

*November 2016***IN THIS ISSUE**

This article describes a recent Fifth Circuit defense success, highlighting defendants' coordinated effort to expose the flaws in plaintiff's causation theories, a district court judge committed to applying Daubert and serving as a gatekeeper as required by the United States Supreme Court, and the exclusion of plaintiff's experts and dismissal of plaintiff's claims.

Fifth Circuit Bursts Plaintiff's Bubble in Benzene Case**ABOUT THE AUTHORS**

Stan Perry is a partner with Reed Smith LLP in Houston. His practice is focused on environmental and toxic tort litigation. He is a graduate of Baylor University and the University of Virginia Law School. He can be reached at sperry@reedsmith.com.



Meredith Knudsen is an associate with Reed Smith LLP in Washington, D.C. Her practice is focused on environmental and toxic tort litigation. She is a graduate of the University of Texas and the George Washington University Law School. She can be reached at mknudsen@reedsmith.com.

ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Deborah C. Prosser
Vice Chair of Newsletter
Kutak Rock LLP
Deborah.Prosser@KutakRock.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

I. Factual Background

A. Plaintiff's Allegations

On October 11, 2016, the U.S. Supreme Court refused to hear a widow's appeal of an appellate court ruling that affirmed the dismissal of a wrongful death lawsuit for her husband's alleged exposure to gasoline containing benzene. Plaintiff Yolande Burst, individually and as the legal representative of Bernard Ernest Burst, Jr., filed a products liability action against Shell Oil Company and Chevron U.S.A., Inc. in the Eastern District of Louisiana, New Orleans Division claiming that her husband's regular exposure to gasoline containing benzene caused his Acute Myelogenous Leukemia (AML) and subsequent death in 2013.

Mr. Burst worked as a mechanic and gas station attendant at various Shell, Gulf, and Texaco gas stations in Louisiana from 1958 to 1971. At each location, he allegedly pumped gas, gauged gasoline storage tanks, and performed various mechanic tasks on a daily basis such as cleaning, repairing, maintenance of automobiles, and washing parts with gasoline while using products manufactured, sold, or supplied by Shell, Gulf and Texaco.

On June 20, 2013, Mr. Burst was diagnosed with AML. He was 71 years old. On December 21, 2013, Mr. Burst passed away as a result of his AML. Plaintiff filed suit shortly thereafter.

In her complaint, Plaintiff alleged that her husband's regular exposure to benzene in gasoline during the years he worked as a gas station attendant and mechanic caused his AML. She claimed that Defendants negligently manufactured and sold products containing benzene and that they negligently failed to warn foreseeable users of the health hazards associated with these products. She additionally alleged strict products liability.

B. Procedural History

Less than three months after filing her original petition, Plaintiff filed for partial summary judgment on the general causation theory that benzene causes AML. Plaintiff also sought summary judgment findings from the district court on her contentions that Defendants knew benzene could cause AML in humans prior to 1958, and Defendants failed to warn users of the dangers of benzene exposure in gasoline.

Defendants countered that Plaintiff was seeking to incorrectly frame the case because Mr. Burst's alleged exposures were to gasoline, not pure benzene. While Plaintiff attached over 1,000 pages of scientific and technical information to her motion, the vast majority addressed exposure to large concentrations of benzene. Defendants contended that this evidence was irrelevant because the chemical composition of "gasoline" is not interchangeable with that of "benzene."

Similarly, Defendants argued that the question of when Defendants knew that benzene could cause AML was irrelevant. While they conceded that benzene exposure can, in certain circumstances, cause one type of leukemia (AML, the disease in *Burst*), they maintained that there is no established causal connection between exposure to gasoline, which contains a small amount of benzene, and AML. Furthermore, Defendants contended that, because IARC, OSHA, and other regulatory agencies have not found that gasoline is a human carcinogen, gasoline warnings were not necessary.

C. The Court Whittles Down Plaintiff's Complaint

On August 8, 2014, Judge Sarah S. Vance entered an order denying in part and granting in part Plaintiff's Motion for Partial Summary Judgment.

Judge Vance found that the proper general causation inquiry was whether exposure to gasoline containing benzene can cause AML, not whether exposure simply to benzene can cause AML. Additionally, Judge Vance held that, because the question of whether exposure to gasoline and/or benzene could cause AML was not "common knowledge," Plaintiff failed to meet her burden by submitting expert opinion evidence on the issue of causation.

Judge Vance also denied Plaintiff's motion with respect to whether Defendants knew

that benzene could cause AML prior to 1958, finding that there was a factual dispute on this issue. Judge Vance found that, while Plaintiff presented evidence that Defendants knew that benzene was associated with AML, the documents failed to establish that Defendants knew of a causal relationship between benzene exposure and AML, or that the scientific community reached a consensus on this issue before 1958.

The district court did find that Plaintiff satisfied her burden on the limited factual issue of whether Defendants failed to warn of the dangers of benzene before the late 1970s. Judge Vance looked at this as a pure factual question and did not consider whether Defendants had a duty to warn users that their products contained benzene or that benzene exposure could cause AML.

