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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MORGAN M. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D065733

(San Diego County
Super. Ct. No. NJ14734)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26¹ hearing. Martin W. Staven, Judge. (Retired Judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Granted in part and denied in part, with directions; stay vacated.

¹ Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

Law Offices of Johnson & Johnson and Carin L. Johnson for Petitioner Morgan M.

Kenneth R. Elliott for Petitioner Daniel M.

Dependency Legal Group of San Diego and Jill S. Smith for Petitioner Ariel M., a Minor.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel and Lisa M. Maldonado, Deputy County Counsel, for Real Party in Interest San Diego County Health and Human Services Agency.

Morgan M. and Daniel M., and their daughter Ariel M., seek review of a dispositional order setting a hearing under section 366.26. Morgan and Daniel² argue there is not substantial evidence to support the finding they physically abused their infant daughter. They also contend the court erred when it denied reunification services to them. Ariel does not challenge the jurisdictional findings, but asserts the court erred when it denied reunification services to her parents.

Ariel, now two years old, sustained multiple fractures before she was three months old. Medical experts disagreed on whether Ariel's injuries resulted from child abuse or metabolic bone disease, or a combination of both; whether her significantly low level of 25-hydroxy vitamin D indicated a diagnosis of rickets; and whether some of her injuries were fractures or bone abnormalities. The trial court determined that Ariel was in fact physically abused by her parents. We conclude that the court's jurisdictional findings are

² In his petition for extraordinary relief, Daniel joins in Morgan's arguments and does not separately brief the issues.

supported by substantial evidence and therefore deny the parents' request to dismiss their daughter's dependency case for lack of jurisdiction.

However, we conclude that the court erred when it found that services were unlikely to prevent reabuse because the parents would not admit they were responsible for inflicting Ariel's injuries, and denied reunification services to the parents. On this record, the parents' failure to admit they physically abused their daughter does not demonstrate the futility of reunification services. In addition, the uncontroverted evidence shows that Ariel is closely and positively attached to her mother and father, neither parent has any history of drug or alcohol abuse or violent behavior, and each would benefit from services. We therefore grant petitioners' requests to vacate the order setting a section 366.26 hearing and reverse the order denying family reunification services.

FACTUAL AND PROCEDURAL BACKGROUND

Morgan and Daniel are the parents of Ariel, who was born in July 2012. On October 23, 2012, Morgan and Daniel sought emergency medical care for Ariel, whose legs appeared swollen. Medical doctors determined that Ariel had sustained 14 fractures, including fractures of the ninth and tenth ribs, multiple bilateral fractures of the femurs (thigh bones) and tibias (large lower leg bones), and a fracture of the right fibula (small

lower leg bone), right and left humerii (upper arms), right acromion (point of the shoulder) and left ischium tuberosity (sitting bone).³

The San Diego County Health and Human Services Agency (Agency) detained Ariel in protective custody and filed a petition under section 300, subdivisions (a) and (e) alleging Morgan and Daniel had severely physically abused their infant daughter. After a contested hearing, the court sustained the petition, removed Ariel from her parents' custody, denied reunification services to the parents and set a section 366.26 hearing. The parents petitioned for review of the court's findings and orders under California Rules of Court, rule 8.452.⁴

This court held that the juvenile court abused its discretion when it denied Morgan's request for a continuance during the jurisdiction hearing after she retained new counsel and her counsel located, after the Agency had presented its case, the results of Ariel's 25-hydroxy vitamin D level and an additional set of radiographs from November 26, 2012. Medical experts testifying at trial said the 25-hydroxy vitamin D level should have been, but was not, performed on Ariel while she was hospitalized, and the results would have been important in properly diagnosing Ariel's injuries. Morgan's expert

³ Humerus, femur, tibia and fibula are defined in Stedman's Medical Dictionary (28th ed. 2006) (Stedman's) at page 906, column 1; page 709, column 2; page 1989, column 1; and page 727, column 1, respectively. The acromion is the part of the scapula that forms the point of the shoulder. (*Id.*, at p. 19, col. 2.) The ischium is the lower and posterior part of the hip bone, distinct at birth but later becoming fused with the ilium and pubis. (*Id.*, at p. 1002, col. 1.) A tuberosity is a large rounded elevation, especially from the surface of a bone. (*Id.* at p. 2048, col. 2.)

