UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JENNIFER LASSALLE, et al., Plaintiffs, v. MCNEILUS TRUCK & MANUFACTURING, INC., Defendant.	Case No. 16-cv-00766-WHO **ORDER GRANTING DEFENDANT MCNEILUS TRUCK & MANUFACTURING, INC.'S MOTION FOR SUMMARY JUDGMENT** Re: Dkt. No. 58

INTRODUCTION

Jennifer Lassalle, Emily Anne Lassalle, and Madeline Elizabeth Lassalle (minor) and Grace Caroline Lassalle (minor) by and through their Guardian *ad Litem* (collectively "plaintiffs"), the widow and children of decedent Anthony Lassalle, contend that a vehicle manufactured by defendants McNeilus Truck and Manufacturing, Inc. ("McNeilus"), and Autocar, LLC ("Autocar"), caused Mr. Lassalle's death. They allege claims for negligence, strict liability, and failure to warn in this products liability action. Remaining defendant McNeilus now moves to exclude the testimony of two expert witnesses as well as for summary judgment on all claims. [1] For the reasons set forth below, I DENY the motion to exclude Dr. Sackrin's causation opinion and I GRANT the motion to exclude Dr. Anderson's report and testimony. But because there is

[1] McNeilus has also moved pursuant to Rule 37 to exclude the testimony of plaintiffs' rebuttal expert, economist Philip Allman, as well as a pension statement document for untimely disclosure. In light of the disposition of the motion for summary judgment, it is unnecessary to rule on that motion. For completeness, I would strike the pension statement as well as Mr. Allman's damage calculations based on that document, because plaintiffs have not shown that its late disclosure was either substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). I would otherwise allow Mr. Allman to testify, limited to directly rebutting opinions offered by McNeilus's damages expert, Mr. Weiner.

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no genuine issue of material fact concerning causation, I GRANT the motion for summary judgment in favor of defendant McNeilus.

BACKGROUND

Mr. Lassalle was an employee of Waste Management, Inc. ("WM"), where he used a rear end loader truck manufactured by defendant McNeilus to collect bulk residential curbside waste. Complaint ("Compl.") ¶ 10. While collecting waste on September 17, 2013, he suffered a stroke and died.

The only person at the scene, Yemane Abraham, another WM employee, heard the decedent say, "[S]omething in my arm, something in my face," and saw him fall to the ground. Haley Decl. Ex. 7 (Abraham Dep.), at 39:2 (Dkt. No. 66-1). Decedent was taken to Highland Hospital, where he was placed under the care of Highland Hospital emergency department physician Dr. Steven Sackrin. Haley Decl. Ex. 2 (Sackrin Dep.), at 8:20–24, 24:10–17. He passed away the next day. MSJ McNulty Decl. Ex. 14 (Decedent's Death Certificate). The certificate of death lists the cause of death as "Brain Death, Large Left Middle Anterior Cerebral Artery Stroke" and "Hypercoagulable Disorder." *Id.*

On September 16, 2015, plaintiffs brought a products liability action alleging negligence, strict liability, and failure to warn (strict liability/negligence) against McNeilus and Autocar. Compl. ¶ 1. Plaintiffs believe decedent was exposed to poison and toxins when he activated the hopper blade of the truck, that the blade crushed some boxes and cans, causing toxic material to spray and strike Decedent's face, and that decedent's death was due to the defendants' fault in designing and/or manufacturing the WM truck and failure to warn. Allman Mot. McNulty Decl. Ex. 2 (Pl. Jennifer Lassalle's Responses to Interrogatories), at 2 (Dkt. No. 56-1); Compl. ¶¶s 10-12. Yemane Abraham did not see any such spray. MSJ McNulty Decl. Ex. 4 (Abraham Dep.), at 59:15–19 (Dkt. No. 58-1).

McNeilus moves for summary judgment, or in the alternative, partial summary judgment, for lack of genuine issue of material fact concerning causation.[2] It concurrently filed two motions

[2] Plaintiffs have settled their claims against Autocar. *See* June 21, 2017 Order (Dkt. No. 64).

in limine to exclude the causation opinion of treating physician Dr. Sackrin as well as the report and testimony of expert witness Dr. Scott T. Anderson.

