Filed 12/4/18 Smith v. Garza CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARILYN SMITH, Plaintiff and Appellant, v. CARI EILEEN GARZA, Defendant and Appellant.	B270692 (Los Angeles County Super. Ct. No. GC045404)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, William D. Stewart, Judge. Reversed and remanded with directions.

Marilyn M. Smith, in pro. per.; Law Office of Ann C. Schneider and Ann C. Schneider for Plaintiff and Appellant.

Hanger Steinberg Shapiro & Ash, Marc S. Shapiro, Nicholas S. Walls; Carroll, Kelly, Trotter, Franzen & McKenna, Mark V. Franzen, Jennifer L. Sturges and Seth E. Workman for Defendant and Appellant.

Twenty-year-old Matthew Barker died on June 10, 2008, of an overdose of fentanyl, a potent prescription drug. Barker's mother, plaintiff Marilyn M. Smith, sued Cari Garza, Barker's former psychiatric nurse with whom plaintiff and Barker had been friendly, alleging wrongful death and dependent adult abuse. A jury found in favor of defendant on the latter claim, but concluded defendant, plaintiff, and Barker were all negligent and equally at fault for Barker's accidental death; plaintiff was awarded damages. The trial court denied defendant's motion for judgment notwithstanding the verdict (JNOV). Both sides appeal.[1]

Defendant contends the trial court erred in denying a number of her evidentiary objections and her motion for JNOV. Plaintiff cross-appeals, challenging the trial court's decision to permit the jury to assign comparative fault percentages to her and to Barker. We agree defendant owed Barker a duty of care not to supply him with fentanyl, but the implied jury finding that she did so was not supported by sufficient evidence. Accordingly, we reverse the judgment against defendant on the jury verdict and the order denying her motion for JNOV. We remand with directions to grant the JNOV motion and enter judgment in defendant's favor. Reversal renders plaintiff's cross-appeal moot.

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[1] This is the second appeal in this matter. In *Barker v. Garza* (2013) 218 Cal.App.4th 1449 (*Barker*), we affirmed the dismissal of the action as to decedent's sister, against whom defendant's demurrer was sustained without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. Overview

Barker, born in 1987, was diagnosed with a range of mental health issues at an early age, from ADHD to bipolar disorder. He began abusing street and prescription drugs and alcohol when he was a young teenager. Plaintiff testified "the influence of the friends and drugs [were] everywhere," and she could not keep Barker away from either. Plaintiff first called authorities to have her son placed on a Welfare and Institutions Code section 5150 (section 5150) hold when Barker was 15 years old.

The next five years were punctuated by multiple involuntary section 5150 holds, as well as involuntary and voluntary psychiatric hospitalizations and residential drug rehabilitation programs. Barker's "drugs of choice were primarily marijuana, alcohol, cocaine and methamphetamine." He also used oxycontin and LSD.

When Barker turned 18, plaintiff, an attorney, petitioned the superior court to be appointed as her son's conservator. The superior court agreed Barker was "gravely disabled" and ordered the appointment.[3] Plaintiff's conservatorship was renewed annually, and she remained Barker's conservator until his death.

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[2] Based on defendant's appeal from the denial of her motion for judgment notwithstanding the verdict, this section will focus on the trial evidence presented in plaintiff's case-in-chief. Our recitation of the facts in *Barker* was based on the allegations of the second amended complaint, the then-operative pleading, which we accepted as true for the purposes of that decision.

[3] The conservatorship gave plaintiff the ability to control Barker's money (he received social security disability income),

Plaintiff ensured Barker maintained his California driver's license, and she gave him a car. Barker was able to graduate from high school, albeit a year late. At the time of his death, he was enrolled in at least one 2008 spring semester class at Pasadena City College.

Dr. Joseph S. Haraszti was Barker's treating psychiatrist for the last four years of Barker's life.[4] He explained Barker's "grave disability was basically episodic. It would happen when he went off his medications or when he would become involved with drugs." Chemical dependency was one of Barker's diagnoses, along with bipolar disorder, ADHD, and anxiety.

