DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
WILLIAM G. STRUDLEY and BETH E. STRUDLEY, individually, and as the parents and natural guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor **Plaintiffs** v. ANTERO RESOURCES CORPORATION, CALFRAC WELL SERVICES Corp., and FRONTIER DRILLING, LLC **Defendants**.	▲ COURT USE ONLY▲ Case Number 2011CV2218 Ctrm.: 269

ORDER RE DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court upon Defendants Antero Resources Corporation, Calfrac Well Services Corp., and Frontier Drilling, LLC's Motion to Dismiss or, in the Alternative, for Summary Judgment. The Court, having reviewed the Motion, the Response and Reply, the attached exhibits, the applicable authorities, the court file, and otherwise being fully advised in the premises, makes the following findings and orders:

This case is a complex toxic tort action involving numerous claims by the Plaintiffs, including claims for (a) negligence, (b) negligence per se, (c) nuisance, (d) strict liability, (e) trespass, and (f) medical monitoring trust funds. These claims are premised on allegations that the Defendants committed tortuous acts while drilling and completing three natural gas wells in Silt, Colorado known as the Diemoz A well, the Fenno Ranch A well, and the Three Siblings A well (the "Wells"). Construction of the Wells allegedly began on August 9, 2010. By January 10, 2011, Plaintiffs had moved out of their home and away from Silt.

The central issue is whether the Defendants caused Plaintiffs' alleged injuries, which Plaintiffs vaguely describe as "health injuries" from exposure to air and water contaminated by Defendants with "hazardous gases, chemicals and industrial wastes," including "hydrogen

sulfide, hexane, n-heptane, toluene, propane, isobutene, n-butane, isopentane, n-pentane and other toxic hydrocarbons and combustible gases and hazardous pollutants and industrial and/or residual waste." Amended Complaint ("Compl.") ¶¶ 13, 50.a. Plaintiffs also allege that Defendants have caused loss of use and enjoyment of their property, diminution in value of property, loss of quality of life, and other damages. *Id.* ¶ 13.

Cognizant of the significant discovery and cost burdens presented by a case of this nature, the Court endeavored to invoke a more efficient procedure than that set out in the standard case management order. Accordingly, the Court required Plaintiffs, before full discovery and other procedures were allowed, to make a prima facie showing of exposure and causation, as described in more detail below. *See Lore v. Lone Pine Corp.*, No. L-33606-85 1986 WL 635707 (N.J. Sup. Ct. Nov. 18, 1986) and cases following it.

The Court specifically considered any burdens associated with requiring Plaintiffs to make a prima facie showing on their claims and the corresponding benefits. The Court determined that the prima facie showing requirement does not prejudice Plaintiffs because ultimately they would need to come forward with this data and expert opinions in order to establish their claims.

The Court, in reaching its decision, further relied on the fact that the Colorado Oil and Gas Conservation Commission ("COGCC") had conducted an investigation of the Plaintiffs' well water and had concluded that the water supply was not affected by oil and gas operations in the vicinity. (Mot. for MCMO. Ex. 6.) The Court further considered Defendants' sworn testimony that their activities were conducted in compliance with applicable laws and regulations designed to protect human health and the environment, including those administered by the COGCC and the Colorado Department of Public Health and Environment ("CDPHE"). (Mot. for MCMO. Ex. 5.) Defendants have provided evidence to support their contention that the air emission-control equipment at the Wells and prevailing wind patterns make it unlikely that Plaintiffs or their property were exposed to harmful levels of chemicals from Defendants' activities. *Id.*

Accordingly, on November 10, 2011, the Court issued a Modified Case Management Order ("MCMO"), wherein the Plaintiffs were explicitly instructed to provide the Court and each Defendant with the following:

i. Expert opinion(s) provided by way of sworn affidavit(s), with supporting data and facts in the form required by Colo. R. Civ. P 26(a)(2)(B)(I), that establish for each Plaintiff:
   (a) the identity of each hazardous substance from Defendants' activities to which he or she was exposed and which the Plaintiff claims caused him or her injury;
   (b) whether any and each of these substances can cause the type(s) of disease or illness that Plaintiffs claim (general causation);
   (c) the dose or other quantitative measurement of the concentration, timing and duration of his/her exposure to each substance;
   (d) if other than the Plaintiffs' residence, the precise location of any exposure;
   (e) an identification, by way of reference to a medically recognized diagnosis, of the specific disease or illness from which each Plaintiff allegedly suffers or for which medical monitoring is purportedly necessary; and
   (f) a conclusion that such illness was in fact caused by such exposure (specific causation).

ii. Each and every study, report and analysis that contains any finding of contamination on Plaintiffs' property or at the point of each Plaintiff's claimed exposure.

iii. A list of the name and last known address and phone number of each health care provider who provided each Plaintiff with health services along with a release authorizing the health care providers to provide Plaintiffs' and Defendants' counsel with all of each Plaintiff's medical records, in the form of Exhibit A hereto, within twenty-one days of the date of this Court's entry of this Modified Case Management Order.

iv. Identification and quantification of contamination of the Plaintiffs' real property attributable to Defendants' operations.

