PERSONAL INJURY ISSUES PRESENTED TO THE TRIAL COURT IN *PARR V. ARUBA PETROLEUM*[i]

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The defendants argued, generally, that what a Texas plaintiff must prove to recover for personal injuries in a toxic tort case was established by the Texas Supreme Court in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (1997). According to the defendants:

- The plaintiff must show both general and specific causation. *Havner*, 953 S.W.2d at 715.

- General causation is whether the allegedly offensive substance is capable of causing a particular injury or condition in the general population, and specific causation is whether that substance caused a particular individual's injury. *Havner*, 953 S.W.2d at 715.

- Scientifically unreliable testimony is not legally sufficient evidence. *Havner*, 953 S.W.2d at 712.

- *Havner* holds that when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrate a statistically significant doubling of the risk. *Merck & Co., Inc. v. Garza*, 347 S.W.3d 256, 265 (Tex. 2011).

- *Havner* held that to establish some evidence of general causation, epidemiological studies must meet three standards. First, the study must show "more than a doubling of the risk" due to exposure. *Id.* at 718. Second, the study must have a confidence interval that does not include 1.0. *Id.* at 723. Third, the study must have a confidence level of at least 95 percent. *Id.* at 724.

- *Havner* controls the issue of what evidence is required to establish causation in a toxic tort case and therefore what evidence is relevant. *Id.* at 822.

SUMMARY OF THE PARTIES' ARGUMENTS

- On September 17, 2013, the Parrs filed their Eleventh Amended Petition and disclaimed any 'personal injury' damages that would invoke *Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714-15 (Tex. 1997); *Merck & Co., Inc. v. Garza*, 347 S.W.3d 256 (Tex. 2011); *Borg-Warner v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007); and *Georgia Pacific Corp. v. Bostic*, 320 S.W.3d 588, 596 (Tex. App.—Dallas, pet. granted). Plaintiffs argued that this rendered moot Defendants' challenges under *Havner.*

- In a letter to the court, dated September 18, 2013, Aruba and Encana [who was still in the suit at that time], argued that:

- "Plaintiffs' alleged 'disclaimer' of 'personal injury damages that would invoke *Merrell Dow Pharms. v. Havner,* 953 S.W.2d 706, 714-715, 720 (Tex. 1997) [and other cases]' is wholly ineffective given the damages that Plaintiffs continue to plead in the Eleventh Amended Petition."

- "While Plaintiffs have made the semantic change from alleging 'personal injury damages' generally to alleging 'unreasonable fear, apprehension, offense, discomfort, annoyance, sickness, injury to physical health, impairment of physical health, exacerbation of physical health and/or preexisting health conditions, harm from assault on Plaintiffs' senses, nausea, loss of peace of mind, emotional harm/distress, inconvenience, deprivation of enjoyment of property,' their claims are still based upon their alleged toxic exposure caused by Defendants' natural gas activities. Plaintiffs continue to plead a variety of personal injuries for which the evidence required by *Havner* is wholly absent."

- "Plaintiffs cannot 'disclaim . . . personal injury damages' to avoid the evidentiary requirements of *Havner and Merck & Co., Inc. v.. Garza,* 347 S.W.3d 256 (Tex. 2011), and the causation requirements of *Borg-Warner v. Flores,* 232 S.W.3d 765 (Tex. 2007) and *Georgia Pacific Corp. v. Bostic,* 320 S.W.3d 588 (Tex. App.—Dallas, pet. granted), and then seek to recover for *all of the personal injuries and health effects* that they previously pleaded (save 'toxic encephalopathy') and for which Defendants have already expended time and resources seeking summary judgment."

- On October 29, 2013, Aruba and Encana [who was still part of the lawsuit at that time], sent a letter to the court inquiring whether the court wanted additional briefing in support of their no-evidence motion or summary judgment. Aruba and Encana argued that:

  - "Both before and after the [August 30, 2013] hearing, Plaintiffs' briefing wholly failed to specifically identify epidemiological studies that met *Havner's* requirements that are some evidence of causation linking the alleged contamination to their injuries. In their initial response, filed August 23, 2013, Plaintiffs referred generally to their expert reports but did not identify a single study that met the relative risk and confidence intervals required by the *Havner* court for *any* of the physical injuries they allege."

