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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KEVIN O'BRYAN et al., Plaintiffs and Appellants, v. NUSIL TECHNOLOGY LLC, Defendant and Respondent.	F084899 (Super. Ct. No. BCV-19-100159) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

Bahar Law Office and Sarvenaz Bahar for Plaintiffs and Appellants.

Price, Postel & Parma, Melissa J. Fassett and Timothy E. Metzinger for Defendant and Respondent.

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Plaintiffs and appellants, Kevin O'Bryan ("O'Bryan") and his wife, Tiffany O'Bryan (collectively, "the O'Bryans"), sued defendant and respondent, NuSil Technology LLC ("NuSil"), for fraudulent concealment and loss of consortium. NuSil raised several affirmative defenses including that the O'Bryans' claims were barred by the statute of limitations. Following a bifurcated bench trial, the trial court determined the O'Bryans' claim was not filed within the statute of limitations and entered judgment in favor of NuSil.

On appeal, the O'Bryans contend: (1) the trial court erred in finding the fraudulent concealment claim was time-barred; (2) the court applied the wrong legal standard to the discovery rule; (3) the court failed to determine what facts were necessary to state a fraudulent concealment claim or whether O'Bryan conducted a reasonable investigation; (4) the court's interpretation of the discovery rule violates public policy; and (5) the fraudulent concealment claim was timely filed under the discovery rule. Alternatively, the O'Bryans argue if the evidence is insufficient to show the claim was timely filed, the court erroneously excluded evidence that would have proved the claim was timely filed.

We conclude the appeal was taken from a nonfinal judgment but treat the appeal as a petition for writ of mandate. The petition is denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts*[1]

NuSil manufactures silicone and resins. NuSil utilized hazardous chemicals in the production and manufacture of products at its facility in Bakersfield, California. NuSil posted material safety data sheets with information about dangerous chemicals used at the facility. O'Bryan worked for NuSil from 2006 to May 2016 at its facility in Bakersfield.

[1] The facts in this section are drawn from the evidence presented at trial and the trial court's statement of decision.

O'Bryan's work duties necessitated exposure to hazardous chemicals. NuSil provided training to O'Bryan about the chemicals he worked with and the use of personal protective equipment. Those trainings did not address formaldehyde. None of the material safety data sheets provided by NuSil mentioned formaldehyde.

In 2009, O'Bryan expressed concern to his supervisor about being exposed to chemicals. Around 2011 or 2012, O'Bryan again expressed concern about exposure to chemicals and was issued a full-face respirator. In 2013, O'Bryan's doctor diagnosed him with "problems" that caused O'Bryan to be concerned about his workplace exposure. Around 2013, O'Bryan complained to the manufacturing supervisor, Michael Montague, about swelling and numbness in his hands, as well as extreme fatigue. Montague responded to O'Bryan something like "I'll look into it" or "I'll check into it." O'Bryan was having heart palpitations and his doctors took him off work at one point. In 2014 or 2015, O'Bryan expressed concerns to his supervisor and the plant manager that his health might be at risk from exposure to hazardous vapors at NuSil.

At some time between 2013 and May 11, 2016, O'Bryan complained to the site manager, Steve Helms, that he believed formaldehyde was being generated by the distillation column on process at the facility. O'Bryan assumed there was formaldehyde because the smell was like "at the mortuary." Helms responded to O'Bryan, "We are not getting the material hot enough, we are not heating it hot enough to produce formaldehyde." O'Bryan believed Helms was a former chemistry professor, so he thought Helms was an expert. O'Bryan's highest level of education is a high school diploma, and he has never taken a course in chemistry.

On May 11, 2016, O'Bryan took a disability leave of absence from work due to health symptoms he attributed to chemical exposure in the workplace at NuSil. On June 7, 2016, Dr. Jeffery Freesemann examined O'Bryan and placed him on total temporary disability. In Freesemann's June 7, 2016 work status summary report, O'Bryan's presenting problem was described as "due to exposure of chemicals developed

numbness in both arms and hands, weakness in joints, frustration from stress and loss of sleep." O'Bryan filed a workers' compensation claim against NuSil on June 27, 2016, alleging a cumulative trauma injury through May 10, 2016, to his hands, head, joints, respiratory system, central nervous system, and circulatory system from "exposure to toxic chemicals."

A psychologist, Dr. L. Scott Frazier, evaluated O'Bryan in August 2016 as one of his treating doctors. In his August 13, 2016 report, Frazier noted O'Bryan "reported that during the course of his employment he has been exposed to various chemicals" and "has developed medical problems that he associates with this exposure."

Another of O'Bryan's treating doctors, Dr. Bruce Gillis, examined O'Bryan on October 12, 2016, and issued an evaluative report dated October 21, 2016. Gillis's evaluation was conducted "in regard to [O'Bryan's] medical complaints which he believes have stemmed from his prior employment at NuSil Technology." Gillis reported O'Bryan "believes that his exposure to various and unstated types of chemicals during his career at NuSil led him to develop episodes of skin blistering, skin tingling, watery eyes, stinging of the eyes, eye redness, swelling of his hands, feet and fingers, generalized weakness, chronic fatigue, muscle aching, dyspnea on exertion, diffuse muscle cramps and mental confusion versus 'brain fog.' "

O'Bryan returned to Freesemann on November 2, 2016. Freesemann diagnosed O'Bryan with: "Occupational exposure to toxic agents in other industries," and "Toxic effect of unsp[ecified] gases, fumes and vapors." Freesemann's diagnoses remained the same when O'Bryan visited him again on January 17, 2017.

At some point, O'Bryan filed a complaint about NuSil to California's Division of Occupational Safety and Health (hereafter "OSHA"). OSHA opened an investigation of NuSil on November 30, 2016. OSHA requested air monitoring information for employee exposure from NuSil as part of its investigation. NuSil's "EHS manager," George Alva, provided this information to OSHA. Included in this information was a study conducted

by Jacquelyn Heffner that showed evidence of formaldehyde generation by operations at NuSil. Based on this study, on December 13, 2013, Alva sent an e-mail to several parties including Helms and "recommended to move forward with production scale formaldehyde monitoring."

An OSHA investigator, Greg Clark, interviewed O'Bryan in response to his complaint.[2] O'Bryan may have mentioned the presence or potential presence of formaldehyde during his interview with the OSHA investigator. O'Bryan reported to OSHA that in "January/Feb 2016" he showed his swollen hands to his supervisor, Montague. OSHA's resulting inspection report stated: "In 2013, Kevin O'Bryan reports having a mild heart issue and irregular EKG. He worked with [R.J.] and both he and [R.J.]reportedly told the company (HR and Steve Helms, Plant Manager[)] formaldehyde was making them sick. Mr. O'Bryan reports when [he] told Steve Helms it was the formaldehyde making him sick, he was told by Mr. Helms the process doesn't get hot enough to produce formaldehyde. Mr. O'Bryan reports he had the same conversation about formaldehyde making him sick with his Supervisor, Mike Montague." O'Bryan reported several "health effects from working at NuSil." Montague also told the OSHA investigator that O'Bryan "had general concerns that chemical exposure was [*sic*] work were causing his health issues."

OSHA issued its report regarding NuSil on May 30, 2017.[3] In its report, OSHA cited NuSil based on its finding that employees worked with formaldehyde in manufacturing rooms at the facility. O'Bryan was unaware of the presence of

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[2] The trial court found that O'Bryan and Clark's meeting took place before OSHA's investigation and report, and further found there may have been a second conversation where O'Bryan discussed with Clark a heart episode that occurred on March 24, 2017. O'Bryan was uncertain when the interview with Clark occurred.