In January 2008, Barker saw Dr. Haraszti, who administered a Risperdal Consta injection. According to the physician, patients should receive this injectable drug every two weeks. For patients who are not compliant with prescription pill regimes, this drug provides much needed stability. Patients who regularly receive the injections can expect Risperdal Consta to remain in their systems for six weeks after the last injection. For patients who have not been on the drug, it takes at least two injections and three weeks before mood stabilization may be achieved.

During the January 2008 appointment, Barker told Dr. Haraszti he intended to stop using drugs. The next day, however, Barker obtained a medical marijuana card from another doctor.

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enter into contracts on his behalf, and make all medical decisions, even over Barker's objections.

[4] After Barker's death, plaintiff represented Dr. Haraszti in a number of legal matters unrelated to this action or Barker's death.

Dr. Haraszti was not informed and would not have approved. According to him, "[m]arijuana . . . LSD . . . and also methamphetamine and cocaine, they can trigger a manic episode in someone who is bipolar."

Events spiraled downward beginning on Mother's Day in 2008. Barker had not seen his psychiatrist, received any Risperdal Consta injections, or taken his prescribed medication since January 2008. Barker lived with plaintiff, and she was aware he was off his medications. Plaintiff also knew Barker had a medical marijuana card and was using that drug because she read some of Barker's research on the subject and actually accompanied him to the medical marijuana dispensary on several occasions. Plaintiff was not "concerned [about Barker's mental health] because typical of his illness it goes in episodes. He'll have a long period of time where he'll be doing really good and then he'll fall apart."

On Mother's Day, however, Barker was agitated and unduly focused on his community college class. He would not go to brunch with plaintiff, his maternal aunt and cousin.

A day or two later, Barker had a violent argument with plaintiff after she told him he could not grow marijuana plants in the backyard. He threw a small household appliance, "shove[d]" plaintiff, and (apparently because her car was parked behind his in the driveway) took her car keys, and drove off.

Plaintiff had experienced Barker's explosive anger many times over the years, and she was frequently the target of his ire. She described them as "rage stages." Plaintiff was afraid to confront Barker when he was this angry, so she did not follow him.

Barker called plaintiff "quite a few" times the day he left. Barker finally told her he was in Santa Barbara. Plaintiff decided she could not go to Santa Barbara herself as Barker "was still a little agitated with [her] on the phone, and until [she] knew [Barker] could get to a place of being calm, [she] thought [her] presence, him seeing [her] again, might trigger another episode. Another bad reaction."

According to plaintiff, Barker "was completely paranoid that [she] was going to hospitalize him," as had happened on previous occasions. She contacted authorities in Santa Barbara and Los Angeles, but no one could provide any assistance, particularly when she was told that filing a stolen car report might provoke an armed response from law enforcement if Barker were apprehended.

Plaintiff turned to defendant for help. Plaintiff wanted defendant to go to Santa Barbara, see Barker, assess the situation, and hopefully bring her son and her car home or ensure he received any treatment he needed.

At that point, plaintiff and defendant had known each other for two years. Defendant had been the evening charge nurse in the locked unit at Aurora Las Encinas Psychiatric Hospital (Las Encinas), where Dr. Haraszti was on staff and Barker had been a patient on several occasions in 2006 and 2007. Barker's stays sometimes spanned several weeks at a time; and because plaintiff visited her son in the evenings, she and defendant became friends.

Plaintiff appreciated the care defendant gave Barker. Plaintiff represented defendant in a legal matter. Defendant even came by plaintiff's home on Barker's birthday in 2007.[5]

When plaintiff told her son defendant would be coming to Santa Barbara, Barker asked his mother to send clothes, his cell phone charger, and a patch he had hidden in his bedroom. While still on the telephone with plaintiff, Barker told her where to find the patch. It was unopened and still sealed. Plaintiff recognized it was some kind of medicine, but not anything with which she was familiar. Plaintiff testified that "because of what my son told me I contacted [defendant] right away."

