

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
SOUTHERN DIVISION

RICHARD ALLEN DUFOUR, JR.	§	PLAINTIFF
	§	
	§	
v.	§	Civil No. 1:19-cv-591-HSO-BWR
	§	
	§	
BP EXPLORATION & PRODUCTION INC. and BP AMERICA PRODUCTION COMPANY	§	DEFENDANTS

**MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF’S MOTION [236] FOR DAUBERT HEARING; GRANTING DEFENDANTS’ MOTION [172] TO EXCLUDE THE OPINIONS OF PLAINTIFF’S EXPERT DR. MICHAEL FREEMAN; GRANTING IN PART AND DENYING AS MOOT IN PART DEFENDANTS’ MOTION [178] TO EXCLUDE CERTAIN OPINIONS OF DR. SHAWN K. FRENCH, DR. WILLIAM W. SMITH II, DR. TIMOTHY IVEY, AND DR. JANICE L. MILES; DENYING PLAINTIFF’S MOTION [187] FOR PARTIAL SUMMARY JUDGMENT; GRANTING DEFENDANTS’ MOTION [180] FOR SUMMARY JUDGMENT; AND DENYING AS MOOT ALL REMAINING PENDING MOTIONS [170], [174], [176], [182], [183], [184], [208], [221]**

BEFORE THE COURT are Motions [170], [172], [174], [176], [178], [180], [182], [183], [184], [187], [208], [221], and [236], which are all fully briefed. For the reasons that follow, Plaintiff Richard Allen Dufour, Jr.’s Motion [236] for *Daubert* Hearing will be denied. Defendants BP Exploration & Production Inc. and BP America Production Company’s Motion [172] to Exclude the Opinions of Plaintiff’s Expert Dr. Michael Freeman will be granted, and Dr. Freeman will be precluded from testifying as an expert in this case. Defendants’ Motion [178] to Exclude Certain Opinions of Dr. Shawn K. French, Dr. William W. Smith II, Dr. Timothy

Ivey, and Dr. Janice L. Miles will be granted in part, to the extent that Dr. French will be prohibited from testifying as an expert on causation and will be limited to testifying only to the extent of his medical records. The Motion [178] will otherwise be denied as moot as to the other experts, as they have not been tendered for causation opinions.

Based upon the Court's exclusion of all of Plaintiff's expert testimony on any legal causation, Defendants' Motion [180] for Summary Judgment will be granted, and Plaintiff's claims will be dismissed with prejudice. As such, Plaintiff's offensive Motion [187] for Partial Summary Judgment is not well taken and will be denied. The remaining Motions [170], [174], [176], [182], [183], [184], [208], [221], none of which affect causation or the ultimate outcome, are moot.<sup>1</sup>

## I. BACKGROUND

Plaintiff Richard Allen Dufour, Jr.'s ("Plaintiff" or "Dufour") operative Second Amended Complaint [49] in this case alleges that he suffered "Work Related Asthma Secondary to Oil Spill Exposure and Worsening or an Aggravation of the Preexisting Condition of Asthma and Depressive Disorder"<sup>2</sup> caused by his exposure to substances during his work in the clean-up effort following the 2010 *Deepwater Horizon* Oil Spill, at times referred to in the record as the "BPDWH." See 2d Am.

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<sup>1</sup> One of these Motions is a Motion [221] to Strike several Declarations, including that of Dr. Freeman. See Mot. [221]; Ex. [216-1]. The Declaration addresses Dr. Freeman's "qualifications, training, education, and testimony history," Ex. [216-1] at 2, which are not central to the reliability of his opinions, which is one of the issues before the Court, see Mot. [172]; Mem. [173]. The Court therefore need not resolve this particular Motion [221] to Strike, rendering it moot.

<sup>2</sup> As is explained elsewhere in this Order, Dufour has abandoned his claims related to any depressive disorder.

Compl. [49] at 8. Dufour is a member of the *Deepwater Horizon* Medical Benefits Class and is covered by the Medical Settlement Agreement (“MSA”) entered in *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, as Amended on May 1, 2012*, commonly referred to as “MDL 2179.” Compl. [1] at 1 n.1, 5. The MSA resolved

certain claims of individuals engaged as clean-up workers and residents of particular geographical boundaries in the Gulf of Mexico related to their exposure to oil and/or dispersants arising from the DEEPWATER HORIZON incident and subsequent response efforts.

*In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, No. 2:10-md-2179, 2016 WL 4091416 at \*4 (E.D. La. Aug. 2, 2016). On January 11, 2013, the MSA was given final approval, and it became effective on February 12, 2014.

*See id.*

The MSA afforded class members who did not opt-out of the *Deepwater Horizon* Medical Benefits Class, like Dufour, two remedies for pursuing their medical claims. *See In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 2:10-md-02179-CJB-DPC, ECF 6427-1 at 32 (E.D. La. May 3, 2012).<sup>3</sup> The first was a compensation plan which provided fixed payments for Specified Physical Conditions (“SPC”). *Id.* at 25, 32, 41. The second remedy allowed class members to bring a lawsuit against Defendants in this case, BP America Production Company and BP Exploration & Production, Inc. (collectively, “BP” or “Defendants”), for “Later-Manifested Physical Conditions” (“LMPCs”). *Id.*

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<sup>3</sup> The pagination used here is that of the MSA, rather than the page numbers generated by the Court’s Case Management/Electronic Case Files system.

at 57. LMPCs are physical conditions which a class member claims are the result of spill-related exposures that were first diagnosed after April 16, 2012. *Id.* at 17-18. Lawsuits seeking recovery for LMPCs are referred to as Back-End Litigation Option (“BELO”) suits. *Id.* at 9. In a BELO lawsuit such as this one, a plaintiff must prove legal causation. *Id.* at 67.

According to Dufour’s Second Amended Complaint [49], after the *Deepwater Horizon* Oil Spill, he worked as a Clean-Up Worker, as defined by the MSA, from approximately June 10, 2010, until April 26, 2013, within the Southern District of Mississippi. *See* 2d Am. Compl. [49] at 1-3, 6. Dufour states that while working as a Clean-Up Worker, he was “was exposed to oil, other hydrocarbons, and other substances released from the MC252 Well and/or the Deepwater Horizon and its appurtenances, and/or dispersants and/or decontaminants used in connection with the with his [sic] Response Activities.” *Id.* at 3.

Dufour states that he submitted a claim for an SPC, was approved as a Class Member, and received compensation for a separate condition not being claimed here. *See* Compl. [1] at 5-6. In this BELO lawsuit, he alleges that as a result of his exposure to “oil, other hydrocarbons, chemical dispersants, and other substances,” he was diagnosed with the LMPCs “Work Related Asthma Secondary to Oil Spill Exposure and Worsening or an Aggravation of the Preexisting Condition of Asthma Diagnosed on March 30, 2016,” as well as “other chronic conditions related to his exposure such as Depressive Disorder diagnosed on May 25, 2013.” 2d Am. Compl. [49] at 7-8.

Both Dufour and BP have designated numerous experts for trial, some of

whom opine as to general and specific causation of Dufour's conditions, as required for toxic tort claims. *See generally Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347, 351 (5th Cir. 2007) (discussing causation standard in toxic tort cases). The parties have also filed a number of dispositive Motions, including ones seeking to strike each other's expert witnesses under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and ones for summary judgment. *See* Mots. [170], [172], [174], [176], [178], [180], [183], [184], [187], [208], [221], [236].

## II. DISCUSSION

### A. Relevant legal authority

#### 1. Summary judgment standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When a defendant files a typical motion for summary judgment, that defendant, as the movant, bears the “the initial burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.” *Taita Chem. Co. v. Westlake Styrene Corp.*, 246 F.3d 377, 385 (5th Cir. 2001) (quotation omitted). Where, as here, a plaintiff also files an offensive motion for summary judgment, meaning on his own claim on which he carries the burden of proof at trial, “his burden is even higher; he must ‘establish beyond peradventure *all* of the essential elements of the claim . . . .” *Guzman v. Allstate Assurance Co.*, 18 F.4th 157, 160 (5th Cir. 2021) (emphasis in original) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)).

