No. _____

In The Supreme Court of the United States

KIRK PREST,

Petitioner,

v.

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY J. FALCON
Counsel of Record
Falcon Law Firm
5044 Lapalco Boulevard
Marrerro, LA 70072
(504) 341-1234
tim@falconlaw.com

Counsel for Petitioner

QUESTION PRESENTED

The admission of expert testimony in federal courts is governed by Federal Rule of Evidence 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and its progeny. In toxic tort cases, the Fifth Circuit requires plaintiffs to provide "scientific knowledge of the harmful level of exposure to a chemical" as a prerequisite to establishing general causation, even when extensive peer-reviewed epidemiological studies demonstrate that exposure to the toxic agent increases disease incidence in exposed populations.

The questions presented are:

1. Whether a trial court may categorically exclude expert testimony in toxic tort cases solely because the expert cannot quantify precise exposure levels, even when substantial peer-reviewed epidemiological evidence demonstrates increased disease incidence in exposed populations and quantitative exposure data is unavailable or impossible to obtain.

2. Whether the abuse of discretion standard of review remains appropriate when a trial court fails to conduct any substantive analysis of the reliability of expert testimony under Rule 702 and instead applies a categorical rule requiring quantitative exposure data in all toxic tort cases.

PARTIES TO THE PROCEEDINGS

Kirk Prest was the plaintiff in the district court and the appellant in the Fifth Circuit.

BP Exploration & Production, Incorporated; BP America Production Company; and BP, P.L.C., were individual defendants in the district court and the appellees in the Fifth Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *In re Oil Spill by the Oil Rig "Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, No. 2:10-MDL-2179, U.S. District Court for the Eastern District of Louisiana.

- *Kirk Prest v. BP Exploration & Production, Inc. BP America Production Company, and BP, p.l.c*, No. 2:17-cv-3409, U.S. District Court for the Eastern District of Louisiana. Judgment entered on Nov. 10, 2022.

- *Kirk Prest v. BP Exploration & Production, Inc. BP America Production Company, and BP, p.l.c*, No. 22-30779, U.S. Court of Appeals for the Fifth Circuit. Denying rehearing and hearing en banc on July 29, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

This petition concerns the application of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny in toxic-tort actions. As the Eleventh Circuit recently explained, toxic-tort actions come in two forms. In the first, the medical community already recognizes that a specific agent (*e.g.*, drug, chemical, etc.) is toxic and capable of "caus[ing] the type of harm plaintiff alleges." *In re Deepwater Horizon BELO Cases*, No. 23-11535, 2024 WL 4522690, at *1 (11th Cir. Oct. 18, 2024) citing *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1239 (11th Cir. 2005). Plaintiffs in these actions are only required to establish that the agent caused Plaintiff's disease (*i.e.*, specific causation).

In the second type of case, the medical community does not recognize an agent as both toxic and capable of causing the kind of injury a plaintiff alleges. In this latter type of case, a plaintiff must establish both general and specific causation. General causation asks "whether an agent increases the incidence of disease in a group and not whether the agent caused any given individual's disease." *Id.* citing Michael D. Green et al., Reference Guide on Epidemiology, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 549, 623 (Fed. Jud. Ctr., 3d ed. 2011).

In toxic-tort actions, plaintiffs prove general causation through epidemiological evidence, dose-response relationship, and background risk of disease. *Id. citing Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1308 (11th Cir. 2014). More particularly, the Fifth Circuit holds that "[a] plaintiff must show '[s]cientific knowledge of the harmful level

of exposure to a chemical' to satisfy general causation." *Prest v. BP Expl. & Prod., Inc.*, No. 22-30779, 2023 WL 6518116, at *3 (5th Cir. Oct. 5, 2023) (citing *Allen v. Pa. Eng'r Corp.*, 102 F.3d 194, 199 (5th Cir. 1996).