Plaintiff asked defendant, " 'did you sell [Barker] this patch for $50?' And [defendant] said, 'what patch?' And [plaintiff] said, 'it's a duragesic patch.' And [defendant's] response was, 'dura what? I've never heard of that.'[6] [¶] So that was it. [Defendant] said she knew nothing about it. Never — certainly never sold it to [Barker]. Didn't know what [Barker] was talking

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5 By the time of trial, however, plaintiff and defendant disagreed on most every facet of their relationship and communication, from how and when they met, the extent of their personal and professional friendship, whether defendant lied about the death of her son, whether plaintiff played tennis, and whether there was an heirloom quilt in plaintiff's car when Barker drove off. They disagreed on who broached the subject of defendant's driving to Santa Barbara and whether plaintiff's priority was Barker or her car. Plaintiff recalled defendant contacted her, but she did not explain how defendant knew Barker had driven off.

6 "Duragesic" is a brand name for a fentanyl transdermal patch.

about. [Barker] was obviously out of his mind." Plaintiff researched the patch and hid it so Barker could not find it upon his return.

Defendant drove up to Santa Barbara with her sister and Barker's clothes, but without the patch or the cell phone charger (plaintiff thought the inability to charge his phone would influence Barker's decision to return home).

Defendant saw Barker, but he would not return home with her, so defendant drove plaintiff's car home. Defendant reported to plaintiff that Barker "seemed fine" but was not ready to return.

Plaintiff eventually sent Barker a train ticket and he returned to the Los Angeles area on June 2, 2008. Plaintiff would not permit Barker to move back into her home until certain conditions were met, the primary one that Barker resume his prescribed medication regime. Barker chose to stay at the Pasada Motel in Pasadena. Plaintiff met him there and paid for a one-week stay.

One of the first things Barker asked for when he returned was the patch. Plaintiff falsely told him she no longer had it.

Barker saw Dr. Haraszti late the next evening, June 3. Barker was administered his first Risperdal Consta injection in more than four months.

Dr. Haraszti knew defendant had accompanied Barker to one appointment and thought it might have been this one, although he was not sure. If defendant was there, he was sure she did not arrive or leave with Barker. For the June 3 appointment, Barker rode his skateboard to the office and the psychiatrist drove Barker back to the Pasada Motel.

Plaintiff spoke with defendant on June 4 or 5. Defendant advised she would visit Barker. Plaintiff spoke with Dr. Haraszti and "assured [her]self" Barker did not need to be hospitalized.

Defendant saw Barker one time at the Pasada Motel no later than June 5. She went into his motel room, but saw no drugs. That was the last time defendant saw Barker. Defendant told plaintiff in a June 7 telephone call that Barker's mood swings had not yet stabilized and he should be hospitalized.

Defendant received texts from Barker after June 5, and spoke with him by telephone on June 7. Defendant texted Barker in the morning on June 10, before she knew he had died.

Plaintiff saw Barker each day until she left on the afternoon of June 6 to visit her daughter, who attended school in Utah. She returned June 8 and spent the evening with Barker. Barker was calm and upbeat.

Barker returned to Dr. Haraszti's office on June 7 or 8, but he did not have an appointment.[7] Dr. Haraszti was just pulling into the parking structure when he saw Barker on his skateboard. The physician asked Barker to stay and talk, but Barker said he had to go. Dr. Haraszti's staff told him Barker came into the office "somewhat agitated," spoke to plaintiff on his cell phone and was "somewhat upset."

Barker's agitation continued on June 9. He was angry and demanded that plaintiff give him a laptop. He texted plaintiff repeatedly, directed profanity at her, and insisted he needed her. When she did not come to his motel, he threatened to kill himself.

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[7] By the time of trial in 2015, Dr. Haraszti could not be sure of the date. In 2008, June 7 and 8 fell on Saturday and Sunday.

Plaintiff went to his motel, but not into his room. Barker appeared fine, and plaintiff left after approximately 20 minutes.

Barker's angry texts resumed. At one point in the late afternoon on June 9, Barker came to plaintiff's office, still angry. They had a confrontation in the lobby; but Barker calmed down and mother and son made plans to meet the next day and go to his school to resolve the incomplete grade Barker expected because he missed an examination when he was in Santa Barbara. It was the last time plaintiff saw Barker alive.

