REVERSE and RENDER; and Opinion Filed February 1, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01285-CV

ARUBA PETROLEUM, INC., Appellant

V.

LISA PARR, INDIVIDUALLY AND AS NEXT FRIEND TO HER MINOR DAUGHTER, E.D., AND ROBERT "BOB" PARR, Appellees

On Appeal from the County Court at Law No. 5
Dallas County, Texas
Trial Court Cause No. CC-11-01650-E

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Lang-Miers

Aruba Petroleum, Inc. appeals from a judgment entered following a jury trial. The jury found that Aruba intentionally created a private nuisance and awarded appellees Lisa Parr, individually and as next friend to her minor daughter, E.D., and Robert "Bob" Parr (the Parrs) damages caused by the nuisance. In six issues on appeal, Aruba argues that (1) there is no legally or factually sufficient evidence of intent, causation, or damages, (2) the Parrs improperly recovered for disclaimed damages that invoke the proof requirements of *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 715, 720 (Tex. 1999), (3) the trial court erred by admitting expert testimony, and (4) the trial court erred by entering judgment on the verdict

when a juror was disqualified. We conclude that there is no legally sufficient evidence of intent. We reverse and render.

BACKGROUND

Bob Parr owns forty acres of land in Wise County, Texas located atop the Barnett Shale—an area that experienced an increase in natural gas drilling and production activity after 2000. He and Lisa Parr and Lisa's daughter E.D. live on the property.[1] They sued Aruba and other natural gas extraction and service companies and well site operators for causing "environmental contamination and polluting events" on their property. All of the defendants except Aruba either settled or the trial court granted summary judgment or severance of their claims. As a result, at the time of trial, Aruba was the sole defendant.

The Parrs alleged that Aruba's spills, releases, emissions, and discharges of air pollution caused and continue to cause exposure of them and their property to hazardous chemicals, gases, and industrial and hazardous wastes which resulted in damages. The Parrs also alleged that Aruba created a nuisance through, among other things, air contamination, light pollution, and offensive noises and odors. They asserted claims of negligence, gross negligence, negligence per se, private nuisance, and trespass to real property against Aruba. All claims except private nuisance were dismissed, nonsuited, or abandoned prior to trial.[2] The trial court granted Aruba a directed verdict on the Parrs' claim of negligent private nuisance.

[1] Bob Parr has lived on the property since 2002 and Lisa Parr and E.D. have lived on the property since 2007, with the exception of a seven month period in 2010 and 2011 when the Parrs moved out of the house to avoid alleged environmental contamination.

[2] Prior to trial, the Parrs disclaimed any personal injury damages that invoke *Havner*, 953 S.W.2d at 714–15, 720. The trial court (a) ordered that they take nothing on any damage or personal injury that would invoke the proof requirements of *Havner*, 953 S.W.2d at 714–15, 720, (b) limited their damages to "symptoms typical of discomfort rather than disease[,]" and (c) ruled that their "personal injury damages [were] 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." Although the parties disputed at trial and argue on appeal as to whether *Havner* applies to their claimed personal injury and property damages and whether they proved causation, we do not address those arguments as they are not necessary to the disposition of this appeal. *See* TEX. R. APP. P. 47.1.

The jury found that Aruba intentionally created a private nuisance[3] and awarded the Parrs $2.65 million in damages for past and future physical pain and suffering and mental anguish and $275,000 for property damage for loss of market value. After the trial court denied Aruba's post-trial motions, it appealed.

STANDARD OF REVIEW

Although Aruba presents six issues for our review, we focus on Aruba's argument that there was no legally sufficient evidence of intent that would support the jury's finding that Aruba intentionally created a private nuisance.[4] When a party challenges the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate on appeal that no evidence supports the adverse finding. *See Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 215 (Tex. 2011). We will sustain a no-evidence challenge on appeal if the record shows (1) a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Serv. Corp Int'l v. Guerra*, 348 S.W.3d 221, 228 (Tex. 2011). "Evidence is more than a scintilla if it 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Id.* (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)).

In reviewing a jury's finding, we consider whether the evidence would enable reasonable and fair-minded people to reach the verdict under review, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not.

[3] The jury also found that Aruba's conduct was not abnormal or out of place in its surroundings to constitute a private nuisance.

