged that exposure to the toxic chemicals caused a number of ailments, including dermatitis and bladder cancer, and Technicolor knew these conditions were caused by the chemical exposure, but failed to inform him accordingly. Additionally, plaintiffs allege Ms. Bazzini developed severe illnesses and injuries, including urinary infections and red spots on her bladder wall through secondary exposure to the chemicals Mr. Bazzini brought home on his body and clothes.[2] Plaintiffs argued they were not limited to redress through workers' compensation because Labor Code section 3602, subdivision (b) permitted recovery against Technicolor.

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[2] Plaintiffs also named as defendants Carlton Communications Limited, ITV PLC, and Thomson Inc., the prior corporate owner of Technicolor. Plaintiffs do not challenge the trial court's rulings in favor of these defendants.

b. *Technicolor's motion for summary judgment.*

Technicolor moved for summary judgment. With regard to Mr. Bazzini, Technicolor argued any redress was limited to workers' compensation as it did not fraudulently conceal from Mr. Bazzini any work-related injury or illness. Technicolor argued Labor Code section 3602, subdivision (b) did not provide Ms. Bazinni a remedy.

In opposing the motion, plaintiffs claimed Technicolor possessed Material Safety Data Sheets (MSDS's) for chemical substances setting forth precautions and safety procedures for human contacts with the chemicals Mr. Bazzini used. Plaintiffs also claimed these chemicals were toxic and Technicolor knew, or had been informed since the early 1990's that, human contact with them was harmful and could result in cancer. Mr. Bazzini suggested his skin problems were actually "chemical poisoning" from exposure to hazardous chemicals while he was a Technicolor employee that could lead to cancer and Technicolor was aware of the connection between his skin conditions and cancer.

Plaintiffs submitted the declaration of James G. Dahlgren, M.D. and a number of MSDS's in support of their opposition to the summary judgment motion. Dr. Dahlgren, an internist with 35 years of experience in toxicology, performed a detailed history and examination of Mr. Bazzini and reviewed Mr. Bazzini's medical records and appropriate literature.

Dr. Dahlgren opined that "to a reasonable degree of medical certainty . . . Mr. Bazzini's malignant neoplasm of the bladder was proximately caused or caused to occur earlier than would have been the case otherwise by exposure to the chemicals arising from the Technicolor plant . . . ." Dr. Dahlgren's conclusion was based on other statements he made in his declaration including the following. "Perchloroethylene is a chemical which has been the subject of numerous studies which show that it causes cancer in both animals and humans. . . . Mr. Bazzini was heavily and regularly exposed to this chemical. Perchloroethylene is listed as a carcinogen by [the International Agency for Research on Cancer, or IARC, and

the National Toxicology Program, or] NTP. The MSDS for Film cement states that it is a possible cancer hazard. 1,3, dioxane in the MSDS is listed as a carcinogenic chemical (2B). It is a confirmed animal carcinogen (A3). Dichloromethane is also listed in the MSDS as a carcinogenic (2B) and confirmed animal carcinogen (A3). The MSDS on Hydroquinone causes kidney cancers in F-344 rats. 1,2 butylene oxide from MSDS states that rats had increase in nasal and lung tumors. IARC had determined that sulfuric acid is definitely carcinogenic in humans. (1A). According to [the National Institute for Occupational Safety and Health, or] NIOSH, 4-Aminodiphenyl targets both the bladder and skin. NIOSH also specifies that 4-Aminodiphenyl cancer site is bladder cancer. The cancer diagnosed in Mr. Bazzini." Mr. Bazzini was exposed to all of the above discussed chemicals in his employment. The skin rash he complained of while working at Technicolor "was an indication that he was being exposed and harmed by toxic chemical and carcinogens at his job. . . . [¶] . . . Mr. Bazzini was heavily and regularly exposed to [Perchloroethylene which] is listed as a carcinogen by IARC and NTP [and he was exposed to other chemicals that are carcinogenic. Some target the bladder and skin.]"[3]

The MSDS's submitted by plaintiffs referred to a number of chemicals used by Technicolor. While some stated exposure to the chemicals could cause skin problems, and some stated the chemicals could cause cancer in animals, none explicitly stated that they were known to be a measurable human cancer risk, although warnings might be required pursuant to the Safe Drinking Water and Toxic Enforcement Act (Proposition 65).[4] For example, the 2000 MSDS for

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[3] The trial court struck some paragraphs of Dr. Dahlgren's declaration. We have referred only to those paragraphs that were not stricken.