[3] The trial court admitted OSHA's May 30, 2017 report into evidence "for the limited purpose of demonstrating what [O'Bryan] was aware of on the date that he obtained it and not for the truth of the matter."

formaldehyde at the facility prior to OSHA's report and learned of the presence of formaldehyde in approximately "May[or] June" of 2017. He believed OSHA gave him a copy of their report. O'Bryan did not recall when he received the report but confirmed it was after the report's issuance date of May 30, 2017. It might have been several weeks after the report issued that O'Bryan received a copy.

On September 18, 2018, O'Bryan settled his workers' compensation claim for $235,000 by compromise and release. The comments' section of the compromise and release form agreement stated in type with interspersed handwriting (shown in parentheses): "This settlement does not resolve (or affect) any civil action (or right) applicant (may bring forth against NuSil) regarding this claim. All addenda incorporated herein by reference. (This settlement only applies to claims within [Workers' Compensation Appeals Board] jurisdiction.)" The attached addenda continued the comments and stated: "Applicant stipulates that no other known injuries were sustained during employment except as to those delineated within the Compromise and Release and that no other parts of body, condition or systems were injured during the applicant's employment. [¶] This settlement remedies and extinguishes any and all known past, present [stricken] both indemnity and medical, and is binding to release any and all claims by a spouse, heirs, assigns or any other party." The settlement was approved by the Workers' Compensation Appeals Board on September 26, 2018.

B. ***The Pleadings and Pretrial Proceedings***

On January 17, 2019, the O'Bryans filed a complaint against NuSil alleging two causes of action: fraudulent concealment on behalf of O'Bryan and loss of consortium on behalf of Tiffany O'Bryan. The O'Bryans filed the operative first amended complaint on March 27, 2019. O'Bryan alleged exposure to various chemicals including formaldehyde during his employment with NuSil from 2006 to 2016 caused him to suffer pulmonary and liver problems. It was alleged that NuSil concealed and failed to reveal to O'Bryan that his pulmonary and liver problems were caused by exposure to toxic substances and

fumes. NuSil raised several affirmative defenses in its answer including that the claims were barred by the statute of limitations.

NuSil demurred to the O'Bryans' complaint asserting that both causes of action were barred by the statute of limitations and the workers' compensation exclusivity rule. The trial court overruled NuSil's demurrer without prejudice.

NuSil subsequently moved for summary judgment or adjudication arguing the O'Bryans were unable to assert a viable claim against NuSil because the causes of action were barred by the same grounds asserted in NuSil's demurrer. The trial court denied NuSil's motion for summary judgment/adjudication.

The trial court granted NuSil leave to file a cross-complaint against the O'Bryans. In its cross-complaint, NuSil alleged five causes of action: breach of contract, promissory fraud, negligent misrepresentation, fraud (intentional misrepresentation), and abuse of process. NuSil alleged the O'Bryans' civil suit sought recovery for the same claims O'Bryan resolved as part of the 2018 settlement of his workers' compensation claim and O'Bryan was in violation of that settlement agreement. In their answer to NuSil's cross-complaint, the O'Bryans denied the allegations and raised several affirmative defenses.

C. *The Bench Trial, Statement of Decision and Judgment*

The parties stipulated and the trial court agreed to bifurcate the issues and try NuSil's statute of limitations defense in a bench trial before trying the remaining issues. On July 1, 2022, "[p]hase 1" of the bench trial was conducted on the sole issue of the statute of limitations. The court heard testimony from O'Bryan and NuSil's former manufacturing supervisor, Michael Montague. The court found both witnesses "remarkably credible." Several exhibits were admitted into evidence. After the close of evidence, NuSil requested a statement of decision. The O'Bryans' counsel conceded during closing argument that the applicable statute of limitations for the fraudulent concealment claim is two years.

On July 5, 2022, the trial court issued a tentative statement of decision which would become final unless within 10 days, "a party files and serves a document that specifies controverted issues or makes proposals not covered in" the tentative decision. The court noted the parties' agreement that there were initially two issues for the court to decide: (1) which statute is the applicable statute of limitations; and (2) after applying the court's factual findings to the law, whether plaintiffs' action was barred by the statute of limitations.

The trial court acknowledged and agreed with the O'Bryans' concession that the applicable statute of limitations is the two-year period pursuant to Code of Civil Procedure section 335.1. The court took judicial notice that the action was initiated by the O'Bryans' original complaint filed on January 17, 2019.

In analyzing the statute of limitations defense, the trial court found the date of May 11, 2016, "is quite significant." Before this date, the following relevant events were found to have occurred. O'Bryan had formed and expressed the opinion that chemical exposure at NuSil had damaged his health by 2010, and again by 2013 and 2015. O'Bryan had also " 'smelled formaldehyde,' " noted that the workplace " 'smelled like a mortuary,' " and " 'assumed it was formaldehyde.' " O'Bryan had been concerned enough about his belief that formaldehyde was among the chemicals causing damage to his health that O'Bryan spoke with Helms and Montague. The damage to O'Bryan's health, "which he already knew to be caused by the chemicals at work, (which he believed, assumed, or strongly suspected included formaldehyde) had progressed to the point that he needed to take a medical leave of absence from the work site." Lastly, O'Bryan had removed himself from the source of continuing injury. Based on these findings, the court found the statute of limitations "(to the extent it had not already started running at an earlier date) unquestionably had begun running sometime prior to May 11, 2016 and ended sometime prior to May 10, 2018." Because the O'Bryans' action was not

initiated until January 17, 2019, after expiration of the statute of limitations, the court found the claim was time-barred.

The trial court concluded the discovery rule was "of no assistance" to the O'Bryans. The court rejected the O'Bryans' argument that O'Bryan did not discover the facts giving rise to his cause of action until he read OSHA's May 30, 2017 report. The court explained its reasoning as follows:

> "[O'Bryan] actually knew that he had suffered an injury and he knew that the cause of the injury was exposure to many different kinds of toxic chemicals. There is no authority for the proposition that he must know the identity of each and every chemical contributing to his injury before his cause of action arises; this is a matter for discovery. His cause of action arose when he became aware or believed that he was injured by exposure to unknown/unspecified chemicals. This is evidenced by the fact that after complaining of injury caused by unspecified chemicals, he filed his worker's compensation claim in June of 2016 [citation] without specifying any particular chemical or chemicals as causative agents. But the evidence also establishes that he already knew or strongly suspected that formaldehyde was one of the causative agents before he filed that worker's compensation claim. [¶] [O'Bryan] did not discover or form a suspicion for the first time sometime after May 30, 2017 when he read the OSHA report that formaldehyde was or might be on the jobsite and that it had contributed to his injuries."

The trial court also found no basis for equitable tolling of the statute of limitations. The court noted the O'Bryans did not argue equitable tolling of the statute of limitations and concluded "[t]here was probably a good reason for this, since the evidence does not support such an argument." The court found O'Bryan's testimony about his conversation with Helms about whether the facility was producing formaldehyde was insufficient to cause tolling on an equitable basis.

The trial court summarized its conclusion as follows:

> "Since the Court has rejected any basis to toll the Statute of Limitations, this Court concludes that the action is barred by the [Code of Civil Procedure] section 335.1 statute of limitations because [O'Bryan] knew that he had been damaged by any number of unspecified toxic gases that existed

> at the workplace, and that he strongly suspected (if he did not believe he had actual knowledge of) the existence of formaldehyde at the workplace, and that he possessed this knowledge and these suspicions well before the two year period preceding the filing of this lawsuit."