⁴ Further rule references are to the California Rules of Court.

witness said he did not have sufficient time to review the newly discovered radiographs. This court vacated the jurisdictional and dispositional findings and orders, and the order setting a section 366.26 hearing, and remanded the matter to the juvenile court with directions to grant a continuance of the jurisdiction hearing and allow the parties to present additional evidence. (*Morgan M. v. Superior Court* (Sept. 27, 2013, D063873) [nonpub. opn.])

On remand, the matter was assigned to a different judge. The court agreed to the parties' proposed document trial, which would include review of the transcripts of the first jurisdictional hearing, the Agency's reports and exhibits, and the parents' exhibits. In addition, at the disposition hearing, the court heard the social worker's testimony. We summarize the relevant evidence:

Ariel's Medical History

Ariel had routine pediatric visits on August 1, 2 and 10, September 24 and October 1.⁵ Ariel was breast-fed and was receiving a multivitamin supplement. She appeared to be well-nourished. On August 31, Ariel had an acute pediatric visit for what her parents described as bruising that appeared around her eyes after she cried, on her torso after she had been held by family members, and on her buttocks. At the time of the examination, Ariel had a grey ring-shaped discoloration on each buttock surrounding the ischium. The pediatrician did not believe the rings were bruises and did not file a report with child protective services. He gave a vitamin K shot to Ariel and referred her to a

⁵ Unless otherwise indicated, Ariel's medical care was at Naval Medical Center San Diego (NMC).

dermatologist, whom she saw on September 13. She did not have any lesions on that date.

On October 23, the parents brought Ariel to the emergency room at Camp Pendleton after they noticed that her legs appeared swollen. X-rays revealed bilateral femur fractures, and Ariel was transferred to NMC. A series of X-rays were taken on October 24. Ariel was described as a well-developed and well-nourished baby in no acute distress. She did not have any bruises or skin lesions. On October 25, while hospitalized, she received Poly-Vi-Sol to meet her iron and vitamin D needs. Her lab tests were within the normal range. Ariel was discharged from the hospital to foster care on October 25. Hospital notes indicate she had light bruises on her scalp and low back when discharged.

On October 30, Ariel's attending physician discovered that a 25-hydroxy vitamin D level (25-OH level) had not been ordered and asked the laboratory to conduct that test on Ariel's serum. The 25-OH level is a measure of the vitamin D that is stored in the body. Ariel's 25-OH level was 13 ng/ml, which is in the deficient range.⁶

Ariel had a follow-up visit on November 5. She had a full set of X-rays taken on that date. Her fractures were healing and she did not have any new injuries. There was no indication of fractures of the left ischium, left distal humerus and right distal humerus on that date.⁷

⁶ Normal 25-OH levels range from 30 to 100 ng/ml.

⁷ Those three fractures were stricken from the section 300 petition.

On December 3, Ariel was examined by Gayle H. Tyerman, M.D., at the Osteogenesis Imperfecta⁸ (OI) Clinic at Shriner's Hospital. Dr. Tyerman told the parents that Ariel had a fracture pattern seen in infants with type I OI and referred Ariel for genetic testing. Genetic testing determined that Ariel did not have OI.

After Ariel was placed with her maternal grandmother, she received pediatric care from Yvonne Dysilva, M.D. On January 18, 2013, Dr. Dysilva evaluated Ariel for left arm pain, which was diagnosed as nursemaid's elbow.⁹ Dr. Dysilva believed that Ariel's vitamin D level at the time of her injury was consistent with a diagnosis of neonatal rickets,¹⁰ and referred her to Thomas J. Grogan, M.D., an orthopedic surgeon, to rule out continuing bone fragility.