[4] California Code of Regulations, title 27, section 25306, subdivisions (a) and (e); Health and Safety Code section 25249.5 et seq., and specifically, section 25249.8; *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425; *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 345 to 347 [Proposition 65 requires

perchloroethylene stated it could cause "severe skin irritation, even a burn. Repeated contact may cause drying or flaking of skin." This MSDS also stated that the chemical was "listed as a potential carcinogen by IARC and NTP. [It] has been shown to increase the incidence of tumors in certain strains of mice and rats. Other long-term inhalation studies in rats failed to show tumorigenic response. Human data are limited and have not established an association between [this chemical] exposure and cancer. Perchloroethylene is not believed to pose a measurable carcinogenic risk to man when handled as recommended."[5]

Plaintiffs and Technicolor filed objections to the evidence relied upon by the other.

On October 4, 2007, the day before the summary judgment motion was to be heard, plaintiffs took the deposition of Richard Brown, a Technicolor employee. He brought forward a number of items, including an additional MSDS for perchloroethylene from the year 1992. Plaintiffs also submitted a supplemental declaration from their counsel asking for a continuance of the summary judgment motion hearing so that the information obtained from Brown could be considered.

At the October 5, 2007 hearing on the summary judgment motion, plaintiffs suggested information gleaned from Brown showed a triable issue of fact.

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a warning for chemicals known to cause cancer in humans or in experimental animals or known to cause reproductive toxicity; no warning is required if a business can show that exposure poses no significant risk of cancer in humans]; *Exxon Mobil Corp. v. Office of Environmental Health Hazard Assessment* (2009) 169 Cal.App.4th 1264, 1268.

[5] Technicolor states that "tetrachloroethylene" is another name for perchloroethylene. The MSDS submitted for tetrachloroethylene states that in long term studies of mice and rats there was some increased incidence of liver and kidney tumors and leukemia. However, the evidence was "inconclusive in determining whether tetrachloroethylene is associated with increased incidence of cancer in humans."

However, this evidence was not before the court as it had not been submitted by plaintiffs in their opposition to the summary judgment motion. Because the trial was scheduled in less than 30 days, the trial court denied plaintiffs' motion to continue the hearing. Prior to the scheduled hearing, plaintiffs had not brought a motion to compel to insure that Brown's deposition would be taken earlier, nor had plaintiffs brought a motion to continue the trial.

On October 9, 2007, the trial court issued an order in which it sustained some, but not all, of the evidentiary objections. The trial court declined to consider the evidence discussed by Brown or his deposition. The trial court granted the summary judgment motion.

c. *Plaintiffs' motion for reconsideration.*

Plaintiffs filed a motion for reconsideration of the trial court's October 9, 2007 order. Plaintiffs argued the information brought forth by Brown was newly discovered and should be considered by the trial court because during discovery Technicolor suppressed this vital evidence. The trial court denied the motion for reconsideration.

d. *This appeal.*

Plaintiffs have appealed from the entry of summary judgment in favor of Technicolor. The only issue plaintiffs have raised addresses the trial court's conclusion that there are no triable issues of fact with regard to plaintiffs' allegations that the exception to workers' compensation exclusivity found in Labor Code section 3602, subdivision (b)(2) applies. Plaintiffs argue they had brought forth facts, which if proven, would establish Technicolor knew and concealed from Mr. Bazzini that the chemicals causing his contact dermatitis and skin conditions also caused his cancer. Plaintiffs do not contend the trial court erred in ruling on the evidentiary objections.[6] Plaintiffs do not contend the trial court erred in denying their motion for reconsideration which would have permitted the trial

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[6] In a footnote, plaintiffs challenge one immaterial evidentiary ruling.

court to consider evidence brought forth by Brown. Thus, in the discussion below, the only evidence we consider is that considered by the trial court when ruling on Technicolor's motion for summary judgment.[7]

III.