Neither party requested changes or additions to the tentative statement of decision and the statement became final on July 15, 2022. On July 27, 2022, the trial court entered judgment for NuSil against the O'Bryans on "all claims in Plaintiffs' Complaint in its entirety." On August 2, 2022, NuSil filed and served notice of entry of judgment.

On August 5, 2022, the matter came before the trial court for a trial setting conference for phase 2 of the trial. Neither party appeared. The trial court ordered the conference dropped and further notice waived.

The O'Bryans filed a notice of appeal on September 7, 2022.

DISCUSSION

I. Appealability

As a preliminary matter, the challenged judgment is not appealable because the judgment only disposed of the O'Bryans' complaint and left NuSil's cross-complaint unresolved. We are obliged to consider the appealability of the judgment because it goes to our jurisdiction. (*Olson v. Cory* (1983) 35 Cal.3d 390, 398; *Jennings v. Marralle* (1994) 8 Cal.4th 121, 126–127.)

"A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) Under the "one final judgment" rule, an appeal may be taken from a final judgment but not an interlocutory judgment. (Code Civ. Proc., § 904.1, subd. (a).) A judgment is final " 'where no issue is left for future consideration except the fact of compliance or noncompliance' " with the judgment, " 'but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' " (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.) "[A]n appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between

the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743.) Therefore, "a judgment which resolves a complaint but does not resolve a cross-complaint pending between the same parties, is not final and not appealable, even if the complaint has been fully adjudicated." (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 132.)

In their opening brief, the O'Bryans acknowledge the judgment here does not mention NuSil's cross-complaint but argue an appellate court has discretion to dismiss the cross-complaint where the trial court intended, or the practical effect of its ruling, is to dispose of a pending cross-complaint.[4] In the cases the O'Bryans cite in support of this contention, the trial court impliedly intended to dispose of the cross-complaint but did not expressly do so, or the ruling or verdict necessarily resolved the issues raised in the cross-complaint. (*Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 5–6 [the trial court's order for summary judgment against the plaintiffs effectively disposed of the defendant's cross-complaint seeking declaratory relief]; *Holt v. Booth* (1991) 1 Cal.App.4th 1074, 1079–1081 [the trial court and jury's determination clearly disposed of all issues raised in the defendant's cross-complaint]; *Tsarnas v. Bailey* (1960) 179 Cal.App.2d 332, 337 [the trial court issued findings of fact and conclusions of law which included findings against cross-complainant's contentions but the judgment did not mention the cross-complaint].) The same cannot be said of the judgment in this case. Nothing in the trial court's statement of decision or the subsequent judgment showed an implied (or express) ruling or adjudication of the claims in NuSil's cross-complaint. The court's finding that the O'Bryans' fraudulent concealment and loss of consortium claims

[4] In its responsive brief, NuSil did not argue the O'Bryans' appeal was premature or comment on the O'Bryans' request to amend the judgment to dismiss its cross-complaint.

were not timely filed did not resolve whether filing the civil suit constituted a breach of the parties' workers' compensation settlement agreement or if NuSil suffered damages from that alleged breach. (See *Coles v. Glaser* (2016) 2 Cal.App.5th 384, 391 [outlining elements for a cause of action for breach of contract].) This is not a case where the cross-complaint was tried with the complaint and a decision on the cross-complaint was inadvertently omitted from the judgment. (See e.g., *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 702, fn. 8.) While the parties stipulated that "the remaining issues need not be tried" if the trial court concluded the O'Bryans' claims were time-barred in phase 1 of the trial, the parties cannot maneuver their way into a final judgment by agreement or waiver.[5] (*Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105 [parties cannot render a judgment final by agreement]; *Baker v. Castaldi* (2015) 235 Cal.App.4th 218, 225 [jurisdiction on an appeal cannot be conferred by waiver].)

We ordered the parties to submit supplemental briefing regarding the finality of the judgment and our jurisdiction. Our order asked NuSil to advise if it consents to amending the judgment to dismiss its cross-complaint. (See e.g., *Roy Brothers Drilling Co. v. Jones* (1981) 123 Cal.App.3d 175, 180–181 [appellate court modified judgment to render it final after the defendant consented to amending the trial court's order granting summary judgment to dispose of the defendant's cross-complaint as abandoned]; accord, *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 308–309.)

In its supplemental brief, NuSil agrees the judgment was not final but declines to consent to amending the judgment to dismiss its cross-complaint. The O'Bryans in their supplemental brief argue the trial court's August 5, 2022 minute order dropping the trial

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[5] We further note the court's order to bifurcate the trial states: "In the event that the Court finds the Plaintiffs' Complaint to be barred by the Statute of Limitations, judgment shall be entered for Defendant on Plaintiffs' Complaint." The order does not mention NuSil's cross-complaint or include the parties' stipulation that the remaining issues need not be tried if the claims were time-barred.

setting conference for phase 2 "makes clear that the trial court intended to dismiss the Cross-Complaint with prejudice for abandonment." We cannot agree with this characterization of the minute order. The order states: "Trial setting conference for Phase #2 – Dropped. [¶] Further notice waived." While this may at best indicate the court considered the cross-complaint abandoned, this does not evince a "clear" intent to dismiss NuSil's cross-complaint.

The O'Bryans further argue the trial court should have entered a final judgment dismissing NuSil's cross-complaint with prejudice due to abandonment when NuSil failed to appear at the August 5, 2022 trial setting conference pursuant to Code of Civil Procedure section 581, subdivision (d). The O'Bryans cite *Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199 to argue this court may order the trial court to enter the purportedly omitted judgment nunc pro tunc and treat the appeal as having been taken from that judgment. In *Flores*, the plaintiff appealed after the trial court sustained the defendant's demurrer without leave to amend but did not enter judgment against the plaintiff. (*Id.* at p. 203.) This court ordered the trial court to enter a judgment of dismissal nunc pro tunc as of the date of the order sustaining the demurrer and construed the notice of appeal to refer to that judgment. (*Id.* at p. 204.) The circumstances in *Flores* were similar to the cases discussed above where the trial court rendered a decision that necessarily resolved the cross-complaint, or a dismissal was inadvertently omitted from the judgment. Under the circumstances here, the O'Bryans' request for an order dismissing NuSil's cross-complaint for abandonment under Code of Civil Procedure section 581 is more appropriately directed to the trial court *before* filing their appeal, not to this court on appeal.

Both parties urge this court to assert jurisdiction by treating the O'Bryans' appeal as a petition for writ. An appellate court has the discretion to treat an appeal from a nonfinal judgment as a petition for writ of mandate under "unusual circumstances." (*Olson v. Cory*, *supra*, 35 Cal.3d at p. 401; see *Morehart v. County of Santa Barbara*,

supra, 7 Cal.4th at pp. 743–744 [a petition for writ, not an appeal, is the authorized means for obtaining review of a nonfinal judgment].) In *Olson v. Cory*, our Supreme Court considered five factors in deciding whether it was appropriate to treat an appeal as a petition for writ: "(1) requiring the parties to wait for a final judgment might lead to unnecessary trial proceedings; (2) the briefs and record included, in substance, the necessary elements for a proceeding for a writ of mandate; (3) there was no indication the trial court would appear as a party in a writ proceeding; (4) the appealability of the order was not clear; and (5) the parties urged the court to decide the issues rather than dismiss the appeal." (*Hall v. Superior Court* (2016) 3 Cal.App.5th 792, 807 [citing factors from *Olson v. Cory*, *supra*, at pp. 400–401]; see Cal. Rules of Court, rule 8.486(b) [supporting documents required for petition for writ].)