[4] Because of our disposition of this issue, it is not necessary to address Aruba's other issues. *See* TEX. R. APP. P. 47.1. In addition, because our disposition focuses on the legal sufficiency of the evidence, we do not address Aruba's argument that the evidence of intent was not factually sufficient. *See id.*

City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005). We consider all of the evidence in the light most favorable to the verdict and indulge every inference that would support it. *Id.* at 822.

APPLICABLE LAW

"[A] defendant may be held liable for intentionally causing a nuisance based on proof that he intentionally created or maintained a condition that substantially interferes with the claimant's use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, No. 15-0049, 2016 WL 3483165, at *16 (Tex. June 24, 2016).[5] "Intent" in the context of intentional nuisance means that "the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* (quoting *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985)); *see* W. PAGE. KEETON, ET AL., PROSSER AND KEETON ON TORTS § 87, at 624–25 (5th ed. 1984) (stating that a defendant acted intentionally if the defendant "created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests are occurring or are substantially certain to follow"). As a result, "a defendant intentionally causes a nuisance if the defendant 'acts for the purpose of causing' the interference or 'knows that [the interference] is resulting or is substantially certain to result' from the defendant's conduct." *Crosstex*, 2016 WL 3483165, at *16 (quoting RESTATEMENT (SECOND) OF TORTS § 825 (AM. LAW INST. 1979)). *Crosstex* further states:

> Intent is thus measured by a subjective standard, meaning the defendant must have actually desired or intended to create the interference or must have actually known or believed that the interference would result. It is not enough, in other

[5] The supreme court decided *Crosstex* after the parties filed their briefs in this appeal. By letter briefs, appellant notes that *Crosstex* provides a "comprehensive . . . explanation of the circumstances in which Texas law may hold a party liable for causing a private nuisance[,]" *Crosstex*, 2016 WL 3483165, at *4, and the Parrs recognize that the "opinion clarifies the meaning of the term nuisance and the requirement that evidence show that the interference is substantial." Neither party contends that *Crosstex* changed the law that applies to this case.

> words, that the defendant should have known that the interference would result because a reasonable person in the same or similar circumstances would have known that it would. In such circumstances, the defendant will have negligently caused the interference, but cannot be said to have intentionally caused it.
>
> However, to prove an intentional nuisance, the evidence must establish that the defendant intentionally caused the interference that constitutes the nuisance, not just that the defendant intentionally engaged in the conduct that caused the interference.

Id. (internal citations omitted).

ARGUMENTS OF THE PARTIES

Aruba argues that there is no evidence that it knew that it was harming the Parrs or their property or that harm to them or their property was substantially certain to result from its conduct. In addition, Aruba contends that, because the jury found that Aruba's conduct was not abnormal or out of place in its surroundings, Aruba's conduct was no different than the conduct of other oil and gas operators in the area and Aruba "had no reason to know that its wells were uniquely harming the Parrs' land so as to cause a 'substantial interference' with their use and enjoyment of the land." Aruba also argues that "Lisa Parr's generalized, anonymous grievances" did not alert Aruba to "any particular problem on the Parrs' property." Aruba contends that the Parrs "admit that they never identified themselves, never stated where they lived, and failed to identify any specific problem wells." Additionally, Aruba contends that the supreme court's recent decision in *Crosstex* confirms that an intentional nuisance claim requires "specific proof" that a defendant "intended to harm the plaintiff's particular property." *See* 2016 WL 3483165, at *16.

The Parrs argue that while they "were neither required nor able to present direct evidence of Aruba's state of mind regarding intent," the Parrs "submitted evidence demonstrating that Aruba took actions with the specific purpose of harming" them "and/or with knowledge that Aruba's actions were substantially certain to cause harm to" them. They contend that the

evidence is legally sufficient to establish nuisance and liability for damages under the standards set out in *Crosstex*, 2016 WL 3483165, at *7, and that the evidence submitted by Aruba does not negate the evidence that the Parrs submitted.

ANALYSIS

The Parrs contend that there is sufficient evidence to support the jury's finding that Aruba "knew that its activities were harming" them and that Aruba "was intentionally causing a 'substantial interference' with" their "use and enjoyment of their property." They rely on three categories of evidence: (1) complaints made by a neighbor; (2) complaints made to the Texas Commission on Environmental Quality (TCEQ); and (3) complaints they made to Aruba.

In the first category, Lisa Parr testified that the Parrs' neighbor, Christine Ruggiero, complained to Aruba by letters, emails, and phone calls.[6] At oral argument, the Parrs argued that Aruba had knowledge that it was harming the neighboring landowners as a result of complaints by neighbors and this knowledge satisfies the intent requirement as to Aruba's interference with the Parrs' use and enjoyment of their property.

