UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TERRY L. ODOM, Plaintiff, v. BP EXPLORATION AND PRODUCTION, INC., and BP AMERICA PRODUCTION COMPANY, Defendants.	§ § § § § § § § § § §	SA-17-CV-202-OLG (HJB)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Orlando L. Garcia:

This Report and Recommendation concerns Defendants' First Amended Motion for Summary Judgment. (Docket Entry 133.) Pretrial matters in this case have been referred to the undersigned for consideration pursuant to 28 U.S.C. § 636(b). (*See* Docket Entry 78.) For the reasons set out below, I recommend that the motion be **GRANTED**.

I. Jurisdiction.

Plaintiff brings this case under the Back-End Litigation Option ("BELO") of the Medical Benefits Class Settlement Agreement ("Settlement") in the case of *In Re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mex., on April 20, 2010*, No. 2:10-MD-2179 (E.D. La. May 3, 2012). (*See* Docket Entry 1, at 1–2.) The case was transferred to this Court from the Eastern District of Louisiana. (Docket Entry 19.) The Court exercises jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1333, and the Admiralty Extension Act, 46 U.S.C. § 30101. I have authority to issue this Report and Recommendation pursuant to 28 U.S.C. § 636(b).

II. Background.

Plaintiff alleges that she was hired to perform oil cleanup work in the Gulf of Mexico from the 2010 Deepwater Horizon BP oil spill. Plaintiff alleges that she worked for many hours in or near the Gulf each day, collecting oil from the oil slick. Plaintiff was not issued a respirator or other appropriate protective gear by Defendants. (Docket Entry 1, at 2–3.) While performing cleanup work in the Gulf, Plaintiff breathed in fumes and got oily residue on her skin and clothing, both from the oil and from chemical dispersants. Plaintiff alleges that she suffered numerous injuries and illnesses after her chemical exposures to the oil and dispersants. (*Id.* at 3.)

Plaintiff filed a BELO medical claim against Defendants under the terms of the Settlement cited above, and the claim was eventually transferred to this district for resolution. (Docket Entry 19.) Pursuant to the Settlement, certain issues were stipulated in BELO lawsuits, while others remained for litigation. Included in the stipulated issues were the existence of the Settlement;, the fault of BP for the Deepwater Horizon Incident; and the exposure of Plaintiff to oil, other hydrocarbons, and other substances released by the well and/or dispersants and/or decontaminants used in connection with the cleanup. (*See* Docket Entry 64-1 (describing terms of the Settlement)). Matters to be litigated at trial included the fact of any diagnosis; the amount, timing, and location of the release of oil, hydrocarbons, dispersants or decontaminants; the level and duration of Plaintiff's exposure; and whether Plaintiff's injuries were legally caused by the exposure. (*See id.*).

Defendants moved for summary judgment on Plaintiff's claims, arguing that none of her experts could provide the minimum facts necessary to establish legal causation as required in a toxic tort case. (Docket Entry 64, at 4.) Plaintiff responded that legal causation was shown by

the reports and declarations of her retained experts: Dr. Stephen King could testify as to general causation, and Dr. Mark D'Andrea could testify as to specific causation. (Docket Entry 69, at 10–11.) Plaintiff also had a third expert, Dr. Terrance Stobbe, who had been designated "to testify—from an Industrial Hygiene perspective—to [Plaintiff's] exposures to chemical substances while working as a clean-up worker" during the BP Oil Spill response; Plaintiff argued that Dr. Stobbe could "assist . . . in establishing [Plaintiff's] exposure to oil, hydrocarbons, Corexit, dispersants, and other chemicals." ((Docket Entry 133-2, at 3–4, 12.)

Plaintiff's counsel requested oral argument on Defendants' motion for summary judgment, which the undersigned granted. (Docket Entry 75, 79.) On the eve of oral argument, Plaintiff's two causation experts—Drs. D'Andrea and King—formally withdrew from the case. (*See* Docket Entry 80). Plaintiff's counsel also eventually withdrew, and Plaintiff retained new counsel. (Docket Entries 110, 125.) Since that time, no additional experts have been designated on the issue of causation.