We conclude the circumstances here warrant treating the appeal as a petition for writ of mandate. If the appeal is dismissed for seeking review of a nonappealable order, the parties will be required to return to the trial court to obtain a final judgment. If NuSil has indeed abandoned its cross-complaint, this may lead to unnecessary trial proceedings. We granted this case calendar preference due to O'Bryan's poor health.[6] The issues in dispute have been fully briefed and the record contains all the elements necessary to treat the appeal as a petition for writ. There is no indication the trial court would appear as a party in writ proceedings. Treating the appeal as a petition for writ will avoid the waste of judicial resources and time required to dismiss the appeal for the parties to obtain a final judgment and then refile the appeal. Accordingly, we will treat the appeal as a petition for writ and address the merits. (*Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 697–698.)

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[6] On August 16, 2023, this court on its own motion granted calendar preference to the appeal after NuSil requested an extension to file its brief and the O'Bryans objected due to O'Bryan's poor health and deteriorating medical condition.

II. The Trial Court's Statement of Decision and Judgment

The O'Bryans contend the trial court erred in holding that their fraudulent concealment claim was time-barred. Specifically, the O'Bryans argue the court applied an erroneous legal standard in determining when the claim accrued and its application of the discovery rule. The O'Bryans further argue their claim for fraudulent concealment is timely under the correct legal standard.

A. *Standard of Review*

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court's findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).)

B. *Statute of Limitations and the Discovery Rule*

" 'Statute of limitations' is the collective term applied to acts or parts of acts that prescribe the periods beyond which a plaintiff may not bring a cause of action." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).) The statute of limitations serves "to protect defendants from the stale claims of dilatory plaintiffs" and "has as a related purpose to stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395 (*Norgart*).) "Under the statute of limitations, a plaintiff must bring a cause of action within the limitations period applicable thereto after accrual of the cause of action." (*Id.* at p. 389.) A cause of action generally accrues "when the cause of action is complete with all of its elements." (*Ibid*.; see Code Civ. Proc., § 312.)

The discovery rule is an important exception to the general rule of accrual. (*Fox*, *supra*, 35 Cal.4th at p. 807.) The discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Ibid*.) "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action." (*Ibid*.) Suspicion triggers inquiry notice. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1319 (*E-Fab, Inc.*).) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111 (*Jolly*).)

"[P]laintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox*, *supra*, 35 Cal.4th at p. 808.) "Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light." (*Id.* at pp. 808–809.)

While resolution of the statute of limitations issue is normally a question of fact (*Fox*, *supra*, 35 Cal.4th at p. 810), where the facts are undisputed application of the statute of limitations "is a purely legal question" subject to de novo review. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) The parties do not dispute the material facts, though they dispute the legal conclusions to be drawn from the facts. We therefore apply de novo review to application of the statute of limitations.

C. *The O'Bryans' Fraudulent Concealment Claim*

"An employee injured during the course of employment is generally limited to remedies available under the Workers' Compensation Act." (*Jensen v. Amgen Inc.* (2003) 105 Cal.App.4th 1322, 1325 (*Jensen*); see Lab. Code, § 3600, subd. (a).) This exclusive remedy rule is part of the "presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) In exchange for the wider range of damages potentially available in civil tort, the "employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault." (*Ibid*.)

Certain types of injurious employer conduct bring the employee outside the compensation bargain. (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708; *Shoemaker v. Myers*, *supra*, 52 Cal.3d at p. 16.) One exception to the exclusive remedy rule was identified by our Supreme Court in *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465. The plaintiff in *Johns-Manville* was continuously exposed to asbestos during his 29-year employment with the defendant and he developed asbestos-related illnesses because of that exposure. (*Id.* at p. 469.) The defendant had long known exposure to asbestos was dangerous to health but concealed this knowledge from the plaintiff and advised him it was safe to work in close proximity to asbestos. (*Ibid*.) The Supreme Court concluded the plaintiff could state a cause of action and held "that while the workers' compensation law bars the employee's action at law for his initial injury, a cause of action may exist for aggravation of the disease because of the employer's fraudulent concealment of the condition and its cause." (*Ibid*.)

The fraudulent concealment exception outlined in *Johns-Manville* was codified in 1982 as Labor Code section 3602, subdivision (b)(2). (*Jensen*, *supra*, 105 Cal.App.4th at p. 1325.) This statutory subdivision allows a civil suit "[w]here 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." (Lab. Code, § 3602, subd. (b)(2).)

A fraudulent concealment claim under Labor Code section 3602, subdivision (b)(2) requires the employee show three conditions: "(1) the employer must have concealed 'the existence of the injury'; (2) the employer must have concealed the connection between the injury and the employment; and (3) the injury must have been aggravated following the concealment." (*Jensen*, *supra*, 105 Cal.App.4th at p. 1325.)

1. Applicable Statute of Limitations

The parties agree the statute of limitations for the O'Bryans' fraudulent concealment claim is two years pursuant to Code of Civil Procedure section 335.1. (Code Civ. Proc., § 335.1; *Rivas v. Safety-Kleen Corp.* (2002) 98 Cal.App.4th 218, 229–231 (*Rivas*) [former one-year statute of limitations for personal injury claims applied to the plaintiff employee's fraudulent concealment claim].) The O'Bryans filed their initial complaint on January 17, 2019. Thus, the O'Bryans' cause of action was time-barred if all the elements of their fraudulent concealment claim accrued prior to January 17, 2017, absent an applicable exception to the general rule of accrual. (*Norgart*, *supra*, 21 Cal.4th at pp. 397–398.)

2. Accrual of the O'Bryans' Claim

The question of when a "cause of action accrued is a mixed question of law and fact." (*Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398, 406.) The O'Bryans argue O'Bryan's suspicion alone of exposure to formaldehyde was insufficient to trigger the statute of limitations. Because O'Bryan both suspected wrongdoing by NuSil and knew he had suffered injury from exposure to toxic chemicals during his employment prior to January 17, 2017, the O'Bryans' fraudulent concealment claim accrued before the two-year statute of limitations period.

Jolly is particularly instructive on the legal principle that a plaintiff's "*suspicion* of wrongdoing, coupled with a knowledge of the harm and its cause, will commence the limitations period." (*Jolly*, *supra*, 44 Cal.3d at p. 1112; see *Fox*, *supra*, 35 Cal.4th at p. 807 [a plaintiff's "suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period"].) In *Jolly*, the plaintiff learned in 1972 that while in utero, her mother had ingested the synthetic drug estrogen diethylstilbestrol (DES) for the prevention of miscarriage. (*Jolly*, *supra*, at p. 1107.) Between 1972 and 1978, the plaintiff had a series of health issues ultimately leading to a complete hysterectomy and partial vaginectomy. (*Ibid*.) As of 1972, the plaintiff suspected her condition resulted from her mother's ingestion of DES during pregnancy. (*Ibid*.) "[A]s early as 1978 she was interested in 'obtaining more information' about DES because she wanted to 'make a claim'; she felt that someone had done something wrong to her concerning DES, that it was a defective drug and that she should be compensated." (*Id.* at p. 1112.) The Supreme Court held that the "limitations period begins when the plaintiff suspects, or should suspect, that she has been wronged." (*Id.* at p. 1114.) Because the plaintiff suspected wrongdoing outside the limitations period, her claim was time-barred. (*Ibid*.)