⁸ Osteogenesis imperfecta is a connective tissue disorder of type I collagen, characterized by bone fragility, fractures on trivial trauma, skeletal deformity, blue sclerae, ligament laxity, and hearing loss. It is caused by a genetic mutation. (Stedman's, *supra*, at p. 1390, col. 1.)

⁹ Nursemaid's elbow is a dislocation of the radius, a bone in the elbow. It occurs when the bone slips out of its normal position at the elbow joint. It is a common condition in young children, and often occurs after someone lifts a child up by one arm. It may also be caused by the child rolling over in an unusual way or by someone swinging the child from the arms while playing. (The New York Times, Health Guide, Nursemaid's Elbow <<http://www.nytimes.com/health/guides/disease/nursemaids-elbow/overview.html>>, as of Sept. 23, 2014.)

¹⁰ Rickets is a disease attributable to vitamin D deficiency, and characterized by overproduction and deficient calcification of osteoid tissue, with associated skeletal deformities, disturbances in growth, hypocalcemia, and sometimes tetany; usually accompanied by irritability, listlessness, and generalized muscular weakness; fractures are frequent. (Stedman's, *supra*, at p. 1697, col. 1; see p. 931, col. 1 [hypocalcemia is abnormally low levels of calcium in the circulating blood], p. 1966, col. 2 [tetany is a clinical neurologic syndrome, usually resulting from low serum levels of ionized calcium].)

On March 4, Ariel had a normal 24-OH level of 41 ng/ml.

Ralph H. Pickard, M.D., Board Certified Radiologist, Qualified Pediatric Radiologist

Dr. Pickard interpreted Ariel's skeletal surveys of October 24 and November 5, 2012. On October 24, Dr. Pickard determined that Ariel had multiple healing fractures involving the right acromion, right humerus, right ninth and tenth ribs, right femur, right proximal and distal tibia, right fibula, left humerus, left proximal and distal femur, and left proximal and distal tibia. Dr. Pickard also suspected a fracture of the left ischium tuberosity. Ariel's bones were otherwise normal without any radiographic evidence of demineralization, bone dysplasia¹¹ or underlying condition that would make Ariel more susceptible to fracture, including rickets or metabolic bone disease. Many of Ariel's fractures were highly concerning for abuse, and in current practice were considered highly specific for abuse. The few fractures that did not fall into the category of "highly specific for abuse" were the fractures of the left proximal femur, right and left distal humeri, and right distal femur. The bilateral distal humeral fractures were not specific for abuse. The other fractures were suspicious for abuse. On November 5, the right ninth rib fracture, the left distal humeral fractures and the suspected ischium fracture were not definitively seen on Ariel's radiographs. Dr. Pickard said the other 11 fractures were clearly present and consistent with nonaccidental trauma.

Dr. Pickard disagreed with the parents' expert witnesses, Dr. Charles Hyman and Dr. Julie Mack, about the interpretation of Ariel's radiographs. All of Ariel's bone

¹¹ Dysplasia means abnormal tissue development. (Stedman's, *supra*, at p. 599, col. 2.)

abnormalities were consistent with healing fractures. The number, type and distribution of Ariel's fractures, and lack of certain other findings were rarely, if ever, seen incidentally or associated with any known metabolic or other disease. Ariel had multiple fractures that were highly specific for nonaccidental trauma without any objective evidence of extraordinary bone fragility.

Dr. Pickard said even if it were proved Ariel had weak bones, he would conclude that Ariel's fractures were those of an abused child with weak bones. Fractures caused by normal handling of an infant with weak bones would not present like the fractures Ariel suffered; they would not be distributed in the skeleton like Ariel's fractures; and they would not show healing changes like Ariel's fractures. Dr. Pickard said, "It deserves to be repeated that Drs. Mack and Hyman possess opinions regarding the evaluation of child abuse that are outside the standard of care set by the prominent professional societies specifically concerned with the medical diagnosis and treatment of disease in children."