The general causation standard adopted and applied by the Fifth and Eleventh Circuits has become a *de facto* bar to claims by plaintiffs like Mr. Prest, the petitioner here, who was exposed to a toxic cocktail of oil and chemical dispersants while working to clean-up the environmental disaster that resulted when BP's *Deepwater Horizon* exploded off the coast of Louisiana in 2010.

The scale of the *Deepwater Horizon* disaster resulted in the creation of several well-funded government studies of the health impacts of the spill on response workers and the impacted communities. These studies have conclusively established that individuals who worked on the spill response have suffered adverse health impacts as compared to control groups who did not work on the response (*i.e.*, general causation), including conditions like those suffered by Mr. Prest. No reasonable person would suggest that these studies are junk science.

As detailed *infra*, however, hundreds of oil spill response workers like Mr. Prest have been unable to establish "[s]cientific knowledge of the harmful level of exposure to a chemical" in the wake of the oil spill for a number of reasons, including the fact that sufficient exposure levels—of both kind and quantity—were not measured during the spill response.

The lack of such quantifiable measurements is problematic because the chemical exposure that plaintiffs allege to have caused their damages was a mix of crude oil and chemical dispersants that were used at scale for the first time during a spill response. Moreover, the combination of the oil and dispersant rapidly volatized in the heat of the southern summer sun, such that exposure pathways were not only physical (*i.e.*, by coming into contact with the chemical mixture), but via inhalation of the volatized mixture.

Because plaintiff's experts have been unable to determine harmful levels of exposure to that chemical mixture, the trial courts in the Fifth and Eleventh Circuits have summarily denied relief to all the claimants who opted out of an underlying settlement framework and pursued their individual claims in court. Moreover, because appeals of such rulings are based on an abuse of discretion, the Fifth Circuit has been unwilling and/or unable to look beyond the rote application of the general causation rubric that has been developed post-*Daubert* for toxic tort cases.

Notwithstanding the de facto bar on recovery for plaintiffs like Mr. Prest, the studies conducted in the wake of the *Deepwater Horizon* disaster have conclusively established that workers such as Mr. Prest have suffered disproportionate adverse health impacts as compared to populations who were not exposed to the chemical impacts of the oil spill. In short, there is dependable science establishing adverse health impacts caused by the oil spill, but no plaintiff seeking to establish such damages has survived a motion for summary judgment.

Although the present petition arises in the context of a toxic tort claim, similar issues have arisen are frequently litigated in claims arising from pharmaceutical and product liability actions where district and circuit courts must struggle with the scope and complexity of their role as gatekeepers to the admission of complex scientific testimony. Rule 702 of the Federal Rules of Evidence was recently amended in an effort to clarify that role.

At bottom, however, there are significant disparities in the ways that the lower and circuit courts are exercising their roles as gatekeepers and Petitioner submits that this petition squarely presents the Court with an opportunity to bring clarity and uniformity to the type of analysis the lower courts must perform under Rule 702.

Mr. Prest urges this Court to grant his petition and reverse.

OPINIONS BELOW

The original opinion of the court of appeals is unreported but available at 2023 WL 6518116. Pet. App. 1a-11a. The denial of rehearing en banc is also unreported. Pet. App. 34a-35a. The opinion of the United States District Court for the Eastern District of Louisiana's granting the motion to exclude plaintiff's expert (Pet. App. 31a-33a) and subsequent motion for summary judgment is reported and available at 640 F.Supp. 3d 542. Pet. App. 13a-30a.

JURISDICTION

The original opinion of the court of appeals was filed on October 5, 2023. Pet. App. 1a. On July 29, 2024, the court denied rehearing en banc. Pet. App. 34a. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 702. Testimony by Expert Witnesses

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 the proponent demonstrates to the court that it is more likely than not that*:

(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~~ *expert's opinion reflects a reliable application of* the principles and methods to the facts of the case.