DISCUSSION

A. *Burden of review on summary judgment.*

" 'A defendant moving for summary judgment bears the burden of showing that a cause of action has no merit because plaintiff cannot establish an element of the claim or because defendant has a complete defense. If the defendant makes this showing, the burden then shifts to the plaintiff opposing the summary judgment motion to establish that a triable issue of fact exists as to these issues. [Citations.]' [Citation.]" (*Davis v. Nadrich, supra,* 174 Cal.App.4th at p. 7.)

"In determining the existence of a triable issue of material fact, the court must consider all admissible evidence on the motion, except that to which objections have been sustained, and 'all inferences reasonably deducible' therefrom . . . . ([Code Civ. Proc.,] § 437c, subd. (c).)" (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 352-353.)

" ' "Summary judgment is properly granted where there are no triable issues of fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision granting a summary judgment de novo. In doing so, we liberally construe all conflicting facts in the light most favorable to the party opposing the motion. [Citations.]" [Citation.]' [Citation.]" (*Davis v. Nadrich, supra,* 174 Cal.App.4th at p. 7;

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[7] We do not address plaintiffs' argument that the trial court improperly failed to consider the evidence obtained through Brown. This argument is raised for the first time in plaintiffs' reply brief without an attempt to show good cause as to why it could not have been raised earlier. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005; *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1216, fn. 2.)

accord, *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose, supra*, 174 Cal.App.4th at pp. 352-353.) We disregard any evidence that was not properly before the trial court when it ruled on the summary judgment motion. (Code Civ. Proc., § 437c, subd. (c); cf. *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 453, fn. 6; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.)

B. *Labor Code section 3602, subdivision (b)(2).*

Generally, an employee's exclusive remedy for work-related injuries is through workers' compensation. (*Jensen v. Amgen Inc.* (2003) 105 Cal.App.4th 1322, 1325; *Hughes Aircraft Co. v. Superior Court* (1996) 44 Cal.App.4th 1790, 1794.) Labor Code section 3602, subdivision (b) contains exceptions to the general rule. At issue here is Subdivision (b)(2) providing in pertinent part: "Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation."[8]

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[8] Labor Code section 3602 reads:

"(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and 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.

"(b) An employee, or his or her dependents in the event of his or her death, may bring an action at law for damages against the employer, as if this division did not apply, in the following instances:

"(1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.

"(2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.

"Thus, before an employer may be liable under [Labor Code] section 3602, subdivision (b)(2), the employee must establish the existence of three conditions: (1) the employer concealed 'the existence of the injury,' (2) the employer concealed the connection between the injury and the employment, and (3) the injury is aggravated, following this concealment." (*Hughes Aircraft Co. v. Superior Court, supra,* 44 Cal.App.4th at p. 1794; accord, *Jensen v. Amgen, Inc.*, *supra*, 105 Cal.App.4th at p. 1325.)

Labor Code section 3602, subdivision (b)(2) codified *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465 (*Johns-Manville*). In *Johns-Manville,* the Supreme Court held an employee who had lung cancer and other asbestos-related illnesses properly defeated a motion for judgment on the

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"(3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person.

"(c) In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted.

"(d) For the purposes of this division, including Sections 3700 and 3706, an employer may secure the payment of compensation on employees provided to it by agreement by another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, both employers shall be considered to have secured the payment of compensation within the meaning of this section and Sections 3700 and 3706 if there is a valid and enforceable agreement between the employers to obtain that coverage, and that coverage, as specified in subdivision (a) or (b) of Section 3700, has been in fact obtained, and the coverage remains in effect for the duration of the employment providing legally sufficient coverage to the employee or employees who form the subject matter of the coverage. That agreement shall not be made for the purpose of avoiding an employer's appropriate experience rating as defined in subdivision (c) of Section 11730 of the Insurance Code.