DISCUSSION

I. MOTION IN LIMINE NO. 1 TO EXCLUDE DR. SACKRIN'S CAUSATION OPINION

Under *Goodman v. Staples The Office Superstore, LLC*, a treating physician who has not been retained as an expert witness and has not submitted an expert report may not testify concerning opinions formed after the course of treatment. 644 F.3d 817, 826 (9th Cir. 2011); *Kauffman-Stachowiak v. Omni Hotels Mgmt. Corp.*, No. 15-cv-05186-WHO, 2016 WL 4269504, at *7 (N.D. Cal. Aug. 15, 2016). McNeilus moves to exclude the post-treatment opinions regarding causation of the treating physician, Dr. Sackrin. Plaintiffs oppose this motion and contend that Dr. Sackrin's opinions regarding causation were formed during the course of treatment.

The medical records as well as Dr. Sackrin's deposition testimony are unclear concerning when he changed his opinion about causation. At his deposition, Dr. Sackrin testified that he believed the cause of death to be attributable to a "stressful event." MSJ McNulty Decl. Ex. 10 (Sackrin Dep.), at 47:5–9. At the time of death, however, Dr. Sackrin indicated that a hypercoagulable disorder was the cause. *See* Sackrin Mot. McNulty Decl. Ex. 2 (Decedent's Medical Records), at 119 ("One wonders if he had a major thrombosis in the left internal carotid artery . . . . We were very concerned and suspicious the patient had a hypercoagulable disorder. . . . We will follow up on the hypercoagulable lab test studies.") (Dkt. No. 59-1). Indeed, he listed "hypercoagulable disorder" as one of the causes of death on the death certificate. MSJ McNulty Decl. Ex. 14. But as plaintiffs and Dr. Sackrin noted, Dr. Sackrin ordered hypercoagulable lab test studies over the course of his treatment to confirm his "suspicio[n]." Sackrin Opp. at 3 (Dkt. No. 67); Sackrin Mot. McNulty Decl. Ex. 2, at 119. It is plausible that the results of these studies contradicted his suspicion, and led Dr. Sackrin to change his mind as to the cause of death upon receipt.

On this record, McNeilus has not pointed to sufficient evidence in support of its assertion

that Dr. Sackrin changed his opinion "long after the termination of his stint as treating physician." Sackrin Mot. at 5 (Dkt. No. 59). Dr. Sackrin's opinions regarding causation could have been formed within the scope of his treatment of the decedent. I DENY McNeilus's motion to exclude Dr. Sackrin's opinions regarding causation.

II. MOTION IN LIMINE NO. 2 TO EXCLUDE DR. ANDERSON'S REPORT AND TESTIMONY

McNeilus also moves to exclude the testimony and report of Dr. Scott T. Anderson, who opines that the decedent's triggering cause of death was some type of toxic exposure. *See* Anderson Mot. McNulty Decl. Ex. 2 (Anderson Report), at 39–40 (Dkt. No. 60-1). Dr. Anderson is a Qualified Medical Examiner. He was asked to determine whether the decedent's death was workplace related in connection with the decedent's Workers' Compensation case. *Id.* He did not treat the decedent. Anderson Mot. McNulty Decl. Ex. 1 (Anderson Dep.), at 11:12–22. Although plaintiffs have not specifically designated him as an expert witness, because he was not a treating physician and therefore does not have personal knowledge of the matters to which his opinion relates, *see* Fed. R. Evid. 602, I will treat Dr. Anderson as an expert witness subject to Rule 702 and the *Daubert* standard.[3]

Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise" where:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. To be admissible under Rule 702, expert testimony must be both relevant and reliable. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

Under the reliability requirement, the expert testimony must "ha[ve] a reliable basis in the knowledge and experience of the relevant discipline. *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010). To ensure reliability, the court must "assess the [expert's] reasoning or methodology,

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[3] McNeilus's motion to exclude his report and testimony also treats him as an expert witness, and plaintiffs do not argue otherwise in their opposition.

