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CASENOTE: TRIAL COURT GRANT OF DEFENDANTS MSJ AFFIRMED. MEDICAL EXPERT NOT QUALIFIED ON CAUSATION; MAY NOT SIMPLY REGURGITATE STUDIES HE READ

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

JOELENA WILSON, et al.,

Plaintiffs and Appellants,

v.

McKESSON CORP., et al.,

Defendants and Respondents.

B266990

(Los Angeles County
Super. Ct. Nos.
BC485295, BC485366,
BC485367)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed.

Girardi/Keese, Keith Griffin; Law Offices of Martin N. Buchanan and Martin Buchanan for Plaintiffs and Appellants.

Ice Miller, Katherine D. Althoff, Amy K. Fisher; King & Spalding, Peter A. Strotz, Paul R. Johnson and Cameron J. Hoyler for Defendants and Respondents.

INTRODUCTION

Plaintiffs are consumers who sued Defendants AstraZeneca Pharmaceuticals LP and McKesson Corporations, the companies that sell and market the drug Nexium, for negligence, fraud, and products liability. Nexium is a proton pump inhibitor (PPI) medication that suppresses acid in the stomach and treats complications from peptic ulcers and severe gastric esophageal reflux disease. Plaintiffs alleged that ingestion of Nexium causes bone deterioration, osteoporosis, or bone fractures.

Plaintiffs appeal from the trial court's ruling granting Defendants' motion for summary judgment on the ground that Plaintiffs could not prove general causation after the court excluded testimony from Plaintiffs' medical expert. The sole issue on appeal is whether the trial court abused its discretion when it concluded Plaintiffs' expert was not qualified to opine on the relationship between PPIs and bone fractures and the expert's opinion amounted to inadmissible guesswork. We affirm as Plaintiffs' expert was not qualified to provide an opinion on causation.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs, 204 people in total, filed three lawsuits against the Defendants in Los Angeles County Superior Court, which were consolidated into one case. Plaintiffs alleged that they suffered injuries, including bone deterioration, osteoporosis, and fractures, as a result of taking Nexium. Other individuals simultaneously brought a federal action against Defendants alleging similar injuries and causes of action.

Plaintiffs designated Dr. Sonny Bal as their general causation expert and produced his expert report in both the present action and in the related federal action. Dr. Bal is an orthopedic surgeon who specializes in hip and knee replacements. By his own admission, Dr. Bal lacks any experience in the field of epidemiology,¹ and is not an epidemiologist, bone biologist, or gastroenterologist.² Based on his review of epidemiological studies published in medical literature, Dr. Bal opined in his three-page report that proton pump inhibitors cause fractures by compromising calcium intake.

In March 2014, the federal defendants moved to exclude the testimony of Dr. Bal and for summary judgment based on lack of evidence of general causation. In September and October 2014, the federal court granted the defense motion to exclude Dr. Bal's opinions as unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579. The federal court also granted Defendants' motion for summary judgment based on the absence of general causation evidence. The federal plaintiffs appealed the judgment and the Ninth Circuit affirmed.

¹ "Epidemiology is the branch of medical science that studies the distribution of diseases in populations and the factors influencing the occurrence of disease by time, place, and persons." (2 O'Reilly, *Toxic Torts Prac. Guide* (2016) § 16:5.)

² Gastroenterology is "a branch of medicine concerned with the structure, functions, diseases, and pathology of the stomach and intestines." (Merriam-Webster's Online Dict. (2016) <[https:// www.merriam-webster.com/dictionary/gastroenterology](https://www.merriam-webster.com/dictionary/gastroenterology)> [as of January 24, 2017].)

In January 2015, Defendants in the present case also moved to exclude Dr. Bal's expert opinion and moved for summary judgment.³ Defendants asserted that Dr. Bal was unqualified because he lacked special expertise in epidemiology and the metabolism of PPIs, his opinion failed to assist the trier of fact in determining whether Nexium caused the injuries, and his opinion lacked foundation.