"Employers who have complied with this subdivision shall not be subject to civil, criminal, or other penalties for failure to provide workers' compensation coverage or tort liability in the event of employee injury, but may, in the absence of compliance, be subject to all three."

pleadings and could pursue a civil lawsuit upon the following allegations: "Plaintiff worked in [defendant's] . . . plant for 29 years beginning in February 1946, and he was continuously exposed to asbestos during that period. As a result of the exposure, he developed pneumoconiosis, lung cancer, or other asbestos-related illnesses. [¶] The defendant corporation has known since 1924 that long exposure to asbestos or the ingestion of that substance is dangerous to health, yet it concealed this knowledge from plaintiff, and advised him that it was safe to work in close proximity to asbestos. It failed to provide him with adequate protective devices and did not operate the plant in accordance with state and federal regulations governing dust levels. [¶] In addition, the doctors retained by defendant to examine plaintiff were unqualified, and defendant did not provide them with adequate information regarding the risk of asbestos exposure. It failed to advise these doctors of the development of pulmonary disease in plaintiff or of the fact that the disease was the result of the working conditions at the plant, although it knew that his illness was caused by exposure to asbestos. Finally, defendant willfully failed to file a . . . Report . . . with the State of California regarding plaintiff's injury, as required by law. Had this been done, and if the danger from asbestos had been revealed, plaintiff would have been protected. Each of these acts and omissions was done falsely and fraudulently by defendant, with intent to induce plaintiff to continue to work in a dangerous environment. Plaintiff was ignorant of the risks involved, and would not have continued to work in such an environment if he had known the facts." (*Id.* at pp. 469-470.)

Johns-Manville, supra, 27 Cal.3d 465 explained, however, that workers' compensation barred "the employee's action at law for his initial injury . . . ." (*Id.* at p. 469.) Rather, an action at law *only* existed for "aggravation of the disease because of the employer's fraudulent concealment of the condition and its cause." (*Ibid.*) "[I]f the complaint alleged only that plaintiff contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices

to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law." (*Id.* at pp. 474-475.) Thus, workers' compensation would have "provided the exclusive remedy for injuries suffered because the employer made false representations about, or concealed dangers inherent in, a material employees were required to handle. [Citation.]" (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 721.) Labor Code "[s]ection 3602, subdivision (b)(2) does not impose liability on an employer for injuries resulting from either the failure to provide a safe work environment or from failure to warn of unsafe premises. [Citation.]" (*Hughes Aircraft Co. v. Superior Court, supra,* 44 Cal.App.4th at p. 1795.)

Johns-Manville then went on to explain that the employee could proceed with a civil lawsuit because the employer's intentional misconduct went beyond failing to assure that the tools, substances, or the physical environment of a workplace were safe: "In the present case, plaintiff alleges that defendant fraudulently concealed from him, and from doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions. These allegations are sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of the employment which caused him to contract the disease." (*Johns-Manville, supra,* 27 Cal.3d at p. 477.)

The Supreme Court's subsequent opinion of *Foster v. Xerox Corp.* (1985) 40 Cal.3d 306 (*Foster*) expanded upon the concepts discussed in *Johns-Manville. Foster* held that fraudulent concealment did not require an affirmative misrepresentation. Rather, an employee may state a cause of action if the employer knew of the existence of work-related injuries "but failed to reveal them to the employee." (*Id.* at p. 309.) The court also noted, however, that it was

insufficient for the employee to allege that the employer knew of injuries, as the employer must also be aware of their significance. (*Id.* at p. 312.)

Foster, supra, 40 Cal.3d 306 held that the defendant employer must have knowledge of the initial injury and the significance of its symptoms: "Defendant next asserts the complaint is defective because it fails to allege that defendant had knowledge that plaintiff had contracted arsenic poisoning. Such knowledge is essential to establish a claim under [Labor Code section 3602,] subdivision (b)(2) because defendant obviously could not be charged with concealing matters which it did not know. [Citation.] Defendant is correct that the allegations that plaintiff had advised his supervisors in 1978 and 1981 that he was suffering from certain symptoms and that defendant knew the symptoms were those of arsenic poisoning are insufficient to allege that defendant knew of plaintiff's disease. There is no allegation that the supervisors to whom these symptoms were reported were aware of their significance, or that they reported plaintiff's condition to a physician or other official employed by defendant who recognized that plaintiff was suffering from arsenic poisoning caused by this employment." (*Foster, supra*, at p. 312.)[9] Thus, actual knowledge by the employer is required. Otherwise, the employee may only pursue his or her workers' compensation remedies. (*Santiago v. Firestone Tire & Rubber Co.* (1990) 224 Cal.App.3d 1318, 1334.)