If a summary judgment movant satisfies its initial burden, the nonmovant must then present evidence beyond the pleadings that demonstrates “specific facts showing that there is a genuine issue for trial.” *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994); *see Guzman*, 18 F.4th at 160. To rebut a properly supported motion for summary judgment, the nonmovant must show, with “significant probative evidence,” that there exists a genuine issue of material fact for resolution at trial. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). “If the evidence is merely colorable, or is not significantly probative,’ summary judgment is appropriate.” *Cutting Underwater Techs. USA, Inc. v. ENI U.S. Operating Co.*, 671 F.3d 512, 516 (5th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

At summary judgment, a court must “view the evidence in the light most favorable to the nonmovant and construe all reasonable inferences in [his] favor” and “may not evaluate the credibility of the witnesses, weigh the evidence, or resolve factual disputes.” *Guzman*, 18 F.4th at 160 (quotation omitted). The sole question before a court at summary judgment is whether a “reasonable jury drawing all inferences in favor of the nonmoving party could arrive at a verdict in that party’s favor.” *Id.* (quotation omitted).

## 2. Causation in BELO cases

One of the dispositive questions raised in BP’s Motion for Summary Judgment is whether Dufour can establish legal causation. *See Mot.* [180]. BP argues, in part, that Dufour “has produced no admissible evidence showing that his alleged injuries were caused by his alleged exposure to any chemicals during his

involvement in the response effort to the *Deepwater Horizon* oil spill.” Mem. [181] at 1. Dufour responds that, “BP does not satisfy its burden as the party moving for summary judgment so long as Plaintiffs have admissible causation expert testimony.” Resp. [206] at 9. He argues that should either of his causation experts’ testimony be admitted, BP’s Motion [180] for Summary Judgment must be denied. *See id.* at 9-10.

Traditionally in tort cases, a plaintiff must “prove that it is more likely than not that another individual has caused him or her harm.” *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 198 (5th Cir. 1996) (quotation omitted). The MSA provides that it “shall be interpreted in accordance with General Maritime Law,” *In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 2:10-md-02179-CJB-DPC, ECF 6427-1 at 192 (E.D. La. May 3, 2012), and that BELO suits for LMPCs may litigate legal causation at trial, *see id.* at 67.

In toxic tort cases, the Fifth Circuit has pronounced the following causation standard:

General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual’s injury. Evidence concerning specific causation in toxic tort cases is admissible only as a follow-up to admissible general-causation evidence. Thus, there is a two-step process in examining the admissibility of causation evidence in toxic tort cases. First, the district court must determine whether there is general causation. Second, if it concludes that there is admissible general-causation evidence, the district court must determine whether there is admissible specific-causation evidence.

*Knight*, 482 F.3d at 351 (internal citations omitted).

The Fifth Circuit has declined to decide whether the toxic tort standard or

another causation standard should apply to BELO litigation where such a determination was unnecessary because a plaintiff had “failed to offer the evidence necessary to prove legal causation per the MSA under any plausible causation standard.” *McGill v. BP Expl. & Prod., Inc.*, 830 F. App’x 430, 434 & n.2 (5th Cir. 2020). However, it is clear from Fifth Circuit precedent that, to survive summary judgment, a plaintiff must present evidence to at least meet some “plausible causation standard.” *Id.*

For a plaintiff to establish legal causation, whether under diversity jurisdiction or general maritime law, “[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain a plaintiff’s burden.” *Allen*, 102 F.3d at 199; *see Seaman v. Seacor Marine, LLC*, 326 F. App’x 721, 723 (5th Cir. 2009). The Fifth Circuit requires such proof be established through expert testimony. *See Seaman*, 326 F. App’x at 723; *Harriel v. BP Expl. & Prod. Inc.*, No. 2:17-CV-197-KS-MTP, 2019 WL 2574118 at \*3 (S.D. Miss. May 15, 2019). In opposing BP’s request for summary judgment, Dufour contends that, “[s]hould any of [his] causation experts’ testimony be admitted, BP’s Motion for Summary Judgment must be denied.” Resp. [206] at 10.

Therefore, the threshold question this Court must resolve is whether any of the experts upon whom Dufour relies to show legal causation can survive a *Daubert* challenge. In opposing summary judgment, Dufour relies only upon the causation opinions of his experts Dr. Michael Freeman and Dr. Shawn K. French. *See* Resp.



[206] at 11-15.<sup>4</sup> Dr. Freeman “is a consultant in the fields of forensic medicine and forensic epidemiology,” and he was designated to “offer testimony on general and specific causation.” Ex. [179-1] at 3-4. Dufour’s Expert Witness Disclosure states that “Dr. French is a Medical Doctor and Plaintiff’s pulmonologist/treating physician,” who is

expected to offer testimony regarding Plaintiff’s Work Related Asthma Secondary to Oil Spill Exposure; Worsening or an Aggravation of the Preexisting Condition of Asthma, including but not limited to, his diagnosis, course of treatment, the chronic nature of Plaintiff’s illness, the side effects of available treatments any and all chronic issues that have resulted, refer, or relate to his past, current and future damages regarding Plaintiff’s diagnosis of Work Related Asthma Secondary to Oil Spill Exposure; Worsening or an Aggravation of the Preexisting Condition of Asthma, the prognosis for this condition, and any and all reasonable future medical care. As well as factual testimony regarding his treatment of the Plaintiff, as noted above. All of this treating physician’s medical records have been produced by the Plaintiff and/or obtained via authorization and/or subpoena by Defendant. Therefore, detailed accounts of Plaintiff’s interaction and treatment with Dr. French are in Defendant’s possession. Any and all opinions and/or diagnosis [sic] and/or facts testified to in Dr. French’s Deposition dated January 14, 2022, are attached [to the Expert Witness Disclosure] as **Exhibit F**. Also, see all opinions and/ or diagnosis on NOIS and Physician Certification Form dated May 26, 2020, attached . . . as **Exhibit G**.

*Id.* at 4 (emphasis in original).

Whether Dufour’s claims can survive summary judgment hinges upon the

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<sup>4</sup> In his Response to BP’s Motion [180] for Summary Judgment, the only other of his experts whom Dufour mentions in passing is Dr. Ranajit Sahu. See Resp. [206] at 10 n. 36. Dr. Sahu is a mechanical engineer who evaluated levels of exposure, see Ex. [179-1] at 3, and Dufour has made it clear in a separate filing that “Dr. Sahu was never retained to provide any medical causation opinions,” Resp. [214] at 2. Because Dufour does not rely upon Dr. Sahu for any medical causation opinions in opposing summary judgment, see Resp. [206], the Court need not address the admissibility of Dr. Sahu’s expert testimony at this time.

admissibility of either Dr. Freeman's or Dr. French's expert causation opinions. This is because he must proffer some expert testimony on causation to create a fact question for trial on the merits of his claim. *See Seaman*, 326 F. App'x at 723; *Harriel*, 2019 WL 2574118, at \*3. As such, the Court turns first to BP's Motions [172], [178] seeking to exclude Drs. Freeman and French.

3. Rule 702 and *Daubert*

BP seeks to exclude Dr. Freeman's and Dr. French's causation opinions pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Mot. [172]; Mot. [178]. Rule 702 provides that,

[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Under Rule 702 and *Daubert*, a district court acts as a gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589; *see United States v. Herman*, 997 F.3d 251, 269 (5th Cir. 2021). To be relevant, an expert's "reasoning or methodology must be properly applied to the facts in issue." *In re: Taxotere (Docetaxel) Prod. Liab. Litig.*, 26 F.4th 256, 268 (5th Cir. 2022) (quotation omitted). To be reliable, an expert's

testimony “must be grounded in the methods and procedures of science and be more than unsupported speculation or subjective belief.” *Id.* (quotation omitted).

In *Daubert*, the Supreme Court delineated several factors that courts should consider when exercising their gate-keeping function: (1) whether the theory or technique in question can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the technique has been generally accepted in the scientific community. *See Daubert*, 509 U.S. at 593-94. This inquiry is a “flexible one,” and a court’s focus is on the principles and methodology employed, not the conclusions generated. *Id.* at 594. However, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997).

