ROSENDEZ v. GREEN PHARMACEUTICALS

No. D071073.

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RACHEL ROSENDEZ et al., Plaintiffs and Appellants, v. GREEN PHARMACEUTICALS, Defendant and Respondent.

Court of Appeals of California, Fourth District, Division One.

Filed October 4, 2017.

Attorney(s) appearing for the Case

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NARES, *Acting P. J.*

Plaintiffs in a certified class action filed by representative plaintiff Rachel Rosendez [1] against defendant Green Pharmaceuticals (Green) appeal from a judgment after a court trial in favor of Green on their causes of action for violation of the Consumers Legal Remedies Act (CLRA, Civ. Code, § 1750 et seq.) and violation of the unfair competition law (UCL, Bus. & Prof. Code, § 17200 et seq.) and false advertising law (FAL, Bus. & Prof. Code, § 17500 et seq.). Green manufactures and markets SnoreStop FastTabs (SnoreStop), a homeopathic remedy for snoring. In their complaint, plaintiffs' allege SnoreStop "is a sugar pill that . . . Green . . . falsely advertises has the ability to stop snoring. In reality, [SnoreStop] consists of a simple blend of highly diluted ingredients that have no impact on snoring."

Although the trial court found the testimony of Green's homeopathy expert was not credible and gave it no weight, the court concluded plaintiffs failed to meet their burden of proof on both of their causes of action, noting they "proceeded on the theory that there is no scientific basis for the advertised efficacy of SnoreStop" but "provided no evidence of tests to determine the efficacy of SnoreStop." Plaintiffs contend the court should have entered judgment in their favor and awarded them relief because they met their burden of proof on both of their causes of action through expert testimony and other evidence that the court improperly ignored. They also contend the court abused its discretion by decertifying the class. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Rosendez filed a class action complaint in June 2011 against Green that included a first cause of action for violation of the CLRA and a second cause of action for violation of the UCL and FAL. The complaint alleges that Green produces and sells SnoreStop and makes numerous false claims about the product's efficacy. For example, the front of the SnoreStop packaging bears the product name in bold letters directly above the statement, "Thanks, now I'm back in the bedroom!" The back of the packaging includes representations that SnoreStop shrinks the swollen soft tissues that block air passages in the back of the throat and dries mucus that blocks nasal passages. Green's website contains the statement that SnoreStop "has been proven to stop or reduce snoring for a great majority of snorers."

The complaint further alleges that Green claims a clinical study showed that 79.5 percent of SnoreStop users reported noticeable improvements within the first five nights, but in reality, the study does not support the findings attributed to it and "is instead characterized by severe methodological deficiencies." SnoreStop allegedly "has no effect on snoring or any other efficacy," and "simply consists of a myriad of toxic substances that are provided in such extremely diluted form that they have no impact on the human body whatsoever."

The complaint sets forth the following basic explanation of homeopathy from Green's website under the heading "Principles of Homeopathy": "The term homeopathy is derived from the Greek words homeo (similar) and pathos (suffering from disease). The first basic principles of homeopathy were formulated by the German physician Samuel Hahnemann in the late 1700s. Curious about why quinine could cure malaria, Hahnemann ingested quinine bark and experienced alternating bouts of chills, fever, and weakness, the classic symptoms of malaria. From this experience he derived the principle of similars, or `like cures like': that is, a substance that can cause certain symptoms when given to a healthy person can cure those same symptoms in someone who is sick." The complaint alleges "there is no legitimate scientific basis for this belief."

The complaint lists SnoreStop's seven "purportedly active ingredients" and their dilution levels, five of which are specified on the SnoreStop label as being diluted to one part per million, one of which is specified as being diluted to one part per ten thousand and one part per million, and one of which is specified as being diluted to one part per trillion. Rosendez allegedly purchased SnoreStop because she hoped it would stop her snoring, but she did not experience any benefit from the product despite consuming it as directed.

In September 2013, the trial court granted Rosendez's motion for class certification and certified a class consisting of "[a]ll persons located within California who purchased SnoreStop . . . for personal use at any time from June 28, 2007 to the present."

The case was tried to the court in September 2014. Plaintiffs called as an expert witness Dr. Lynn Willis, who has a Ph.D. in pharmacology, which is the study of drugs. Willis has extensive research and teaching experience in both pharmacology and the closely related field of toxicology, which is the study of poisons. The court granted plaintiffs' motion to designate Willis as an expert on pharmacology, toxicology, and homeopathic theory.

Willis testified that there are two fundamental principles of homeopathy — the law of similars and the principle of dilution. The law of similars "is based on a very ancient notion that it's possible to effectively treat the symptoms of a disease with a medicine that given to someone who does not have that disease . . . will cause symptoms that mimic the symptoms of the disease." Willis explained that the objective of homeopathy is to give a sick patient with active symptoms a diluted form of something "that would produce the same symptoms in a healthy individual . . ., and then through some unknown mechanism, what is called the vital energy of the patient[] is released or activated and that's what is supposedly responsible for generating the healing response that occurs."