The trial court granted the motion to exclude Dr. Bal's opinion testimony, finding that (1) Dr. Bal was not qualified to give an expert opinion on causation⁴ and (2) the basis of Dr. Bal's opinion was unsound. As to the expert qualifications issue, the trial court stated Dr. Bal was not "qualified to opine on the relationship between proton pump inhibitors and fractures." The court found: "Here, Bal did not testify that he has education on, experience with, observation or, . . . association with epidemiology, such that he would be qualified to opine on the relationship between proton pump inhibitors and fractures. In oral argument, [Plaintiffs'] counsel was unable to say whether Bal has taken even one course in statistics."

As to foundation, the court concluded that Dr. Bal's inference of general causation amounted to "guesswork" and was the

³ Plaintiffs in the state action continued to rely on Dr. Bal and never moved to revise their expert designation. Dr. Bal was the sole expert provided by Plaintiffs on the issue of general causation.

⁴ Plaintiffs assert that the trial court "did not definitively decide[] whether Dr. Bal was qualified to render an expert opinion on general causation." This is clearly contrary to the record, in which the trial court concluded that "Bal's testimony is inadmissible" after explaining that Dr. Bal did not provide a basis for the court to conclude he was qualified to opine on the relationship of proton pump inhibitors and fractures.

type of expert testimony that “requires a ‘leap of logic or conjecture’ ” that is properly excluded under the California Supreme Court’s decision in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*). The trial court explained that Dr. Bal admitted the “studies on which he relies show an association between proton pump inhibitors and fractures, but [did] not demonstrate that proton pump inhibitors cause fractures.” The court also stated that although Dr. Bal infers that PPIs cause fractures by compromising calcium intake, “he admittedly [did] not understand how proton pump inhibitors would compromise calcium intake, or how Nexium would compromise calcium intake in comparison to other proton pump inhibitors.” The court further stated that Dr. Bal “testified that he did not [know] how . . . particular proton pump inhibitors are metabolized, how genetic variance in patients would affect their use of different proton pump inhibitors, whether particular proton pump inhibitors had different half-lives than others, whether particular proton pump inhibitors had different bioavailability, or how the plasma concentrations over time would vary with repeated doses between different proton pump inhibitors.” In addition, Dr. Bal failed to seriously evaluate any of the factors relevant to determining whether he could infer that Nexium causes bone deterioration, osteoporosis, or bone fractures.

The trial court granted Defendants’ motion for summary judgment because Plaintiffs no longer had evidence of causation. Plaintiffs appeal.

DISCUSSION

The sole issue on appeal is whether the court properly excluded Dr. Bal's opinion on general causation, the absence of such evidence being the basis for summary judgment. In analyzing the admissibility of the expert opinion, the trial court is tasked with determining whether the expert witness is qualified pursuant to Evidence Code⁵ section 720 to testify about the subject matter and whether the foundation of the expert opinion is sound pursuant to sections 801 and 802. Here, the trial court excluded the opinion both because the expert witness was unqualified and because foundation of his opinion was unsound.

We review the court's decision excluding expert opinion for abuse of discretion. (*Sargon, supra*, 55 Cal.4th at p. 773.) A trial court abuses its discretion when it makes an unreasonably irrational or arbitrary ruling in the context of the applicable legal principles. (*Ibid.*)

1. The Court Did Not Abuse Its Discretion in Finding that Dr. Bal Was Not Qualified to Testify as to Causation

Before expert opinion testimony may be offered, the expert must be shown to have "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (§ 720, subd. (a).) These qualifications "may be shown by any otherwise admissible evidence, including his own testimony." (§ 720, subd. (b).) "[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony." (*People v. Hogan* (1982) 31 Cal.3d 815, 852 (*Hogan*), disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) Consequently, "the field of expertise must be carefully distinguished and limit-

⁵ All subsequent statutory references are to the Evidence Code unless indicated otherwise.

ed” (*People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 37), and “[q]ualifications on related subject matter are insufficient” (*Hogan*, at p. 852).