In the second category, they rely on evidence that they "made grievances to the State[,]" namely to the TCEQ—"the entity which was supposed to protect" them. Bob Parr testified that the Parrs submitted complaints to the TCEQ or the TCEQ was on the Parrs' property "to investigate numerous complaints" "eight or ten" times. He also testified that he filed "probably 12, 15" complaints against Aruba through the TCEQ. Lisa Parr testified that, during February 2010, "complaints [were] being filed around" her and, between July 19 and 24, 2010,

[6] The record reflects that two of Aruba's wells were located on the Ruggieros' property. The record does not reflect the nature of their complaints.

"complaints [were] made on or around that time[.]"[7] And she testified that, on February 19, 2011, Bob Parr and a ranch hand smelled "a sweet odor" and "the TCEQ [was] called[.]"

In addition, Lisa Parr testified that, on June 17, 2010, which was "during the month" when Aruba was drilling a well, the Parrs experienced "health effects" and left the property and she "called the TCEQ" and "TCEQ got involved." Lisa Parr said that, on July 26, 2010—the day after she smelled an "offensive" and "very strong" odor—she spoke with "Damon" who was "a representative" from TCEQ who called her "wanting to know how many times" she "had seen a similar unit, which was a nitrogen lift unit, in the areas around" and that "there had been some problems going around that he was investigating." Lisa testified that, one day in October 2010 when she was on the property for twenty minutes and developed a headache, she believed that she "called TCEQ" and "TCEQ told [her] that the compressor station had gone out and they had a workover rig on the site to get it back online." But the Parrs do not identify evidence that Aruba knew that the Parrs made complaints or that the complaints were about the Parrs' property.

In the third category, the Parrs contend that "[t]here were also efforts made to alert Aruba directly of the problems observed by the Parrs." Lisa Parr said that she called Aruba "to discuss the problems" that she was having. She called "their Plano office" and "asked the person who answered the phone if they could tell [her] anything about the activity in the Decatur, Allison area and that [she] was wanting to know if they were going to fix the area contaminated by the leaks, spills, and admissions [sic]." Lisa Parr testified that the person who answered the phone told Lisa "to call their PR firm, Sunwest." Lisa called the public relations firm and they replied "no comment."

[7] One of Aruba's expert witnesses, Thomas Dydek, testified that complaints to "the environmental agency in Texas" "that are written up and eventually get to the people who possibly caused the problem are anonymous."

Lisa Parr said that, in addition to attempting "to reach someone to voice [her] complaints" "that day by phone[,]" she also did so "numerous times on site." She testified that, when "a large workover rig" and "noise" and "a lot of nuisance" irritated them "at home[,]" she saw "a white truck over there" so she "went over there and knocked on the window and asked the guy what his name was and who he worked for." Lisa testified, "I asked why these annoying events had been going on and when were they going to stop" and "it was a complete nuisance to the entire neighborhood." Lisa stated, "The gentleman in the truck told me he worked for Aruba and his name was—it was Bob or Rob Johnson[.]" She testified that Johnson described a problem with fluid being sucked up into pipes. Lisa testified that she told him that she "watched the pipes go out and back in several times in the course of one month" and asked "[w]hen was the problem going to be fixed?"

On cross-examination, Lisa Parr testified that she "talked to several people on Aruba sites" including "Rob or Bob Johnson[,]" a "guy named Tim" and she "believe[d] his wife was Tracey" who "was with him[,]" and "some gentlemen that didn't give [her] their names."[8] She testified that they would not tell her if they were contractors or if they worked for Aruba. In addition, "one night," she "told some of them"—whose names she did not remember—"who were working on Aruba sites": ""[P]lease let me know what's going on. My entire family is sick. We are desperate. We are under medical attention. They don't know what to do. Can you please help us? Whatever you're doing is making us sick."

In addition, Lisa Parr testified on direct examination:

> Q. Lisa, did you, on more than one occasion, try to contact Aruba Petroleum, Inc., regarding the natural gas activities that were taking place around the property and the health effects that you and your family were experiencing?

[8] Bob Parr also testified that, on July 25, 2010, when there was an "incident" involving "some kind of a mini frack or a nitrogen lift[,]" Lisa Parr "checked cows one evening and encountered the workman over there."