Here, in order for plaintiffs to proceed, they must be able to show that Mr. Bazzini's injuries were aggravated by Technicolor's fraudulent concealment of the injury and of its connection to Mr. Bazzini's employment. Even if Mr. Bazzini's injury was "chemical poisoning," in order to succeed, plaintiffs must have brought forth evidence that Technicolor knew his skin conditions, which would have been the symptoms of the poisoning, were precursors to his later developed

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[9] *Foster, supra,* 40 Cal.3d 306 was a pleading case because it involved an appeal from the sustaining of a demurrer. The Supreme Court permitted the case to go forward because of the mandate to liberally construe pleadings. (*Id.* at p. 312.)

cancer. (*Santiago v. Firestone Tire & Rubber Co., supra*, 224 Cal.App.3d at pp. 1335-1336 [even if it has been recognized that workers' exposure to chemical may suffer bone marrow injury which ultimately may lead to leukemia, employee can recover in civil court if employee shows employer acted with actual knowledge].)

C. *Discussion.*

We first address the allegations as they relate to Mr. Bazzini. Plaintiffs state Mr. Bazzini's injury is "chemical poisoning," rather than the skin problems, such as contact dermatitis. Plaintiffs contend Mr. Bazzini suffered from chemical poisoning as a result of exposure to toxic chemicals he used while working at Technicolor; Technicolor had actual knowledge that Mr. Bazzini's contact dermatitis was a symptom of chemical poisoning; Technicolor had actual knowledge that the poisoning initially manifested itself as contact dermatitis and also had actual knowledge that this was a precursor to cancer; Technicolor concealed the connection between his chemical poisoning and his employment; Mr. Bazzini did not know the chemicals he used were carcinogenic and dangerous to his health; and Mr. Bazzini was unaware of the fact that he was not obtaining the proper treatment for his chemical poisoning and as a result he developed cancer. Plaintiffs define chemical poisoning as "human illness and negative effects caused by ingestion, inhalation, and/or absorption of harmful chemical compounds in the body."[10]

We need not address all pieces of the puzzle. Rather, it is sufficient to demonstrate that plaintiffs have not raised a triable issue of fact because they have not brought forth any evidence to demonstrate Technicolor knew Mr. Bazzini's contact dermatitis was a symptom of chemical poisoning that could eventually

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[10] Mr. Bazzini bases his definition of chemical poisoning on that utilized by the Center for Disease Control as "when human illness results from an unintentional or intentional release of a toxin . . . or a toxicant . . . into the environment."

lead to cancer. Plaintiffs have not shown that Mr. Bazzini's injury was aggravated as a result of any concealment. Thus, for purposes of discussion, we assume Technicolor knew some of the chemicals Mr. Bazzini used in his employment could cause cancer in humans. However, even with that knowledge, Technicolor could not be liable in the civil courts for the injuries claimed by Mr. Bazzini because other facts were not present.

There is no evidence that any Technicolor employee had actual knowledge that the skin problems Mr. Bazzini suffered were indications he would or could later develop cancer. Such knowledge is essential as without this knowledge there could be no fraudulent concealment. (*Foster, supra,* 40 Cal.3d at p. 312; *Santiago v. Firestone Tire & Rubber Co., supra,* 224 Cal.App.3d at pp. 1335-1336.)