Sarah Villarroel, D.O., Board Certified Child Abuse Pediatrician

Dr. Villarroel reviewed Ariel's medical records to evaluate possible genetic causes of fragile bones. In her initial report, she concluded that Ariel's fractures were not due to an underlying metabolic bone disease but resulted from inflicted injury. Later, when the results of Ariel's 25-OH levels became known, Dr. Villarroel said although Ariel's vitamin D level was consistent with vitamin D deficiency, her calcium and phosphorous levels were normal, and there was no radiographic evidence of demineralization or bone dysplasia. This excluded a diagnosis of rickets. Further, vitamin D levels can decrease in the setting of multiple fractures and increase once the fractures have healed. This was

most likely the case because Ariel's 25-OH level increased to 41 ng/ml on March 4, 2013, without the long-term vitamin D supplementation that would have been necessary to correct her vitamin D level that quickly. While a diagnosis of rickets could not be completely excluded, Ariel's lab tests and clinical presentation were not consistent with rickets. Even if Ariel had rickets, her fractures were not consistent with those seen in rachitic patients.

Kathleen M. Dully, M.D., Board Certified Child Abuse Pediatrician

At the first jurisdictional hearing, Dr. Dully testified she reviewed Ariel's medical records and concluded there was no alternative explanation for Ariel's injuries except for nonaccidental trauma. The fractures resulted from pulling apart the ends of the bones, which was caused by traction, twisting, torsion or yanking. There was more than one act of abuse. Dr. Dully said a 25-hydroxy vitamin D level would have shown whether Ariel had had rickets or a vitamin D deficiency, but she expected that such a test, had it been ordered, would have been within normal limits because Ariel's bones did not show any mineralization problems or deficiencies. Dr. Dully testified that if the 25-hydroxy vitamin D level was not normal, it would not be consistent with her conclusions.

When the result of the newly discovered 25-hydroxy vitamin D level was brought to Dr. Dully's attention, she testified that Ariel's 25-OH level was deficient. However, there were no other indications that Ariel had rickets. Dr. Dully did not believe Ariel had rickets but could not state with 100 percent certainty that Ariel did not have rickets.

Gayle H. Tyerman, M.D.

Dr. Tyerman and her colleagues reviewed Ariel's radiographs from October 24, 2012. Dr. Tyerman said Ariel's bones definitely looked unusual, especially in the areas where the fractures were located. In her opinion, the radiographs did not reveal fractures of the ninth and tenth ribs. As of December 3, 2012, Ariel's fractures had healed completely and her bones appeared healthy, with normal mineralization.

Thomas J. Grogan, M.D., Orthopedic Surgeon

Dr. Grogan examined Ariel on May 21, 2013. Ariel's 25-OH level of 13 ng/ml at the time of her injuries suggested a vitamin D deficiency, which was synonymous with neonatal rickets and increased bone fragility, making Ariel's bones unusually susceptible to fracture and contributing to the fracture pattern observed on October 24, 2012.

However, Dr. Grogan believed that someone handled Ariel in a manner that caused the bones to fail. For example, Ariel's fracture of the acromion was caused by squeezing her arms together, instead of reaching under her arms, to lift her up. Her posterior rib fractures were caused when someone grabbed her around her chest. It was unlikely Ariel's injuries occurred during normal handling because she was not that fragile; however, it was impossible to tell whether any rough handling was intentional.

Julie A. Mack, M.D., Board Certified Radiologist, Qualified Pediatric Radiologist

Dr. Mack reviewed Ariel's radiographs and concluded that Ariel's injuries were not specific for inflicted injury. The unusual appearance of numerous bone defects indicated abnormality in normal bone remodeling and repair. Ariel's bones did not show normal mineralization. There was nothing about Ariel's radiographs that should have

been construed as specific evidence of an inflicted traumatic event. Rib fractures can occur from coughing or from repetitive low force causing stress fractures. A pediatric patient with bone fragility will fracture at forces lower than a pediatric patient with normal bone strength. Ariel's proximal left femur was significantly asymmetric compared to the right, indicating an ongoing chronic process of faulty bone growth and remodeling. There was a lucent defect of the femoral neck that was atypical in orientation and shape for a fracture. It was not in the location where classic metaphyseal lesions occur. The asymptomatic lesions of Ariel's distal femurs did not fit the appearance of either acute or healing fractures. A full and complete workup for bone fragility should have been, but was not, performed on her. In cases such as this one, the default diagnosis should not be inflicted trauma.