II. **Eastern District of Louisiana Excludes Plaintiff's Experts**

A. Daubert Challenges

Despite Judge Vance's finding that "the proper general causation question in this case is whether exposure to gasoline containing benzene can cause leukemia, not whether exposure simply to benzene can cause leukemia," Plaintiff's retained experts continued in their efforts to prove that exposure to benzene, rather than gasoline which contains benzene, can cause AML.

Plaintiff produced reports from an industrial hygienist, Richard L. Miller, a forensic meteorologist, Dr. David L. Mitchell, an

epidemiologist, Dr. Peter Infante, and a medical doctor, Dr. Robert Harrison. Defendants challenged the admissibility of these experts' opinions, stating they did not meet the reliability and relevance requirements outlined in Rule 702 of the Federal Rules of Evidence. Plaintiff, in turn, challenged the admissibility of each of Defendants' experts.

As a result of these competing *Daubert* motions, Judge Vance ordered a two-day hearing on general causation. The hearing took place on February 10-11, 2015.

B. Dr. Robert Harrison is excluded under *Daubert*

Defendants moved to exclude Dr. Harrison's general causation opinions on the basis that they were unreliable and irrelevant. Judge Vance agreed that Dr. Harrison's opinions were unreliable and granted Defendants' *Daubert* motion on May 9, 2015.

Judge Vance criticized Dr. Harrison's failure to evaluate studies relating to gasoline, the product at issue in this case. Instead, Dr. Harrison provided conclusory cites to scientific literature relating to benzene and did not apply reliable methodology to such studies. Finally, the district court held that Dr. Harrison's reliance on Dr. Infante's report and the studies cited therein was inadmissible because it reflected no original analysis.

C. Dr. Richard Miller is excluded under *Daubert*

On May 14, 2015, the district court also excluded testimony from Dr. Miller. In a 36-page opinion, Judge Vance outlined the numerous ways in which Dr. Miller's specific causation opinions were unreliable. In his report, Dr. Miller opined that Mr. Burst inhaled gasoline vapors, which included benzene, and that Mr. Burst absorbed benzene through his skin. He opined that Mr. Burst was exposed to over 60 ppm*years of benzene exposure while working for a single year at a Gulf gas station. Dr. Miller did not account for the fact that, if this estimate were correct, Mr. Burst and his co-workers would have died from acute overexposure to gasoline. In addition to Dr. Miller's failure to validate his exposure estimates, the court found his opinions unreliable because he unreasonably relied on witness testimony.

D. Dr. Peter Infante is excluded under *Daubert*

Finally, in a 45-page opinion entered on June 16, 2015, Judge Vance granted Defendants' *Daubert* motion with respect to Plaintiff's epidemiologist, Dr. Peter Infante. The court found that Dr. Infante used unreliable methodology to formulate his general causation opinions that low-level benzene exposure from gasoline can cause AML.

Dr. Infante's expert opinions were based primarily on benzene exposure studies, resulting in "too great an analytical gap between the underlying data and the

opinion offered.” The court noted that benzene literature, alone, was insufficient to provide a reliable basis for the ultimate opinions at issue in this case. While Dr. Infante did address some gasoline exposure studies, these studies: (1) did not isolate gasoline exposure from exposure to other substances; (2) did not show statistically significant results; (3) did not specifically examine AML; and/or (4) were cherry-picked or manipulated to support Dr. Infante’s conclusions.

Because the district court excluded Dr. Infante’s opinion on general causation and there was no other admissible general causation evidence from any of Plaintiff’s experts, Dr. Infante’s specific causation testimony was also deemed inadmissible.

III. District Court Dismisses *Burst* Lawsuit

In a toxic tort suit, the plaintiff must present admissible expert testimony to establish general causation and specific causation. Evidence of specific causation is admissible only if there is evidence of general causation. To prove general causation - that gasoline can cause AML - Plaintiff offered the opinions of two experts: an epidemiologist (Dr. Peter Infante) and a physician (Dr. Robert Harrison). Because the district court excluded both experts’ general causation opinions as unreliable, Defendants moved for summary judgment on the basis that Plaintiff could not prove general or specific causation without this expert testimony.

On July 2, 2015, Judge Vance granted Defendants’ motion, dismissing Plaintiff’s lawsuit with prejudice based on the exclusion of Plaintiff’s general causation experts.

IV. Fifth Circuit Affirms Judge Vance’s *Daubert* Rulings and Dismissal

Undeterred, Plaintiff filed her appellant’s brief with the Fifth Circuit Court of Appeals on October 26, 2015. In sweeping and accusatory language, Plaintiff accused Judge Vance of abusing her discretion when she excluded Plaintiff’s experts, Dr. Infante and Dr. Harrison. Specifically, Plaintiff argued, on appeal, that Judge Vance failed to allow Plaintiff to be the “master of her complaint,” alleging benzene exposure caused her deceased husband’s AML, as opposed to gasoline, the product Mr. Burst worked with and around. Plaintiff also misunderstood and misstated the epidemiology evidence Dr. Harrison and Dr. Infante relied upon to support their conclusions that gasoline exposure is casually associated with increased risks of AML.