Willis explained that the second tenet of homeopathy, known as the law of infinitesimals, involves serial dilution and "a process by which an extract of . . . an herbal or mineral or organic substance that is part of the compendium of homeopathic medicines is put through a series of dilutions . . . in a process that is called potentiation, and is believed . . . to actually render the medication more powerful." Stated differently, the law of infinitesimals is "the idea that the therapeutic power of a drug increases when that drug is rendered progressively and exceedingly more dilute[.]" Willis testified he was not aware of any valid scientific support for that idea, which is in direct opposition to dose response theory — the basic principle of pharmacology. Willis explained that dose response theory "holds that as the dosage of [a] biologically active chemical is increased, the intensity of the response that is elicited . . . will increase, and as the doses increase, new responses may emerge as well, that will occur at the higher dosage."

Willis explained the part of the process of preparing a homeopathy remedy known as "succession" or "potentizing" as follows: "During the process of dilution, between each stage of dilution, the vial containing the solution that's being diluted or that may be containing the powder substance, is tapped a standardized number of times on the counter. And according to my understanding of what Dr. Hahnemann believed was happening here is that this tapping is in part causing the release of the healing energy of this medication that's being diluted." When asked if he had "ever detected any evidence to support the homeopathic idea of the release of healing energy by striking a substance[,]" Willis responded, "The simple answer is no. The reason I believe is because science has no way to measure this energy."

Willis testified that based on his education, training, research, and scientific review of homeopathic literature, he was of the opinion that the homeopathic law of similars is "not compatible with conventional theories of how drugs and other medications work," and is contrary to proven scientific theory. He was also of the opinion that the homeopathic law of infinitesimals and the homeopathic idea of succession and potentizing were contrary to proven scientific theory.

Willis then addressed each of the following seven active ingredients of SnoreStop specified on the product label and their dilution levels: belladonna 6x [2], ephedra vulgaris 6x, histaminum hydrochloricum 12x, hydrastis (golden seal) 6x, kali bichromicum 6x, nux vomica 4x and 6x, and teucrium marum 6x. As to each ingredient Willis testified the ingredient would not in isolation relieve snoring or shrink swollen tissues.

Plaintiffs' counsel then asked Willis to consider SnoreStop's active ingredients in combination. Counsel asked, "Is there any credible scientific evidence to support the idea that the combination of those seven ingredients at the dilution level listed on the label would have the capacity to shrink the swollen tissues that block air passages in the mouth and in the back of the throat?" Willis responded, "I'm aware of none." He was of the opinion that the combination of the seven active ingredients at the dilution levels specified on the SnoreStop label would not shrink the swollen tissues that block air passages in the mouth and in the back of the throat.

Willis also testified about the "Lipman study," the clinical study referenced on the SnoreStop label. [3] Willis criticized various aspects of the study, including the lack of standardization of the method of collecting and reporting data regarding the test subjects' snoring. He viewed the collection of data by the subjects' bedmates "as being somewhat of just an opinion[-]based means of obtaining data." He criticized the study's authors' failure to conduct a "power analysis" to determine how many subjects are needed in a study to detect a treatment difference if one exists, and the study's failure to use an objective measure of snoring. He testified that the recruitment of study participants was suspect because the authors recruited only 100 subjects, a relatively small number for a clinical study, and retained 90 percent of the subjects, which is a relatively large percentage of recruited persons retained. Willis noted that one of the study's exclusion criteria was a history of sleep apnea, but a person who snores might have sleep apnea and not know it, which creates the possibility that one or more of the study subjects may have incorrectly represented that they did not suffer from sleep apnea. Willis viewed this as "a bit of an oversight in terms of the manner in which they selected their subjects."

Willis testified about the phenomenon known as the "placebo response," explaining that "if I were to give you a tablet and say that this tablet will help you sleep or will relieve the pain you're having from your painful joints, and if you believe that, even though what I have given you [is] a sugar pill that has no pharmacologic activity, you are likely to report that this has helped you sleep or helped you relieve your pain." Willis cited a study that reported "about 35 percent [of the population] can be expected to have a placebo response in an experimental setting."

Willis noted the Lipman study used a placebo control group, but he thought the study "underplayed or ignored the contribution of the placebo response to the response of the treated group." Since about 45 percent of the placebo group showed a reduction of snoring, Willis reasoned that "we would have to expect that at least that percentage of responders in the [] treatment group would similarly have been reacting to a placebo response." After

testifying about certain mathematical errors in the study and inaccurate reporting about the number of subjects in the treatment group who actually showed improvement, Willis concluded the actual percent of improvement that should have been attributed to the treatment group was 20.4 percent, and that the reported 79.5 percent ignores the placebo response.

In summary, Willis testified that the Lipman study properly controlled for observer bias, but the interpretations offered on the SnoreStop label did not properly control for the placebo response and the math used in the interpretation of the study was not "correct in the context of the way the data were presented." He concluded that and "the proper conclusion for the Lipman study is that the study does not show that SnoreStop is any more effective than the placebo treatment."

Plaintiffs' case-in-chief included Rosendez's testimony about her use of SnoreStop and its ineffectiveness as a remedy for her snoring, and the testimony of a damages expert regarding the total amount the class members paid in California for SnoreStop during the class period. After plaintiffs rested, Green moved for judgment under Code of Civil Procedure section 631.8 on the ground plaintiffs failed to meet their burden of proof.