Similarly, here, O'Bryan suspected NuSil's alleged wrongful conduct had injured him well before filing his civil complaint. By at least May 11, 2016, O'Bryan knew his health had been damaged by toxic chemical exposure at NuSil and suspected this exposure included formaldehyde, a chemical that was purportedly not being produced at the facility. At multiple times before May 11, 2016, O'Bryan expressed concern that his health was at risk from chemical exposure during his employment at NuSil. O'Bryan was concerned about this exposure as early as 2009. O'Bryan expressed concern about exposure to chemicals around 2011 or 2012 and was issued a full-face respirator in response to his complaints. In 2013, O'Bryan's doctor diagnosed him with "problems" that further concerned O'Bryan about his workplace exposure to chemicals. Around

2013, O'Bryan complained to Montague about swelling and numbness in his hands, and extreme fatigue. O'Bryan confirmed his disability leave of absence on May 11, 2016, resulted from health symptoms he attributed to his exposure to chemicals at NuSil. O'Bryan told Helms he believed formaldehyde was being generated by a specific process at the facility.[7] Later in 2016 after he stopped working at NuSil, O'Bryan reported to Frazier and Gillis that he attributed his medical issues to chemical exposure at NuSil.

The facts here are substantially like *Rivas*. In *Rivas*, the Court of Appeal upheld a grant of summary judgment based on the former one-year statute of limitations for a personal injury claim where the plaintiff suffered kidney injuries due to prolonged exposure to a particular solvent at work. (*Rivas*, *supra*, 98 Cal.App.4th at p. 223.) In 1991, a doctor asked the plaintiff to provide a list of all chemicals he encountered and told the plaintiff to stay away from the solvent. (*Ibid*.) In 1996, almost two years before filing his civil complaint, the plaintiff filed a workers' compensation claim alleging injury to his kidneys from " 'repetitive exposure to toxic fumes, gases and liquids.' " (*Ibid*.) The Court of Appeal concluded that even if the doctor's advice to stay away from the solvent was ambiguous and insufficient to arouse the plaintiff's suspicion, the plaintiff's filing of a workers' compensation claim "based on exposure to toxic chemicals at work is definitive proof that he had a suspicion that 'someone ha[d] done something wrong to [him]' long before his civil complaint was filed." (*Id.* at p. 229.)

Like in *Rivas*, the allegations in O'Bryan's workers' compensation claim showed O'Bryan knew he was injured by exposure to toxic chemicals at work. His civil cause of action did not accrue solely due to O'Bryan's suspicions, nor did it accrue solely due to O'Bryan's knowledge of his injury and its cause. (See *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1057 ["the plaintiff must be aware of her injury, its factual

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[7] The trial court found that although various dates were given for the conversation between O'Bryan and Helms, "there can be no doubt that [the conversation] was sometime before May 11, 2016," when O'Bryan stopped working at NuSil's facility.

cause, and sufficient facts to put her on inquiry notice of a negligent cause"].) Instead, O'Bryan suspected NuSil of wrongdoing *and* had actual knowledge he was injured by chemical exposure from working at NuSil's facility. As found by the trial court, O'Bryan "possessed this knowledge and these suspicions well before the two year period preceding the filing of this lawsuit."[8] O'Bryan's complaint to OSHA about NuSil, lodged before OSHA's November 30, 2016 investigation, further evinced he suspected wrongdoing by NuSil prior to the two-year limitations period.

We reject the O'Bryans' contentions they could not assert their cause of action until the May 30, 2017 OSHA report confirmed the presence of formaldehyde at NuSil's facility. This argument misapprehends the necessary facts to assert a cause of action. "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery." (*Jolly*, *supra*, 44 Cal.3d at p. 1111; see Code Civ. Proc., § 128.7, subd. (b)(3) [a party filing a pleading must certify that the "allegations and other factual contentions have evidentiary support or, . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"].) "[T]he plaintiff discovers the cause of action when . . . he at least 'suspects . . . that someone has done something wrong' to him [citation], 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' " (*Norgart*, *supra*, 21 Cal.4th at pp. 397–398; see *Fox*, *supra*, 35 Cal.4th at p. 807 [courts "do not take a hypertechnical approach" but instead, "look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them"]; *Jolly*, *supra*, at p. 1110, fn. 7 ["In this context, 'wrong,' 'wrongdoing,' and 'wrongful' are used in their lay understanding."].) After "*Jolly*, courts have rejected the argument that the limitations period does not begin to run until a plaintiff learns the specific causal mechanism by

[8] Because the trial court applied the correct legal standard and our review is de novo, we do not address the O'Bryans' argument that the court's alleged improper use of "suspicion alone" to determine the statute of limitations violates public policy.

which he or she has been injured." (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1298.) O'Bryan was not required to know with scientific certainty which toxic chemicals (including formaldehyde) he was exposed to by NuSil's alleged wrongdoing before filing his cause of action. "It is a plaintiff's *suspicion* of [wrongdoing], rather than an expert's *opinion*, that triggers the limitation period." (*Id.* at p. 1300; see *Rivas*, *supra*, 98 Cal.App.4th at p. 242 [the "statute of limitations does not await the plaintiff's discovery of every specific fact he needs to allege a cognizable claim"].) O'Bryan's long-standing suspicion of unsafe exposure to chemicals and awareness he had suffered injury from exposure to toxic chemicals in the workplace gave him reason to investigate. The trial court correctly concluded that the specific identity of each chemical contributing to O'Bryan's injury was "a matter for discovery."

Furthermore, restricting accrual of the O'Bryans' claim solely to formaldehyde exposure as the O'Bryans attempt is inconsistent with the allegations in the first amended complaint and the parties' stipulation to the issue to be tried. The O'Bryans' first amended complaint did not allege injury solely from exposure to formaldehyde at NuSil. Instead, the O'Bryans alleged O'Bryan's "exposure included, without limitation, toxic substances and fumes from combined chemicals used to manufacture silicon products such as tetrahydrofuran, xylene, toluene, ethylbenzene, hydrochloric acid, carbon tetrachloride, acetone, phenyl trimethicone, monochlorobenzene, formaldehyde, as well as the reactive byproducts generated from the mixtures." The trial court was obligated to liberally construe the allegations in the O'Bryans' first amended complaint "with a view to substantial justice between the parties." (Code Civ. Proc., § 452; see *Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 312.) Limiting accrual of the O'Bryans' claim solely to alleged exposure to formaldehyde is inconsistent with that mandate when O'Bryan alleged exposure to multiple chemicals without limitation. The parties also stipulated generally to "try the issue of the Statute of Limitations first," not solely with respect to O'Bryan's exposure to formaldehyde. Parties may stipulate to limit the issues presented

to the trial court and the court will respect that stipulation. (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 733.) The court correctly considered accrual of the cause of action based on O'Bryan's suspected negligent exposure to *any* toxic chemical in the workplace, not solely his suspected exposure to formaldehyde.[9]

The O'Bryans argue O'Bryan's knowledge he was ill because of exposure to unspecified toxic chemicals generally was enough to state a workers' compensation claim but was insufficient to state a claim for fraudulent concealment or trigger the statute of limitations for that claim. The O'Bryans essentially contend O'Bryan's workers' compensation and fraudulent concealment claims must have accrued at different times because not all causes of action related to the same injury accrue at the same time.[10]

Where a plaintiff suffers a single injury from "two distinct types of wrongdoing," the resulting causes of action may not accrue simultaneously "and should be treated separately in that regard." (*Fox*, *supra*, 35 Cal.4th at pp. 814–815.) A workers' compensation claim and fraudulent concealment claim "are not alternative remedies for the same harm; they are different remedies for different harms." (*Aerojet General Corp. v. Superior Court* (1986) 177 Cal.App.3d 950, 956 (*Aerojet*).) These claims are not two

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[9] The O'Bryans' trial brief, filed after the parties' stipulation to bifurcate the trial, similarly attempted to limit accrual of the cause of action specifically to O'Bryan's knowledge of formaldehyde exposure. At the close of trial, the O'Bryans' counsel claimed "the sole issue as to the statute of limitations affirmative defense specifically alleges formaldehyde." As discussed herein, restriction of the issue to exposure only to formaldehyde is inconsistent with liberal construction of the first amended complaint and the parties' stipulation to the issue to be tried.