Charles J. Hyman, M.D., F.A.A.P.,¹² Board Certified Pediatrician

Dr. Hyman said Ariel had an obvious case of metabolic bone disease and bone fragility that was, at least in part, associated with rickets. She was not a victim of child abuse. Her bones were markedly abnormal and fractured with minimal force. Occult, clinically silent, nonabusive fractures occur with some frequency in infants with metabolic bone problems. For a child with bone fragility, a lack of a history of accidental injury cannot be considered diagnostic of child abuse. Normal handling of an infant with bone fragility can cause microfractures that can progress to completed fractures. Dr. Villarroel was not correct when she stated Ariel did not have rickets because her other

¹² Fellow of the American Academy of Pediatrics.

tests were normal. Normal levels of serum calcium, phosphorous and alkaline phosphatase do not exclude a diagnosis of rickets in infancy, especially healing rickets of infancy. There can be a 20 to 40 percent reduction in the bone before osteopenia¹³ is seen on plain films. In addition, Dr. Villarroel was not aware that Ariel had been receiving vitamin D supplementation since September 2012, and her assertion that vitamin D levels decrease with multiple fractures was not scientifically supported.

Dr. Hyman said the concept of child abuse-specific fractures was valid if a possible bone disorder had been eliminated. However, Ariel's evaluation did not exclude metabolic bone conditions and bone fragility. Further, to determine whether the child was intentionally injured, clinicians must review the entire history of the case, including the family's medical and psychosocial history. According to Dr. Hyman, Ariel had a number of risk factors for fracture, including maternal vitamin D insufficiency during pregnancy; maternal history of chronic musculoskeletal pain and fracture; family history of collagen vascular problems; being breast-fed; a proven vitamin D deficiency; weight loss around the time she presented with fractures; radiographic abnormalities compatible with metabolic bone dysfunction associated with rapid bone turnover; and radiographic abnormalities diagnostic of abnormalities of mineralization and healing rickets. In making a diagnosis, clinicians also should have considered other relevant information, including the family's good psychosocial profile; hospital notes describing Morgan's ease in breast-feeding Ariel and pair bonding following her birth; doctor's notes at Morgan's

¹³ Osteopenia is decreased calcification or density of bone. (Stedman's, *supra*, at p. 1391, col. 1.)

six-week postpartum visit indicating Morgan did not have any psychological problems and there were no concerns about bonding between mother and child; Ariel's history of regular pediatric care; and the parents' history of seeking medical care for Ariel when they had concerns about her well-being.

Harvey Feinman, Ph.D., Licensed Clinical Psychologist

Dr. Feinman provided weekly marriage counseling to Morgan and Daniel from May 2013 to February 2014. During the counseling sessions, he discussed a variety of parenting issues. Both parents were sensitive to Ariel's needs and developmental issues. They continued to maintain their innocence throughout the therapy. Dr. Feinman did not find any indication either parent had significant problems with anger or impulse control or that they would be unable to adequately care for their daughter if reunification proceeded.

Social Worker Errinn Hart

Social worker Hart testified that Ariel was closely and positively attached to her parents. They consistently visited Ariel twice a week, and accompanied the grandparents and Ariel on vacation, with no protective issues. Ariel cried for her parents when they left. When Ariel saw her mother, she would get excited. She called them "mama" and "daddy." Before the dispositional hearing started, Morgan walked past Ariel on the way to the courtroom. Ariel fussed and said "mama." Fussing on separation indicated Ariel had a close bond to her parents.