Defendants filed an amended motion for summary judgment, arguing that the opinions of Dr. Stobbe—Plaintiff's lone remaining designated expert—were insufficient to show either general causation or specific causation. (Docket Entry 133, at 7–8.) Plaintiff responded that the Dr. Stobbe's testimony would be sufficient to prove general causation, and that expert testimony was not necessary to show specific causation as to a number of Plaintiff's medical conditions, because these conditions are within the common knowledge of laypersons. (Docket Entry 145, at 1–2.)

III. Summary Judgment Standard.

Under Federal Rule of Civil Procedure Rule 56, 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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Burrell v. Prudential Ins. Co. of Am.*, 820 F.3d 132, 136 (5th Cir. 2016) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). A fact is material if "its resolution could affect the outcome of the action." *Nunley v. City of Waco*, 440 F. App'x 275, 277 (5th Cir. 2011). The court must view the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Darden v. City of Fort Worth*, 880 F.3d 722, 727 (5th Cir. 2018).

"Where the non-movant bears the burden of proof at trial, 'the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating ... that there is an issue of material fact warranting trial." *Kim v. Hospira, Inc.*, 709 F. App'x 287, 288 (5th Cir. 2018) (quoting *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015)). If the movant produces evidence that tends to show that there is no dispute of material fact, the nonmovant must then identify evidence in the record sufficient to establish the dispute of material fact for trial. *Celotex*, 477 U.S. at 321–23. "'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*, 477 U.S. at 249).

IV. Analysis.

In this case, Plaintiff has the burden of "prov[ing] that the legal cause of [her] claimed injury or illness is exposure to oil or other chemicals used during the response." *In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20*, 2010, No. MDL 2179, 2021 WL 6053613, at *11 (E.D. La. Apr. 1, 2021). "Scientific 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 this burden. *Allen v. Pa. Eng'g Corp*, 102 F.3d 194, 199 (5th Cir. 1996); *see also Clark v. BP Expl. & Prod. Inc.*, No. 1:22CV105, 2023 WL 5028858, at *2 (S.D. Miss. Aug. 7, 2023) (citing *Allen*).

The Fifth Circuit has developed a "two-step process" in examining the causation evidence in toxic tort cases. *Knight v. Kirby Inland Marine Inc*., 482 F.3d 347, 351 (5th Cir. 2007); *see, e.g.*, *Stephens v. BP Expl. & Prod. Inc.*, No. 17-4294, 2022 WL 1642136, at *2 (E. D. La. May 24, 2022) (citing *Knight*). First, plaintiff must show general causation, which means that she must show that "a substance is capable of causing a particular injury or condition in the general population." *Knight*, 482 F.3d at 351. For BELO cases, the general-causation requirement places the burden on the plaintiff to "prove, at minimum, that exposure to a certain level of a certain substance for a certain period of time can cause a particular condition." *Lee v. BP Expl. & Prod., Inc*., No. 18-10381, 2020 WL 6106889, at *4 (E.D. La. Sept. 29, 2020); *see also Williams v. BP Expl. & Prod*., No. 18-9753, 2019 WL 6615504, at *8 (E.D. La. Dec. 5, 2019) (same, citing *Knight*).

If the Court concludes that plaintiff has produced admissible evidence on general causation, it must then determine whether plaintiff has shown specific causation. Specific causation "is whether a substance caused a particular individual's injury." *Knight*, 482 F.3d at 351 (citation

omitted). Evidence concerning specific causation in toxic tort cases is admissible only as a follow-up to admissible general-causation evidence. *Id*. (citing *Raynor v. Merrell Pharm*., 104 F.3d 1371, 1376 (D.C. Cir. 1997)). Accordingly, if the Court finds that there is no admissible general causation evidence, there is "no need to consider" specific causation. *Knight*, 482 F.3d at 351 (citing *Miller v. Pfizer, Inc*., 356 F.3d 1326, 1329 (10th Cir. 2004)).