The trial court acknowledged that in ruling on the motion for judgment, it was required to view the evidence in the light most favorable to plaintiffs. The court concluded an inference could be drawn that consumers relied on information stated on SnoreStop's label in deciding whether to purchase SnoreStop. The court observed: "The question then becomes . . . whether or not the product itself has any therapeutic value as advertised. In the light most favorable to the plaintiff, the testimony of Dr. Willis'[s] qualifications that he knows pharmacology, he is an expert in pharmacology, and that his review of . . . the substances that are contained [in SnoreStop] as indicated in the package literature, that none of those have any relevance to any mechanical aspect of the human body dealing with snoring and as a result of that the conclusion he reached is it is ineffective and it basically has no therapeutic value; that is the light most favorable to the plaintiff. [¶] . . . I think that opinion itself would be sufficient at least to overcome a [motion for judgment], I would think."

After hearing argument from Green's counsel, the court denied Green's motion for judgment and motion to strike Willis's testimony. The court concluded that the evidence, viewed in the light most favorable to plaintiffs, supported an inference that none of the components of SnoreStop specified on the product's label have any effect on reducing the swelling of tissue that causes snoring.

Green called, as an expert on homeopathy, Gregory Dana Ullman, who testified that he practiced homeopathy and had written hundreds of articles on homeopathy. He further testified that Time Magazine had referred to him as the leading proselytizer for homeopathy and NBC's 20/20 news program had referred to him as homeopathy's foremost spokesperson.

Ullman confirmed Willis's testimony about serial dilution, stating: "It is our observation over the last 200 years that you need fewer doses of a medicine that had been diluted one to ten . . . 200 times or 1,000 times than if you use a medicine that was diluted one to ten three times or six times or nine times." Ullman explained that homeopathy views less diluted medicines as having lower potency and requiring more frequent doses than more highly diluted medicines. He testified that "[a]nything under 12x is considered a low potency[,]" and therefore the ingredients in SnoreStop "are what we call low potencies." He also testified that he believed all of the statements at issue on the SnoreStop package label were accurately stated and correct.

After the parties submitted written closing arguments, the court issued a statement of decision. The court concluded that plaintiffs failed to meet their burden of proof as to both causes of action in their complaint. Regarding plaintiffs' cause of action for violation of the CLRA, the court stated: "Plaintiff[s] had the burden of proving that [Green] engaged in an unlawful business practice and Plaintiff[s] failed to do so."

After citing the various allegedly false statements on the SnoreStop package referenced in plaintiffs' complaint,[4] the court stated: "Plaintiff[s] presented the testimony of Dr. Willis as to the active ingredients of SnoreStop to challenge the statements made on the SnoreStop package. Dr. Willis testified as to some of SnoreStop's individual ingredients but could not testify as to the product as a whole. There was not sufficient evidence presented that the combined ingredients of SnoreStop failed to perform the function that is advertised on the package. [¶] . . . [¶] The court also heard testimony from Plaintiff[s'] expert, Dr. Willis, indicating that he took issue with the results of the study of SnoreStop that was referenced on [Green's] website. However, neither Dr. Willis nor the Plaintiff[s] submitted any evidence of product testing or proof that the study . . . was flawed."

Noting that Ullman testified for Green as an expert witness, the court found "Mr. Ullman's testimony to be not credible." The court stated: "Mr. Ullman's credibility was undermined by his admission that he advocated the use of a radionics machine, whereby a physician puts a picture of his patient on one side, and a few medicines on the other side, and then sees which of the medicines the needle points toward. He relied on his personal experience with a radionics machine. [¶] Mr. Ullman's testimony was unhelpful in understanding the purported efficacy of the ingredients of SnoreStop to reduce the symptoms of snoring. Although he is familiar with the theory of homeopathic treatment, his opinions regarding its effectiveness [were] unsupported and biased. The Court gave no weight to his testimony."[5]

The court concluded that although it had "serious reservations regarding the effectiveness of the product in question," plaintiffs presented insufficient evidence to meet their burden of proof to establish a viable claim under the CLRA because they "offered insufficient evidence to support [their] contention that [Green] engaged in unfair and deceptive business practices[.]" As a result of that finding, the court did not address whether plaintiffs suffered damage from an unfair business practice. The court likewise found plaintiffs failed to meet their burden of proof on their cause of action for violation of the UCL, concluding "[t]here was insufficient evidence showing that members of the public are likely to be deceived by [Green's] advertising."

The court entered a judgment that incorporated the statement of decision and largely reiterated its findings and conclusions. Regarding plaintiffs' UCL and FAL cause of action, the judgment added that a finding for plaintiffs requires a showing "by a preponderance of the evidence that [Green] made false or misleading statements in advertising or labeling as to one or more of [its] products. Moreover, it must be shown that [Green] knew, or through the exercise of reasonable diligence should have known, that the statements were false. With respect to these claims, the Court finds that the Plaintiff[s] presented insufficient evidence to prove that [Green] made any false or misleading statements or representations in connection with the advertising or labeling of its product. Furthermore, the Plaintiff[s] presented insufficient evidence to show that [Green] knew or should have known that any of their statements were untrue, false or misleading."