[10] The O'Bryans argue the trial court wrongly held that O'Bryan "could have and should have filed his fraudulent concealment claim at the same time that he filed his workers' compensation claim" because he knew at that time he was injured from exposure to unspecified toxic chemicals. The trial court did not conclude that O'Bryan should have simultaneously filed his civil suit when he filed his workers' compensation claim. Instead, the court found that O'Bryan's allegations in his workers' compensation claim showed he "actually knew that he had suffered an injury and he knew that the cause of the injury was exposure to many different kinds of toxic chemicals."

sides of the same coin and require a different showing for each with a different applicable statute of limitations.[11]

An employee seeking workers' compensation benefits must show the injury: (1) arose out of the employment; and (2) occurred in the course of employment. (Lab. Code, § 3600, subd. (a).) While the arising out of employment component requires showing the employment and injury are linked in some causal fashion (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.* (2015) 61 Cal.4th 291, 297), "[w]hether the employer was at fault is not at issue when the remedy the employee seeks is worker's compensation" (*Aerojet*, *supra*, 177 Cal.App.3d at p. 955, fn. 4). As previously discussed, an employee seeking workers' compensation benefits is generally not required to show negligence caused or contributed to the injury; it is expressly a no-fault system.[12]

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[11] Proceedings for workers' compensation benefits must generally be commenced "within one year of whichever of the following 'results in the longest period: (a) the date of the injury; (b) the date of the last indemnity payment for temporary or permanent disability; or (c) the date of the last furnishing of any medical or hospital benefits.' " (*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 685; see Lab. Code, § 5405.)

[12] An employee asserting a "serious and willful misconduct" claim against an employer under Labor Code section 4553 must however show the injury resulted from "an act deliberately done for the express purpose of injuring another, or intentionally performed whether with knowledge that serious injury is a probable result or with a positive, active, wanton, reckless and absolute disregard of its possibly damaging consequences." (*Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1622.) This "remedy departs to some extent from the no-fault principle upon which our workers' compensation system is primarily based," but must still be pursued within the workers' compensation arena. (*Ibid*.; see *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 158.) The Supreme Court has identified a "tripartite system for classifying injuries arising in the course of employment": (1) "injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system"; (2) "injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553"; and (3) "certain types of intentional employer conduct which bring the employer beyond the boundaries

(See, e.g., Lab. Code, § 3600, subd. (a) [liability for compensation exists "without regard to negligence"]; Lab. Code, § 3600, subd. (a)(3) [the injury must be "proximately caused by the employment, either with or without negligence"].)

Alternatively, a fraudulent concealment claim "is for a different wrong entirely, that being the harm [the employee] assertedly suffered as a result of [the employer's] fraudulent concealment of the injury's cause." (*Aerojet*, *supra*, 177 Cal.App.3d at p. 955.) An employee pursuing a fraudulent concealment claim must show intentional wrongdoing by the employer. (*Johns-Manville*, *supra*, 27 Cal.3d at p. 477; *Jensen*, *supra*, 105 Cal.App.4th at p. 1325.)

O'Bryan's workers' compensation claim was filed on June 27, 2016, and alleged injury to multiple body parts from "exposure to toxic chemicals." O'Bryan filed this claim following Freesemann's June 7, 2016 report, in which Freesemann stated that "due to exposure of chemicals [O'Bryan] developed numbness in both arms and hands, weakness in joints, frustration from stress and loss of sleep." This was sufficient for O'Bryan to allege an injury arising out of and occurring in the course of his employment for purposes of seeking workers' compensation benefits.

By the time O'Bryan filed his workers' compensation claim, he had repeatedly expressed his suspicion that he was being unsafely exposed to toxic chemicals, including formaldehyde, at NuSil. As discussed above, O'Bryan's knowledge of his injury's cause *together with* his suspicions of wrongdoing triggered O'Bryan's duty to investigate. While O'Bryan's workers' compensation claim and fraudulent concealment claim did not necessarily accrue at the same time, the filing of the former revealed O'Bryan's knowledge of facts regarding the latter. (See, e.g., *Rivas*, *supra*, 98 Cal.App.4th at p. 229.) Specifically, the allegations in his workers' compensation claim show O'Bryan

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of the compensation bargain, for which a civil action may be brought." (*Fermino v. Fedco, Inc.*, *supra*, 7 Cal.4th at pp. 713–714.)

knew his medical issues were caused by chemical exposure from his employment at NuSil.

We therefore conclude the O'Bryans' fraudulent concealment claim accrued prior to the two-year limitations period.

3. Facts Necessary for Fraudulent Concealment Claim

The O'Bryans fault the trial court for purportedly failing to determine the facts necessary to state a fraudulent concealment claim.

"A statement of decision need not address all the legal and factual issues raised by the parties." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124–1125; see *Bauer v. Bauer* (1996) 46 Cal.App.4th 1106, 1118 [the trial court is not required to make an express factual finding on every controverted factual matter where the statement of decision sufficiently disposes of all the basic issues].) The "statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." (*Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380.) Under " 'the doctrine of implied findings, the reviewing court must infer, following a bench trial, that the trial court impliedly made every factual finding necessary to support its decision.' " (*Thompson*, *supra*, 6 Cal.App.5th at p. 981; see *In re Marriage of Arceneaux*, *supra*, 51 Cal.3d at p. 1133; Code Civ. Proc., §§ 632, 634.)

The O'Bryans argue the trial court did not consider the necessary factual allegations to state a fraudulent concealment claim. The O'Bryans did not propose additional findings or object to the court's tentative statement of decision. A party who does not timely object to a statement of decision forfeits the right to challenge on appeal any omissions or ambiguities in that statement. (Code Civ. Proc., § 634 [omissions or ambiguities in the statement of decision must be brought to the attention of the trial court to avoid implied findings on appeal].) We therefore "infer the trial court made every implied factual finding necessary to uphold its decision, even on issues not addressed in

the statement of decision." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 48.)

Even if the argument was not forfeited, the O'Bryans do not adequately explain how this alleged omission was error. The parties did not dispute the necessary factual allegations to state a fraudulent concealment claim. The sole issue for the trial court to determine was whether the O'Bryans' claim was barred by the statute of limitations. At the outset of the trial, the court expressly stated it was "not dealing with the fraudulent concealment issue" during phase 1. While determination of the statute of limitations defense necessitated determining when the O'Bryans' claim accrued, the lack of an express discussion of the necessary factual allegations for that claim does not mean the court did not consider those facts in determining the material issues and the statement of decision indicates it did so.[13] We presume the court considered the necessary factual allegations for a fraudulent concealment claim in determining when the O'Bryans' cause of action accrued and reject the O'Bryans' speculative assertion to the contrary. (*Thompson*, *supra*, 6 Cal.App.5th at p. 981.)

