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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GIANA BRELIANT,

Plaintiff and Appellant,

v.

STEPHEN S. MARMER, M.D. et al.,

Defendants and Respondents.

B261351

(Los Angeles County
Super. Ct. No. EC057245)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Donna Fields Goldstein, Judge. Affirmed.

Arent Fox LLP, Stephen G. Larson, Steven E. Bledsoe and R.C. Harlan; Larson
O'Brien LLP and Stephen G. Larson for Plaintiff and Appellant.

La Follette, Johnson, De Haas, Fesler & Ames, Don C. Fesler, Jason James
Scupine and David J. Ozeran for Defendant and Respondent Eric A. Lifshitz, M.D.

Reback, McAndrews, Kjar, Warford, Stockalper & Moore LLP, Thomas Francis
McAnderson and Tina E. Lee, for Defendant and Respondent Stephen S. Marmer, M.D.

Bonne, Bridges, Mueller, O'Keefe & Nichols and Joel Bruce Douglas for
Defendant and Respondent Gary M. Chase, M.D., by and through his guardian ad litem,
Phyllis Chase.

In this action for wrongful death based on medical malpractice, plaintiff Gianna Breliant appeals from a judgment in favor of defendants Stephen S. Marmer, M.D., Gary A. Chase, M.D., and Eric A. Lifshitz, M.D. The trial court granted summary judgment based on plaintiff's inability to show that defendants' alleged breaches of the standard of care were a causal factor in the death of plaintiff's daughter, the late Amy Breliant, from an overdose of heroin.¹ Finding no triable issue of material fact, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Amy died from an overdose of heroin while living in a "safe house" run by Warren Boyd, an "interventionist," on September 21, 2010. Amy "was found dead in her bedroom, behind a locked door, . . . with the heroin-tainted syringe still in her hand, amid heroin and drug paraphernalia."

Plaintiff filed the present action against Amy's psychiatrists, Drs. Marmer, Chase, and Lifshitz, in November 2011 (No. EC057245). Plaintiff filed a related action in August 2012 against Boyd, Boyd's business entity Commerce Resources International, Inc., Darryl Fujihara, Seacliff Recovery Center, Carrie Fisher, and Jacob Schmidt (No. EC059174).²

The complaint in the present case alleges that Amy became a patient of Dr. Marmer in January 2007, and of Drs. Lifshitz and Chase in January 2010; each defendant agreed to treat Amy's "mental, psychiatric, psychological and emotional condition, her multi-substance abuse and addictions, and her general medical condition"; and as a result of the "negligence, carelessness and unskillfulness of said defendants, [Amy] died."

¹ Because of their same surname, we refer to Gianna Breliant as plaintiff and Amy Breliant as Amy. No disrespect is intended.

² The facts underlying the case against Boyd are set out in our prior opinion, *Breliant v. Boyd* (Dec. 22, 2014, B251349 [nonpub. opn.]).

Plaintiff asserts that Drs. Marmer, Liftshitz, and Chase breached the prevailing standard of care in their treatment of Amy by failing to “(1) take a complete history, (2) make an accurate or complete diagnosis, (3) have a clear treatment plan, (4) coordinate care and communicate with other doctors, (5) take blood tests, and/or (6) follow up for suicidal ideation on a regular basis for Amy, who was depressed, on antidepressants and abusing drugs.” In addition, she contends that Drs. Marmer and Chase breached the standard of care by prescribing benzodiazepines for Amy without providing for appropriate monitoring.

Defendants moved for summary judgment based on two alternative theories: plaintiff is unable to prove either that the psychiatric care and treatment they provided fell below the prevailing standard of care for psychiatrists, or that their alleged breaches of the standard of care played a causal role in Amy’s death. The trial court rejected the first theory, which is not at issue on appeal.³ This appeal challenges the second theory which formed the basis of the summary judgment ruling.

The evidence is undisputed that Dr. Chase prescribed three medications for Amy—Lorazepam and Clonazepam, which are benzodiazepines, and Citalopram, an antidepressant—and that bottles containing these medications were found on a table in the home where Amy died.⁴ Joseph Dolo, who lived in the home with Amy, testified at deposition that “Amy took her medicine three times a day” during the 14-day period before her death.⁵

³ The trial court found that Richard Ruffalo, M.D., who is not a psychiatrist, was not qualified to render an expert opinion on the applicable standard of care for the psychiatric care and treatment provided to Amy, and excluded that portion of his declaration. Defendants do not challenge that ruling.