The judgment provides that "[t]he claims in this Class Action are hereby adjudicated and Plaintiff and each of the Class Members shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever relinquished, and discharged all claims in this action." The judgment further provided that "[a]ll Class Members are hereby forever barred and enjoined from prosecuting the Claims that were brought in this Action."

DISCUSSION [6]

I. *Plaintiffs Met Their Burden of Proof Through Uncontradicted and Unimpeached Expert Testimony*

This appeal presents a highly unusual situation in that although the court found plaintiffs' evidence was sufficient to overcome Green's motion for judgment at the close of plaintiffs' case, the court ultimately concluded that plaintiffs failed to meet their burden of proof even though the court essentially rejected all of Green's trial evidence. Plaintiffs contend the court should have entered judgment in their favor and awarded them relief because they met their burden of proof through expert testimony and other evidence that the court improperly ignored. Essentially, plaintiffs contend the court erred by entering judgment in Green's favor despite their presentation of uncontroverted evidence supporting their claims.

Generally, in reviewing a judgment for sufficiency of the evidence to support it, "[t]he power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination.' [Citation.] [¶] This standard, however, can be `misleading' in cases when the judgment for one party is based on the other party's failure to satisfy a burden of proof. [Citation.] When, for example, the plaintiff has the burden of proving the elements of his claim and the court finds he has failed to satisfy that burden, judgment will be for the defendant — even if there is no evidence supporting the defense. There being *no* evidence for the defense, there could be no *substantial* evidence in the record to support the judgment. Yet, the plaintiff, who failed to prove his case, would clearly not be entitled to reversal of the defense judgment. Plainly, the substantial evidence standard, as it is usually stated, is an inadequate appellate tool in that situation.

"Thus, `[w]hen the trier of fact has expressly or implicitly concluded that the party with the burden of proof failed to carry that burden and that party appeals . . . the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding."'" (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732-733.) In other words, under this standard, an appellant must show "undisputed facts lead to only one conclusion" compelling judgment for appellant. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529.)

"The same rules apply where the evidence consists of expert opinion. It is well established that a trier of fact is `not automatically required to render a verdict [that] conforms to . . . expert opinion,' even if `unanimous.' [Citations.] `To hold otherwise would be in effect to substitute a trial by `experts' for a trial by jury. . . .' [Citation.] As [the California Supreme Court has] explained, `[t]he value of an expert's opinion depends upon the quality of the material on which the opinion is based and the reasoning used to arrive at the conclusion.' [Citation.] In other words, `"[e]xpert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions."' [Citation.] Thus, as a general rule, the trier of fact remains free to reject even uncontradicted expert testimony after considering the expert's opinion, reasons, qualifications, and credibility, so long as it does not act arbitrarily. [Citations.] The trier of fact's decision in this regard is binding on an appellate court unless the trier of fact could not, in light of the record, reasonably reject the expert's testimony." (*In re R.V.* (2015) 61 Cal.4th 181, 218-219, dis. opn. of Chin, J.) As we will explain, the trial court here unreasonably rejected the testimony of plaintiffs' expert witness, Willis.

The California Supreme Court "has recognized that `[a]ny violation of the false advertising law . . . necessarily violates' the UCL. [Citation.] . . . [T]hese laws prohibit `not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.' [Citation.] Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, `it is necessary only to show that "members of the public are likely to be deceived."'" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950-951.)

Similarly, "[t]he CLRA proscribes certain `unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer,' including `[u]sing deceptive representations or designations of geographic origin in connection with goods or services.' (Civ. Code, § 1770, subd. (a)(4).) The standards for determining whether a representation is misleading under the FAL apply equally to claims under the CLRA." (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 679-680.) Thus, to prevail on their causes of action under the CLRA and UCL, plaintiffs had to prove SnoreStop was not an effective remedy for snoring and, therefore, Green's advertising and marketing claims regarding SnoreStop's efficacy were false, deceptive, or misleading. Plaintiffs met that burden.

Willis's expert testimony regarding the efficacy of SnoreStop was uncontradicted and unimpeached and constituted ample proof that SnoreStop is not an effective snoring remedy. Willis earned a bachelor's degree in general science and a Ph.D. in pharmacology. He did postdoctoral research at the Mayo Clinic on renal physiology and the manner in which kidneys respond to drugs, and was a professor at the Department of Pharmacology and Toxicology at the Indiana University School of Medicine. He had special training and experience in the interpretation of scientific testing and studies relating to toxicology and pharmacology, and his teaching experience since 1970 focused on pharmacology and toxicology. He had instructed medical students on herbal medicines, dietary supplements, and alternative medicine, including homeopathy, and had studied and analyzed the theories forming the basis of homeopathy. He believed his expertise in toxicology and pharmacology and his research experience enabled him to understand, analyze, and critique the scientific viability of homeopathy.