4. Whether the O'Bryans Conducted a Reasonable Investigation

The O'Bryans contend the trial court failed to determine whether they conducted a reasonable investigation to find the facts necessary to state their fraudulent concealment claim. The O'Bryans maintain their fraudulent concealment claim was timely because they conducted a reasonable investigation and could not have discovered the presence of formaldehyde at NuSil before O'Bryan saw OSHA's report.[14]

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[13] The statement of decision reflects awareness of the factual allegations for a fraudulent concealment claim. Specifically, the trial court cited two cases – *Rivas* and *Aerojet* – involving fraudulent concealment claims in support of its conclusion that the applicable statute of limitations was two years pursuant to Code of Civil Procedure section 335.1. (See *Rivas*, *supra*, 98 Cal.App.4th 218; *Aerojet supra*, 177 Cal.App.3d at pp. 955–956 & fn. 5 [identifying factual allegations for a fraudulent concealment claim].)

[14] The O'Bryans assert that NuSil stipulated O'Bryan conducted a reasonable investigation. This is inaccurate. NuSil confirmed at trial it was not contending that

"If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1150.) Where the discovery "rule applies, the limitations period does not accrue until the aggrieved party has notice of the facts constituting the injury." (*E-Fab, Inc.*, *supra*, 153 Cal.App.4th at p. 1318.) "A person generally has 'notice' of a particular fact if that person has knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact." (*First Fidelity Thrift & Loan Assn. v. Alliance Bank* (1998) 60 Cal.App.4th 1433, 1443; see Civ. Code, § 19.)

" 'It is plaintiff's burden to establish "facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry." ' " (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 833.) The essential question where a plaintiff asserts the discovery rule is whether the plaintiff exercised reasonable diligence in investigating the wrongful cause of an injury. (*Fox*, *supra*, 35 Cal.4th at pp. 807–809.) A plaintiff whose " 'claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence.' " (*E-Fab, Inc.*, *supra*, 153 Cal.App.4th at p. 1319.) " 'There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge.' " (*Id.* at p. 1320.) Whether a plaintiff exercised reasonable diligence is a question of fact. (*April Enterprises, Inc. v. KTTV*, *supra*, at p. 833.)

The trial court did not expressly address in its statement of decision whether

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O'Bryan should have personally conducted testing for formaldehyde at NuSil's facility. This cannot plausibly be construed as a stipulation that O'Bryan conducted a reasonable investigation.

O'Bryan conducted a reasonable investigation. Pursuant to the discussion above, we infer the court made every implied factual finding necessary to determine the issues in dispute. The O'Bryans raised application of the discovery rule at trial and the court expressly concluded the statute of limitations was not tolled by this rule. Implicit in the court's decision is a finding that the O'Bryans did not prove O'Bryan was reasonably diligent in investigating his claim. This implied finding is also contained in the statement of decision. Specifically, in addressing whether the statute of limitations was equitably tolled, the court concluded that nothing in Helms's opinion to O'Bryan that " 'it is not hot enough to produce formaldehyde' " prevented O'Bryan "from retaining someone to conduct an inspection or investigation."

The O'Bryans cite *Whitfield v. Roth* (1974) 10 Cal.3d 874 to argue " 'it is difficult to conceive what more [O'Bryan] could have done' " to investigate his suspicion of wrongdoing beyond his inquiries of three people at NuSil and complaint to OSHA. In *Whitfield*, accrual of a minor's medical malpractice suit was delayed until the minor's mother discovered the negligent cause of her daughter's injury through examination of her medical records. (*Id.* at pp. 877–881.) The minor's ailments were misdiagnosed by a series of doctors until it was discovered she had a brain tumor. (*Ibid*.) Following surgery to remove the tumor, the minor suffered a stroke that left her totally paralyzed in both legs and one arm. (*Id.* at p. 881.) The mother suspected malpractice and retained an attorney to pursue a cause of action on behalf of her daughter. (*Ibid*.) Medical records obtained during pretrial discovery revealed for the first time that a doctor had suspected the minor had a brain tumor and recommended additional testing for this diagnosis nine months prior to the final diagnosis and surgery. (*Ibid*.) This suspected diagnosis had not been disclosed to the mother and the hospital positively represented to her the absence of any organic disease. (*Ibid*.) The Supreme Court held the mother was reasonably diligent in pursuing her suspicion of possible negligence by the doctors and hospital. (*Id.* at p. 889.) The high court concluded "it is difficult to conceive what more she could have

done" beyond contacting two attorneys and sending a long letter to newspapers within three months of her daughter's final diagnosis and operation. (*Ibid*.)

Whitfield is distinguishable. The plaintiff mother could not know the doctors and hospital were negligent in detecting the possible existence of the tumor until she obtained her daughter's medical records. In malpractice cases, the " 'facts and circumstances of the medical treatment rendered a patient are within the exclusive knowledge of the hospital and the attending physicians. It is difficult to understand how an injured person could discover the cause of the injury until he has obtained that information.' " (*Whitfield v. Roth*, *supra*, 10 Cal.3d at p. 886.) This is not a medical malpractice case where the alleged negligent cause of O'Bryan's injury was uniquely within the defendant's control. O'Bryan *knew* what caused his injury: exposure to toxic chemicals during his employment at NuSil. His repeated concerns about that exposure, including complaining to management until he was issued a full-face respirator, show he suspected NuSil was exposing him to chemicals in an unsafe manner and to byproducts from the facility's processes, including formaldehyde, for which NuSil had not provided him with training or protection. O'Bryan was not limited to inquiries from employees at NuSil or awaiting the results of his complaint to OSHA.[15] He was obliged to go find the facts – he could not sit back and wait for the facts to find him. (*Jolly*, *supra*, 44 Cal.3d at p. 1111.) The trial court aptly concluded that nothing prevented O'Bryan from retaining someone to inspect or investigate for him.

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[15] The O'Bryans cite no authority for the implied assertion that a fraudulent concealment claim cannot accrue until OSHA finds a violation by the employer. OSHA is charged with assuring "safe and healthful working conditions for all California workers within its purview" and is authorized to enforce effective standards to assist and encourage employers " 'to maintain safe and healthful working conditions.' " (*Cortez v. Abich* (2011) 51 Cal.4th 285, 291; accord, Lab. Code, § 6300.) OSHA was not O'Bryan's private inspector sent to evaluate whether unsafe chemical exposure at NuSil injured him – OSHA's role is to assure the safety of *all* employees and employer compliance with occupational safety and health standards. (*Cortez v. Abich*, *supra*, at pp. 291–292.)

The O'Bryans argue the trial court's conclusion that nothing prevented O'Bryan from retaining someone to conduct an inspection or investigation "is not supported by any evidence, no less substantial evidence." They further contend there is no evidence whether there are any private third parties O'Bryan could have hired to test for formaldehyde. As plaintiffs, the O'Bryans bear the burden of proving they could not have discovered their cause of action despite reasonable diligence. (*April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d at p. 833.) Any evidentiary lack on this issue is consequently attributed to the O'Bryans. Viewing the evidence in the light most favorable to the judgment, substantial evidence supports the trial court's implied finding that the O'Bryans did not conduct a reasonable investigation for purposes of the discovery rule.

Accordingly, we reject the O'Bryans' contention their fraudulent concealment claim was timely under the discovery rule.