⁴ Of the 30 Lorazepam tablets that were issued on September 17, 2010, 14 remained in the bottle. Of the 90 Clonazepam tablets that were issued on September 8, 2010, 29 tablets were still in the bottle.

⁵ According to his testimony, Dolo kept his and Amy’s prescription medications in a locked box. As was their custom, he brought the box to Amy three times a day, and she

Deputy medical examiner Anjay Panchal, M.D., performed an autopsy for the Los Angeles County Coroner. He collected blood and tissue samples, and requested toxicology tests for heroin and the three prescription medications found in the home. As will be explained, the coroner's laboratory performed only the toxicology test for heroin; the laboratory did not run the additional tests for the three prescription medications.⁶ Based on the autopsy findings and toxicology test results for heroin, Dr. Panchal attributed Amy's death to heroin intoxication, and listed this as the cause of death on the death certificate.

Daniel Anderson, a senior toxicologist at the coroner's laboratory, approved the decision not to run the additional tests for the three prescription medications. Mr. Anderson testified at deposition that heroin is an unstable substance which quickly metabolizes into 6-MAM, and then into morphine. Because heroin metabolizes so quickly, it usually is not found in the bloodstream during an autopsy. The fact that 6-MAM was detected in Amy's blood means that her death occurred quickly. The presence of 6-MAM in Amy's blood led to the finding of death by heroin intoxication, and obviated the need to test for 6-MAM in other bodily fluids (the procedure would have been to test the vitreous eyeball fluid next, and then the urine). Based on the presence of 6-MAM in Amy's blood, Mr. Anderson concluded she had injected a "very large" amount of heroin and died before it metabolized.

removed her own prescription medications from the box. At different times, the box contained one, two, or three bottles of Amy's prescription medication.

Dolo testified in relevant part: "And you're asking me did I see her [during] those [last] 14 days [of her life] take any of those medicines in those 14 days? Yes." "Q Did you see her on any one of those 14 days take one of the medicines three times in a day? [¶] MR. DOUGLAS: It's still vague and ambiguous as you framed it. [¶] A. She took her medicine three times a day."

⁶ On January 5, 2012, Amy's family had her body exhumed for a private autopsy. The private autopsy found no Clonazepam, Lorazepam, or other benzodiazepine in her system, which was not surprising because those substances break down over time. Although the medical examiner's office retained Amy's blood samples for the prescribed period, the family did not request that her preserved blood samples be tested for Clonazepam, Lorazepam, or other benzodiazepines.

Mr. Anderson described the decision not to perform the additional toxicology tests for the three prescription medications as an administrative decision that was influenced by factors such as efficiency, costs, and time management. In the toxicology report that was prepared in response to Dr. Panchal's request, Mr. Anderson indicated the additional tests were unnecessary because, in light of the drug paraphernalia (a syringe was found in Amy's hand), Amy's history of IV drug abuse, and the findings of 6-MAM and morphine in her bloodstream, the cause of death was heroin intoxication.

Both Mr. Anderson and Dr. Panchal were questioned during their depositions about the effect that a positive test result for the prescription medications would have had on their determination that heroin was the cause of Amy's death. Dr. Panchal prefaced his answer by noting that without the additional toxicology tests, he could not say whether prescription medications were present in Amy's blood, and mere possession does not necessarily mean the medications were taken near the time of death ("Some people have medications, and they don't take them. So I have no idea."). Dr. Panchal then responded that assuming Lorazepam was detected in the blood, it would have had an effect on respiratory depression; and given the known synergistic effects of Lorazepam and heroin, if 99 percent of the respiratory depression could be attributed to heroin, and 1 percent to Lorazepam, he would have written in the autopsy report that death was caused by the effects of multiple drugs, without quantifying the effect of each drug.

Mr. Anderson provided a similar response to the hypothetical question. He agreed that heroin and the three prescription medications found at the scene "can all cause some sort of respiratory depression, CNS [central nervous system] depression." He stated that if test results showed that both heroin and the prescription medications were present in the bloodstream, it would be difficult to exclude the prescription medications as a contributing causal factor.

Defendants provided the declaration of Richard Ruffalo, M.D.⁷ to explain why the presence of 6-MAM in Amy's bloodstream ruled out the possibility that the prescription medications played a causal role in her death. According to Dr. Ruffalo, heroin metabolizes into 6-MAM, which has a half-life of 5 to 10 minutes and metabolizes into free morphine. Because it breaks down so quickly, 6-MAM is rarely found in the bloodstream during an autopsy. Its presence in Amy's blood is "dramatic and compelling proof" that 6-MAM, which is more potent than heroin or morphine, entered her brain and had a clinical effect similar to general anesthesia, which can induce sleep within 30 to 45 seconds.