  - "Throughout the briefing, Plaintiffs conceded that they lacked the evidence required by *Havner* to establish a causal link between the alleged contamination and their alleged injuries. Instead of responding to Defendants' *Havner* motion, Plaintiffs argued that their amendments to their alleged damages-adding the language of "discomfort" rather than "disease"-mooted the issue. Defendants have consistently argued both that Plaintiffs' alleged "disclaimer" is ineffective and that Plaintiffs lack the evidence required by *Havner* linking Plaintiffs' alleged exposure and injuries to permit their claims for damages for personal injuries-whether described as "symptoms" or as "diseases"-to go forward."

- On January 28, 2014, the court granted partial summary judgment, ruling that:

- "Plaintiffs take nothing on any personal injury claim that would invoke the proof requirements of *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997)."

- "Plaintiffs take nothing on any claim that Defendants' actions caused a disease that occurs genetically and for which a large percentage of the causes are unknown and that Plaintiffs' claims for damages are limited only to symptoms typical of discomfort rather than disease."

- "[P]laintiffs' personal injuries are limited to injuries that are (1) within the common knowledge and experience of a layperson, and (2) the sequence of events is such that a layperson may determine causation without the benefit of expert evidence."

- "Plaintiffs may not seek damages for personal injuries or economic damages related to personal injuries that do not fit the criteria set forth in this Order."

- After the jury awarded $2.65 million for the Parrs' personal injuries, Aruba argued in its motion for JNOV that:

  - "Plaintiffs' injuries and damages fell within the general rule that expert testimony is required to prove causation in a toxic exposure case. *See Abraham v. Union Pacific R.R. Co.*, 233 S.W.3d 13, 18 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Thus, it is incorrect to state that Plaintiffs' damages are supported by the pleadings, given that they expressly disclaimed the kinds of damages awarded by the jury."

  - The court's rulings left the Parrs with an "exceedingly narrow window of available claims to be proven at trial" and "the damages awarded by the jury do not fall within this very limited category" and "could not be proven by lay testimony."

  - "The jury's personal injury awards necessarily encompass awards for toxic tort damages, for which expert evidence of causation was required. The absence of such evidence is fatal to Plaintiffs' efforts to recover these awards, requiring a reconsideration of the amounts awarded. . . . The Parrs did not come close to meeting the Supreme Court's requirements for scientific expert testimony. Although the Parrs do not deny that this is a toxic tort case, they simply ignore the binding precedent requiring evidence of both general and specific causation to prove toxic tort claims. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 715 (Tex. 1997)."

  - The damages awarded by the jury in this case fall within the general rule that expert testimony is required to prove causation in a toxic exposure case. *Abraham v. Union Pacific R.R. Co.*, 233 S.W.3d 13, 18 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Baker v. Energy Transfer Co.*, No. 10-09-00214-CV, 2011 WL 4978287, at *5 (Tex. App.—Waco 2011, pet. denied). "The existence of a causal connection between exposure to a certain chemical and injury or disease requires specialized expert knowledge and testimony because such matters are not within the common knowledge of lay persons." *Abraham*, 233 S.W.3d at 18.

- Parrs' Response:

    - "the trier of fact is usually allowed to decide the issue of causation in cases of this nature: (1) when general experience and common sense will enable a layman fairly to determine the causal relationship between the event and the condition; (2) when scientific principles, usually proved by expert testimony, establish a traceable chain of causation rom the condition back to the event; and (3) when probable causal relationship is shown by expert testimony." *Lenger v. Physician's General Hosp., Inc.,* 455 S.W.2d 703, 706 (Tex. 1970).

    - "Plaintiffs offered expert testimony regarding general causation of their 'symptoms typical of discomfort rather than disease.' Specifically, testimony was elicited from Dr. Paul Rosenfeld and Dr. Thomas Dydek regarding the toxic effects caused by VOCs. Additionally, Dr. Didriksen and Dr. Rea (via medical records) established the nature of Plaintiff's symptoms. Like in *Schneider* and *Lenger,* a clearly-established sequence of events and 'expert testimony [were] relied upon to establish a possible causal relationship, [and] the jury was allowed to make the ultimate determination on the basis of general experience and common sense. . . .'" followed the causation framework of *Lenger* by offering expert testimony regarding general causation of their "symptoms typical of discomfort rather than disease.'