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using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance." *Id.* at 564. These factors are "helpful, not definitive," and a court has discretion to decide how to test reliability "based on the particular circumstances of the particular case." *Id.* (internal quotation marks and footnotes omitted). "When evaluating specialized or technical expert opinion testimony, the relevant reliability concerns may focus upon personal knowledge or experience." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006). The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied. *Lust By & Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

McNeilus seeks to exclude Dr. Anderson's testimony on the grounds that he is not qualified to offer toxicology opinions and that his opinion is unreliable under the *Daubert* standard. Plaintiffs oppose this motion, arguing that he is qualified to render a causation opinion, and that his opinion is reliable as it is based on review of the records in this case. Although I agree with plaintiffs that Dr. Anderson is qualified to opine as an expert in this case, I conclude that his report and testimony are unreliable and should be excluded.

A. Dr. Anderson's Qualifications

Dr. Anderson is a medical doctor who has been board certified in the fields of internal medicine, rheumatology, and geriatrics since the 1990's. *See* Anderson Mot. McNulty Decl. Ex. 1, at 18:8–18. For the past twenty years, he has worked on both patient care and medical and legal consulting, mostly in the workers' compensation context. *Id.* at 16:7–17:12. He also serves as an expert for the California Medical Board's complaint unit. *Id.* at 17:13–25. Although he does not specialize in toxicology, Dr. Anderson testified that toxic exposures are part of his rheumatology practice. *See id.* at 20:16–21:3. He estimated that he has given opinions regarding the pathology of a toxic-induced condition "hundreds of times" in his workers' compensation practice. *Id.* at 21:8–13. He also testified that he sees stroke patients "frequently" in his rheumatology practice, and has given opinions regarding the pathology of a stroke "many times." *Id.* at 21:23–22:9.

McNeilus argues that these qualifications are insufficient to qualify Dr. Anderson to offer an opinion that the decedent's death is attributable to chemical exposure, citing to a case from

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another district for the proposition that "[i]t is generally recognized that in the toxic tort context, with respect to general causation, the relevant scientific field is epidemiology and not clinical medicine." *Farris v. Intel Corp.*, 493 F. Supp. 2d 1174, 1182 (D.N.M. 2007) (internal quotation marks and citation omitted). In that case, however, the court found that the clinical doctor at issue *was* qualified as an expert regarding general causation, because he had previously served as the Medical Director of a research institute that focused on the type of toxic exposure at issue in that case, albeit a decade ago. *Id.*

In *Casey v. Ohio Medical Products*, the defendants similarly moved to exclude a medical doctor as unqualified to offer an expert opinion on the causal connection between a toxic exposure and chronic active hepatitis because he was not an expert in hematology or toxicology. 877 F. Supp. 1380, 1383 (N.D. Cal. 1995). The judge noted, however, that in the course of his occupational health work, the doctor "participated in the diagnosis and treatment of numerous individuals with liver injury caused by toxic exposures," and his experience included hepatitis. *Id.* The opinion concluded that "[t]he fact that he is not an expert specifically in hematology or toxicology does not, in view of his other medical experience, disqualify him as an expert on the issue in this case." *Id.*

I agree with the reasoning in *Casey*. Given the factual similarity, I cannot grant McNeilus's motion to exclude Dr. Anderson based on his qualifications. Dr. Anderson's work experience, including his frequent experience dealing with toxic exposures as well as stroke patients in his rheumatology practice, adequately qualify him to testify as to causation in this case.

B. Reliability of Dr. Anderson's Report and Testimony

Having concluded that Dr. Anderson is qualified to render an expert opinion, I must also examine whether his opinion rests on a "reliable foundation." *Daubert*, 509 U.S. at 598. Although *Daubert* focuses on reasoning and methodologies, "conclusions and methodology are not entirely distinct from one another." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). A district court may, in its discretion, exclude evidence if it "conclude[s that] there is simply too great an analytical gap between the data and the opinion proffered." *Id.*; *see also Lust By and Through Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996) ("[T]he district court

can exclude the opinion if the expert fails to identify and defend the reasons that his conclusions are anomalous.”).