“The proponent of expert testimony bears the burden of establishing the reliability of the expert’s testimony.” *Sims v. Kia Motors of Am., Inc.*, 839 F.3d 393, 400 (5th Cir. 2016). He “need not prove to the judge that the expert’s testimony is correct, but [they] must prove by a preponderance of the evidence that the testimony is reliable.” *In re: Taxotere (Docetaxel) Prod. Liab. Litig.*, 26 F.4th at 268 (quotation omitted).

B. Plaintiff’s Motion [236] for a *Daubert* Hearing

On February 10, 2023, over a month after the parties had filed their eight

*Daubert* Motions [170], [172], [174], [176], [178], [182], [183], [184], Dufour filed a Motion [236] asking the Court to “hold an evidentiary *Daubert* Hearing with live expert testimony,” with respect to the numerous experts that were the subject of the Motions. Mot. [236] at 1; *see* Mem. [237] at 1-2. BP opposes the request, taking the position that “both parties have been given every opportunity to be the proponent of its experts, and that the record is fully developed such that the Court can examine the reliability of each expert.” Resp. [241] at 3.

Under this Court’s Local Rules, it “will decide motions without a hearing or oral argument unless otherwise ordered by the court on its own motion or, in its discretion, upon written request made by counsel in an easily discernible manner on the face of the motion or response.” L.U. Civ. R. 7(b)(6)(A). Given the thoroughness of the parties’ briefs and exhibits, as well as the Court’s familiarity with the issues raised, the Court finds that neither a hearing nor oral argument would be helpful or otherwise warranted on any of the pending Motions in this case. Dufour’s Motion [236] for a *Daubert* Hearing is not well taken and should be denied.

C. BP’s Motion [172] to Exclude Dr. Freeman

1. Dr. Freeman’s opinions

Dufour has designated Dr. Freeman, who is “a consultant in the fields of forensic medicine and forensic epidemiology,” as an expert to opine on “general and specific causation.” Ex. [179-1] at 3-4 (Pl.’s Expert Witness Disclosure). Dr. Freeman has offered two separate reports, the first dated February 21, 2022 (the “Original Report”), Ex. [173-1], and a supplemental report dated August 22, 2022 (the “Supplemental Report”), Ex. [173-2].

a. The Original Report

Dr. Freeman’s Original Report proffers opinions “pertain[ing] to the fields of forensic medicine,” meaning the “intersection of medicine and law,” and to “forensic epidemiology,” meaning the “scientific study of disease and injury in populations, including prevalence, risk, and incidence in specific populations.” Ex. [173-1] at 2-3. It also offers opinions “relat[ing] to and address[ing] issues of causal probability as they relate to Mr. Dufour’s circumstances.” *Id.* at 3. According to Dr. Freeman, his opinions are based on his “expertise and training as a medical scientist, and not as a medical clinician.” *Id.*

Dr. Freeman states that his Original Report “provides an analysis of the scientific evidence of the causal link to BPDWH oil spill associated substances,” and that “[i]t is also notable there is also strong common-sense evidence that bridges general (population-based) and specific (individual) causation for Mr. Dufour.” *Id.* at 14 (emphasis removed). According to Dr. Freeman, “[i]t is not difficult to understand, from common experience, that an inhaled chemical irritant can cause inflammation of the respiratory tract resulting in acute respiratory symptoms, especially among persons with preexisting asthma.” *Id.* Dr. Freeman posits that, “[a]dditionally, it makes sense that after 2.5 years of occupational exposure to irritants acute symptoms persist and then can become chronic even in the absence of the irritant.” *Id.*

Dr. Freeman recites Sir Austin Bradford-Hill’s nine criteria (the “Hill Criteria”) “by which population-based determinations of causation could be made when there is substantial epidemiologic evidence linking a disease or injury with an

exposure,” and he states that these “nine criteria have been universally adopted as a scientific basis for the evaluation of both general and specific causation”: (1) strength of association; (2) consistency; (3) specificity; (4) temporality; (5) biological gradient (known as “dose-response”); (6) biologic plausibility; (7) coherence; (8) experiment; and (9) analogy. *Id.* at 15-17. According to Dr. Freeman,

[t]here is no formula or algorithm that dictates whether a causal inference is reasonable based on the Hill Criteria, as one or more factors may be absent even when a true causal relationship exists, and vice versa. Thus, the determination that evidence meets the threshold to demonstrate a causal relationship is a matter of judgment applied to both qualitative and quantitative information.

*Id.* at 17.

Relevant to Dufour’s case, Dr. Freeman’s Original Report considered “[e]vidence for a Hill Criteria analysis of the relationship between worsening of preexisting asthma and exposure to substances associated with the . . . oil spill.” *Id.* at 18 (emphasis removed). While he “did not find any studies that directly evaluated aggravation of preexisting asthma in BPDWH oil spill clean-up workers,” Dr. Freeman contends that he did find “studies of work aggravated asthma demonstrated that 3,253 agents have been described as potential triggers,” and he then makes the inferential leap that this “suggest[s] that virtually any irritant that can cause respiratory symptoms can also aggravate asthma.” *Id.* at 30.

According to Dr. Freeman, his analysis of data and results of other studies reveal “increased respiratory symptoms among BPDWH oil spill clean-up workers exposed to chemicals and irritants associated with the spill,” and that “[f]ollow-up investigations showed that these symptoms can persist and become chronic even

after the exposures ended.” *Id.* Dr. Freeman therefore concludes that “[i]t is logical to infer that these effects would be magnified among workers with preexisting asthma.” *Id.* Finally, Dr. Freeman opines that,

[t]he results of my review of the relevant scientific and epidemiologic evidence support a general causal relationship between occupational exposure to chemicals associated the BP Deepwater Horizon oil spill and aggravation of preexisting asthma. In the case of Richard Allen Dufour, Jr., it is my opinion, to a reasonable degree of medical and scientific certainty, that exposures to oil spill-associated irritants during his response work were a substantial factor in causing his asthma to worsen during his employment and to persist afterward. There is no evidence in any of the reviewed records that Mr. Dufour’s asthma would have worsened in the absence of his prolonged work exposure to chemical respiratory tract irritants.

*Id.* at 35.

b. Supplemental Report

In his Supplemental Report, Dr. Freeman purports to update his analysis based upon “the data collected by the National Institute for Occupational Safety and Health (NIOSH) as part of a health hazard evaluation (HHE) to investigate potential hazards associated with BPDWH onshore response work activities.” Ex. [173-2] at 2-3 (the “HHE data”). He also cites a July 2022 evaluation, the Lawrence Study, of other individuals who presented results purportedly showing “asthma risk among BPDWH oil spill response and cleanup workers exposed to airborne total hydrocarbons (THC), benzene, toluene, ethylbenzene, o-, m-, and p-xylenes and n-hexane (BTEXH) from crude oil and PM<sub>2.5</sub> from burning/flaring oil and natural gas.” *Id.* (citing Lawrence KG, et al., *Associations Between Airborne Crude Oil Chemicals and Symptom-Based Asthma*, *Environ Int.*, 2022; 167:107433 (the “Lawrence Study”)); *see also* Ex. [173-5].

(i) Lawrence Study

According to Dr. Freeman, the authors of the Lawrence Study “found that working in the oil spill cleanup effort in any capacity was associated with a higher risk of incident asthma.” Ex. [173-2] at 3. The Lawrence Study observed an increased risk of asthma with an increasing level of THC exposure as well as with an “increasing exposure to individual BTEX-H chemicals and the *chemical mixture*.” *Id.* (emphasis in original). While reported strengths of the Lawrence Study included its “estimat[ion] of relationships between asthma risk and a BTEX-H mixture,” and the “large study sample size, the use of air monitoring data at the time of exposure, and asthma characterization evaluated as incidence versus prevalence,” Dr. Freeman recognized that there may have been “misclassification and over reporting of asthma due to the utilization of self-reported wheezing in the case definition” and “use of self-reported smoking and lack of individual THC and BTEX-H exposure monitoring results for many persons.” *Id.* at 3-4.