Dr. Ruffalo stated the amount of free morphine found in Amy's blood indicated there was "quite a lot" of heroin in her system. Given that Amy's blood contained both morphine and 6-MAM, Dr. Ruffalo concluded "the cause of death was unquestionable—heroin intoxication, killing her very quickly upon injection." In his expert opinion, Amy's death "happened so quickly [that] she was found dead with the syringe still in her hand! This plainly reflects that she quickly lost consciousness, stopped breathing, and rapidly succumbed to the powerful, lethal dose of heroin she injected, that was rapidly metabolized into 6-MAM that rapidly entered her brain." Based on the amounts of morphine and 6-MAM found in the blood, Dr. Ruffalo found no reasonable medical basis to attribute the cause of death to the prescription medications.

As to the contention that defendants had failed to prevent Amy's addiction from worsening, defendants relied on Dr. Marmer's medical records that Amy often said she had no intention of giving up drugs. At deposition, Dr. Marmer testified that in his

⁷ In addition to his medical degree, Dr. Ruffalo has a doctorate (Pharm. D.) in clinical pharmacy and served as a post-doctoral resident in clinical pharmacology and therapeutics at the Los Angeles County/U.S.C. School of Medicine. He is a physician, surgeon, and anesthesiologist; he is an assistant professor of anesthesiology at U.C.L.A. School of Medicine; and he is a former assistant professor of clinical pharmacy and pharmacology at U.S.C. School of Pharmaceutical Sciences, and a former assistant professor of medicine at Loma Linda School of Medicine.

opinion, Amy was a refractory drug addict, meaning she did not want to get well, she lived for drugs, and her addiction was a potentially fatal disease.

B. Plaintiff's Evidence

Plaintiff provided the declaration of psychiatrist Brian Jacks, M.D. It was his opinion that defendants breached their duty of care to Amy, and that their negligence was a substantial causal factor in her death.

Dr. Jacks criticized defendants for not keeping contemporaneous records of their sessions with Amy, not following up on Amy's suicidal ideation even though she was depressed and taking anti-depressant medications, and not monitoring her benzodiazepines. Dr. Jacks opined that drug addicts need a stable and competent treatment plan to prevent their condition from worsening, and their medications need to be monitored to prevent their addiction from escalating; if their addiction escalates, they are at risk of overdose, injury, and death. He stated that defendants should have provided a supportive treatment program to prevent further deterioration, treated the underlying psychiatric causes of her addiction, and stabilized her addiction. He concluded there was a reasonable medical probability that if defendants had provided a suitable treatment program for Amy's psychiatric problems, she would have been able to maintain or reduce her drug abuse without dying.⁸

⁸ In his declaration, Dr. Jacks stated as to causation:

"27. Here, effective treatment was lacking to control and monitor Amy Breliant's drug abuse. More specifically, the failures of Dr. Chase, Dr. Marmer, and Dr. Lifshitz to: (1) take a complete history, (2) make an accurate or complete diagnosis, (3) have a clear treatment plan, (4) coordinate care and communicate between themselves, (5) take blood tests, and/or (6) follow up for suicidal ideation on a regular basis for Amy Breliant, who was depressed, on antidepressants and abusing drugs, led to and contributed to Amy Breliant's unfortunate death on September 21, 2010 to a reasonable degree of medical probability.

"28. The unmonitored prescription of benzodiazepines by the Defendant doctors to Amy Breliant, and the synergistic effects of those benzodiazepines with heroin, was also a significant, substantial factor in causing Amy Breliant's death to a reasonable degree of medical probability.

"29. At the time of her death and up to that point, it was in all reasonable medical probability unlikely that Amy Breliant would have completely stopped abusing drugs, but

As to the use of benzodiazepines to treat drug addiction, Dr. Jacks explained that benzodiazepines interact with other medications to “unwittingly” cause added intoxication that can make it easier for a patient to overdose and die. Dr. Jacks concluded that Amy’s unmonitored use of benzodiazepines, and the synergistic effects of combining benzodiazepines with heroin, were causal factors in her death.