Willis testified there was no valid scientific support for the homeopathic law of infinitesimals, which is the belief that the therapeutic power of a medicine increases the more the medicine is diluted. He explained that the law of infinitesimals was in direct opposition to dose response theory, the basic principle of pharmacology. Willis also testified that he had never detected any evidence to support the homeopathic idea that striking a substance releases healing energy, noting that "science has no way to measure this energy." Based on his education, training, research, and scientific review of homeopathic literature, Willis opined that the homeopathic laws of similars and infinitesimals and homeopathic theories of succession and potentizing were contrary to proven scientific theory.

Willis's testimony was unimpeached and uncontradicted. Ullman was the only witness who attempted to contradict and impeach Willis's expert testimony that homeopathy has no basis in science, but the court entirely rejected Ullman's testimony as not credible and "unhelpful in understanding the purported efficacy of the ingredients of SnoreStop to reduce the symptoms of snoring." The court expressly stated that it gave no weight to Ullman's testimony.

"A court may not disregard or reject the uncontradicted and undisputed testimony of a witness unless that testimony is inherently improbable or other circumstances such as the witness's demeanor, bias, or motives, create a logical basis for doing so." (*Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1046.) Accordingly, as discussed above, "the uncontradicted and unimpeached testimony of an expert witness may not be arbitrarily disregarded by the trier of fact." (*Lauderdale Associates v. Department of Health Services* (1998) 67 Cal.App.4th 117, 126.)

Willis's testimony about the inefficacy and scientific implausibility of homeopathy in general alone was sufficient to satisfy plaintiffs' burden of proving the inefficacy of SnoreStop as a snoring remedy. As one court observed in a false advertising action against a company that marketed homeopathic cold and flu remedies, "If Plaintiffs can prove that homeopathy is a `pseudoscience,' as they claim, and that Defendants' products therefore uniformly do not perform as advertised, then the putative class will be entitled to relief under Plaintiffs' warranty and false advertising claims." (*Forcellati v. Hyland's, Inc., et al.* (C.D.Cal., Apr. 9, 2014, No. CV 12-1983 GHK MRWx) 2014 WL 1410264; accord, *Allen v. Hyland's Inc., et al.* (C.D.Cal. 2014) 300 F.R.D. 643, 661 ["If Plaintiffs' theory of the case is correct — i.e., Defendants made material misrepresentations about products which do not work and cannot possibly work as a matter of scientific principle, given the level of dilution of their active ingredients — then consideration of individual users' symptoms and the distinct active ingredients in each product is unnecessary."]; *Hammock, et al. v. Nutramarks, Inc., et al.* (S.D.Cal., Sept. 12, 2016, No. 15CV2056 BTM (NLS)) 2016 WL 4761784 [in action concerning the effectiveness of defendants' homeopathy products, proof that homeopathy in general is ineffective would likewise prove that defendants' products are ineffective]; *Allen v. Similasan Corp.* (S.D.Cal. 2015) 96 F.Supp.3d 1063, 1072-1073 [based on expert's discussion of the relevant literature and theory of homeopathy in general, his opinion regarding the defendant's homeopathy products was logical, and an examination of the products was unnecessary].)

In any event, as noted, Willis's testimony was not limited to homeopathy in general; he also testified regarding the inefficacy of each of the active ingredients specified on the SnoreStop label to remedy snoring and the inefficacy of those ingredients in combination. The trial court did not expressly *reject* Willis's expert testimony regarding the inefficacy of SnoreStop and homeopathy in general, but the court *disregarded* that testimony and mischaracterized certain aspects of it in its statement of decision and judgment. For example, the court stated in its statement of decision that "Dr. Willis testified as to some of SnoreStop's individual ingredients but could not testify as to the product as a whole. There was not sufficient evidence presented that the combined ingredients of SnoreStop failed to perform the function that is advertised on the package." [7] Contrary to this statement, Willis testified about each of the individual active ingredients of SnoreStop and, as to each, opined that the ingredient would not have an effect on snoring or would not shrink swollen tissue. He further testified that he was not aware of any credible scientific evidence that the *combination of SnoreStop's seven specified active ingredients* would shrink swollen tissues that block air passages in the mouth and in the back of the throat, and was of the opinion they would not.

The court also stated in the statement of decision that neither plaintiffs nor Willis submitted any "proof that the study that [Green] cited was flawed." Contrary to that statement, Willis testified about a number of flaws in the Lipman study, including his views that (1) there was no standardization of the method of collecting and reporting the data regarding the test subjects' snoring; (2) the study's authors did not conduct a "power analysis" to determine how many subjects were needed to detect a treatment difference if one does exist; (3) the study did not use an "objective measure of snoring"; and (4) the recruitment of study participants was suspect because the authors recruited a relatively small number of subjects and retained a relatively large percentage of them. The court incorrectly stated in the judgment that plaintiffs provided no scientific evidence to support their theory that there is no scientific basis for the advertised efficacy of SnoreStop. [8] This statement was inaccurate because, as discussed *ante,* Willis provided credible expert testimony that the advertised efficacy of SnoreStop is scientifically implausible.

The court based its determination that plaintiffs failed to meet their burden of proof largely on the fact that neither plaintiffs nor Willis tested the actual SnoreStop tablets. Given the list of active ingredients and dilution levels of those ingredients on the SnoreStop label, Willis did not need to test the actual product to offer an opinion about its efficacy; he was entitled to accept the information on the label and could competently testify that given that information, there is no scientific basis to conclude that SnoreStop could have any effect on snoring beyond a placebo effect.