Barker's body was found in his motel room on June 10. Various drugs and paraphernalia, including a fentanyl transdermal patch wrapper—but not the patch itself—were in Barker's motel room. The supplemental death certificate listed Barker's death as an accidental acute fentanyl ingestion. The level of fentanyl in Barker's system was many times higher than a lethal dose. A coroner investigator dispatched to Barker's room testified during the defense case that the motel was "low budget, rundown, all of [her] other cases there had all been drug overdoses. . . . [A]t [the] time it was known for drug use."

The fentanyl wrapper found in Barker's motel room was identical to the sealed wrapper containing the fentanyl patch that plaintiff retrieved from Barker's room the previous month. They bore the same "batch" number and expiration date.

Fentanyl with that batch number was never traced to any supply source. As a schedule II, highly addictive drug, it was closely inventoried and monitored at Las Encinas, the psychiatric hospital where defendant previously worked. None was reported missing from that facility. There was no testimony as to the number of patches that were manufactured with the same batch number and expiration date.

Called as a witness by plaintiff under Evidence Code section 776, defendant denied a sexual relationship with Barker and denied she ever stole or illegally procured drugs or supplied drugs of any kind to Barker.

II. Pleadings, Pretrial, and Trial

Plaintiff and her daughter sued defendant and Robin Motola, another Las Encinas nurse.[8] The operative pleading was the third amended complaint; the surviving causes of action were for wrongful death and dependent adult abuse. As noted, the daughter was dismissed on a demurrer. (See fn. 1, *ante*.)

Plaintiff confirmed the wrongful death cause of action was not against defendant in her professional capacity or for nursing malpractice. She was sued only on a theory of ordinary negligence.

A number of motions in limine (MIL's) were argued on the record. As one would expect, the trial court granted some, denied some, and deferred others. The issues addressed in the MIL's recurred with considerable frequency during the trial.

For example, defendant sought to exclude four text messages sent from Barker's cell phone number to defendant's cell phone number on June 7. The texts read: "Can u bring those klons down 2nite," "Or [that] patch I already bought I could really use it," "Ey u need budda," and "I can get u narcus." The trial court ruled the texts were not hearsay and permitted them to be offered into evidence. With this ruling, Barker's cell phone and

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[8] The case against Motola proceeded by way of default. By the time of trial, Motola was living out of state. Portions of her deposition were read to the jury. Motola is not involved in this appeal, and the appellate record does not include a judgment against her.

the records of calls and texts to and from his numbers were presented to the jury.

There was no "chain of custody" for Barker's cell phones after his death; plaintiff had retained them. She first gave them to a tech person to examine (referred to at trial as "Cell Phone Mike"). In 2015, plaintiff gave the phone to her designated expert, Mark Eskridge, a licensed private investor specializing in "computer and cell phone forensic," in 2015. Eskridge testified he had no way to determine if text messages had been deleted from that cell phone and, if so, he added they might not be recoverable.

Defendant denied ever reading Barker's texts, and Eskridge testified there was no way to dispute that. Eskridge added, however, that within minutes of Barker's cell phone sending the texts, defendant's phone number registered as an incoming call to Barker's cell phone.

The trial court granted defendant's MIL to exclude hearsay statements from Barker to Joseph Davenport, who testified in his deposition that Barker said he had a sexual relationship with defendant. Davenport and Barker became friends after meeting at an "alumni" function for individuals who had successfully completed a residential drug rehabilitation program. They attended AA and NA meetings together until they stopped going to those and got "loaded instead."

When Davenport failed to appear pursuant to plaintiff's trial subpoena, the trial court permitted counsel to designate portions of his deposition to be read to the jury. Both sides did so. Although Davenport's denial in his deposition that he had ever witnessed Barker and defendant (who was 30 years older than Barker) engage in any sexual contact was read to the jury,

so were Barker's hearsay statements. Defense counsel did not object when plaintiff's counsel read the hearsay statements.

The trial court denied a defense MIL to prevent Dr. Haraszti from offering testimony that defendant and Barker had a sexual relationship. Dr. Haraszti also testified without objection that Barker told him he was "involved" with defendant, which the psychiatrist understood to mean they had a sexual relationship. He thought Barker told him this during his final appointment, on June 3, the week before Barker's death. Although a mandatory reporter when he learns such information, Dr. Haraszti never reported the conversation. Defendant does not challenge on appeal the MIL ruling concerning Dr. Haraszti's testimony.