C. Trial Court’s Ruling

The trial court excluded Dr. Ruffalo’s opinion on the standard of care of psychiatrists, finding he was not qualified as an expert witness on that topic. The court found that although the declaration by Dr. Jacks was sufficient to support a finding that defendants had breached the duty of care in providing psychiatric care and treatment for Amy, there was no substantial evidence that their alleged breaches were a causal factor in Amy’s death. The court excluded Dr. Jacks’ opinion that defendants’ failure to conform to the standard of care was a causal factor in Amy’s death, finding his opinion on that issue was “unsupported speculation.”

The court found there were numerous possible causes for Amy’s death, including her long history of substance abuse, her “love” of heroin, her lack of desire to change, and the large quantity of heroin that she had injected on the night of her death. Because there were so many possible causes, the court concluded “the possibility that proper psychiatric care and treatment would have prevented the overdose does not rise to the level of probable cause to make it more likely than not that Amy Breliant died as a result of the Defendant’ failure to provide proper psychiatric care.”

with careful proper psychiatric care and treatment, it was also to a reasonable medical probability unlikely that she would have overdosed and died. With careful supportive care, and if not for the breaches of the standard of care as described above, Amy Breliant would have, to a reasonable degree of medical probability, been able to maintain and/or reduce her drug use without dying.

“30. Based on the foregoing, as well as my education, training and experience, it is my expert medical opinion that the care and treatment provided by Dr. Chase, Dr. Marmer, and Dr. Lifshitz, and each of them, fell below the standard of care, and that such breach of the standard of care caused or contributed to the death of Amy Breliant to a reasonable degree of medical probability.”

The court found that Dr. Ruffalo was qualified to provide expert opinion testimony on matters in this case related to pharmacology, toxicology, drug abuse, drug overdose, and cause of death. Given the absence of expert testimony to contradict Dr. Ruffalo's explanation that heroin alone was sufficient to cause Amy's death, his opinion that there was no reasonable medical basis to attribute the cause of death to the prescription medications was unrefuted.

Finding no triable issue of material fact, the court granted the motion for summary judgment. This timely appeal followed.

DISCUSSION

A defendant moving for summary judgment has the initial burden of showing that a cause of action has no merit. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that one or more material facts exist as to that cause of action. (*Ibid.*)

“In determining whether the parties have met their respective burdens, the court must ‘consider all of the evidence’ and ‘all of the inferences reasonably drawn therefrom,’ and ‘must view such evidence [citations] and such inferences [citations] . . . in the light most favorable to the opposing party.’ (*Aguilar [v. Atlantic Richfield Co. (2001)] 25 Cal.4th [826,] 844–845.*) ‘There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ (*Id.* at p. 850, fn. omitted.)” (*Powell v. Kleinman (2007) 151 Cal.App.4th 112, 121–122.*) We review the trial court's summary judgment ruling de novo. (*Id.* at p. 122.)

Plaintiff argues that summary judgment was improper for two principal reasons. First, the “testimony established the synergistic, lethal effect of combining benzodiazepines and heroin, particularly where the patient is receiving sub-standard medical treatment.” Second, there was sufficient evidence to support a finding that, in the absence of the negligent psychiatric care and treatment provided by defendants, Amy

“would have ‘been able to maintain and/or reduce her drug abuse without dying.’” We disagree.

The forensic evidence that Amy’s death was due to heroin intoxication was sufficient to shift the burden to plaintiff to show there were benzodiazepines in Amy’s system, and this was a substantial factor in causing her death. On this issue, plaintiff’s expert, Dr. Jacks, provided no testimony as to the amount of benzodiazepines she would have had to consume and how soon before death she would have had to consume them in order to create a synergistic effect with heroin, resulting in death. Even assuming there were benzodiazepines in her blood, the expert opinion of Dr. Ruffalo that heroin alone was sufficient to cause Amy’s death was not refuted. Dr. Panchal did not contradict Dr. Ruffalo’s testimony on this point. Although Dr. Panchal testified that heroin combined with benzodiazepines could produce a synergistic effect, he could not quantify the amount of medication needed to produce that effect.

Mere possibility alone is not sufficient to establish a prima facie case in a medical malpractice action. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402–403 (*Jones*).) On this record, the benzodiazepines were not a causal factor in death because the heroin would have caused death regardless of the benzodiazepines. (See *id.* at pp. 402–403.)

Plaintiff argues there is substantial evidence to allow a jury to infer that absent defendants’ breaches of the duty of care in providing psychiatric treatment to Amy, there is a reasonable medical probability that her heroin usage would have remained at a non-lethal level. She points out that a cause of death can be a substantial factor even if not the only factor. (See *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1049–1500.)