McNeilus argues that Dr. Anderson’s conclusions are unreliable because of the analytical gap between the actual data and his opinions. McNeilus points to several portions of his report and deposition testimony that reveal incorrect assumptions and conclusions about the decedent. Plaintiffs largely do not address McNeilus’s specific examples, but instead state that his report is based on his review of “extensive records.” Anderson Opp. at 3 (Dkt. No. 68).

I have reviewed Dr. Anderson’s report and deposition testimony and cannot conclude that his opinions rest on a sufficiently reliable foundation. His report and deposition testimony both mistook the immediate cause of death. The death certificate and medical records clearly state, and the parties do not dispute, that the decedent died due to “brain death” after suffering from a stroke, not cardiac arrest. MSJ McNulty Decl. Ex. 14. Dr. Anderson’s report, which was purportedly based on the same materials, attributes his death both to “brain death and cardiac arrest,” but opines that an “explosion” or “trauma to the face region” could “increase myocardial vulnerability to bradyarrhythmia or tachyarrhythmia, ultimately giving rise to cardiac arrest, which transpired in this case.” Anderson Mot. McNulty Decl. Ex. 2, at 39. Dr. Anderson repeated this incorrect assertion during his deposition testimony, until he conceded his mistake “upon reviewing the records” at McNeilus’s counsel’s request. Anderson Mot. McNulty Decl. Ex. 1, at 33:3–23. Considering that plaintiffs would proffer his testimony to render an opinion on the event triggering the cause of death, his misreading of the records and mistake as to the actual cause of death are troubling. His report is based on an incorrect assumption that renders his opinions on the trigger event irrelevant.

A separate error regarding the decedent’s protein S score reveals that Dr. Anderson’s report mischaracterized the decedent’s condition. His closing comments note that he “personally reviewed the original laboratory results,” which included “normal protein S at 45.” Anderson Mot. McNulty Decl. Ex. 2, at 40. In his deposition, however, he admitted that a protein S score of 45, well outside the “reference range” of 70–150, “indicates a low protein S score,” which “can be associated with an increased propensity to form blood clots.” Anderson Mot. McNulty Decl. Ex.

1, at 56:6–19. It is troubling that rather than addressing this diverging piece of evidence in the records, Dr. Anderson's report mischaracterizes the protein score as "normal" in support of his conclusion that the cause of death was triggered by a toxic exposure event rather than a predisposition to stroke.

Inconsistencies in Dr. Anderson's deposition testimony also indicate a lack of reliable reasoning and methodologies. When asked whether he knew the dosage of the toxic exposure, Dr. Anderson responded that "[t]he critical issue wouldn't be dosage so much as tissue level of the compounds." Anderson Mot. McNulty Decl. Ex. 1, at 46:3–9. When asked to review the brain autopsy report, however, Dr. Anderson discredited that report by contending that "[pathologists are] really looking at tissue" rather than "the whole clinical history." *Id.* at 58:21–59:14. When convenient, Dr. Anderson was of the opinion that "tissue level" was critical to the evaluation of a toxic exposure event, but he quickly changed his mind about its importance when presented with the findings of a pathologist who had analyzed the tissues but came to different conclusions.

Finally, Dr. Anderson's deposition testimony suggests that he allowed his desired conclusions to dictate his reading of the medical records, rather than developed a reasoned opinion based on the evidence. When asked if the autopsy report, in which the pathologist came to an alternate conclusion regarding the cause of death, changed his opinion, Dr. Anderson discredited the pathologist's methodology without offering an alternative, more reliable methodology. Instead, he simply explained, "I come back to this explosion and this exposure. It would have been just too much of a coincidence for him to suddenly develop a complication of hypertension that was totally independent of that event." Anderson Mot. McNulty Decl. Ex. 1, at 59:8–14. Similarly, when asked to explain the basis of his opinion that "roughly 60 percent of causation [was] due to chemicals and 40 percent due to the ballistic trauma," Dr. Anderson could point to no scientific methodology or reasoning supporting his conclusion. *Id.* at 48:16–22. Instead, he claimed that his conclusion was "consistent with common sense," because to "postulate that he happened to die of an unrelated medical cause right after this explosion occurred, to my way of thinking that would be unlikely and kind of speculative to put out there." *Id.* at 48:12–49:15. Putting aside that the jury has no need for expert testimony on issues of "common sense," these