Another MIL involved Barker's hearsay statements to plaintiff concerning the unopened fentanyl patch. Twice during plaintiff's direct examination, she repeated Barker's hearsay statement to her that defendant sold him the patch for $50. This contravened the trial court's MIL ruling. Both times, defendant objected and the testimony was stricken. Defendant did not ask for the trial court to admonish the jury to disregard the answer or to advise that the testimony was offered only to explain plaintiff's state of mind, i.e., why she looked for the patch. In any event, on cross-examination, defense counsel asked plaintiff, "you said [Barker] told [you] that you sold him a patch of duragesic, correct?" Without objection plaintiff responded, "yes."

Defendant was willing to stipulate the unopened fentanyl patch found in Barker's bedroom carried the same batch number and expiration date as the fentanyl wrapper found in Barker's room. Plaintiff declined to so stipulate, preferring instead to have Mark Chimarusti, an investigator with the California

Department of Consumer Affairs, testify. Plaintiff wanted Chimarusti to testify he was conducting a criminal investigation and defendant refused to provide finger and palm prints so he could determine if they were a match to prints found on the unopened fentanyl package.

The trial court conducted an Evidence Code section 402 hearing and determined the "refusal" characterization was not accurate and excluded the testimony pursuant to Evidence Code section 352. The trial court determined it would take too long and be too confusing for the jurors to attempt to explain why there was an investigation and that it apparently had been dropped.

The trial court did permit Chimarusti to identify himself and his job title and testify he had been conducting an investigation not prompted by plaintiff and the unopened fentanyl package and used wrapper bore identical numbers. Defendant was not mentioned in his testimony.

Finally, over defendant's objection, the trial court permitted the video deposition of plaintiff's expert, registered nurse Nancy Henry, who was unavailable to testify in person at trial. Nurse Henry testified her assignment was "to render opinions on the relationship that took place between [defendant] and . . . Barker [after he left Las Encinas] . . . as to whether that breached the standard of nursing ethics professional standards of conduct, as a registered professional nurse in the state of California." Nurse Henry concluded the relationship breached a nurse's ethical obligations, was inappropriate, and "contributed to [Barker's] demise." This expert had no information that defendant ever provided any drugs to Barker, but testified

defendant was in situations and environments with Barker where that could have happened.

After more than two weeks of testimony, the cause was submitted to the jury. Jurors initially announced they could not reach a decision on the wrongful death cause of action. The jury's verdict, in defendant's favor, on the dependent adult abuse cause of action was accepted. Counsel gave supplemental closing arguments on the wrongful death claim, and the jury resumed deliberations.

The jury found defendant was negligent and her negligence was a substantial factor in causing Barker's death. The jury awarded $650,000 in damages. The jury was not asked to find whether defendant provided Barker with the fentanyl that caused his death. The jury found Barker and Smith were negligent as well and assigned equal percentages of fault to the three of them. The court entered judgment in plaintiff's favor against defendant in the amount of $216,666.67.

Defendant filed a motion for JNOV. Plaintiff opposed the motion, and it was briefed by both sides. There is no reporter's transcript for the hearing on the JNOV motion, which the trial court denied.

Defendant appealed, asserting evidentiary error as well as the erroneous denial of her motion for JNOV. Plaintiff cross-appealed, challenging only the comparative fault findings against herself and Barker.

DISCUSSION

I. Reversal is Compelled

A. Standard of Review

While we agree evidentiary errors were made, it is not necessary to analyze each one to determine if—individually or

cumulatively—they were prejudicial. We begin our analysis instead with the denial of defendant's motion for JNOV and consider whether any substantial evidence supports the verdict against defendant. We will address various claims of evidentiary error as part of that analysis.

In this regard, we reject plaintiff's argument that defendant forfeited the challenge to the sufficiency of the evidence by filing a brief that ignored plaintiff's trial evidence. Defendant's brief is adequate to preserve the substantial evidence issue for appellate review.