A. Yes.

Q. And at any time—at any time, did you receive any help from Aruba Petroleum, Inc., when you made those requests for help?

A. No, I did not.

Lisa Parr also testified that, after Aruba began drilling near their home, it became unbearable and the Parrs developed "health problems" and had "problems with [their] animals." She stated: "We begged them to fix it. They—they showed no mercy. They never tried. They never offered to help us. They even—they never called us when they knew we were complaining."

On cross-examination, however, Lisa Parr testified that she knew that Aruba drilled wells in the area near her home, that Aruba's phone number was accessible online, that she looked up Aruba's phone number online, and called and spoke with whoever answered the phone and asked when Aruba would fix the "contamination that's going on in the Decatur, Allison area." When opposing counsel noted that she did not state, "hello, my name is Lisa Parr, I live on Star Shell Road, I live near, may I speak with someone about your activities in my town?" she replied, "I stated the community I live in, which is Allison."

Lisa Parr also testified on cross-examination that she submitted a Freedom of Information Act request to the TCEQ through email. Then she testified:

Q. Now, did you email Aruba?

A. Not to my knowledge.

Q. Did you send them a letter?

A. No, I didn't. I was getting nowhere with a one-on-one conversation.

Q. Okay. With the field guys?

A. And Aruba employees. They told me—some of them told me they work for Aruba.

. . . .

> Q. . . . You could have—you knew where Aruba was. You could have sent them an email or written them a letter to make sure the people in charge of the company would know that you, Lisa Parr, are complaining, right?
>
> A. I guess I could have.
>
> Q. And you did not do that, did you?
>
> A. I did not.[9]

On redirect examination, Lisa Parr testified that she did not "do more than make these two phone calls to" Aruba because she "got nowhere with the workers" and her "friend had sent numerous letters to the company, to the executives, made numerous phone calls, sent emails, and they never responded[—n]ot one time."

Similarly, Bob Parr testified:

> Q. Let's focus on Aruba right now. Did you sit down and write a letter and say this is what I'm experiencing? I think y'all are—y'all are causing some problems for me and my family and I want to—I want to talk to you about it. Did you ever write that letter?
>
> A. No, I did not.
>
> Q. Did you ever go to Aruba . . . did you ever go to someone at Aruba and say let's work this thing out, let's see if we can't work this thing out? Did you ever do that?
>
> A. My wife had called a couple of times. I personally had not.

In addition, Bob Parr testified that he talked with, he believed, "a guy named Casey"—who was a "foreman or something" who was "running the crew"—and "got zero response."

Bob Parr said that he thought that Lisa Parr "might have stopped somebody on the driveway a couple times next-door" and "she's had a[n] oral confrontation with a subcontractor" but he was "not sure if he was from Aruba Petroleum or just a subcontractor." He also said that

[9] Later in her testimony, Lisa Parr reiterated that it was "correct" that she "didn't send them a letter or an email."

"[t]here w[ere] times when she was confronted and/or spoke to either a subcontractor or an employee."

Aruba contends that none of this is evidence of intentional nuisance. As to the first category, complaints by neighbors, it argues that there is no evidence that those complaints included anything about the Parrs or their property. It argues that those complaints would only be relevant if the claim was negligent nuisance and the standard was that Aruba should have known that it was interfering with the use and enjoyment of the Parrs' property. But because the complaint is that the nuisance was intentional, it contends that the neighbors' complaints are no evidence of intent as to the Parrs or their property.

As to the second category, the complaints to the TCEQ, Aruba contends there is no evidence in the record that the Parrs identified themselves or that Aruba knew the complaints were made by the Parrs or about anything happening on the Parrs' property. And it says the evidence was that the TCEQ complaints were about what was happening at the well site, not on the Parrs' property.

As to the third category, complaints to Aruba, Aruba contends that the anonymous complaints to people at the well site, anonymous comments to a person who answered the phone, and an anonymous call to Aruba's public relations firm are not evidence of the required element of intent.

Aruba also argues that there were no active wells on the Parrs' property and Aruba had no knowledge of problems perceived by the Parrs on their property. Aruba acknowledges that "at times, its wells could be noisy and dusty, and emit bright lights and odors during drilling, just like the 87 other wells within a two-mile radius of the Parrs' property." But the jury answered "No" to the question asking "Do you find Aruba Petroleum, Inc.'s conduct was abnormal and out

of place in its surroundings such as to constitute a private nuisance?" In sum, Aruba argues that there was no evidence of intent.