responses suggest that rather than viewing the medical records and developing an opinion based on the evidence, the temporal connection between the events made up his mind that a purported explosion event caused the decedent's eventual brain death. Rather than engage with the evidence and explain any scientific basis for dismissing alternate theories, his only methodology was to ignore anything inconsistent with that conclusion.

Given the factual errors, mischaracterizations, inconsistencies, and lack of reasoning and methodologies supporting his report, Dr. Anderson's report and testimony are not sufficiently reliable. While Dr. Anderson may be qualified based on his experience, I conclude that his proffered opinion in this case is not based on the requisite "intellectual rigor" and sound methodology required by the federal rules. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). For these reasons, I GRANT McNeilus's motion to exclude Dr. Anderson's report and testimony.

III. MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper where the pleadings, discovery, and affidavits demonstrate that there is "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party.

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party "is entitled to a judgment as a matter of law [when] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* (internal quotation marks omitted). The moving party need only show "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that there is a

genuine issue for trial. Fed. R. Civ. P. 56(c). "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. It is not the task of the court to scour the record in search of a genuine issue of triable fact. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Id.*

McNeilus moves for summary judgment on the grounds that plaintiffs cannot show the requisite causal connection between the decedent's death and any defect in the rear end loader truck manufactured by McNeilus. Plaintiffs' three causes of action—negligence, strict liability, and failure to warn (strict liability/negligence)—each require a causal connection between plaintiffs' injury and the manufacturer's product. *See Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 478 (2001) ("[U]nder either a negligence or a strict liability theory of products liability, to recover from a manufacturer, a plaintiff must prove that a defect caused injury."). Under California products liability law, a plaintiff bears the burden of causation, and "must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury." *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968 (1997); *see also Stephen v. Ford Motor Co.*, 134 Cal. App. 4th 1363, 1373 (2005) ("A product liability case must be based on substantial evidence establishing both the defect and causation (a substantial probability that the design defect, and not something else, caused the plaintiff's injury) and where, as here, the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation."). In cases "presenting complicated [] medical causation issues, the standard of proof ordinarily required is a reasonable medical probability based upon competent expert testimony that the defendant's conduct contributed to [the] plaintiff's injury." *Bockrath v. Aldrich Chem. Co., Inc.*, 21 Cal. 4th 71, 79 (1999). "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Saelzler v. Advanced Grp. 400*, 25 Cal. 4th 763, 775–76 (2001).

McNeilus raises several arguments. First, it asserts that plaintiffs' liability expert, Kenneth Smith, did not offer an opinion on any causal connection between the alleged design defect and

plaintiffs' injuries. McNeilus also notes that plaintiffs have not proffered expert testimony on medical causation, and contends that Dr. Sackrin's opinion does not establish reasonable medical probability. Next, McNeilus contends that there is no evidence of any toxic exposure, but rather testimony from two doctors points to hypertensive disease as the cause of death. Finally, McNeilus argues that a temporal connection is insufficient to establish causation.

Plaintiffs respond first by describing the purported design defect in McNeilus's rear end loader truck. They next take issue with McNeilus's summary of the law, and contend that expert testimony is not required; instead, causation is a question of fact for the jury. With regards to their liability expert, Kenneth Smith, plaintiffs argue that Mr. Smith's report establishes that the design is defective, and that because the design could have been repaired so as to eliminate that risk, his report offers an opinion on causation. Plaintiffs next defend Dr. Sackrin as a qualified medical expert, and assert that his opinion shows with reasonable medical probability that the decedent's stroke was stress induced.