The trial court excluded Dr. Jacks’ opinion—that defendants’ breach of the standard of care caused Amy to use increasingly larger doses of heroin until she died—as speculative. Plaintiff contends the exclusion of his expert opinion was erroneous. We do not agree.

Under Evidence Code sections 801, subdivision (b), and 802,⁹ “the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative.” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771–772 (*Sargon*).) To perform this function, the trial court must first determine whether the expert’s opinion is “founded on sound logic.” (*Id.* at p. 772.) Where an expert’s opinion “is based on a leap of logic or conjecture,” a trial court may exercise discretion to exclude the expert’s opinion as speculative. (*Ibid.*)

“[T]he plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is *more probable than not* the negligent act was a cause-in-fact of the plaintiff’s injury.” (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1119 (*Jennings*).) Dr. Jacks’ recitation of the correct standard for causation—to a degree of reasonable medical probability (*Jones, supra*, 163 Cal.App.3d at p. 403)—does not cure the lack of evidentiary support. Because even first-time users may die from an overdose, the fact that Amy died does not indicate her drug use increased, decreased, or remained constant before death. If Amy’s consumption of

⁹ “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: . . . (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.” (Evid. Code, § 801, subd (b).)

“A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.” (Evid. Code, § 802.)

heroin did not escalate—and there is no evidence cited by Dr. Jacks on that issue—his opinion that defendants caused the escalation has no factual basis.

Plaintiff’s reliance on several medical malpractice actions—*Espinosa v. Little Co. of Mary Hospital* (1995) 31 Cal.App.4th 1304 (*Espinosa*),¹⁰ *Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735 (*Uriell*),¹¹ *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075 (*Mayes*)¹²—is misplaced. In each case, there was no dispute as to the physician’s causal role in the patient’s injury, and admissibility of expert testimony on causation was not at issue. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [appellate decision provides authority only for “points actually involved and actually decided”].)

Plaintiff has not shown that exclusion of Dr. Jacks’ opinion as speculative constituted an abuse of discretion. (See *Sargon, supra*, 55 Cal.4th at p. 772.) Because

¹⁰ *Espinosa, supra*, 31 Cal.App.4th 1304 involved a malpractice action against an obstetrician and hospital based on the birth of a baby with brain damage. Three possible causes of brain damage were: mother’s use of lithium, which predated the hospital’s involvement; doctor’s and hospital’s failure to identify and respond to baby’s depressed heart rate; and fetal abnormalities. Each factor played a causative role that plaintiff’s expert could not quantify. Nonsuit was granted for the hospital because, according to plaintiff’s expert, it was not possible to quantify the hospital’s responsibility for the damage in relation to the damage caused by other factors not caused by the hospital’s actions. The appellate court reversed, holding that the inability to apportion a percentage fault to the hospital is immaterial for purposes of causation. (*Id.* at p. 1317.)

¹¹ In *Uriell, supra*, 234 Cal.App.4th 735, the plaintiff sued a university hospital that employed the physicians who negligently reviewed the mammogram and ultrasound reports for the plaintiff’s wife (patient) without finding a cancerous growth. (*Id.* at p. 741.) The jury found for the plaintiff, and the appellate court affirmed, finding the cancer and the hospital’s negligence were concurrent causes of the patient’s death. (*Id.* at pp. 746–747.)

¹² In *Mayes, supra*, 139 Cal.App.4th 1075, a post-surgical bowel obstruction was misdiagnosed as a pulmonary embolism, resulting in the wrong treatment and death of the patient. The plaintiffs prevailed in their malpractice suit against the medical personnel involved in the patient’s treatment. The court of appeal affirmed, holding that there was no evidentiary support for the defendants’ theory that the patient would have died regardless of the misdiagnosis. (*Id.* at p. 1097.)

his opinion is speculative, it has no evidentiary value (*Jennings, supra*, 114 Cal.App.4th at pp. 1117–1118 [expert’s conclusory opinion does not help jury make findings, “but instead supplants the jury by declaring what occurred”]) and does not support a finding of causation. (*Spinner v. American Broadcasting Companies, Inc.* (2013) 215 Cal.App.4th 172, 183 [conclusory assertions do not raise issues of fact]; *Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1371 [triable issue of material fact exists only if evidence would allow reasonable juror to find underlying fact in favor of party opposing summary judgment].)

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.