Dr. Freeman nevertheless concludes that the Lawrence Study “provided the first evidence of increased asthma risk associated with exposures to both individual crude oil components and the BTEX-H mixture.” *Id.* He contends that, “[c]onsistent with the subjects in the [Lawrence Study], Mr. Dufour was exposed to an undefined mixture of chemicals in tar balls and oil spill associated residue associated with his BPDWH clean-up work.” *Id.* at 9.

(ii) HHE data

The Supplemental Report states that,

[b]ecause Mr. Dufour experienced worsening of his pre-existing asthma



in association with his BPDWH oil spill onshore clean-up work, I evaluated the HHE data to investigate possible associations between respiratory symptoms (coughing, trouble breathing, short [sic] of breath, chest tightness, or wheezing) and other parameters assessed as part of the HHE.

Ex. [173-2] at 4-5. Dr. Freeman considered the HHE data collected by NIOSH investigators between July 1 and July 23, 2010,<sup>5</sup> *see id.* at 4-8, and he claims to have found “statistically significant dose-response relationships between the number of days worked in BPDWH onshore clean-up and respiratory symptoms” and “between the frequency with which workers were exposed to tar balls, dust, dispersants, and dripping oil and respiratory symptoms,” *id.* at 3; *see id.* at 7-8.

Dr. Freeman opines as follows:

My analysis of NIOSH health hazard evaluation data associated with BP Deepwater Horizon oil spill onshore clean-up workers demonstrate that several indicators of oil spill-related chemicals, defined or undefined, were independently associated with self-reported respiratory symptoms. Both having skin contact with oil and experiencing disturbing odors were associated with more than a 2-fold increase in the odds of respiratory symptoms. In addition, both exposure duration and frequency were associated with increased odds of respiratory symptoms in a dose-dependent manner:

- each 30-day increase in the duration of employment was associated with a 24% increase in the odds of respiratory symptoms.
- each level increase in the frequency of exposure to tar balls (from not at all to a few days to almost every day to daily) was associated with a 27% increase in the odds of respiratory symptoms; for dust the increase was 20% per level.

As I discussed in my initial report dated February 21, 2022, a dose-response relationship provides strong evidence for a causal relationship. This relationship is reinforced with this additional information and analysis, and also demonstrates that the established threshold for duration of exposure to the chemicals is more than 30 days exposure as a shore clean up [sic] worker.

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<sup>5</sup> According to the Second Amended Complaint [49], Dufour was a clean-up worker from approximately June 10, 2010, to April 26, 2013. *See* 2d Am. Compl. [49] at 1, 6.

In the case of Richard Allen Dufour, Jr., it is my opinion, to a reasonable degree of medical and scientific certainty, that exposures to oil spill-associated irritants during his response work were a substantial factor in causing his asthma to worsen during his employment and to persist afterward.

My analysis of NIOSH HHE data demonstrates that BPDWH oil spill onshore workers like Mr. Dufour were exposed to these irritants, and those exposures were associated with wheezing and other respiratory symptoms consistent with those who experience environmentally induced worsening of asthma, that the association demonstrates a high degree of monotonic dose-response, and that the threshold of exposure at which the association is statistically significant is more than 30 days. Collectively, the new information described in this supplemental report provides high quality scientifically valid evidence of a causal association between the toxic environmental exposures sustained by BPDWH shore workers and an increased risk of both incident and chronic asthma, and asthma-like symptoms.

*Id.* at 10. According to Dr. Freeman, his “opinions were given as reasonable medical and scientific probabilities.” *Id.*

2. Whether Dr. Freeman’s opinions are sufficiently reliable

a. Causation opinions in the Original Report

In his Original Report [173-1], Dr. Freeman purportedly found a general causal relationship “between occupational exposure to chemicals associated [with] the BP Deepwater Horizon oil spill and aggravation of preexisting asthma.” Ex. [173-1] at 35. While Dr. Freeman does mention some chemicals associated with crude oil, oil spills, and dispersants used to break up oil slicks, he does not attempt to offer any specifics as far as what substances Dufour actually encountered in the cleanup, and it is beyond dispute there were a large array of oil spill response workers in different locations who experienced varying exposure potentials. *See id.* at 21-22, 35.

Dr. Freeman then proceeds to list various epidemiological studies, without providing any meaningful analysis of them, and he cherry picks certain portions of those studies that benefit Dufour. *See id.* at 19-31. However, when epidemiology is used in legal disputes, “the methodological soundness of a study and its implications for resolution of the question of causation must be assessed.” Fed. Judicial Ctr., Reference Manual on Scientific Evidence, 554 (3d ed. 2015) (“Ref. Manual”). Dr. Freeman’s Original Report does not adequately perform this task.

The studies to which Dr. Freeman cites in the Original Report do not address the same exposure scenario that Dufour experienced. *See Ex.* [173-1] at 19-31. One study determined that some of the most prevalent irritant compounds causing work-aggravated asthma are pesticides and glues, *see id.* at 19 (the “Maestrelli Study”), but there is no allegation or other evidence in the record that Dufour was exposed to either pesticide or glue. Another study upon which Dr. Freeman relies (the “McGowan Study”) expressed concerns about “[m]isclassification of exposure” being “another potential problem because of the reliance of self-reported information about the work performed.” *Ex.* [173-5] at 26. A third cited in the Original Report (the “2018 Rusiecki Study”) noted “several limitations that should be considered for both the overall study and [its] results,” similarly including that the “[a]ssessment of exposure to crude oil and other agents relies on self-report, which could be subject to recall bias.” *Id.* at 37.

Dr. Freeman acknowledged in his Original Report that he “did not find any studies that directly evaluated aggravation of preexisting asthma in BPDWH oil spill clean-up workers,” though he attempted to extrapolate by drawing the

conclusion that “studies of work aggravated asthma demonstrated that 3,253 agents have been described as *potential* triggers *suggesting* that virtually any irritant that can cause respiratory symptoms can also aggravate asthma.” *Id.* at 30 (emphasis added). However, Dr. Freeman offers nothing more than his *ipse dixit* opinion to make this inferential leap from an observation that there are a large number of agents in the occupational setting that can *potentially* aggravate asthma, to a conclusion that the substances to which Dufour was actually exposed in his cleanup efforts, which are not on that list, can also aggravate asthma and can persist and become chronic after exposure ends. *See id.* Dr. Freeman has simply left too great an analytical gap between the data and the causation opinion proffered. *See Gen. Elec. Co.*, 522 U.S. at 144.

As for Dr. Freeman’s reliance upon the Hill criteria to establish both general and specific causation, this Court has previously explained that “the Bradford Hill criteria are used to establish general causation from epidemiological studies – they are not used to establish specific causation.” *Yarbrough v. Hunt S. Grp., LLC*, No. 1:18CV51-LG-RHW, 2019 WL 4392519, at \*4 (S.D. Miss. Sept. 12, 2019) (quotation omitted).

The Bradford Hill criteria are used to assess whether the association between an illness and exposure to an environmental factor is, in fact, causal, or merely coincidental. This inquiry goes to the essence of general causation – whether a substance is capable of causing the illness observed. It does not assess whether exposure to the substance specifically caused the illness observed in a particular instance.

*Id.* Therefore, Dr. Freeman’s purported use of the Bradford Hill criteria to determine that Dufour’s exposure to any chemical related to the oil spill specifically

caused the worsening of his chronic asthma is plainly misplaced and renders his opinions on specific causation unreliable. *See id.*

Even if the Hill criteria may be used to establish both general and specific causation, Dr. Freeman's reliance upon them does not bridge the analytical gap between the data provided in his Original Report and his causation conclusions. The Original Report contains only a cursory and superficial consideration and analysis of the criteria, *see* Ex. [173-1] at 14-18, 33-35, which is insufficient to establish reliability under *Daubert*, *see Sims*, 839 F.3d at 400.

For example, in the "Consistency" section of the Original Report, Dr. Freeman states that "[i]n addition to demonstrating strength of association, the 3 study results described [in his Original Report] demonstrate consistent associations between exposure to products of the BPDWH oil spill and symptoms or conditions associated with asthma." Ex. [173-1] at 33. But he does not explain how the data supports this conclusion, and his description of the studies undermines his finding of consistency. *See id.*

Consistency in epidemiology "is an important factor in making a judgment about causation." Ref. Manual at 604. "Different studies that examine the same exposure-disease relationship generally should yield similar results." *Id.* However, the three studies referenced in the "Consistency" section of Dr. Freeman's Original Report did not examine the same exposure-disease relationship. *See* Ex. [173-1] at 22-30, 33. This is problematic.