Plaintiffs were given 105 days to comply with the MCMO.

On February 23, 2012, Plaintiffs submitted a variety of maps, photos, medical records, and air and water sample analysis reports, together with the affidavit of Thomas L. Kurt, MD, MPH ("Dr. Kurt"). Defendants assert that, in derogation of the MCMO, Plaintiffs have failed to produce sufficient information and expert opinions upon which to establish the prima facie elements of their claims, including exposure, injury, and both general and specific causation. The Court agrees.

After reviewing the data and facts gathered by Plaintiffs, Dr. Kurt merely opined that

> sufficient environmental and health information exists to merit *further* substantive discovery to include (1) modeling of ambient plumes of fugitive emissions from the three wellhead areas . . . (2) []further information of compliance with public environmental safety of the Strudley family . . . (3) a search for microseismic findings for vertical fault fracturing among the three wells . . . (4) a review of company-performed ambient air sampling during the hydraulic fracking process and afterwards (5) determining what quality testing inspections were performed for cementing leaks allowing vertical pressure driven migration (6) evaluation of the skin rashes in the color photographs with a dermatological history-taking by a dermatologist and (7) clinical testing by a neuropsychologist for neuropsychological environmental injury.

(Rsp. to MCMO. Aff. at 9.) (emphasis added). "Certainly where there is personal injury or illness it is possible to obtain adequate reports of treating physicians and an opinion as to whether or not exposure to toxic materials was a contributing factor." *Lone Pine*, No. L-33606-85 1986 WL 635707 at *3. But, all Dr. Kurt conclusively opines on is that "sufficient environmental and health information exists to merit *further* substantive discovery." Significantly, Dr. Kurt makes no opinion as to whether exposure was a contributing factor to Plaintiffs' alleged injuries or illness. (Rsp. to MCMO. Aff. at 9.) (emphasis added). Plaintiffs' requested march towards discovery without some adequate proof of causation of injury is precisely what the MCMO was meant to curtail.

While Plaintiffs' submissions are markedly more voluminous than those received by the *Lone Tree* court, the same adequacy issues plague the Plaintiffs here. First, as in *Lone Pine*, where the expert stated he could not offer an opinion until he had an opportunity to review the problem in greater detail, Dr. Kurt stated that, in his opinion, further discovery was warranted. *Lone Pine*, No. L-33606-85 1986 WL 635707 at *2. Second, as in *Lone Pine*, where the expert's conclusions seemed inapposite to the EPA's findings, the material relied on by Dr. Kurt seems inapposite to the COGCC's determination that Plaintiffs' well was not affected by oil and gas operations in the vicinity at the time Plaintiffs lived in their Silt home. *Id.*; (Mot. for MCMO. Ex. 6.) Third, similar to the expert in *Lone Pine*, Dr. Kurt suggests, at best, a very weak

circumstantial causal connection between the Wells and Plaintiffs' injuries. *Id.* In fact, upon review of the Plaintiffs' collective medical records, Dr. Kurt only *temporally associates* Plaintiff's symptoms with the Wells being brought into production.[1]

In an attempt to meet their burden under the MCMO, Plaintiffs submit reports based on an analysis of both air and water samples taken from their home in Silt. However, Dr. Kurt avers that he had no air or water sampling reports "available to him" which were performed between the date wellhead preparations began in August of 2010, and the date Plaintiffs moved out of their home in January of 2011.

Air sample, taken the day after the Plaintiffs moved out of their Silt home, shows detectable levels of certain gasses and compounds. However, this raw data is not accompanied by any explanation of what levels are necessary to cause any of the symptoms complained of by Plaintiffs.