Hart believed the lack of reunification services would not be detrimental to Ariel because she had a primary parent/child bond with her maternal grandmother and was

closely and positively attached to her. Ariel's family was bonded, and she would have an ongoing relationship with her parents, supervised by the maternal grandparents.

The parents voluntarily completed a 52-week child abuse parenting course and other programs. Hart said additional services were unlikely to prevent reabuse because the parents did not address the protective issues. Instead, they continued to maintain that Ariel's fractures were caused by vitamin D deficiency rickets. Because the parents insisted there was a medical cause for Ariel's injuries, Hart was unable to make a safety plan for Ariel with them.

Hart acknowledged the parents did not have any history of drug or alcohol abuse, crime or domestic violence. The only additional service Hart would recommend for the parents would be therapy with a TERM therapist. However, unless the parents accepted responsibility for Ariel's injuries, they could not make substantive progress in a case plan.

The Court's Findings

The court stated:

"After careful consideration and reading your reports -- many reports on more than one occasion, I have concluded that Dr. Hyman is not credible, nor is his position plausible. Dr. Hyman has carved out a line of business for himself that he puts forth in great detail in his reports. The longer the reports, in this Court's estimation, the less credibility. And his reports are an example of that. The court has experience of 46 years in court. It didn't take but a little bit of reading of Dr. Hyman's reports to get the idea that this was a man who not only has not seen pediatrically children for ages but has a position that he wants to put forward whether it makes any sense or not. [¶] On the other side, the doctors who make up the County counsel case I find to be credible and reliable. [¶] Having said that, the Court finds the petition to be true by clear and convincing evidence."

After the parties concluded their dispositional arguments, the court stated:

"The parents have taken a position that I think at this point apparently is impossible to get around, and so we have this problem of not taking responsibility, which the Court has encountered on numerous occasions in different kinds of cases. . . . [¶] . . . [¶] It's clear to me that not admitting that you committed the crime, not taking responsibility is just fatal to the idea that this person can be rehabilitated. . . . [The parents] could do services for years, and we wouldn't be anywhere for the simple proposition that they didn't do it. . . . The Court does not believe that [the parents] would be likely to succeed based on their prior comments about acknowledgment of responsibility. There's a reason why the statute was written this way, because what happened is -- as long as I've done this, I still can't imagine somebody abusing a child of this age, but it happens. And I did not find that it was intentional. It may not have been, but it happened, and one of the parents did it. So I am ordering that no reunification services be offered.

The court removed Ariel from the custody of her parents, denied reunification services to the parents under section 361.5, subdivision (b)(5), and set a section 366.26 hearing.

Morgan, Daniel and Ariel petitioned for review of the court's order under rule 8.452. This court issued an order to show cause, the Agency responded and the parties waived oral argument. On July 3, 2014, this court granted the petitioners' requests to stay the section 366.26 hearing.

DISCUSSION

A

Jurisdiction

Morgan and Daniel argue there is not substantial evidence to support the juvenile court's findings that they were responsible for inflicting severe physical abuse on their

infant daughter. They contend the court abused its discretion when it determined that Dr. Hyman was not credible because his report was too long and the Agency did not otherwise meet its burden of proof to show that Ariel's fractures were caused by physical abuse.

To sustain a petition under section 300, subdivision (a), the Agency must prove by a preponderance of the evidence the child has suffered, or there is a substantial risk the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent. Section 300, subdivision (e) requires proof the child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. As relevant here, " 'severe physical abuse' " means any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; or any single act of physical abuse, each of which causes bleeding, significant external or internal swelling, bone fracture or unconsciousness. (*Id.*, subd. (e).)

We review the trial court's findings for substantial evidence. We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) We do not limit our review to isolated bits of evidence favorable

to the respondent but must resolve the issue in the light of the entire record. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.)