Our standard of review after the denial of a motion for JNOV is the same as the trial court's: We examine the record, give all favorable inferences to the prevailing party, and determine if any substantial evidence or reasonable inferences from the evidence support the verdict. (*Pacific Corporate Group Holdings, LLC, v. Keck* (2014) 232 Cal.App.4th 294, 309.) We do not reweigh the evidence and we resolve evidentiary conflicts in plaintiff's favor.[9] (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320.)

It is of no analytical consequence that this is a circumstantial evidence case. Relevant circumstantial evidence may be sufficient to support a verdict, "even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548, overruled on another point in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548.) What is pivotal is whether the

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[9] Where plaintiff's witnesses offered testimony on cross-examination that conflicted with their testimony on direct examination or testimony given years earlier in depositions, we ignore the inconsistencies and rely on the evidence favorable to plaintiff.

verdict is supported by substantial evidence, i.e., "evidence which is reasonable, credible, and of solid value . . . such that some reasonable trier of fact could find that the judgment and each essential element thereof [were] established by the appropriate burden of proof." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 414 (*Rivard*).)

B. Analysis

Defendant was sued on the theory that her negligence led to Barker's death. "[T]he well-known elements of [every] negligence cause of action [are] duty, breach of duty, proximate cause and damages." (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) Defendant owed plaintiff a duty of care not to illegally supply Barker with fentanyl. The evidence was undisputed that Barker died from a fentanyl overdose and plaintiff sustained damages as a result of his death. The question for this court is whether substantial evidence supports the jury's finding that defendant breached her duty and supplied Barker with the fentanyl that caused his death.

Evidence produced in plaintiff's case-in-chief that was received without objection may be summarized as follows:

Fentanyl is a highly addictive opiate-based drug.

Barker was diagnosed with bipolar disorder at least a decade before his death. He was also diagnosed with chemical dependency, ADHD, and anxiety. With the exception of the single Risperdal Consta injection on June 3, one week before his death, he had not taken any prescribed medications for his disorders for more than four months before he died. During that period, however, he used marijuana. His psychiatrist testified Barker "probably was" abusing cocaine as well. A reasonable inference from the evidence was that Barker continued to abuse

street and prescription drugs during the months he was not taking the medication prescribed by Dr. Haraszti.

Barker hid an unopened fentanyl patch in his bedroom in plaintiff's home. The only inference from this evidence is that Barker obtained the patch illegally. Plaintiff produced this patch after Barker's death. Barker did not ingest this patch, and it did not contribute to Barker's death.

After Barker's death, the coroner investigator found a wrapper for a fentanyl patch in Barker's motel room. The wrapper bore the same batch number and expiration date as the unopened patch plaintiff found in Barker's room at home. Barker died from a fentanyl overdose. A reasonable inference from the empty fentanyl wrapper is that Barker ingested its contents in some manner, leading to his death.

Dr. Haraszti testified Barker, told him he was "involved" with defendant. Dr. Haraszti understood this meant Barker and defendant engaged in a sexual relationship.

Defendant never had access to fentanyl patches at work after she worked as a psychiatric nurse. Her mother-in-law was prescribed fentanyl patches in 2013.

Defendant never gave or sold a fentanyl patch to Barker. Defendant never stole or bought a fentanyl patch.

Plaintiff's evidence received over defense objections included the following:

Barker's cell phone records, which included the time and content of incoming and outgoing text messages, as well as the time and duration of telephone calls, were received in evidence over the defense objection that no foundation had been laid.

Other than the telephone calls and texts between plaintiff and Barker, the rest of Barker's cell phone records were not

properly authenticated and should not have been received into evidence. Plaintiff aptly argues, "[a] document can be authenticated by the testimony of a witness with knowledge." (*U.S. v. Workinger* (9th Cir. 1996) 90 F.3d 1409, 1415.) But as to those texts between Barker and everyone other than plaintiff, no one with knowledge offered any testimony. Defendant denied receiving and/or reading the texts, and plaintiff's cell phone expert agreed there was no way to verify on that model cell phone whether the sent text messages were opened or read.