III. Evidentiary Rulings

If the evidence is insufficient to show the O'Bryans' fraudulent concealment claim was timely filed, the O'Bryans contend in the alternative the trial court's evidentiary rulings constitute prejudicial error. Specifically, the O'Bryans argue the court erred by excluding the testimony of the OSHA investigator, Greg Clark, and preventing O'Bryan from answering a question about whether Helms confirmed or denied the existence of formaldehyde at the facility.

A. *Applicable Law*

" 'A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446–447.) "Claims of evidentiary error under California law are reviewed for prejudice applying the 'miscarriage of justice' or 'reasonably probable' harmless error

standard of *People v. Watson* (1956) 46 Cal.2d 818, 836." (*Id*. at p. 447.) Under the *Watson* standard, the appellant must "show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred." (*Ibid*.) Reasonable probability in this context means " 'a *reasonable chance*, more than an *abstract possibility*.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

B. *Exclusion of Clark's Testimony*

The O'Bryans identified Clark, the OSHA investigator, among their witnesses prior to trial. At trial, NuSil made an oral in limine motion to exclude Clark's testimony. The O'Bryans' counsel argued Clark's testimony was relevant to whether O'Bryan could have conducted a reasonable investigation and specifically, to address whether O'Bryan could have investigated further than he did. The O'Bryans' counsel expected Clark to testify about the way testing for formaldehyde is typically done and whether O'Bryan could have done the testing himself. In response to the court's questioning, NuSil's counsel confirmed it was not contending that O'Bryan should have personally conducted testing. The O'Bryans' counsel persisted that Clark's testimony was necessary for the "ultimate discovery of formaldehyde at the facility, which is the final fact" for the fraudulent concealment claim. The court granted NuSil's in limine motion reasoning that the "fraudulent concealment issue" was not before the court, because the sole issue was when O'Bryan knew or was on inquiry notice of his claim.

The O'Bryans argue Clark's testimony was relevant to show what a formaldehyde investigation entails and whether it would have been reasonable for O'Bryan to have conducted or arranged for such an investigation. To the extent the O'Bryans' contentions assume O'Bryan was required to confirm the presence of formaldehyde before filing his civil suit, we have already concluded O'Bryan was not required to show with scientific certainty there was formaldehyde at NuSil's facility before pursuing this cause of action. Because NuSil conceded at trial it was not contending O'Bryan should have personally conducted testing, Clark's testimony was unnecessary to address whether he could have

done so, and the court was entitled to exclude the testimony as irrelevant to the sole disputed issue. (See Evid. Code, § 350 [only relevant evidence is admissible]; *In re A.G.* (2020) 58 Cal.App.5th 973, 1007 [an offer of proof is insufficient if it fails to identify the proposed evidence's relevance].)

The O'Bryans' counsel did not state at trial that Clark was also expected to testify about the reasonableness of retaining a third party to conduct testing. Generally, a judgment may not be reversed for the erroneous exclusion of evidence unless "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354, subd. (a); see *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282 ["failure to make an adequate offer of proof in the court below ordinarily precludes consideration on appeal of an allegedly erroneous exclusion of evidence"].) The trial court cannot be faulted for excluding testimony from Clark on a subject not specified by counsel at trial. (*In re A.G.*, *supra*, 58 Cal.App.5th at pp. 996–997 [a proper offer of proof must be specific about what testimony would be elicited from the witness].)

Lastly, the O'Bryans contend if Clark had been allowed to testify, there is a reasonable probability the trial court would have found it "was not reasonable to require O'Bryan hire a third party to test the NuSil plant for formaldehyde." This misreads the court's findings. The court found that the O'Bryans were not prevented from retaining someone to conduct an inspection or investigation but said nothing about specifically retaining a person to conduct testing at the facility. The O'Bryans' assertion there is a reasonable probability Clark's testimony would show O'Bryan conducted a reasonable investigation for purposes of the discovery rule is speculative and unsubstantiated.

C. *Exclusion of Testimony About Helms*

O'Bryan testified about discussing the possible presence of formaldehyde at NuSil's facility with the site manager, Helms, in relevant part:

"[THE O'BRYANS' COUNSEL:] Can you explain to me the complaints or your discussion with Mr. Helms?

"A. It was kind of a passing-by type thing. But said something to the fact that we are producing formaldehyde, formaldehyde is being generated, something to that effect, and kind of a walking-by type deal. And he said, 'We are not getting the material hot enough, we are not heating it hot enough to produce formaldehyde,' something in that respect. I don't remember exactly. [¶] . . . [¶]

"[THE O'BRYANS' COUNSEL:] And Mr. Helms had told you that the processes don't get hot enough to produce formaldehyde at the facility where you worked; is that correct?

"A. If I recall, not plural, I was referencing the distillation column on process, and that's what he referenced, it wasn't getting hot enough to produce formaldehyde. [¶] . . . [¶]

"[THE O'BRYANS' COUNSEL:] Mr. O'Bryan, just to reiterate, when you thought your injuries were being caused by your employment, you brought that concern to your supervisor at NuSil, correct?

"A. Yes.

"Q. And when you also thought that formaldehyde was the specific chemical was the cause of your injuries, you also brought that to Defendant NuSil's attention, correct?

"A. It's what I thought I smelled, yes. It was my concern. It smelled like formaldehyde. And a number of my depositions, I -- at the mortuary, it's the smell. It's a smell you don't forget. It was strong. So I assumed it was formaldehyde.

"Q. Okay. And then -- you mentioned that to Steve Helms, was it?

"A. Yes. [¶] . . . [¶]

"[THE O'BRYANS' COUNSEL:] Did you have any reason to believe or to doubt that -- to doubt Mr. Helms' statement that the process does not get hot enough to produce formaldehyde?

"A. No. He's the expert on -- or I thought he was. [¶] . . . [¶]

"[THE O'BRYANS' COUNSEL:] And did you ask NuSil's employees if there was formaldehyde?

"A. I only asked -- mentioned in that type of form or context was Steve and then Mike Montague.

"[THE O'BRYANS' COUNSEL:] I'm sorry. You said Steve?

"A. Steve Helms.

"[THE O'BRYANS' COUNSEL:] And when you mentioned it to him, did he confirm or deny whether there was formaldehyde?

"[NUSIL'S COUNSEL]: Your Honor, this has been asked and answered repeatedly.

"THE COURT: Sustained."

The O'Bryans argue O'Bryan had not provided this specific testimony before the trial court sustained NuSil's objection. The record belies this contention. O'Bryan testified more than once that he asked Helms about whether the facility was producing formaldehyde and Helms replied that the material was not getting hot enough to do so. This may fairly be construed as a denial of the presence of formaldehyde. The O'Bryans cannot claim error for "exclusion" of evidence that was not excluded.

The O'Bryans further argue exclusion of testimony about how O'Bryan perceived Helms's statement, as a fact or as an opinion, was prejudicial because this was relevant to the trial court's ruling on equitable tolling. O'Bryan was not asked about his perception of Helms's statement in the question sustained by the court. The O'Bryans do not identify where O'Bryan was asked about his perception of Helms's statement and the court excluded his response. We therefore do not address this contention. (*Antelope Valley Groundwater Cases* (2021) 63 Cal.App.5th 17, 50, fn. 9 [the reviewing court is not required to consider assertions unaccompanied by citations to the record or pertinent legal authority].)

We find no abuse of discretion by the trial court.

DISPOSITION

The appeal is treated as a petition for writ of mandate. The petition for writ is denied. NuSil to recover its costs.

DETJEN, Acting P. J.

WE CONCUR:

PEÑA, J.

SMITH, J.