In *Lewert v. Boiron, Inc.* (C.D.Cal. 2016) 212 F.Supp.3d 917 (*Lewert*) — a class action against two related companies that manufactured a homeopathic product marketed as providing relief for flu-like symptoms — the defendants moved to strike the testimony of plaintiffs' expert, who stated in a written report that the product was "`nothing more than a sugar pill with no active ingredients whatsoever' and that `the reported clinical trials that have assessed [the product's] efficacy are fundamentally flawed and therefore cannot be used to substantiate the claims made by [the defendant] on the packaging.'" (*Id.* at p. 925.) Among other challenges to plaintiffs' expert testimony, the defendant argued the expert's methodology was unreliable because he conducted no chemical testing of the product. The *Lewert* court ruled that the expert's decision not to run his own chemical analysis was not fatal to his opinions, stating: "The Ninth Circuit has expressly held that an expert's opinion is not unreliable as a matter of law simply because the expert's opinions `are based on data collected by others.' [Citations.] Rather, as long as his testimony is based on `the scientific method, as it is practiced by (at least) a recognized minority of scientists in the field' the expert's opinion is sufficiently reliable to meet the *Daubert*[[9]] standard for reliability." (*Id* at p. 930.) The court concluded the expert's failure to run his own chemical analysis and perform the actual homeopathic dilution process himself went to the weight of his opinion rather than admissibility. (*Ibid.*)

In the present case, there is no indication that Willis's testimony regarding the scientific implausibility of homeopathic theory in general and SnoreStop's efficacy as a snoring remedy in particular was not based on the scientific method as generally practiced by pharmacologists. Willis's testimony about the efficacy of SnoreStop was not impeached by the fact that he relied on the information on the SnoreStop label regarding its ingredients rather than chemically analyzing and testing actual SnoreStop tablets. The court did not specify any basis for rejecting Willis's testimony other than the fact he did not test SnoreStop — i.e., the court did not articulate any concern regarding Willis's reasoning, qualifications, or credibility. Thus, the court's disregard and rejection of Willis's expert testimony about the inefficacy of SnoreStop and homeopathy in general was arbitrary.

Witkin notes that "[t]he term `burden of proof' is often used loosely in two senses: (1) the secondary meaning of the burden of *initially producing* or *going forward* with the evidence; and (2) the primary meaning of the burden of *proving the issues* of the case. [¶] In the first sense, when the plaintiff offers a prima facie case, the burden shifts to the defendant until the case is met; in the second and proper sense, it rests throughout the case with the party who has the burden." (1 Witkin, Cal. Evid. (5th ed. 2012) Burden of Proof and Presumptions, § 1, p. 174.) As the California Supreme Court has explained, "the plaintiff bears the burden of proof[[10]] `with respect to all facts essential to its claim for relief.' [Citations.] The plaintiff `must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). [Citation.] The burden of proof *does not* shift . . . [;] it remains with the party who originally bears it.' [Citation.]

"This burden of [proof or] persuasion is different from the `burden of producing evidence' [citation], which may shift between the parties.[ [11]] `[T]he

burden of producing evidence as to a particular fact rests on the party with the burden of proof as to that fact. [Citations.] If that party fails to produce sufficient evidence to make a prima facie case, it risks nonsuit or other unfavorable determination. [Citations.] But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence *shifts* to the other party to refute the prima facie case.'" (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436.)

In the present case, plaintiffs clearly met their burden of proof in the sense of initially producing evidence sufficient to present a prima facie case. The court's denial of Green's motion for judgment confirms that plaintiffs met this burden sufficiently to shift the burden to Green to refute the prima facie case. Thus, the court's determination that plaintiffs failed to meet their burden of proof was either an inconsistent determination that plaintiffs failed to present sufficient evidence to make a prima facie case, or a determination that although plaintiffs presented a prima facie case, defendant's evidence of SnoreStop's efficacy outweighed plaintiffs' prima facie showing. To the extent the court's decision reflects the latter determination, it was inconsistent with its express rejection of Green's homeopathy expert Ullman and its express finding that none "of the defense witnesses really added to the [court's] understanding of the product or the case."

In light of the court's denial of Green's motion for judgment, we construe the court's ultimate conclusion that plaintiffs failed to meet their "burden of proof to establish a viable claim under the [CLRA] because [they] offered insufficient evidence to support [their] contention that [Green] engaged in unfair and deceptive business practices" as a determination that plaintiffs presented insufficient evidence that SnoreStop is ineffective as a snoring remedy. Likewise, the court's ultimate conclusion regarding plaintiffs' UCL and FAL cause of action that "[t]here was insufficient evidence showing that members of the public are likely to be deceived by [Green's] advertising[]" was a determination that plaintiffs' presented insufficient evidence of SnoreStop's inefficacy to prevail on that cause of action. Considering that the court arbitrarily disregarded Willis's uncontradicted and unimpeached expert testimony regarding the inefficacy of homeopathy in general and SnoreStop in particular, and expressly rejected Ullman's testimony and Green's evidence in general, we conclude the court erred in ruling plaintiffs failed to meet their burden of proof that SnoreStop is an ineffective snoring remedy. Given the uncontradicted and unimpeached evidence that the fundamental principles of homeopathy have no basis in science and that SnoreStop in particular is not an effective remedy for snoring, the court should have found for plaintiffs on both of their causes of action and awarded the appropriate relief requested in plaintiffs' complaint. [12]

II. *Apparent Decertification of the Class*

The judgment contains the following ambiguous provision that can be construed as an order decertifying the class: "Plaintiff's request for certification of the proposed classes and notice thereto to be paid by [Green] is DENIED." Construing this language as a decertification order, however, renders it inconsistent with other provisions in the judgment.