    - Parrs cited cases to support their belief that expert testimony is allowed to augment the causal analysis with evidence of general causation regarding "symptom damages" where specific causation was within the experience and understanding of the jury.

    - "Nothing in Court's orders nor anything in Texas case law "prevented Plaintiffs from introducing (1) expert testimony regarding on 'Event Causation,' and (2) expert testimony on 'general' causation to augment 'specific' causation of symptoms 'typical of discomfort rather than disease.'" The court "ruled that Dr. Rosenfeld was permitted to provide expert testimony on Aruba's emission of VOCs and on health effects *generally* caused by VOCs."

    - "Dr. Rosenfeld was permitted to provide expert testimony on Aruba's emission of VOCs and on health effects *generally* caused by VOCs. . . . Dr. Rosenfeld's testimony provided legally sufficient evidence of general causation because he testified about Plaintiffs' complaints and their causal relation to the chemicals and/or particulates found to be emanating from Aruba's well sites. . . . Dr. Rosenfeld's testimony provided legally sufficient evidence of general causation because he testified about Plaintiffs' complaints and their causal relation to the chemicals and/or particulates found to be emanating from Aruba's well sites."

    - "The foregoing causation requirements from *Havner, et al.,* do not apply to this case because Plaintiffs seeks damages for 'symptoms typical of discomfort rather than disease.'" *Schneider,* 147 S.W.3d at 269.

- "Plaintiffs provided expert testimony on general causation and established 'a sequence of events from which the trier of fact [did] properly infer, [with or] without the aid of expert medical testimony,' that Aruba's natural gas activities were a 'substantial factor in bringing about the damages, and without which condition such damages would not have occurred.' Plaintiffs called Robert Parr and Lisa Parr, who testified that they never experienced the nature and severity of symptoms and nuisance conditions prior to Aruba beginning its operations in 2008."

- From all the testimony presented, Parrs argued that "the jury was permitted to conclude that Aruba adding pepper was a substantial factor in why the Parrs experienced their symptoms and the Parrs would not have experienced those symptoms had Aruba not been adding toxic pepper to the stew." This analogy comes from the Parrs' interpretation of the testimony of an Aruba expert.

- <u>Aruba's Reply:</u>

  - "the Parrs attempt to craft a new standard for proving scientific causation that would allow plaintiffs to present conclusory, generic expert testimony about general causation and leave specific causation to the jury's 'general experience and common sense.' (Response at Paragraphs 49-51.) No Texas case authorizes this standard."

  - "Reaching for support, the Parrs rely on *Lenger v. Physician's Gen. Hosp., Inc*., 455 S.W.2d 703, 706 (Tex. 1970). *Lenger* is a 44-year-old case that long pre-dates the seminal cases setting standards for scientific evidence, *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). In any event, *Lenger* does not support the Parrs' theory because the court in *Lenger* rejected the plaintiffs' arguments that the sequence of events in that case allowed a lay jury to reasonably determine causation based on general experience and common sense. *Lenger*, 455 S.W.2d at 707-08."

  - "The Parrs contend that 'numerous other Texas courts' have 'allowed expert testimony to augment the causal analysis with evidence of 'general' causation regarding 'symptom damages' where 'specific' causation was within the experience and understanding of the jury.' (Response at Paragraph 51.) But none of the cases cited by the Parrs say this. In fact, none of the cases even discuss general and specific causation, and thus, they do not say that plaintiffs are relieved of their burden to present evidence of specific causation in a toxic tort case."

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[i] Caveat and disclaimer: This summary is not intended to provide legal advice, to comment on the court's orders, to evaluate the parties' positions, or to predict the outcome of the case. We have attempted to present a neutral and un-biased report based on court filings. If you are a lawyer, you are advised to read the documents on file at http://courts.dallascounty.org/CaseDetail.aspx?CaseID=4582952. For a complete understanding of the issues, you should read all of the documents and not merely those cited in this summary. If you are not a lawyer, you should hire a lawyer to interpret the documents for you.