The foregoing reflects modifications enacted effective December 1, 2023, which occurred after the district court rulings here. The comments to the 2023

Amendments conclude with the following observation:

> Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

STATEMENT

A. Factual Background

On April 20, 2010, the oil drilling rig *Deepwater Horizon* was operating in the Gulf of Mexico when it exploded and sank. The tragedy resulted in the largest oil spill in the history of marine oil drilling operations (hereinafter referred to as the "BP Oil Spill"). Four million barrels of oil flowed from the damaged well before it was finally capped on July 15, 2010—nearly three full months after the explosion.

In an attempt to combat the effects of the spill, BP enlisted local fishing vessels and residents in the Vessels of Opportunity ("VoO"') program to assist in spill response efforts. Kirk Prest was a charter fisherman who lived and operated a fishing and hunting lodge in south Louisiana located

approximately 40 miles from the site of the *Deepwater Horizon* explosion. Mr. Prest signed up for the VoO program and began assisting with clean-up activities on May 3, 2010—only days after the oil from the BP Oil Spill began to inundate his fishing grounds and the Louisiana marshes and coastline.

Kirk Prest's family has spent generations in south Louisiana fishing and hunting in the waters that suffered some of the heaviest impacts of the BP Oil Spill. As his business was suffering due to the Oil Spill, Mr. Prest entered into a Master Vessel Charter Agreement wherein he chartered his bay boat, a 24-foot vessel, to BP. The agreement provided that he would use his bay boat to assist in the recovery effort and he did so.

Mr. Prest performed clean-up activities between May 3, 2010 and October 30, 2010. During that time, he worked six to seven days per week and would typically work from daylight until after dark, usually 12 to 15 hours per day, with most of that spent out on the water. The work that Mr. Prest performed was typically performed in extreme heat and included, but was not limited to: (i) recovery and capture of wildlife and placing wildlife in boxes/crates for return to staging areas; (ii) installation of air cannons to prevent birds from landing in oiled areas; (iii) identifying areas heavily impacted by oil and/or oil/Corexit mixtures; and (iv) transporting personnel for the state and federal wildlife agencies.

Mr. Prest was exposed to the BP oil and the oil/dispersant mixture for nearly six months while he assisted with clean-up efforts. As detailed in the

report prepared by Dr. Rachel Jones, an industrial hygienist, Mr. Prest was regularly covered in oil due to the handling of oiled wildlife, traversing through heavily oiled waters to reach that oiled wildlife, and cleaning his vessel each day after work activities.

Due to the substantial amount of oil that was released and its proximity to fragile coastal wetlands, BP was permitted by the US Government to apply dispersants both aerially and to inject them at the wellhead.[1] This was the first (and only) time that dispersants had ever been used in a spill response like this.

Critically, the use of these dispersants changed the chemical and physical properties of oil, which altered the transport, fate and potential effects of the oil.[2] The goal of the dispersant use was to increase oil mixing in the water column and to decrease the potential that oil slicks on the water surface would contaminate shorelines.[3] Due to the extensive use of dispersants, epidemiological studies of health impacts suffered by response workers cleaning up past oil spills are not as relevant to the BP Oil Spill.

In addition to the chronic impacts associated with the daily exposure to the oil and dispersant mixture, and his handling of oiled wildlife, Mr. Prest also had other experiences that resulted in a significant acute

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[1] ROA.22-307779-10719.

[2] ROA.2230779.10741.

[3] ROA.2230779.10741.

chemical exposure. Specifically, between May 17 and May 22, 2010, Mr. Prest was working out of Venice. He and his crew were travelling in the mid-morning hours when an aircraft dumped Corexit directly on them. The exposure was a dense mist that immediately caused everyone on the vessel to start coughing and to experience burning eyes/sinus, along with shortness of breath.