The court credited the testimony of the Agency's expert witnesses and did not credit the testimony of Dr. Hyman.¹⁴ Morgan and Daniel argue the Agency witnesses were not credible because they did not specialize in bone science, and ask this court to reweigh the evidence.

Morgan and Daniel did not challenge the qualifications of the Agency's expert witnesses at trial, and have forfeited the argument those witnesses were not qualified to render an opinion on the cause of Ariel's injuries. To the extent the parents challenge the credibility of the Agency's witnesses, "[t]he testimony of witnesses who were apparently believed by the trier of fact may be rejected on appeal only if that testimony was physically impossible of belief or inherently improbable without resort to inferences or deductions." (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 195.)

The parents do not meet their burden on appeal to show that the opinions of Agency's expert witnesses were inherently improbable. Dr. Pickard and Dr. Villarroel

¹⁴ Dr. Hyman's report included his credentials; his findings; an explanation of his methodology; summaries of Ariel's medical records, the Agency's reports and the medical findings of her other physicians; copies of Ariel's radiographs; explanations of bone development, the significance of vitamin D on bone development in infants and rickets, and other relevant issues; criticism of current child abuse diagnostic methodology; rebuttal of the Agency's expert witnesses; and numerous supporting references to published articles.

While we do not share the court's view that longer reports are inherently less credible than shorter reports, " 'we review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm.' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 351, fn. 11.)

said Ariel had multiple fractures that were highly specific for nonaccidental trauma without any objective evidence of extraordinary bone fragility. Although Ariel's 25-OH level was deficient, Dr. Villarroel and Dr. Dully did not believe that Ariel was properly diagnosed with rickets. There were no other indications to support such a diagnosis, such as low levels of calcium or phosphorous, demineralization or bone dysplasia. Further, to the extent Ariel's bones were weak, Dr. Pickard said the pattern, distribution and healing changes in her bones would not have occurred in the absence of inflicted injury. This view was corroborated in part by Dr. Grogan, the parent's expert, who did not believe Ariel's bones were sufficiently fragile to have fractured with normal handling. According to Dr. Grogan, Ariel's multiple fractures were caused by someone who was handling her too roughly. The record shows that Morgan and Daniel were Ariel's only caregivers during the time she was injured.

The court could reasonably find that the opinions of Dr. Hyman and Dr. Mack regarding the diagnosis of child abuse were outside the current standard of care set by preeminent organizations such as the American Academy of Pediatrics and the Society of Pediatric Radiology, and instead rely on the findings and opinions of the Agency's witnesses. We conclude there is substantial evidence in this record to support the court's findings that Ariel is a child described by section 300, subdivisions (a) and (e).

B

Disposition

Morgan and Daniel assert the court erred when it did not order reunification services under section 361.5, subdivisions (b)(5) and (c). Daniel specifically argues the

fact he did not admit culpability for Ariel's injuries is not legally sufficient reason to deny reunification services.

Ariel contends the court erred when it denied reunification services to her parents. She argues the court did not find that Daniel was responsible for severely physically abusing his daughter by act or failure to protect, as required under section 361.5, subdivision (b)(5). Ariel further argues both parents met their burden at trial to show that services were likely to prevent reabuse and failure to attempt reunification would be detrimental to her under section 361.5, subdivision (c). Minor's appellate counsel further states it is imperative the parents receive services because even if reunification does not occur, the parents will continue to have contact with Ariel in a family setting.

The Agency acknowledges it is unclear which parent inflicted Ariel's injuries but asserts the lack of identification does not defeat a finding under section 300, subdivision (e). To the extent the father was not the perpetrator, he should have known the mother was abusing Ariel, and was therefore responsible for his daughter's injuries because he failed to protect her. The Agency further argues the court did not err when it found that by not taking responsibility for Ariel's injuries the parents demonstrated their inability to protect Ariel from further harm. It asserts the " 'confession dilemma' " described in *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1752, 1753 (*Blanca P.*) applies only when an innocent parent is asked to admit that he or she abused the child, and is not applicable here because each parent is culpable for Ariel's injuries either by act or failure to protect.