As discussed above, the COGCC conducted a test of Plaintiffs' well water in December of 2010, just over a month *before* Plaintiffs left their home in Silt. The COGCC results show slight elevations in total dissolved solids, sulfate, and sodium. (Mot. for MCMO. Ex. 6.) The COGCC concluded that "there is no data that would indicate the water quality in your domestic well has been impacted by nearby oil and natural gas drilling and operations." *Id.* Neither methane nor hydrogen sulfide was detected on November 30, 2010, the day the COGCC collected the samples. *Id.* Plaintiffs' well water was not tested again until October and December of 2011, nearly a year *after* the Plaintiffs had moved from their home in Silt. After analyzing the results of this testing, John G. Huntington, PhD simply stated that levels of hydrogen sulfide were consistent with Plaintiffs' reports of a rotten egg smell. *See* (Rsp. to MCMO. Aff. at 9.) Dr.

---

1 A temporal relationship, by itself, provides no evidence of causation. *See In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1232 (D. Colo. 1998); *In re Swine Flu Immunization Products Liability Litig.,* 533 F.Supp. 567 (D. Colo. 1980). Temporality *at best* addresses the issue of specific causation; therefore, evidence of temporality is inadmissible where no admissible evidence of general causation exists. *In re Breast Implant Litig.*, 11 F. Supp. 2d at 1232 (citations omitted)(emphasis added).

Huntington further stated that levels of sodium and chloride were "higher than EPA *recommends* for drinking water, and are not typical of well water used as drinking water. *Id.* Such levels are in the range expected from a number of deep well sources, such as *may be* produced from gas wells." *Id.* (emphasis added). Again, there was no statement regarding what constitutes dangerous levels of any substance in drinking water or whether any causal link exists between the study's results and Plaintiffs' alleged injuries. Dr. Huntington's concluding opinion was merely that "[a]ll of these results *could* be consistent with contamination from gas well chemicals or production waters, *although that conclusion cannot be reached unequivocally from the chemical data alone*." *Id.* (emphasis added).

Though the evidence shows existence of certain gases and compounds in both the air and water of Plaintiffs' Silt home, there is neither sufficient data nor expert analysis stating with *any* level of probability that a causal connection does in fact exist between Plaintiffs' injuries and Plaintiffs' exposure to Defendants drilling activities.

Ultimately, Dr. Kurt's affidavit is wholly lacking in the establishment of causation and, at times, even presents information that is circumstantially in direct contradiction to Plaintiffs allegations. For instance, William G. Strudley complained of "nasal sinus congestion, nose bleeds at inconvenient times" and "an aversion to odors." (Rsp. to MCMO. Aff. at 5.) As Dr. Kurt notes, William G. Strudley owns a painting business. *Id.* Working in a painting business and being exposed to paint vapors could, in a lay juror's eyes, constitute the primary, if not exclusive cause of all of William G. Strudley's respiratory symptoms. While the Court is clearly not making a finding as to paint vapors, the Court utilizes this example to illustrate this case's serious, persisting causation problem.

Plaintiffs' sole expert is apparently not willing to go beyond a temporal connection between Plaintiffs' alleged injuries and Defendants' drilling activities. These missing links in the chain of causation are exactly what the Court sought to remedy through the MCMO. As discussed above, the MCMO was entered in an effort to determine whether Plaintiff could

produce admissible evidence concerning exposure and causation. Despite this, Dr. Kurt was only willing to represent that environmental exposure and health information existed to warrant further substantive discovery. Dr. Kurt did not opine on whether any and each of the substances present in the air and water samples can cause the type(s) of disease or illness that Plaintiffs claim (general causation). He did not discuss the dose or other quantitative measurement of the concentration, timing and duration of each Plaintiff's exposure to each substance. Dr. Kurt failed to address whether there was any exposure at some precise location in addition to the Plaintiffs' residence. He further neglected to provide an identification, by way of reference to a medically recognized diagnosis, of the specific disease or illness from which each Plaintiff allegedly suffers or for which medical monitoring is purportedly necessary. Finally, and perhaps most significantly, Dr. Kurt did not even attempt to draw a conclusion that Plaintiffs' alleged injuries or illnesses were *in fact* caused by such exposure (specific causation).

Given Dr. Kurt's qualifications, the time allowed Plaintiffs to comply with the MCMO, and the clear mandates contained within the MCMO, the Court concludes that Plaintiffs have failed to make a prima facie claim for injuries.

Because the Court determines that Plaintiffs' claims can be dismissed with prejudice, the Court does not address Defendants' arguments in favor of Summary Judgment. Accordingly, Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment is GRANTED. Plaintiffs' claims are DISMISSED WITH PREJUDICE.

SO ORDERED this 9th day of May, 2012.

BY THE COURT:

Ann B. Frick

DISTRICT COURT JUDGE