Before the BP oil spill, Mr. Prest was 42-years old and he enjoyed perfect 20/20 vision. He had not previously experienced trouble with his eyes. Beginning in September 2010, however, Mr. Prest began to experience serious headaches, blurred vision, and even had a blackout event. He sought medical attention, and in October 2010, his eye doctor, Dr. Robert Ross, advised him to stop working on spill response efforts. Even though his business had been decimated by the Oil Spill, Mr. Prest took his doctor's advice. He was eventually diagnosed with central serous retinopathy (CSR).

Over the following years, Mr. Prest has continued to have eye problems, including severe headaches and ocular pain. Beginning in 2016, Mr. Prest began treating with Dr. Tere Vives, a board-certified ophthalmologist with a specialization in neuro-ophthalmology. Back in 2017, she ordered MRIs of Mr. Prest's brain, orbit, and face with contrasts. Beginning in the latter part of 2021, Mr. Prest began experiencing memory problems and blurred vision and his pre-existing pain began to substantially worsen.

At the end of 2021, Mr. Prest returned to Dr. Ross for multiple visits that lasted into the first part of 2022. Once it became evident that Mr. Prest's current issues extended beyond the CSR diagnosis, Mr. Prest returned to Dr. Vives in Spring 2022. In the notes from that visit, Dr. Vives noted that Mr. Prest had recently been suffering from a progressive loss of eyesight, ocular pain, and mild optic nerve swelling.

As detailed *infra*, Mr. Prest's treatment has been ongoing and he underwent serious and substantial testing (*i.e.*, multiple MRIs and a spinal tap) in an effort to evaluate and diagnose his condition. These symptoms are all related to his initial exposure to the oil and dispersant.

B. Procedural Background

This case was originally part of multidistrict litigation ("MDL") pending in the United States District Court for the Eastern District of Louisiana.

Mr. Prest personally filed a "Short Form Joinder" in the United States District Court for the Eastern District of Louisiana on April 21, 2011, which resulted in him being named as a plaintiff in the MDL. He opted out of the medical benefits class of the supervised settlement reached with BP on, or about, October 30, 2012. Mr. Prest subsequently filed a complaint in compliance with Pretrial Order No. 31, which initiated the present suit on April 12, 2017.

Mr. Prest also complied with Pretrial Order No. 66, which required him to disclose the nature of the work he performed, to identify his treating physicians, and

to detail the nature of his exposure. Mr. Prest's PTO 66 submission included the following in response to an inquiry asking him to describe "the circumstance(s) in which your exposure to the oil spill and/or chemical dispersant occurred:"

> Direct exposure of Corexit chemicals 9500 & 9527 sprayed from plane, as well as massive amounts of oil [and] chemicals ingested travelling through rough waters, and from pelicans flapping oil in eyes, skin, face, etc.

The parties exchanged discovery while the matter was consolidated within the MDL until the case was severed and re-allotted on April 13, 2021. The Court's Order of that date provides a detailed history of the multi-district litigation.

Mr. Prest's case was one of more than 800 individual B3 cases that were severed and reallotted within the Eastern District of Louisiana and other federal courts. After reallotment, the trial court held a scheduling conference in November 17, 2021, and set the matter for trial on December 19, 2022.

Although Mr. Prest's eye problems were not common amongst oil spill first responders, his other medical conditions (*i.e.*, chronic rhinosinusitis, headaches, eye pain, and dermatitis) were similar to other plaintiffs who had similar exposure levels to the oil and chemical dispersants in the aftermath of the BP Oil Spill disaster. Mr. Prest retained Dr. Jerald Cook and Dr. Rachael Jones to establish the link between the injuries he suffered and his work on the Oil Spill, in addition to his treating physicians, Dr.

Robert Ross and Dr. Tere Vives, who treated his eye and neurological issues.