The Parrs acknowledge—quoting *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009), and citing *City of Keller*, 168 S.W.3d at 828–30—that intentional nuisance "requires evidence of more than an 'awareness of the mere possibility of damage.'" The Parrs also contend that "Aruba need not have intended to specifically harm" them and quote *City of Princeton v. Abbott*, 792 S.W.2d 161, 166 (Tex. App.—Dallas 1990, writ denied), for the proposition that intentional invasion of another's property occurs if "the actor knows that it is resulting or is substantially certain to result from his conduct." They rely on evidence that Aruba was aware that its operations at well sites result in noise, odors, ground vibrations, and significant light at night from burning off excess gas through "flaring" and on evidence that Aruba decided not to erect a sound barrier around its well sites. The Parrs also rely on testimony by Aruba's corporate representative, John Goforth, that (1) the noise was "probably" "a nuisance to people living in the community close to that drill site[,]" (2) Aruba "probably" had complaints concerning their twenty wells located near the Parrs' home, (3) the dark smoke plumes that emanate from engines during drilling contain volatile organic compounds that are a health hazard, and (4) he considers the smoke plumes a nuisance. Additionally, the Parrs rely on Goforth's testimony that every Aruba well site has fugitive emissions, Aruba does not have procedures to reduce emissions or capture casing head gas, and Aruba does not conduct routine air monitoring or sampling. And the Parrs also rely on Bob and Lisa Parr's testimony that they perceived and were negatively affected by the noise, dust, odors, vibration, and light from Aruba's operations.

But the issue before us is not whether there is evidence in the record that Aruba created a nuisance or was negligent in creating a nuisance but whether Aruba intentionally did so as to the

Parrs. And the legal standard confirmed by the supreme court in *Crosstex*, 2016 WL 3483165, at *16, is that a defendant intentionally creates a nuisance if it "actually desired or intended to create the interference" or actually knew or believed "that the interference would result." Evidence that Aruba "intentionally engaged in the conduct that caused the interference" is not sufficient to establish an intentional nuisance. *Id.* Rather, the evidence must show that Aruba "intentionally caused the interference that constitutes the nuisance[.]" *Id.*; *see Abbott*, 792 S.W.2d at 166 (concluding that city's allowing continued flooding of appellees' property, "after being notified of the problem, constituted an intentional act").

Although there is evidence that Lisa Parr spoke by phone with someone at Aruba's business office to ask about drilling activities in the Decatur and Allison area, spoke by phone with Aruba's public relations firm, and spoke with individuals who she said were either Aruba's employees or contractors at or near well sites, and there is evidence that the Parrs submitted complaints to the TCEQ concerning Aruba's operations, the Parrs have not cited any evidence that Aruba knew who placed these calls and made these complaints or that they were specific to the Parrs or their property. None of the evidence cited by the Parrs of the noise, light, odors, and other claimed effects of Aruba's operations established that Aruba actually intended or desired to create an interference on the Parrs' land that they claim was a nuisance or actually knew or believed that an interference would result. *See Crosstex*, 2016 WL 3483165, at *16.

Consequently, we conclude that, on review of the record in this case, there is no legally sufficient evidence that Aruba intentionally created or maintained a condition that substantially interfered with the Parrs' use and enjoyment of their land. We sustain Aruba's first issue.

CONCLUSION

We reverse the judgment of the trial court and render a take-nothing judgment in favor of Aruba.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ARUBA PETROLEUM, INC., Appellant

No. 05-14-01285-CV V.

LISA PARR, INDIVIDUALLY AND AS NEXT FRIEND TO HER MINOR DAUGHTER, E.D., AND ROBERT "BOB" PARR, Appellees

On Appeal from the County Court at Law No. 5, Dallas County, Texas
Trial Court Cause No. CC-11-01650-E.
Opinion delivered by Justice Lang-Miers, Justices Bridges and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that appellees LISA PARR, INDIVIDUALLY AND AS NEXT FRIEND TO HER MINOR DAUGHTER, E.D., AND ROBERT "BOB" PARR take nothing on their claims against appellant ARUBA PETROLEUM, INC.

It is **ORDERED** that appellant ARUBA PETROLEUM, INC. recover its costs of this appeal from appellees LISA PARR, INDIVIDUALLY AND AS NEXT FRIEND TO HER MINOR DAUGHTER, E.D., AND ROBERT "BOB" PARR.

Judgment entered this 1st day of February, 2017.