The first study was the NIOSH HHE data, which involved *acute* symptoms reported by "responders that were either shore cleaning workers or involved in

equipment decontamination or waste management,” *id.* at 22, while a second study “investigated the *long-term effects* of the BPDWH oil spill exposure among those participants involved in its clean-up activities 7 years after their exposure by evaluating medical records,” *id.* at 27 (emphasis added). According to Dr. Freeman, the third “study was designed to investigate potential *acute and long-term health effects* from oil spill response work exposures and utilized prospective, objective health data from military medical encounters and cross-sectional survey data.” *Id.* at 28 (emphasis added). Therefore, the three studies upon which Dr. Freeman relies do not all address the same conditions, *see id.* at 22-28, nor do any appear to address the specific worsening of preexisting chronic asthma that is the central issue in Dufour’s case, *see id.*

Nor does it appear that the studies were based upon the same exposures. Even if the exact same substances were involved in each of the three studies, despite the large geographic spread across which the oil spill occurred and over which the studies were conducted, Dr. Freeman’s analysis focused on one study’s findings concerning inhalational exposure from oil spills, *see id.* at 30, while the other two studies did not appear to be limited to inhalation exposure, nor did they differentiate between methods of exposure, *see id.* at 21-27. The discrepancies in the underlying data used to support the exposure-disease relationship in the Original Report, along with Dr. Freeman’s *ipse dixit* statements as support for the other Hill criteria, indicate that Dr. Freeman did not reliably apply the relevant criteria. *See* Fed. R. Civ. P. 702; Ex. [173-1] at 33; Ref. Manual at 604; *see also*, *e.g.*, Ex. [173-1] at 34 (for “Coherence,” merely stating that “[i]t certainly ‘makes

sense' that exposure to inhaled irritants can cause acute and chronic respiratory symptoms, including the aggravation of preexisting asthma”).

In sum, Dufour has not shown that the opinions expressed in Dr. Freeman's Original Report [173-1] are reliable. There is simply too great of an analytical gap between the data and the conclusions in the Original Report that Dufour's chronic asthma worsened due to exposure to chemicals associated with his oil spill cleanup efforts. *See* Fed. R. Civ. P. 702; *Gen. Elec. Co.*, 522 U.S. at 144; *Daubert*, 509 U.S. at 593-94.

b. The causation opinions in the Supplemental Report

The Supplemental Report purports to update Dr. Freeman's analyses based upon the Lawrence Study and NIOSH HHE data. However, Dr. Freeman does not provide any “updated” analysis from his Original Report, only offering a new analysis of the Lawrence Study and NIOSH HHE data, without any mention of the Hill criteria. *See* Ex. [173-2].

Dr. Freeman states that the Lawrence Study “provided the most compelling and detailed evidence of increased asthma risk associated with exposures to individual crude oil components and the BTEX-H mixture.” Ex. [173-2] at 9; *see* Ex. [173-5] at 53 (Lawrence Study). But Dr. Freeman himself undermines confidence in the Lawrence Study by pointing out that “[o]ne limitation of the study is possible misclassification and over reporting of asthma due to the utilization of self-reported wheezing in the case definition.” Ex. [173-2] at 4. It was incumbent upon Dr. Freeman to demonstrate that his reliance upon the Lawrence Study was nevertheless reliable despite this study limitation, but he has made no effort to do

so. Instead, the Court is left with Dr. Freeman's own statements and the Lawrence Study itself, which states that "[i]n analyses where asthma was defined based only on a physician's diagnosis associations between asthma and oil spill exposures were largely attenuated and exposure-responses were no longer apparent for any associations." Ex. [173-5] at 75. Dr. Freeman has also not addressed this limitation.

Moreover, the Lawrence Study included certain adults who participated in oil spill response and cleanup work, but it excluded "those who reported an asthma diagnosis prior to April 20, 2010, the onset date of the disaster." *Id.* at 72. There is no dispute that Dufour has long suffered from asthma, including as a child, *see, e.g.*, Ex. [173-1] at 11, and that he would therefore have been excluded from the Lawrence Study, *see* Ex. [173-5] at 72. The fact that the Lawrence Study would not have included Dufour as a participant because of his preexisting asthma demonstrates that he is not on common footing with any participant in that Study, and as such Dr. Freeman did not reliably apply the Lawrence Study to this case. Nor did he address this issue in his Supplemental Report.

Next, Dr. Freeman relies upon the NIOSH HHE data to find that "each 30-day increase in the duration of employment was associated with a 24% increase in the odds of respiratory symptoms," Ex. [173-2] at 9, and that "each level increase in the frequency of exposure to tar balls (from not at all to a few days to almost every day to daily) was associated with a 27% increase in the odds of respiratory symptoms; for dust the increase was 20% per level," *id.* at 10. Dr. Freeman claims that the dose-response discussed in his Original Report is "reinforced" with this



additional data, which included the survey form for collecting the data and other data not originally available in the public data set. *Id.* at 4, 10.

However, the dose-response discussed by Dr. Freeman in his Original Report concerned the reporting of symptoms, not the diagnosis or worsening of asthma or any other chronic conditions. *See* Ex. [173-1] at 34. Dr. Freeman acknowledged in his deposition that while these symptoms are symptoms of asthma, “they’re not specifically asthma worsening.” Freeman Dep. [173-4] at 59. He explained that “[p]eople who have worsening of asthma all have trouble breathing or will feel shortness of breath and wheezing, by definition that’s asthma. But not everybody who wheezes or has shortness of breath, et cetera, has asthma.” *Id.* at 60.

Dr. Freeman has not provided a reasonable basis for using respiratory symptoms alone as a proxy for chronic asthma in opining as to causation in Dufour’s case. His leap from data showing an increased chance of respiratory symptoms based on duration and frequency of exposure to a conclusion “that exposures to oil spill-associated irritants during [Dufour’s] response work were a substantial factor in causing his asthma to worsen during his employment and to persist afterward,” Ex. [173-2] at 10, constitutes *ipse dixit* testimony and leaves too great of an analytical gap between the data and his causation opinion, *see Gen. Elec. Co.*, 522 U.S. at 144.

For the foregoing reasons, Plaintiff has not shown that Dr. Freeman applied the Lawrence Study and the NIOSH HHE data reliably to the facts of this case. *See* Fed. R. Evid. 702. The Supplemental Report is otherwise rife with *ipse dixit* statements and leaves too great an analytical gap between the data provided and

the causation opinions offered. *See Gen. Elec. Co.*, 522 U.S. at 144.

In sum, having considered the relevant legal authority, both Dr. Freeman's Original and Supplemental Reports, his deposition testimony, and the record as a whole, Dufour has not carried his burden of establishing the reliability of Dr. Freeman's opinions or testimony concerning legal causation in this case, whether it be it general, specific, or otherwise. *See Fed. R. Civ. P. 702; Daubert*, 509 U.S. at 593-94; *Sims*, 839 F.3d at 400. Because Dufour has not carried his burden to show that Dr. Freeman's opinion can satisfy any plausible causation standard, BP's Motion to Exclude Dr. Freeman's expert testimony should be granted, and Dr. Freeman will be precluded from testifying as an expert at trial.

D. BP's Motion [178] to Exclude Certain Opinions of Dr. Shawn K. French, Dr. William W. Smith II, Dr. Timothy Ivey, and Dr. Janice L. Miles

BP seeks to exclude certain opinions of Dufour's treating physicians, Dr. Shawn K. French, Dr. William W. Smith II, Dr. Timothy Ivey, and Dr. Janice L. Miles. *See Mot.* [179]; *Mem.* [180]. Because these physicians did not produce written reports, BP asks the Court to limit their testimony to the contents of their medical records. *See Mot.* [178] at 1.

1. Dr. French

a. The parties' arguments

According to BP, Dr. French is one of Dufour's treating physicians, and it is undisputed that he did not provide a written report under Federal Rule of Civil Procedure 26(a)(2). *See Mem.* [179] at 10. For this reason, BP argues that Dr. French should not be permitted to testify concerning causation. *See id.* at 10-11.