BP filed a Motion in Limine to Exclude the Causation Opinions of Dr. Cook, which was granted by the trial court. BP subsequently filed a Motion to Strike and Exclude the Medical Causation Opinions of Plaintiff's Treating Physician, Dr. Robert Ross, for Failure to Comply with FRCP 26(a)(2)(B) and FRE 702 and a Motion for Summary Judgment. Notably, BP never deposed any of Mr. Prest's treating physicians. The trial court resolved the motions in favor of BP and subsequently entered a judgment dismissing Mr. Prest's case. An appeal to the United States Fifth Circuit Court of Appeal followed.

The Fifth Circuit denied Mr. Prest's appeal on October 5, 2023. He filed timely Petitions for Rehearing and for Rehearing En Banc, which were denied almost a year later, on July 29, 2024.

In order to provide pertinent context to the issues presented by this petition, the following outlines: (1) the trial court's rulings; (2) why Dr. Cook's opinions were not junk science; and (3) how the Fifth Circuit's opinion undermines Rule 702 and Daubert.

1. The Trial Court's Ruling

The trial court granted a *Daubert* motion in *limine* to exclude the general causation opinions Dr. Cook.[4] In a two-page ruling (Pet. App. 31a-33a), the trial

[4] ROA.22-30779.10615.

court found that "Defendants' motion here is nearly identical to the Daubert motions regarding Cook filed by Defendants, and granted by this Court, in other B3 cases."[5] The trial court cited other B3 cases and, without further analysis, granted BP's motion "for the reasons stated in the Order & Reasons issued in those cases."[6] The reasons provided in the other cases found that Dr. Cook failed to establish a harmful level of any chemical to which [the claimant] was allegedly exposed and that such "failure to identify the dose of the toxic chemicals necessary to cause any of the complained-of health effects weighs heavily in favor of exclusion."[7] The trial court focused on Dr. Cook's inability to provide quantitative dose-response data and ruled as follows:

> [I]t is irrelevant that there is (apparently) no dose-response data related to the BP oil spill (regardless of the alleged reason). The point of an expert opinion on general causation is to explain whether the exposure to a particular chemical is capable generally of causing a certain health issue in the general population. It is not dependent on data from the particular incident at issue. The law is clear. Because identification of the harmful level of exposure to a chemical is one of the "minimal facts necessary to sustain the plaintiff's burden in a

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[5] *Id.*

[6] ROA.22-30779.10616.

[7] *Carpenter v. BP Expl. & Prod. Inc.,* 17-3645, 2022 WL 2757416, at *6 (E.D. La. July 14, 2022).

> toxic tort case," *Allen*, 102 F.3d at 199, and Cook has not provided any such identification, his report is unreliable and thus his opinions are inadmissible. Accordingly, BP's motion *in limine* to exclude Cook's testimony must be granted.[8]

In addition to the two-sentence order adopting the prior rulings, the trial court's Order included the following footnote in this case:

> Dr. Cook updated his report on September 30, 2022. R. Doc. 40-5. The Court has reviewed the new report and concludes that it does not cure the previously identified deficiencies in Cook's prior reports; specifically, the September 30 report does not provide admissible general causation opinions. *Id.* Prest admits in his opposition memorandum that applying the Court's prior reasoning in similar motions to this one would lead to the same result, namely, exclusion of Cook's opinions. R. Doc. 44 at 6. Prest advocates for a different approach that ignores Fifth Circuit toxic tort precedent and blames Defendants for the lack of dose-response data. *Id.* at 6-25. The Court is not persuaded by these arguments.[9]

The trial court reasoned that because there was no dose-response data available, its analysis ended there.

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[8] *Id.* at 6. Emphasis added.

[9] ROA.22-30779.10615.

In its footnote, the trial court acknowledged that Mr. Prest outlined a different approach that did not require him to identify the harmful level of exposure to a chemical to establish general causation, but the trial court dismissed such arguments with a conclusory finding that failed to address the substance of the arguments. Notwithstanding the Fifth Circuit's precedent, the trial court abdicated its role of gatekeeper pursuant to Rule 702.