In addition to plaintiff, the Council for Education and Research on Toxics (CERT), a non-profit funded and supported by plaintiffs’ counsel and experts often retained by plaintiffs’ counsel, sought leave to file an amicus brief, even though the deadline for amicus briefs had expired. Defendants opposed CERT’s motion for leave because it was untimely and CERT’s brief would not add anything substantive to the issues that were

fully briefed, argued, and heard by Judge Vance. The Fifth Circuit denied CERT's motion for leave to file an amicus brief on November 25, 2015.

Defendants filed their appellees' brief on December 21, 2015. In this brief, Defendants stressed that Judge Vance complied with *Daubert* and subsequent decisions as interpreted by the United States Supreme Court and the Fifth Circuit. Far from abusing her discretion, Judge Vance thoroughly assessed the methodology underpinning Dr. Infante's and Dr. Harrison's opinion. This assessment led her to the conclusion that their opinions were based upon one-sided, selective evaluations of the relevant literature and not the robust scientific scrutiny required by *Daubert*.

Plaintiff's reply brief filed on January 7, 2016 continued her attack on Judge Vance's decisions but provided nothing new or novel for the Fifth Circuit to review.

On May 23, 2016, in an unpublished opinion, the Fifth Circuit Court of Appeals affirmed Judge Vance's exclusion of Dr. Infante and Dr. Harrison and her dismissal, with prejudice, of Plaintiff's claims. The Fifth Circuit found that Judge Vance did not abuse her discretion based on her exhaustive review, including two days of *Daubert* hearings, and the notable shortcomings of Plaintiff's experts' methodologies.

V. Petition for Writ of Certiorari to the United States Supreme Court

On September 1, 2016, Plaintiff filed her Petition for Writ of Certiorari with the United States Supreme Court. Plaintiff's primary argument for why the United States Supreme Court should hear her petition was the division among circuit courts of appeals on the standard for evaluating *Daubert* decisions by district court judges.

Plaintiff argued that the Fifth Circuit, as in the decision below, along with the Second, Third, Sixth, and Tenth Circuits apply *Daubert* narrowly, with any step that renders the experts unreliable a ground for exclusion. In contrast, the Seventh, Eighth, and Ninth Circuits apply a more liberal interpretation of *Daubert* that stresses the totality of the evidence reviewed by the expert and the limits of the district court judge's gatekeeper role.

Six weeks after Plaintiff filed her Petition for Writ of Certiorari, the United States Supreme Court denied this Petition.

VI. Conclusion

On one level, *Burst* is just another lawsuit that was filed, resolved, and ended with one party, Plaintiff, displeased and the other parties, Shell and Chevron, very pleased.

On another level, *Burst* reinforces the power of *Daubert* and why *Daubert* is so critical. In many state courts, and even district courts in some circuits, Plaintiff's experts would have

been able to present to the jury the causation theories about gasoline causing AML that were contrary to the scientific and medical literature and in direct conflict with the determinations by the leading United States (for example, the Agency for Toxic Substances and Disease Registry) and global scientific agencies (for example, International Agency for Research on Cancer).

Instead of presenting this bogus science to the jury, Plaintiff's experts were held accountable by a district court judge who invested the necessary time and analysis to sort through Plaintiff's experts' theories. Judge Vance evaluated the competing evidence (reports and at the two days of *Daubert* hearings) and law to determine whether these theories were based on relevant and reasonable scientific methodologies or subjective, litigation-driven experts who selectively decide what scientific evidence is reliable by first determining whether it supports their conclusions. In the end, Judge Vance concluded there is no place in a United States District Court for opinions that lack scientific rigor and are based on a result-driven reliance on the scientific literature.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

OCTOBER 2016

The Recent Use of RICO to Fight Toxic Tort Abuse
Samuel L. Blatnick and Deborah C. Prosser

It is Time to Amend Federal Rule of Evidence 702
David E. Bernstein and Eric G. Lasker

SEPTEMBER 2016

False Claims Act Liability for Failure to Make Required Toxic Risk Disclosures
Michael L. Fox

MARCH 2016

Tooley's Trail of Trepidation: The Impact of the *Tooley* Decision on Asbestos-Related Claims against Employers
Diane Fleming Averell and Pamela R. Kaplan

AUGUST 2016

Chevron Strikes Back Against Fraudulent Judgment
Jim Shelson

JANUARY 2016

Fifth Circuit Finds Common Sense Inferences Support Mass Action Removal
Michael L. Fox and Brian M. Davies

JULY 2016

Lead in the Water – The Flint Water Crisis
Jim Shelson

DECEMBER 2015

Eight Circuit Rejects Class Certification for Nuisance Claims Based on Fear of Contamination
Jim Shelson

JUNE 2016

New York Courts Continue Raising the Bar for Plaintiffs' Proof of Causation
Joshua K. Leader

NOVEMBER 2015

Diversity Removal of a Limited Liability Company to Federal Court: Pitfalls and Practice Tips
Deborah C. Prosser and Stephanie A. Hingle

APRIL 2016

Crumb Rubber Turf Wars: The Synthetic Turf Fields Investigation
William Anderson and Cheryl Falvey