Dufour responds that Dr. French's opinions related to diagnosis, causation, and prognosis are admissible and that BP's arguments go to their weight, rather than their admissibility. *See* Resp. [205] at 8. According to Dufour, "Dr. French testified at deposition to the facts disclosed during the course of care and treatment of Mr. Dufour, including Mr. Dufour's diagnosis, the causation of his injuries, and his prognosis, and Dr. French based his opinions on his personal knowledge and observations obtained during the course of care and treatment of Mr. Dufour . . . ." *Id.* Dufour contends that it "cannot be fairly argued to be unreliable or unhelpful to a jury because Plaintiff does not rely upon Dr. French, or any other treating physician for that matter, to prove the *entirety* of his case." *Id.* at 11 (emphasis in original).

In its Reply [218], BP insists that any attempt by Dr. French to offer causation opinions outside the scope of his medical records is improper under Rule 26(a)(2). *See* Reply [218] at 2-12. Alternatively, BP maintains that any opinion testimony on medical causation offered by Dr. French should be excluded under Rule 702 and *Daubert* because Dufour has not shown how Dr. French is qualified to proffer such an opinion, because the causation opinion is not based upon sufficient facts or data and is not the product of reliable principles or methods, and because Dr. French has not properly applied those principles or methods to the facts of this case. *See id.* at 12-17.

b. Whether Dr. French can testify as to causation

(i) Rule 26(a)(2) disclosure requirements

Federal Rule of Civil Procedure 26(a)(2)(B) requires the disclosure of expert

testimony and a written report “if the witness is one retained or specially employed to provide expert testimony in the case.” Fed. R. Civ. P. 26(a)(2)(B). There is no dispute that Dr. French is a treating physician, not a retained expert, and that he did not prepare a written expert report. *See id.*; Ex. [179-1] at 4. The parties dispute whether Dr. French, without having provided a written report, can now opine as to legal causation. *See* Mem. [179]; Resp. [205]; Reply [218].

When a party does not provide an expert report from a treating physician who will testify at trial, the doctor’s “testimony is limited to those facts and opinions in his disclosed medical records.” *Harriel*, 2019 WL 2574118, at \*4 (quotation omitted) (collecting cases). If the medical records of a treating physician who did not provide a written report do not state that a “[p]laintiff’s condition is either generally or specifically caused by any particular substance,” that treating physician cannot subsequently offer a causation opinion in the litigation. *Id.*

In opposing BP’s Motion [178] to Exclude, Dufour does not rely upon Dr. French’s medical records. *See* Resp. [205]. Instead, he quotes portions of Dr. French’s deposition testimony, which he characterizes as Dr. French’s evaluation of causation and his explanation as to how and why he diagnosed Dufour with work-related asthma and/or a worsening of chronic asthma. *See id.* at 9-11. Dufour contends that he can properly rely upon Dr. French’s deposition testimony for causation opinions because Dufour’s Expert Witness Disclosure referred to “[a]ny and all opinions and/or diagnosis [sic] and facts testified to in Dr. French’s Deposition dated January 14, 2022.” Ex. [179-1] at 4.

There is no indication that Dr. French’s medical records contain any

causation opinions, as Plaintiff relies exclusively upon Dr. French's opinions offered during his deposition. *See* Resp. [205] at 8-11. Permitting Dr. French, as a treating physician, to introduce causation opinions during his deposition that were not contained in his medical records, without requiring him to prepare a formal written report, would plainly circumvent Rule 26's written report requirement. *See* Fed. R. Civ. P. 26(a)(2)(B); *see also, e.g., Perez v. Boecken*, No. SA-19-CV-00375-XR, 2020 WL 3074420, at \*4-\*5 (W.D. Tex. June 10, 2020) (recognizing that "[t]he biggest concern with permitting treating physicians to testify in all circumstances without providing expert reports is that this would permit circumvention of the policies underlying the expert report requirement," and holding that, "to the extent [the physician] relie[d] on sources other than those of a treating physician to causally connect the accident at issue in th[at] lawsuit and Plaintiff's injuries, [his] opinion exceed[ed] that of a treating physician and should have been disclosed under Rule 26(a)(2)(B)" (quotation omitted)); *Wells v. Helena Lab'ys Corp.*, No. 1:18-CV-74, 2019 WL 13252673, at \*5 (E.D. Tex. May 2, 2019) ("Permitting treating physicians to testify in all circumstances without providing expert reports would permit circumvention of the expert report requirement." (quotation omitted)).

Without any written expert report, Dr. French was not properly designated as an expert with respect to any causation opinions. *See* Fed. R. Civ. P. 26(a)(2)(B). "Absent a finding of just cause, [which Dufour has not shown here,] failure to make full expert disclosures by the expert designation deadline is grounds for prohibiting introduction of that evidence at trial." L.U. Civ. R. 26(a)(2). BP's Motion [178] to Exclude Dr. French's causation opinions should be granted for this reason.

(ii) Dr. French's qualifications under Rule 702

Even if there had been a proper disclosure of Dr. French's causation opinions within the meaning of Rule 26(a)(2), Dufour has not shown that this testimony is admissible under Federal Rule of Evidence 702 and *Daubert*. See, e.g., *Tajonera v. Black Elk Energy Offshore Operations, L.L.C.*, No. 13-0550, 2016 WL 3180776, at \*7 (E.D. La. June 7, 2016) ("Treating physicians are no different than any other expert for purposes of Rule 702; before proffering expert testimony, they must withstand *Daubert* scrutiny like everyone else." (quoting *Higgins v. Koch Dev. Corp.*, 794 F.3d 697, 704 (7th Cir. 2015)). "Before a district court may allow a witness to testify as an expert, it must be assured that the proffered witness is qualified to testify by virtue of his 'knowledge, skill, experience, training, or education.'" *United States v. Cooks*, 589 F.3d 173, 179 (5th Cir. 2009) (quoting Fed. R. Civ. P. 702). The Fifth Circuit has admonished that "[a] district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject." *Id.*

According to Dufour, "Dr. French is a Medical Doctor and Plaintiff's pulmonologist/treating physician." Ex. [179-1] at 4. There is no indication in the record as to what qualifications Dr. French has as a pulmonologist that would qualify him to offer expert opinions on the effects on the human body generally, or upon Dufour specifically, of any of the particular substance(s) at issue in this case, whether at specified or unspecified levels. Without evidence that Dr. French is qualified to testify on causation in the context of the facts of this case, his opinions should be excluded.

(iii) Reliability of Dr. French's causation opinions

Finally, Dufour has not shown that Dr. French's causation opinions are reliable under Rule 702 and *Daubert*. See *Sims*, 839 F.3d at 400. Dufour relies upon the following exchanges he extracts from Dr. French's deposition (taken verbatim from Dufour's Response [205]):

Q: Do you discuss potential causes of diagnosis or causes of illness with the patients?

A: Yes. So I will – say, for instance, and I'll just give you an example, it's a mass in the lung, and I'll say the working differential diagnosis, right, and then I'll put a colon, and then I put the list of possibilities if I don't know what the possibility – if I don't know what it is. As soon as I figure out what the cause is, then I'll say the cause is, you know, infection or cancer or something like that, so . . .

Q: Do you know what the trigger was for Mr. Dufour to come see you in – on March 30, 2016?

\* \* \*

A: Well, that day – it was probably just chronic respiratory complaints. He wasn't having – you know – like we say, he wasn't having an exacerbation that day. In other words, I didn't treat him for acute symptoms. I was seeing him, evaluating him and diagnosing him for chronic symptoms. So something had been ongoing.

Q: What, if anything, is the significance of Mr. Dufour having COPD in the past?

A: Well, so COPD doesn't come and go. It's a – it's chronic obstructive pulmonary disease . . . . So technically speaking, he had – he has chronic obstructive pulmonary disease. The name of it is just asthma, right? And – would you like for me to tell you how I get to that point?

Q: That was my next question.