“Whether a person qualifies as an expert in a particular case . . . depends upon the facts of the case and the witness’s qualifications.” (*People v. Bloyd* (1987) 43 Cal.3d 333, 357.)

“[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth.’” (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 (*Lattimore*).

“The essential questions which must be favorably answered to qualify a witness as an expert are two: Does the witness have the background to absorb and evaluate information on the subject? Does he have access to reliable sources of information about the subject? Two aspects of the witness’s history are thus involved: the first, a subjective aspect, the capacity of the witness to understand and report; the second, an objective aspect, the witness’s access and exposure to relevant data on the subject matter on which his opinion is sought.” (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 658.) We focus on the former, as our review of the record indicates that Dr. Bal lacked the background to evaluate information on the subject of proton pump inhibitors causing fractures.

Plaintiffs contend Dr. Bal was qualified to offer his opinion as to causation (i.e. the relationship between proton pump inhibitors and bone deterioration, osteoporosis, and bone fractures) because he is “an orthopedic surgeon who regularly treats bone fractures, a professor of orthopedic surgery, a trained physician, and the author of numerous scientific articles in the field of orthopedics.” Plaintiffs produced Dr. Bal’s deposition testimony

and his curriculum vitae to show his experience and training as an orthopedic surgeon.

As noted above, the expert's qualifications must be related to the particular subject upon which he is giving expert testimony. The medical fields at issue in his expert opinion involve epidemiology, bone biology, endocrinology, gastroenterology, and vitamin and mineral metabolism. The testimony specifically involved the impact of PPI ingestion on bone integrity.

Yet, there is no evidence in the record that Dr. Bal had any education on, experience with, observation of, or association with epidemiology (or any of the above mentioned fields) or the study of PPIs (let alone the study of PPIs in the context of bone deterioration and fractures). Dr. Bal never prescribed Nexium or any other PPIs, nor did he study the impact of PPIs on bones. Dr. Bal admitted he did not understand how proton pump inhibitors compromised calcium intake, and did not know how they were metabolized. When asked about the particulars regarding how PPIs could cause bone deterioration, Dr. Bal conceded at least 10 times that he would defer to "experts," specifically a gastroenterologist, an epidemiologist, or an endocrinologist. Outside of the Nexium litigation, Dr. Bal has never opined that PPIs cause bone deterioration or fractures.

In short, Dr. Bal simply read epidemiological studies in preparation for this litigation and summarized what he thought such studies said. (See *People v. Bloyd, supra*, 43 Cal.3d at p. 358, citing *Hogan, supra*, 31 Cal.3d at p. 853, ["mere observation without analysis or inquiry cannot qualify a witness as an expert."]) As the trial court aptly noted, Dr. Bal had " 'no apparent qualifications that would allow him to provide special insight into the absorption of calcium in the digestive system or in the detailed function of PPIs in general or Nexium in particular.' " Thus, al-

though Dr. Bal had some medical training, his opinion on causation fell well outside of his experience, training, and education.

Citing a number of federal cases, Plaintiffs contend that Dr. Bal was qualified to give his opinion because “a physician may give opinions on general causation of diseases or injuries within his field of expertise, even if he is not an epidemiologist.” We note that although a physician may give opinions outside his or her expertise, the physician must nonetheless demonstrate that he is qualified to address the subject matter of his testimony.⁶ For instance, in *Lattimore, supra*, 239 Cal.App.4th 959, 969-970, the expert witness physician was board-certified in “family medicine” and “emergency medicine” but did not have specific training or experience as a gastroenterologist or a general surgeon. The Court of Appeal concluded the physician was competent in the wrongful death action to opine on the standard of care for physicians who allegedly failed to properly diagnose and treat patient’s gastrointestinal bleeding because the witness’s qualifications in emergency medicine demonstrated skill and experience in treating patients experiencing internal bleeding or otherwise in need of immediate treatment. (*Ibid.*)