I agree with McNeilus that there is no genuine issue of material fact as to causation. The gap between the evidence and the conclusion that plaintiffs suggest is simply too wide for a reasonable jury to find causation inference upon inference. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002) ("At summary judgment, this court need not draw *all* possible inferences in [plaintiff's] favor, but only all *reasonable* ones.").

As a preliminary matter, plaintiffs misunderstand their burden under the law. They contend that expert testimony is not required, and instead maintain that causation is a question "on which any layman is quite as competent to pass judgment as the most learned court." *Lysick v. Walcom*, 258 Cal. App. 2d 136, 153 (1968); *see also Osborn v. Irwin Memorial Blood Bank*, 5 Cal. App. 4th 234, 253 (1992) ("[C]ausation in fact is ultimately a matter of probability and common sense . . . . [T]riers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case."). None of the cases plaintiff cites, however, arise in the products liability or remotely similar contexts, but instead involve claims of bad faith and negligence against an attorney, and negligent misrepresentation against a blood bank. Plaintiffs' suit not only involves complicated questions of product design defect but also medical causation, both of which

require expert testimony. *See, e.g.*, *Lattimore v. Dickey*, 239 Cal. App. 4th 959, 970 (2015) ("The law is well settled that in a personal injury action causation must be established within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case."). Plaintiffs must thus provide competent expert testimony as to the causal connection between the alleged defect and injury, as well as to a reasonable medical probability that the defect contributed to the injury.

A. Liability Expert Kenneth Smith

In support of their claim that McNeilus's design defect caused the decedent's injury, plaintiffs submit the expert opinion of Kenneth Smith, who opines that the design of the rear end loader "in this incident posed a risk to the operators." Haley Decl. Ex. 9 (Smith Decl.), at ¶ 1. McNeilus contends, and plaintiffs do not dispute, that he is plaintiffs' sole liability expert. Plaintiffs bear the burden of providing competent expert testimony on causation—i.e., "a substantial probability that the design defect, and not something else, caused the plaintiff's injury," *Stephen*, 134 Cal. App. 4th at 1373. But Mr. Smith does not opine on causation in his report, nor did he in deposition. His report never offers any opinion concerning a causal link between the design defect and the decedent's injury, but rather only opines that the design generally "posed a risk." Haley Decl. Ex. 9, at ¶ 1. Mr. Smith's deposition testimony repeatedly confirms that he has no opinion about the specific causal connection in this case:

> A: I wasn't looking to build an opinion about whether he was exposed to something or not. You know, my focus was, is there a hazard present on this vehicle or not.

MSJ McNulty Decl. Ex. 16 (Smith Dep.), at 51:3–6.

> Q: In this particular incident, do you have an opinion, to a reasonable degree of engineering certainty, whether or not the hazards that you've identified caused Mr. Lassalle's injuries?
> A: I didn't look into causation—

Id. at 51:21–25.

> Q: Do you have an opinion as to whether these proposed alternative designs would in any way have changed the outcome for Mr. Lassalle?
> A: Since I don't have an opinion about whether he was struck by anything or not, you know, this is an opinion about the safety and efficacy of the truck, not this particular accident.

Q: So the answer is "no"?
A: What was the question again?
[The reporter read the question back to the deponent.]
A: No.

Id. at 140:7–23.

Mr. Smith's report and testimony concern the alleged design defect of the truck's lack of a barrier. That alone is insufficient to establish the requisite causal link.

B. Medical Causation and Dr. Sackrin's Opinion

Nor do plaintiffs provide testimony sufficient to establish causation within a reasonable medical probability. Plaintiffs claim that Dr. Sackrin and Dr. Anderson's opinions demonstrate, within a reasonable medical probability, that plaintiffs' injuries were caused by a stressful and/or toxic exposure event. I have already found that Dr. Anderson's opinion is not reliable and should be excluded from evidence. I further find that Dr. Sackrin's opinion does not show causation within a reasonable medical probability.