The texts were not authenticated, and it was an abuse of discretion to receive them into evidence.[10] Their admission, however, was not prejudicial. The texts did not provide any evidence relevant to the question of whether defendant supplied Barker with the fentanyl patch he ingested. The text mentioning "tat [that] patch" could only refer to the patch plaintiff found in her home. Barker obtained that patch before he left for Santa Barbara and did not have on his return. That patch did not cause Barker's death.

Barker's conversation with plaintiff concerning the patch was also hearsay. Objections to this evidence were sustained on plaintiff's direct examination. Nevertheless, defense counsel brought up the point herself on plaintiff's cross-examination. Accordingly, defendant failed to preserve the objection for appeal.

Regardless, the hearsay does not provide substantial evidence of causation. As discussed above, the fentanyl patch Barker referred to in the conversation with plaintiff remained in plaintiff's possession and was produced at trial.

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[10] Finding no authentication, we do not address the hearsay arguments.

Defendant also failed to preserve any objections concerning Davenport's deposition testimony read to the jury. Defendant's brief does not include citations to the record to permit us to review this issue. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.)

While somewhat salacious in parts, Davenport's testimony offered nothing of substance in terms of whether defendant supplied the fentanyl patch Barker ingested. Davenport testified he and Barker drifted apart and he had not seen Barker for months before his death. On earlier occasions when he had seen defendant and Barker together, he never saw defendant act in a manner that could support a reasonable inference she was providing Barker with drugs. Davenport's marijuana testimony was directed more to Motola; but in any event, as previously discussed, Barker possessed a medical marijuana card in early 2008.

The trial court did not abuse its discretion in permitting witness Chimarusti, the investigator with the Department of Consumer Affairs, to testify that he conducts criminal administrative investigations. The sum of his testimony was that the investigator received the unopened fentanyl package from plaintiff and the wrapper from the coroner. They bore the same expiration date and what the witness referred to as "batch" number, although he did not know what that number meant. Chimarusti offered no testimony concerning defendant and said nothing that could support a reasonable inference that defendant provided Barker with the fatal fentanyl patch.

When advised of plaintiff's intention to play the video deposition of her retained expert, registered nurse Henry, defendant made Evidence Code section 352 and relevancy

objections and specified specific portions of the deposition to be excluded. The trial court overruled most of the objections, sustaining only those concerning whether defendant provided Barker with alcohol and engaged in a sexual relationship with him.

The expert testified plaintiff's inappropriate relationship with Barker was a substantial factor in his death. But that was a conclusory statement without any evidentiary support and essentially contradicted the undisputed finding that Barker died from a fentanyl overdose. Henry's testimony had no evidentiary value vis-à-vis the wrongful death claim.[11] She testified she had no information that defendant ever provided any drugs to Barker. Her testimony that defendant was in situations where that "could" have happened did not " ' "rise to the dignity of substantial evidence." ' " (*People v. Wright* (2016) 4 Cal.App.5th 537, 545 [" 'when an expert bases his or her conclusion on factors that are "speculative, remote or conjectural," or on "assumptions . . . not supported by the record," the expert's opinion "cannot . . . " and a judgment based solely on that opinion "must be reversed for lack of substantial evidence" ' "]; see also *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

We have examined the trial evidence and given all favorable inferences from it to plaintiff. The evidence was insufficient to support the jury's finding that defendant breached

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[11] We recognize wrongful death was not the only claim sent to the jury; it also considered whether defendant's actions constituted dependent adult abuse. Defendant did not clarify with the trial court whether the expert's testimony was offered for both theories and never asked for a limiting instruction.

a duty of care and provided Barker with the fentanyl that caused his death. (*Rivard, supra,* 164 Cal.App.3d at p. 414.)

II. Cross-Appeal is Moot

Because we hold the verdict against defendant was not supported by substantial evidence and must be reversed, plaintiff's cross-appeal on the comparative fault issue is moot.

DISPOSITION

The judgment and the trial court's order denying defendant's motion for JNOV are reversed. The matter is remanded to the trial court with directions to grant defendant's motion for JNOV and enter judgment in favor of defendant. Defendant is awarded costs on appeal.

DUNNING, J.*

We concur:

BIGELOW, P. J.

RUBIN, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.