A: Yeah . . . . The diagnosis of asthma comes – it's very well-defined. It's been defined since 19 – in the 1980s by the National Heart, Lung and Blood Institute. So you have to have chronic recurring respiratory symptoms. And I would say at least three months of symptoms. You can't have, like, an acute virus and get diagnosed with something chronic. You have to have a good chest X-ray . . . . So the way we usually start is you just do spirometry, which you're just measuring airflow through the pipes of the lung. So you measure the airflow, you give them a

dilator, bronchodilator, albuterol, and then you repeat the test. And if you have significant improvement, and there's a definition for that from a physiologic perspective, that's the definition of variability. So if you get the history, chronic symptoms, you have a good chest X-ray, and I see variability on the breathing test, it's almost always right.

Q: And so I guess – I guess my question is, is it your opinion that Mr. Dufour's asthma was somehow related to any of the oil spill cleanup work that he may have done?

A: It – it – I think that he had asthma. I think that he had an exposure that worsened his lung function. That's what I think happened. It's just historical, you know, it's just questions that you ask to get – arrive at that, so . . .

Q: . . . would it be your opinion that, beyond a reasonable degree of medical certainty, that Mr. Dufour's asthma in March of 2016 was worse because of work he did, oil spill cleanup in the 2010 to 2011 time frame?

A: Best I can tell, that's – that's accurate, yes.

Q: And what did you do to determine that, other than just have Mr. Dufour tell you, "It's worse now than it was before I did oil spill work"?

A: There is – it's just history

Q: And he told you that – he did sort of relate those increases in symptomatology to the – temporally to the time that he was working out at the oil spill, right?

A: Correct.

Q: And then based on that foundation, based on those materials, you had the objective testing, the radiology, the pulmonary function test, his history and everything else, you formed the opinion, based on a reasonable degree of medical probability, that he has a work-related worsening of his asthma condition?

A: That – that was the assessment, yes.

Resp. [205] at 9-11 (footnotes omitted) (quoting French Dep. [205-1] at 17, 26, 28, 29, 30, 69, 70, 71, 98).

Dr. French's specific causation methodology purportedly involved assessing Dufour's self-reported asthma "history" pre- and post-oil spill. *Id.* But Dr. French offers no explanation for how he made the determination that a worsening of Dufour's asthma was more likely caused by the oil spill cleanup efforts rather than



anything else. *See id.* Dr. French does not attempt to relate Dufour’s purported worsening chronic asthma to any sort of chemical exposure, and he has not shown how his apparent reliance upon temporal connection alone in this case constitutes a reliable methodology. *See id.*; *but see, e.g., Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278 (5th Cir. 1998) (“In the absence of an established scientific connection between exposure and illness, or compelling circumstances such as those discussed in *Cavallo [v. Star Enter.]*, 892 F. Supp. 756 (E.D. Va. 1995), *aff’d. in part*, 100 F.3d 1150 (4th Cir. 1996)], the temporal connection between exposure to chemicals and an onset of symptoms, standing alone, is entitled to little weight in determining causation.”).<sup>6</sup> In the portions of Dr. French’s deposition quoted by Dufour, he provides nothing more than *ipse dixit* testimony that leaves too great of an analytical gap between the data and causation opinions, rendering his causation opinions inadmissible under *Daubert*. *See Gen. Elec. Co.*, 522 U.S. at 144.

Dr. French’s subsequent testimony on cross-examination is more enlightening as to why his opinions should be excluded, as he clarified that he did not inquire into, and has not delved into, legal causation in his position as Dufour’s treating physician. For example, BP’s counsel questioned Dr. French as follows:

Q. [Dufour] also, I think, told you from the notes that he worked in the oil spill cleanup and that he thinks that that may be a – a reason why he – his asthma had a flare-up or some sort of

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<sup>6</sup> In *Cavallo*, the district court theorized that there may be instances of temporal connection that would be “so compelling as to dispense with the need for reliance on standard methods of toxicology,” such as “if a person were doused with chemical X and immediately thereafter developed symptom Y” or “if a known chemical is accidentally introduced into a company’s ventilation system, and all of the workers exposed immediately develop the same adverse reaction.” 892 F. Supp at 774. There is no such compelling temporal connection in Dufour’s case.

- exacerbation; is that correct?
- A. Yeah, that would – well, that would be – not – I wouldn't use the word exacerbation. I would just say his baseline symptoms got worse. That's the history I got, yes.
- Q. And that's based on what Mr. Dufour told you, not over any testing that you performed?
- A. Correct.
- Q. And did you do any sort of research or digging in to [sic] what about that work that he talked about would have caused his asthma baseline to worsen?
- A. No, it – and the reason is a very practical reason. He [sic] doesn't change treatment. You now [sic], once I make a diagnosis, from my point of view, he has the history, the physical, the X-ray, the breathing test findings, and the reason – the why he got there doesn't matter nearly as much as me just getting things controlled. I just have to make sure I've got the right diagnosis, that way, I'm doing the right treatment. And so getting the right treatment is the next step.
- Q. And so it really doesn't matter to you what may or may have not caused it, as long as you get the treatment right to where you're treating it properly?
- A. Right.
- Q. And getting him better?
- A. And get the right response to the treatment, correct.
- \* \* \*
- Q. How much knowledge do you have about the Deepwater Horizon oil spill and its response?
- A. Very little.
- Q. Do you – are you familiar with the term COREXIT?
- A. No.
- Q. Are you familiar with the chemical composition or makeup of crude oil?
- A. No.
- Q. Do you have any knowledge related to the potential health effects of COREXIT and/or chemical constituents of crude oil?
- A. I do not.
- Q. Would you be able to offer an opinion that Mr. Dufour's medical conditions were a result of his exposure to the COREXIT and/or chemical constituents of crude oil?
- A. I couldn't say, you know, whether that was the direct cause or not. I wouldn't be able to say that for sure.

French Dep. [205-1] at 77-79, 82-83.

Dr. French admits a lack of knowledge concerning substances to which

Dufour attributes his injuries and a failure to engage in any research as to what might have caused Dufour's asthma to worsen. *See id.*; Compl. [1]. Dr. French, as Dufour's treating physician, was instead concerned with getting the correct diagnosis and treatment. *See French Dep. [205-1]* at 78. With admittedly no knowledge of the substances at issue and no research into what caused Dufour's chronic asthma to worsen, *see id.*, Dufour has not shown that Dr. French's conclusory causation opinions are reliable or admissible under *Daubert*, *see Sims*, 839 F.3d at 400.

For all of these reasons, BP's Motion [178] to Exclude Dr. French's causation opinions should be granted, and he will be precluded from testifying as to causation.

2. Remaining experts mentioned in Motion [178]

BP's Motion [178] also asks the Court to exclude other witnesses, namely Dr. William Smith, II, Dr. Timothy Ivey, and Dr. Janice Miles. *See Mot. [178]*. In his Response [205], Dufour withdrew Dr. Miles as an expert witness and agreed to limit the testimony of Dr. Smith and Dr. Ivey "to factual and professional opinion information contained in the medical records." *Resp. [205]* at 13. Neither Dr. Smith nor Dr. Ivey have been offered on the topic of causation. Dufour's actions in this regard moot the remainder of BP's Motion [178] to Exclude.

E. Plaintiff's Motion [187] for Partial Summary Judgment

To succeed on his offensive Motion [187] for Partial Summary Judgment, Dufour bears the high burden of establishing "beyond peradventure *all* of the essential elements" of his claim. *Guzman*, 18 F.4th at 160 (emphasis in original) (quotation omitted). Dufour has not even attempted to do so. *See Mot. [187]*;

Mem. [188]. Instead, he asks the Court to bind the BP Defendants to purported stipulations in the MSA and grant summary judgment as to the first two elements of a negligence claim. *See* Mem. [188] at 4-22. “Plaintiff requests that the standard jury instruction on Negligence be altered because the question of whether there was negligence on the part of the Defendants has, or should be, stipulated pursuant to the MSA.” *Id.* at 6.