A. *General Causation*.

Under *Knight*'s two-step process, Plaintiff's sole remaining expert, Dr. Stobbe, provides no admissible opinions on general causation. As noted above, Dr. Stobbe was not designated as an expert on causation. (See Docket Entry 133-2, at 3–4.) But even if he were, his opinions cannot meet the general-causation standard. Neither Dr. Stobbe's report (Docket Entry 133-3) not his subsequent declaration (Docket Entry 145-1) provides evidence that a specific level of any specific substances causes any specific illness or condition. At most, he expresses the general view that hydrocarbons and chemical substances used in cleanup can cause irritation and may be carcinogenic. These global statements are insufficient: absent evidence as to "exposure to a certain level of a certain substance for a certain period of time," general causation cannot be shown. *Lee*, 2020 WL 6106889, at *4.

Plaintiff does not offer arguments on the general-causation issue in responding to Defendants' summary judgment motion, making only a single, conclusory statement that "Plaintiff has presented sufficient proof of general causation through expert testimony." (Docket Entry 145, at 1.) Such conclusory statements are not competent summary judgment evidence to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr*., 476 F.3d 337, 343 (5th Cir. 2007). For these reasons, Plaintiff has failed to present competent summary judgment

evidence on the issue of general causation.

B. *Specific Causation.*

In light of the lack of evidence of general causation, the Court need not address specific causation in this case. *See Knight*, 482 F.3d at 351. Even if Plaintiff had presented sufficient evidence to raise a genuine dispute as to general causation, Plaintiff lacks any expert evidence as to specific causation. Dr. Stobbe's report and declaration state that Plaintiff was exposed to an unknown set and combination of chemicals in connection with the BP spill cleanup, and that now, years later, it is impossible to determine the combination of chemicals to which Plaintiff was exposed. (Docket Entry 133-3, at 29; Docket Entry 145, at 7.) As Defendants argue, since Dr. Stobbe provides no opinion as to the chemicals or combination of chemicals to which Plaintiff was exposed, specific causation has not been established by expert evidence this case. (Docket Entry 133, at 8.)

Plaintiff does not dispute that she lacks expert evidence as to specific causation. Instead, she argues that expert evidence as to specific causation is not needed as to some of Plaintiff's claimed conditions, because those conditions are "within the layperson's common knowledge." (Docket Entry 145, at 2.) In support of this argument, Plaintiff relies on *Stephens* and two other decisions from the Eastern District of Louisiana: *Wallace ex rel. Wallace v. BP Expl. & Prod. Inc.*, No. 13-1039 2022 WL 1642166 (E.D. La. May 24, 2022); and *Turner v. BP Expl. & Prod. Inc*., No. 17-4210 2022 WL 1642142 (E.D. La. May 24, 2022).

These cases are distinguishable from the instant case. In those cases, the defendant "did not challenge the admissibility of [Plaintiff's] general causation [expert]." *Loftus v. BP Expl. & Prod. Inc.*, No. 17-3339, 2023 WL 2263833, at *12 (E. D. La. Feb. 28, 2023). In this case, by

contrast, Defendants *did* challenge the admissibility of Plaintiff's general-causation expert, Dr. King, and the expert withdrew from the case before the summary judgment motion could be heard. (*See* Docket Entries 64, 80.) The expert having withdrawn, Plaintiff cannot show general causation; accordingly, the Court need not "sort plaintiff's claimed symptoms into those requiring expert testimony on specific causation and those that do not." *Id.* (citing *Johns v. BP Expl. & Prod. Inc*., 2022 WL 1811088, at *3 n.44 (E.D. La. June 2, 2022).

In sum, because Plaintiff lacks sufficient evidence as to causation in this case, summary judgment must be granted to Defendants.

V. Conclusion and Recommendation.

Based on the foregoing, I recommend that Defendants' First Amended Motion for Summary Judgment (Docket Entry 133) be **GRANTED**.

VI. Instructions for Service and Notice of Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested.

Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

The party shall file the objections with the clerk of the court and serve the objections on all other parties. Absent leave of Court, objections are limited to twenty (20) pages in length. A party filing objections must specifically identify those findings, conclusions or recommendations

to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusory, or general objections.

A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root*, *Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on September 18, 2023.

Henry J. Bemporad
United States Magistrate Judge