The judgment states that it is "entered in favor of Defendant, Green Pharmaceuticals, and against Plaintiffs and each of the Class Members." The judgment further states that "[t]he claims in this Class Action are hereby adjudicated and Plaintiff and each of the Class Members shall be deemed to have, and by operation of this Judgment shall have, fully, finally, and forever relinquished, and discharged all claims in this action." The judgment then reiterates the principle that it is res judicata as to all class members by stating: "All class members are hereby forever barred and enjoined from prosecuting the Claims that were brought in this Action." However, the judgment later appears to undermine its own res judicata rulings by inconsistently denying "[p]laintiff's request for certification of the proposed classes and notice thereto to be paid by [Green]. . . ." Construed as an order decertifying the class, this provision of the judgment is inconsistent with the provisions entering judgment in favor of Green *against the class* and ruling that all class claims were adjudicated and that the class members were "forever barred and enjoined" from prosecuting those claims. Absent a certified class against which judgment was entered, the doctrine of res judicata would not bar a nonrepresentative putative class member from later bringing the same claims individually against Green.

The provision of the judgment denying class certification presumably was included as the result of mistake or inadvertence because there was no pending motion or "request" by plaintiffs to certify the class when the court entered judgment; the court had granted plaintiffs' motion to certify the class in September 2013, a year before trial. To the extent the court intended the provision to be a ruling decertifying the class, it was improper because in addition to there being no pending request to decertify, the record does not reflect anything before the court indicating the requirements for certification were no longer satisfied at the time of trial. [13] The fact that the court adjudicated the class claims in Green's favor was not a proper basis to decertify the class.

DISPOSITION

The judgment in favor of Green is reversed, including the portion of the judgment denying "[p]laintiff's request for certification of the proposed classes and notice thereto to be paid by [Green]." The trial court is directed to determine the damages, restitution, and other relief to which the plaintiff class members are entitled under their first and second causes of action based on the court's de novo review of the evidence presented at trial or such additional evidence as the court may deem necessary or advisable. The court is directed to enter judgment in favor of the plaintiff class awarding such damages, restitution, or other relief under the appropriate causes of action. Plaintiffs are awarded their costs on appeal.

O'ROURKE, J. and IRION, J., concurs.

FootNotes

1. The parties and the trial court generally used the term "plaintiff" in the singular as though Rosendez were a sole plaintiff rather than a representative plaintiff in a certified class action. We will refer to the certified class as "plaintiffs."

2. Willis explained that "6x" means that the ingredient has been diluted to one part in ten six times, resulting in a dilution of one part per million. A 12x dilution would be one part per trillion.

3. The Lipman study was not admitted into evidence below and is not part of the record on appeal. Accordingly, we do not consider the study in reaching our decision. (*People v. Sanchez* (2016) 63 Cal.4th 665, 694; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn.1; *In re Autumn K.* (2013) 221 Cal.App.4th 674, 694, fn. 6.) The court did not cite or rely on the Lipman study as evidence contradicting plaintiffs' evidence that SnoreStop was an ineffective snoring remedy. The court merely noted that Green relied on the study, which, in the court's words, "purports to show that the product is effective as advertised[,]" and that Willis gave testimony "indicating that he took issue with the results of the study." As discussed *post,* the court incorrectly stated that neither plaintiffs nor Willis "submitted . . . proof that the study . . . was flawed."

4. Plaintiffs complain that the court did not address certain false or misleading statements on the SnoreStop label that are not referenced in their complaint — e.g., the statement that the clinical study cited on the label was an "independent" study and the statement that SnoreStop is "formulated, tested and recommended by physicians." However, the fundamental issue in this case is whether SnoreStop is falsely advertised and marketed as an effective snoring remedy. The complaint sufficiently alleges representations that singly and together constitute the marketing claim that SnoreStop is an effective remedy for snoring. The fact that the court in its statement of decision and judgment ignored evidence presented at trial of additional representations by Green regarding the efficacy of SnoreStop is immaterial to the ultimate issue of whether plaintiffs met their burden of proving Green's marketing claims of SnoreStop's effectiveness are false.

5. After presentation of all the evidence at trial, the court orally stated, "So I have some difficulty as to whether or not . . . the plaintiff has been able to submit enough information to actually prove their case as opposed to any affirmative showing on the part of the defense, *I didn't find that any of the defense witnesses really added to the understanding of the product or the case.*" (Italics added.)