Dr. Sackrin's opinion, as he testified at deposition, is that decedent's death was caused by a "stressful event." MSJ McNulty Decl. Ex. 10, at 47:5–9. He opines that it is "medically probable this was a stress-induced stroke." Haley Decl. Ex. 2 (Sackrin Dep.), at 49:15–18. More specifically, he attributed this stress to "the incident"—"the event, the explosion, the spray, whatever it was." Haley Decl. Ex. 3 (Sackrin Workers' Comp. Dep.), at 46:3–9, 46:17–22. He stated, however, that he "c[ould not] say with any knowledge that the chemicals did or did not play a special role." *Id.* at 46:22–23. He further testified that he "never claimed to feel or be an expert to maintain that the chemicals itself *caused* this devastation." MSJ McNulty Decl. Ex. 10, at 44:11–13 (emphasis added).

Dr. Sackrin admitted that he does not offer an opinion that a chemical exposure caused the decedent's injury. He admitted that he had no knowledge of the role of any chemicals in this event. *See* Haley Decl. Ex. 3, at 46:22–23. He also admitted that there was no indication in any of the emergency personnel records, ambulance documents, or original intake documents of any chemical exposure, nor did he see any medical findings consistent with chemical exposure during his course of treatment or positive indications in his airways for any type of inhalation exposure.

See MSJ McNulty Decl. Ex. 10, at 30:5–32:7. His opinion that the stroke was nonetheless "stress-induced" is plainly insufficient to make the leap to attributing causation to an event caused by McNeilus because he cannot say with any certainty what he believed that event was, whether an explosion, a spray, or toxic exposure.

Plaintiffs have failed to meet their burden on causation, as they cannot establish a reasonable medical probability based on expert testimony. Because this is an essential element of each of plaintiffs' claims, this alone is sufficient to grant McNeilus's motion for summary judgment.

C. Lack of Evidence of Toxic Exposure As the Cause of Death

Because plaintiffs insist that their claims do not require expert testimony, I will address the remaining evidence. The physical evidence also fails to establish any causal link between McNeilus's rear end loader truck and the decedent's injury. Furthermore, the medical reports and testimony of other experts strongly suggest an alternate explanation for the decedent's untimely brain death.

Plaintiffs' theory is that the decedent filled the hopper on the rear end loader and activated the blade when some kind of toxic chemical spray caused his eventual death. The evidence simply does not support this theory. Most importantly, there is insufficient evidence of the very chemical exposure that plaintiffs believe was so deadly in this case. The only witness to the event, the decedent's partner, did not see any such spray, *see* MSJ McNulty Decl. Ex. 4, at 59:15–19, nor did he hear any type of explosion. *See id.* at 45:21–24. At some point after the incident, another WM employee took photographs of the truck's hopper, which show colored paint cans and spray paint, among other materials. *See* Haley Decl. Ex. 4 (Baebler Dep.). Another employee also testified that she noticed a mild chemical smell. *See* Haley Decl. Ex. 5 (Brandon Dep.), at 48:4–11. But there was no evidence of any colored paint on the decedent's face or clothing, nor elsewhere outside the truck's hopper. There was no evidence of any object having exited the truck's hopper.

Following the decedent's death, the decedent's widow, plaintiff Jennifer Lassalle, commissioned FAI Materials Testing Laboratory, Inc. to analyze the sunglasses and hat that the decedent was wearing at the time of the incident. *See* MSJ McNulty Decl. Ex. 20 (FAI Lab

Report), at 1–2. The FAI Lab Report states that the lab was unable to obtain enough residue to sample from the hat to test for any toxic chemicals, and no residual solvents or volatiles "seemed to remain" on the fabric of the cap. *Id.* at 4, 6. The sunglasses contained "spray residue . . . consistent with an acrylic automotive type lacquer," but "[n]o residual solvents were evident." *Id.* at 8. The report does not establish how long the "spray residue" had been on the sunglasses, or its source. Nothing in evidence connects the "spray residue" to any material found in the rear end loader's hopper after the incident. This "spray residue" is the single piece of evidence suggesting any chemical or toxic exposure event. But given the uncertainties as to its origin, its contents, or its age, it is insufficient to establish the necessary causal link between McNeilus's product and the decedent's death. Plaintiffs cannot meet their burden on this essential element of their claims without more.