Here, Mr. Bazzini merely speculates that Technicolor employees knew of the connection between his skin conditions and cancer. However, speculation and conjecture is insufficient. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525.) While Technicolor employees might have had access to information linking the use of chemicals to cancer, there is no information that any Technicolor employee reviewed this information or that any Technicolor employee knew that skin problems were a sign of the cancer risk. (*Jensen v. Amgen Inc., supra,* 105 Cal.App.4th at pp. 1325-1328 [employer not liable where plaintiff merely argues that employer was aware of the skin problems and *should have* realized that exposure to the mold was likely to cause her illness, but never presents evidence suggesting supervisors actually made that connection]; *Hughes Aircraft Co. v. Superior Court, supra,* 44 Cal.App.4th at pp. 1795, 1797 [knowledge of unsafe work environment and potential risk to employees insufficient to establish liability]; cf. *Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157 [in fraud case against a corporation, plaintiff must plead and prove fraud with specificity, including identifying those persons who committed the fraud].) There is no evidence Technicolor was aware of the *significance* of the skin problems suffered by Mr. Bazzini. "[A]n employer cannot be charged with concealing

something of which it has no knowledge. [Citations.]" (*Ashdown v. Ameron Internat. Corp.* (2000) 83 Cal.App.4th 868, 880.)[11] Thus, plaintiffs cannot prove Technicolor fraudulently concealed information that Mr. Bazzini's skin problems were precursors to his later developed cancer.

Plaintiffs rely heavily on *Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80. However, *Palestini* was a pleading case in which the court of appeal concluded that the lower court improperly sustained a demurrer without leave to amend. (*Id.* at p. 83.) In *Palestini*, an employee alleged he was not limited to workers' compensation and had a right to bring a civil lawsuit against his former employer after he developed testicular cancer that the employee attributed to exposure at work to carcinogenic chemicals. (*Id.* at p. 82.) *Palestini* held that *if* plaintiff could prove the allegations in the complaint, he could successfully sue his employer. (*Id.* at p. 97.) Here, we are not addressing whether plaintiffs successfully pled a case pursuant to Labor Code section 3602, subdivision (b). Rather, we must assess whether plaintiffs brought forth sufficient facts to defeat Technicolor's summary judgment motion.

We also note that any arguments made by plaintiffs that Technicolor deceived and acted fraudulently by not revealing the dangerous nature of the products Mr. Bazzini used during his employment do not expand plaintiffs' remedies beyond those given by workers' compensation. (*Gunnell v. Metrocolor Laboratories, Inc.*, *supra*, 92 Cal.App.4th at p. 721.)

Thus, there are no triable issues of fact with regard to Mr. Bazzini's allegations that Technicolor is liable in the civil court for fraudulent concealment pursuant to Labor Code section 3602, subdivision (b). The trial court properly granted summary judgment to Technicolor with respect to Mr. Bazzini.

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[11] Plaintiffs point to the testimony of Brown to argue that there is information raising a triable issue of fact with regard to Technicolor's knowledge of the consequences of the skin problems and Technicolor's concealment of this knowledge. However, this evidence was not before the trial court and cannot be considered by us.

Ms. Bazzini's case is dependent upon Mr. Bazzini being able to prove fraudulent concealment. Since the trial court properly granted summary judgment to Technicolor with regard to Mr. Bazzini, it also properly granted summary judgment with regard to Ms. Bazzini. In light of this conclusion, we need not discuss Technicolor's argument that because Ms. Bazzini was not a Technicolor employee and because she was not bringing a wrongful death action on behalf of Mr. Bazzini, she had no cause of action against Technicolor pursuant to Labor Code section 3602, subdivision (b).

On appeal, Ms. Bazzini contends she can go forward on a negligence theory because Technicolor's "property was maintained in such a manner as to expose [Ms. Bazzini] to an unreasonable risk of injury offsite, thus it was foreseeable that spouses and family members of employees would come into contact with the chemical substances used at [Technicolor's] facility and would be secondarily exposed." However, while plaintiffs' original complaint contained a negligence cause of action they eliminated a negligence cause of action in the first and second amended complaint. On appeal, Ms. Bazzini may not resurrect a negligence cause of action she has abandoned in the pertinent pleading. (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264-1265 [on summary judgment trial court properly refuses to consider allegations outside of complaint]; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1699 [same].)

The trial court properly granted summary judgment to Technicolor with regard to Ms. Bazzini.

IV.

DISPOSITION

The summary judgment in favor of Technicolor is affirmed. Technicolor is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, ACTING, P. J.

KITCHING, J.