Reunification services need not be provided to a parent when the court finds, by clear and convincing evidence, that the child was brought within the jurisdiction of the court under section 300, subdivision (e) because of the conduct of that parent. (§ 361.5, subd. (b)(5).) The court shall not order reunification in any situation described in section 361.5, subdivision (b)(5) "unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. The social worker shall investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child." (*Id.*, subd. (c).)

"The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful." (§ 361.5, subd. (c).)

At the disposition hearing, the uncontroverted evidence established that Ariel had a beneficial, bonded relationship with her mother and father, who voluntarily sought out, participated in, and benefitted from services. They were cooperative with treatment. There was no evidence Ariel's injuries occurred while the parents were under the influence of drugs or alcohol, or that either parent had a history of violent behavior. Dr. Feinman provided competent testimony that the parents would be able to reunify with

and appropriately care for their daughter with supportive services. The social worker said there had not been any protective concerns about the parents' interactions with Ariel during visitation, including extended vacations. However, she believed reunification would not be successful because they continued to deny that Ariel had been physically abused. The social worker also said failure to try reunification would not be detrimental to Ariel because she was bonded with her grandmother and likely to continue her relationship with her parents in a family setting

We conclude that the court abused its discretion when it denied reunification services to Morgan and Daniel on the ground they did not admit to abusing their daughter and therefore providing reunification services to them would be futile. This case is similar to *Blanca P.*, in which the parents denied that the father had sexually abused a daughter. In that case, the appellate court said it was an injustice to use the fact that a parent denies abusing a child as the reason to terminate reunification services. (*Blanca P.*, *supra*, 45 Cal.App.4th at pp. 1752-1753.) In addition, there was substantial new evidence showing that the father had not sexually abused his daughter. (*Id.* at p. 1754.) The appellate court stated: "In such a case, 'denial'--in both its legal and psychological senses--should not become, perversely, the very fact which demonstrates the futility of reunification services." (*Id.* at p. 1753.)

Blanca P. applies here. Dr. Dysilva and Dr. Grogan believed that Ariel had rickets or bone fragility during the time she was injured, making her more susceptible to fracture. Dr. Grogan said it was impossible to determine whether Ariel's injuries were intentionally inflicted. The evidence clearly shows that Ariel had a deficient level of vitamin D at the

time she sustained her injuries. Although the Agency's witnesses did not believe Ariel had rickets or bone fragility when she was an infant, they did not rule it out. The court's statement it did not find that the abuse was "intentional" underscores the complexity of this case. We conclude that, on this record, which shows that the parents otherwise met all the factors under section 361.5, subdivision (c), it would be an injustice to use the parents' denials they physically abused their daughter to demonstrate the futility of reunification services. (See *Blanca P.*, *supra*, 45 Cal.App.4th at p. 1753.)

In addition, we are not persuaded by the argument the social worker cannot make a safety plan for Ariel with the parents unless they admit responsibility for physically abusing her. The social worker can design the same safety plan she would have designed had the parents admitted responsibility for Ariel's injuries. The parents should understand that to provide maximum safety for Ariel, the plan must assume that one of the parents inflicted Ariel's injuries and the other parent failed to protect her. The social worker should understand, as the court's comment indicates, there is some credible support in the record for the possibility the parents did not deliberately inflict Ariel's injuries. Instead of creating a " 'confession dilemma' " (see *Blanca P.*, *supra*, 45 Cal.App.4th at pp. 1752, 1753), the focus is properly on the parents' ability to comply with their case plans and provide for Ariel's safety, protection, physical and emotional well-being (§ 366.21, subs. (e), (f)).

DISPOSITION

Ariel's petition is granted. Morgan's and Daniel's petitions are granted in part and denied in part. The findings and orders denying reunification services to the parents and

the order setting a section 366.26 hearing are vacated. The matter is remanded to the juvenile court with directions to order the Agency to provide reasonable reunification services to the family. The stay issued July 3, 2014, is vacated.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.