Furthermore, ample evidence in the record suggests an alternate explanation for the decedent's death. Mrs. Lassalle contacted a forensic pathologist, Dr. David M. Posey, to conduct a private autopsy of the decedent's body to find the cause of death. *See* MSJ McNulty Decl. Ex. 12 (J. Lassalle Dep.), at 69:12–70:1; MSJ McNulty Decl. Ex. 13 (Posey Dep.), at 16:23–24. Mrs. Lassalle submitted all of the decedent's medical records as well as the FAI Lab Report to Dr. Posey for his review. MSJ McNulty Decl. Ex. 13, at 14:5–15, 15:23–16:20. Although Dr. Posey operated under the assumption that the decedent was "sprayed in the face" and shortly thereafter collapsed, *id.* at 16:23–17:3, he nonetheless concluded that the cause of death was a "left middle anterior cerebral artery ischemic stroke, complicated by brain death," which he in turn attributed to a thrombus, or blood clot, present. *Id.* at 18:2–11. He testified that the decedent's low protein S score indicated a predisposition to thrombus development, which generally takes two to six minutes to form. *Id.* at 48:12–22; 61:2–25 (noting that the decedent had both "an underlying hypertensive disorder" as well as "an underlying hypercoagulable disorder"). Dr. Posey further opined that the incident was "not industrial-related," *id.* at 21:15–16, nor was there any evidence "to suggest he inhaled a noxious substance." *Id.* at 50:13–18.

Dr. Posey came to an initial conclusion based on his autopsy finding, but also asked forensic neuropathologist, Dr. Peter Cummings, to perform an autopsy of the decedent's brain.

MSJ McNulty Decl. Ex. 13, at 19:5–13; MSJ McNulty Decl. Ex. 21 (Cummings Dep.), at 16:19–17:14. Based on their findings, both pathologists agreed on the cause of death and the manner of death. MSJ McNulty Decl. Ex. 13, at 19:13–16. Dr. Cummings testified that the decedent's brain had a thrombus that had been organizing in his brain "for some period of time," MSJ McNulty Decl. Ex. 21, at 32:18–19, "probably more than an hour." *Id.* at 35:7–23. Dr. Cummings' report also concluded that, "[g]iven the lack of an inflammatory response within the airway, inhalation injury is an unlikely candidate for the pathological findings in this case." MSJ McNulty Decl. Ex. 22 (Cummings Report), at 3. Instead, he attributed the thrombus "most likely" to "hypertensive disease." *Id.* Dr. Cummings's independent findings are entirely consistent with Dr. Posey's, who came to his conclusions after being privately consulted by Mrs. Lassalle, listening to her version of the events preceding the decedent's death, reviewing all of the decedent's medical records, and viewing the FAI Lab Report. Given the dearth of evidence of a toxic exposure event, and the strength of the evidence suggesting otherwise, plaintiffs cannot establish the requisite causal connection.

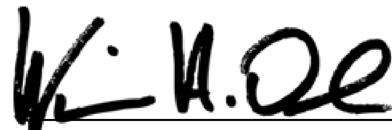
Plaintiffs have failed to meet their burden to provide expert testimony establishing the necessary causal link in this case. Even if this case did not require expert testimony, plaintiffs cannot point to sufficient evidence to establish that plaintiffs' death was caused by a toxic exposure from something within McNeilus's truck. Because plaintiffs have failed to show any genuine issue of material fact relating to causation, I GRANT summary judgment in favor of McNeilus on all counts.

CONCLUSION

For the reasons set forth above, I GRANT McNeilus's motion for summary judgment. Judgment in favor of McNeilus shall be entered accordingly.

IT IS SO ORDERED.

Dated: July 21, 2017



William H. Orrick
United States District Judge

United States District Court
Northern District of California