6. Green argues that plaintiffs' appeal should be dismissed as untimely because plaintiffs did not file their notice of appeal within the 60-day period specified in California Rules of Court, rule 8.104(a)(1), and their motion for new trial did not extend that 60-day period under California Rules of Court, rule 8.108(b), because they did not timely file their notice of intent to move for new trial. Green's contention is without merit because, as plaintiffs pointed out in their reply to Green's opposition to their new trial motion, neither Green nor the court clerk served a notice of entry of judgment on plaintiffs. Consequently, under Code of Civil Procedure section 659, subdivision (a), plaintiffs had 180 days after entry of judgment to file their notice of intention to move for new trial, and under rule 8.104(a)(1)(C), they had 180 days after entry of judgment to file their notice of appeal. Plaintiffs timely filed their notice of appeal within the 180-day period.

7. In the judgment, the court reiterated these statements, but omitted the word "sufficient," stating: "There was no evidence presented that the combined ingredients of SnoreStop failed to perform the function that is advertised on the package."

8. In the statement of decision, the court noted that plaintiffs at trial "proceeded on the theory that there is no scientific basis for the advertised efficacy of SnoreStop. Plaintiff provided no evidence of tests to determine the efficacy of SnoreStop." However, in the judgment, the court stated: "At trial, Plaintiff proceeded on the theory that there is no scientific basis for the advertised efficacy of SnoreStop. *However, Plaintiff provided no scientific evidence to support her contention* and performed no tests to determine the efficacy of SnoreStop. Plaintiff provided no evidence of tests to determine the efficacy of SnoreStop." (Italics added.)

9. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579. Under *Daubert,* a trial court faced with a proffer of expert scientific testimony "must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." (*Id.* at pp. 592-593, fns. omitted.)

10. "The terms `burden of proof' and `burden of persuasion' are synonymous. [Citation.]"

11. "The `burden of producing evidence' has also been referred to as the `burden of production' and the `burden of going forward.' [Citation.]"

12. We are aware that in *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.* (2003) 107 Cal.App.4th 1336 (*King Bio*), a UCL/FLA action against a seller of homeopathic remedies, the Court of Appeal suggested that if a homeopathic product is listed in the Homeopathic Pharmacopoeia of the United States (HPUS), its efficacy is sufficiently established under the federal Food, Drug, and Cosmetic Act to avoid false advertising liability. The federal Food and Drug Administration (FDA) defines a homeopathic drug as any drug labeled as being homeopathic that is also listed in the HPUS. (*Delarosa v. Boiron, Inc.* (C.D.Cal. 2011) 818 F.Supp.2d 1177, 1182 (*Delarosa*).) (The SnoreStop label states that SnoreStop "follows the FDA guidelines of the HPUS.") However, unlike non-homeopathic over-the-counter (OTC) drugs, homeopathic OTC drugs are not evaluated by the FDA at all. (*Id.* at p. 1182.) "The FDA does not impose additional standards for strength, purity, quality, safety, *or efficacy* on homeopathic OTC remedies. Indeed, the FDA has advised that unless a homeopathic remedy is `being offered for use (or promoted) significantly beyond recognized or customary practice of homeopathy, `federal policies on health fraud do not apply.'" (*Id.* at p. 1183, italics added.) "[T]he FDA explicitly states in [one if its internal Compliance Policy Guides] that a homeopathic drug's compliance with the requirements of the HPUS `does *not* establish that it has been shown by appropriate means to be safe, effective, and not misbranded for its intended use.'" (*Id.* at p. 1187.)

The *King Bio* court stated: "The FDA permits homeopathic remedies included in the [HPUS] to be marketed. [The defendant's] products are included in the [HPUS] and otherwise comply with FDA regulations. Thus, prior to the marketing of a product by [the defendant], the general efficacy and safety of the remedy has been substantiated to the extent required by federal law. Public policy would not be furthered under these circumstances by requiring [the defendant] to substantiate its advertising claims as to general efficacy every time a private plaintiff brings a false advertising action." (*King Bio, supra,* 107 Cal.App.4th at p. 1348.)

The *Delarosa* court criticized this analysis in *King Bio,* stating: "The Court is not persuaded by the reasoning set forth in *King Bio* . . . that inclusion in the HPUS is sufficient to guarantee the efficacy and safety of a homeopathic OTC drug. As previously noted, unlike with non-homeopathic OTC drugs, the FDA has not set up a comprehensive process to evaluate the safety or efficacy of homeopathic OTC remedies. [Citation.] More importantly, the FDA explicitly acknowledges that `[a] product's compliance with requirements of the HPUS . . . does *not* establish that it has been shown by appropriate means to be safe, effective, and not misbranded for its intended use.'" (*Delarosa, supra,* 818 F.Supp.2d at p. 1189.) We agree with the *Delarosa* court on this point and conclude that a product's inclusion in the HPUS or compliance with FDA guidelines regarding the HPUS does not establish, much less guarantee, the product's efficacy. To the extent *King Bio* suggests otherwise, we respectfully disagree.

13. Green suggests in its respondent's brief that Rosendez was not an adequate class representative, but there is nothing in the court's statement of decision or judgment indicating the court intended to decertify the class on that basis.

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