⁶ As demonstrated by Dr. Bal’s testimony, the absorption of calcium in the digestive system and the detailed function of PPIs in general or Nexium in particular are not topics within the knowledge and observation of every physician and surgeon generally. (Cf. *Estate of Gore* (1953) 119 Cal.App.2d 796, 799 [“Where the subject matter of an opinion relates ‘to matters within the knowledge and observation of every physician and surgeon,’ the witness need not have specialized in that field.”].)

In contrast, Dr. Bal's experience, education, and practice lack any meaningful relationship to the field of epidemiology or the fields relevant in this causation inquiry. Dr. Bal had to defer to the "experts" throughout his deposition when asked questions about the epidemiological studies on which he relied because he was not conversant in the medical fields relevant to his testimony. In sum, Dr. Bal lacked the background to absorb and evaluate information regarding the causal relationship between PPIs and bone deterioration, and thus could not fulfill the expert witness's role of assisting the jury.

The cases Plaintiffs cite in asserting that Dr. Bal was qualified do not support reversal. *Wagoner v. Exxon Mobil Corp.* (E.D. La. 2011) 813 F.Supp.2d 771, 800, explained that although the expert witness physicians were not epidemiologists, they had relevant experience in the field. *Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 437, did not address the application or requirements of Evidence Code section 720. *People v. Catlin* (2001) 26 Cal.4th 81, 131, concluded that the clinical toxicologist (having a Ph.D. in physiology and pharmacology), with specialized experience in paraquat toxicology, could provide expert testimony regarding the effect of ingesting paraquats. *Brown v. Colm* (1974) 11 Cal.3d 639, 644, held that a surgeon was qualified to testify to the standard of care predating his practice, where he had experience performing the uncommon surgery at issue and he "examined all the available literature on the matter at issue and his opinion was based not only upon this material but also upon his personal training and experience acquired in the decade after 1959 in the use of suture materials."

Unlike the experts in the cases cited by Plaintiff, Dr. Bal did not testify to any experience, education, or training with PPIs or in the fields associated with causation in this case, i.e. epidemiology, bone biology, endocrinology, gastroenterology, and vitamin and mineral metabolism. He forthrightly admitted he did not personally understand how PPIs might compromise calcium intake. Although we agree that the expert need not be an epidemiologist, the expert in this case was required to have some “special knowledge, skill, experience, training, or education sufficient to qualify him as an expert” (§ 720, subd. (a)) as to PPIs causing bone deterioration. Dr. Bal did not satisfy these basic requirements.

Thus, we conclude the trial court did not abuse its discretion in finding that Dr. Bal’s education, training, and experience in orthopedic surgery and in general as a physician were insufficient to qualify him as the causation expert.⁷

2. Summary Judgment Is Affirmed

“A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff’s cause of action cannot be established or that there is a complete defense. (*Id.*, subd. (p)(2).) The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential ele-

⁷ In light of our opinion affirming the trial court’s exclusion of Dr. Bal’s expert testimony because he was unqualified to opine on causation, we do not reach the second ground whether Dr. Bal’s inference of general causation amounted to “guesswork.”

ment. [Citation.] If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).) [¶] We review the trial court’s ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent.” (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 180181.)

The parties do not dispute that general causation was an essential element of Plaintiffs’ causes of action. As explained above, Plaintiffs’ sole expert on general causation was properly excluded by the trial court. Summary judgment was therefore proper as Plaintiffs cannot establish the essential element of causation.

DISPOSITION

The judgment is affirmed. Defendants AstraZeneca Pharmaceuticals LP and McKesson Corporation are awarded their costs on appeal.

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STRATTON, J.

We concur:

EDMON, P. J.

LAVIN, J.