The relief Dufour seeks is simply not of the type awarded at summary judgment. *See* Fed. R. Civ. P. 56(a). Moreover, to the extent that Dufour argues that he has shown that BP was negligent in any way, he certainly has not shown “beyond peradventure,” *Guzman*, 18 F.4th at 160 (quotation omitted), that his exposure to any oil, other hydrocarbon, dispersant, or other substance legally caused an illness from which he claims to suffer, which is required to succeed on his claims, *see McGill*, 830 F. App’x at 434. Plaintiff’s Motion [187] for Partial Summary Judgment is not well taken and should be denied.

F. BP’s Motion [180] for Summary Judgment

1. Plaintiff’s request for supplemental briefing

Dufour contends that, “since expert admissibility is the only issue in dispute in BP’s Motion for Summary Judgment besides the alleged release, the Court should allow Plaintiffs [sic] to file Supplemental Briefs after the *Daubert* hearing, if necessary.” Resp. [206] at 22 (emphasis removed). The Court did not conduct a *Daubert* hearing, obviating the need for supplemental briefs, and it finds that supplemental briefs would not otherwise be appropriate or helpful.

2. Plaintiff's request for additional discovery

Dufour states that

[d]iscovery to date has made one thing clear: the exposure data collected by BP are unreliable and untrustworthy to use at face-value. Absent further discovery, Plaintiffs [sic] will be prejudiced in being able to further evaluate their [sic] extent of exposure.

*Id.* Dufour contends that further discovery is necessary to show that BP's exposure data and science is flawed, biased, and inconsistent. *See id.* at 15-22. Essentially, after the close of discovery and after the filing of dispositive motions, Dufour seeks yet another bite at the apple by asking the Court to stay his case until medical literature can "catch up" and "eventually show the connection between [Dufour's] condition and the toxic substance." *Id.* at 21 (quotation omitted).

"Any written communication with the court that is intended to be an application for relief or other action by the court must be presented by a motion in the form prescribed" by Local Uniform Civil Rule 7(b). L.U. Civ. R. 7(b). Dufour has not filed a formal Motion for leave to either file a supplemental brief or to seek a stay or additional discovery, in contravention of this Local Rule. *See id.* Dufour's requests should be denied for this reason alone. *See id.*

Even on the merits, Dufour's request for discovery is not well taken and should be denied. To the extent that Dufour seeks relief under Federal Rule of Civil Procedure 56(d),

[i]f a nonmovant *shows by affidavit or declaration* that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
  - (2) allow time to obtain affidavits or declarations or to take discovery;
- or

(3) issue any other appropriate order.

Fed. R. Civ. P. 56(d) (emphasis added). Dufour has not supplied an affidavit or declaration supporting his request for discovery, *see id.*, and offers only conclusory assertions that BP's exposure data and science is flawed, biased, and inconsistent, which Dufour claims has hampered oil spill victims' ability to demonstrate causation, *see id.* at 15-22.

This BELO action has been pending for over four years, *see* Compl. [1] (filed March 6, 2019), and is on the eve of trial, *see* Nov. 3, 2022, Text Only Am. Case Mgmt. Order (setting jury trial for August 2023 trial calendar). Dufour has presented no competent evidence of when, or even if, any purported new data may be forthcoming, or what that data might reliably show. This is insufficient to permit an indefinite stay of this case or to allow additional discovery under Rule 56(d). *See* Fed. R. Civ. P. 56(d).

3. Plaintiff's claim for depressive disorder

The Second Amended Complaint [49] claimed that, as a result of Dufour's exposure to "oil, other hydrocarbons, chemical dispersants, and other substances," he was diagnosed with "chronic conditions related to his exposure such as Depressive Disorder diagnosed on May 25, 2013." 2d Am. Compl. [49] at 7-8. BP contends that Dufour "has conceded that his depressive disorder resulted from his Guillain-Barre Syndrome ("GBS") and not from his Deepwater Horizon response work" and that he has offered no evidence to support a causal link. Mem. [181] at 9 (emphasis in original).

In opposition to summary judgment, Dufour does not substantively address

his depressive disorder claim. *See* Resp. [206]. Failure to pursue a claim beyond the complaint constitutes abandonment of that claim, as does inadequate briefing. *See Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006) (“[F]ailure to pursue this claim beyond her complaint constituted abandonment.”); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (“A party who inadequately briefs an issue is considered to have abandoned the claim.”).

Dufour’s abandonment of this claim is further evidenced by his statement in response to BP’s Motion [176] to Exclude Dufour’s life care planning expert, which he filed on the same day as his Response [206] to the Motion [180] for Summary Judgment, that “[a]t this time, Plaintiff withdraws the claim for depressive disorder diagnosed on May 25, 2013.” Resp. [212] at 2 n.3. The Court therefore finds that BP’s Motion for Summary Judgment should be granted to the extent it seeks dismissal of Dufour’s claim for depressive disorder.

#### 4. Plaintiff’s asthma claim

As for Dufour’s asthma claim, BP raises two arguments in support of its Motion [180] for Summary Judgment: (1) Dufour has produced no admissible evidence showing that his alleged injuries were caused by his alleged exposure to any chemicals related to the oil spill; and (2) Dufour released any future claims against the BP Defendants for asthma under the MSA. *See* Mem. [181] at 1, 5-15. Even if Dufour did not release this claim, the Court agrees that Dufour has failed to offer any competent summary judgment evidence demonstrating causation.

The Fifth Circuit requires proof through expert testimony to establish legal causation. *See Seaman*, 326 F. App’x at 723; *Harriel*, 2019 WL 2574118, at \*3. In

opposing summary judgment, Dufour only refers to and relies upon Dr. Freeman and Dr. French, *see* Resp. [206] at 11-15, and the Court has determined that neither may opine as to causation. Without any expert testimony on causation, Plaintiff cannot establish his asthma claim against BP. *See Seaman*, 326 F. App'x at 723; *Harriel*, 2019 WL 2574118, at \*3. Because Dufour cannot meet his burden of proof on causation as an essential element of his claim, summary judgment should be granted. *See* Fed. R. Civ. P. 56(a); *Little*, 37 F.3d at 1075.

### III. CONCLUSION

To the extent the Court has not specifically addressed any of the parties' remaining arguments, it has considered them and determined that they would not alter the result.

**IT IS, THEREFORE, ORDERED AND ADJUDGED**, that Plaintiff Richard Allen Dufour, Jr.'s Motion [236] for *Daubert* Hearing is **DENIED**.

**IT IS, FURTHER, ORDERED AND ADJUDGED**, that Defendants BP Exploration & Production Inc. and BP America Production Company's Motion [172] to Exclude the Opinions of Plaintiff's Expert Dr. Michael Freeman is **GRANTED**, and Dr. Michael Freeman is **EXCLUDED** from testifying as an expert witness in this case.

**IT IS, FURTHER, ORDERED AND ADJUDGED**, that Defendants BP Exploration & Production Inc. and BP America Production Company's Motion [178] to Exclude Certain Opinions of Dr. Shawn K. French, Dr. William W. Smith II, Dr. Timothy Ivey, and Dr. Janice L. Miles is **GRANTED IN PART**, to the extent it seeks to preclude Dr. French from testifying as an expert on causation, and



otherwise **DENIED IN PART AS MOOT**, and Dr. Shawn K. French will be **EXCLUDED** from offering any opinions concerning causation in this case.

**IT IS, FURTHER, ORDERED AND ADJUDGED**, that Plaintiff Richard Allen Dufour, Jr.'s Motion [187] for Partial Summary Judgment is **DENIED**.

**IT IS, FURTHER, ORDERED AND ADJUDGED**, that Defendants BP Exploration & Production Inc. and BP America Production Company's Motion [180] for Summary Judgment is **GRANTED**, and Plaintiff Richard Allen Dufour, Jr.'s claims are **DISMISSED WITH PREJUDICE**.

**IT IS, FURTHER, ORDERED AND ADJUDGED**, that all remaining pending Motions [170], [174], [176], [182], [183], [184], [208], and [221] are **DENIED AS MOOT**. The Court will enter a separate Final Judgment in accordance with Federal Rule of Civil Procedure 58.

**SO ORDERED AND ADJUDGED**, this the 2<sup>nd</sup> day of June, 2023.

*s/ Halil Suleyman Ozerden*  
HALIL SULEYMAN OZERDEN  
UNITED STATES DISTRICT JUDGE