2. *Dr. Cook's Opinion was not junk science.*

Dr. Cook is a retired Navy physician with a master's degree in environmental toxicology. He is a fellow of the American College of Occupational and Environmental Medicine and board-certified in occupational medicine, public health, and general preventative medicine. The BP Defendants did not challenge his qualifications to testify as a medical expert in toxicology, but did seek to exclude his opinion based on the methodology he employed to reach his opinions.

Dr. Cook's report also included a specific causation analysis that applied the Bradford Hill criteria and expressly relied upon exposure data generated by Dr. Rachel Jones, Mr. Prest's expert industrial hygienist.

Had the trial court fulfilled its proper role it would have considered the substance of Dr. Cook's opinions, including an analysis of his application of the Bradford Hill criteria to support his reliance on the GuLF STUDY and the Coast Guard Cohort studies. As the following details, Dr. Cook's causation opinions were reliable and relevant for the following reasons:

(1) the studies are state-of-the-art science; (2) they are peer reviewed; (3) they relate specifically to the BP Oil Spill and the worker population of which Mr. Prest is a member; (4) they have been recognized and adopted as reliable science by some of the world's leading experts; and (5) they were developed by recognized national scientific institutions at a cost of over $70 million.

Both the GuLF STUDY[10] and Coast Guard Cohort[11] study programs are dedicated to studying the exposure and health outcomes of BP Oil Spill responders. The publications of these programs are the best, state-of-the-art science on which to base causation opinions related to BP Oil Spill worker exposures. As detailed in Dr. Cook's report, Mr. Prest's health conditions include chronic rhinosinusitis, headaches, eye pain, and dermatitis.[12] As also discussed in Dr. Cook's report, these conditions are occurring at statistically significant levels based among BP Oil Spill responders according to the GuLF STUDY and Coast Guard Cohort published studies. This is the essence of general causation.

When it became clear that the trial court was unwilling to look beyond the fact that Dr. Cook did identify the harmful level of exposure to a chemical as one of the "minimal facts necessary to sustain the

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[10] ROA.22-30779.9956-9966.

[11] ROA.22-30779.9939-9956.

[12] ROA.22-30779.9999-10003.

plaintiff's burden in a toxic tort case," *Allen*, 102 F.3d at 199, counsel undertook additional efforts to persuade the court that Dr. Cook's opinions satisfied the requirements of Rule 702 and *Daubert*, which primarily seek to prevent the introduction of junk science to the jury.

In furtherance of that effort, counsel for Mr. Prest obtained an affidavit from Linda Birnbaum, Ph.D. who was the Director of the National Institute of Environmental Health and Sciences ("NIEHS") from 2009 to 2019.[13] Dr. Birnbaum was the NIEHS Director at the time of the BP Oil Spill.[14]

As detailed in Dr. Birnbaum's affidavit, NIEHS scientists began designing research programs to study the exposure and long-term health effects on BP Oil Spill responders under Dr. Birnbaum's leadership as the spill response was ongoing.[15] This research program ultimately became the GuLF STUDY program, which is still conducting research and publishing science regarding BP Oil Spill responder chemical exposures and the associated long-term health effects.

The GuLF STUDY program has been regularly publishing peer reviewed exposure and epidemiology studies on BP Oil Spill responders since 2014. Dr. Cook relied heavily on the exposure and

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[13] ROA.22-30799.11522-11528.

[14] ROA.22-30799.11523.

[15] *Id.*

epidemiological literature being published by the GuLF STUDY program, in addition to the exposure and epidemiological literature published by the Coast Guard Cohort study program.[16]

The GuLF STUDY devoted substantial effort to characterizing BP Oil Spill response worker exposures. The GuLF STUDY researchers utilized the extensive monitoring that was done by BP's contractors and federal agencies. The GuLF STUDY exposure assessment work took over a decade to complete and has involved input from experts from a range of scientific disciplines. Per Dr. Birnbaum, the GuLF STUDY exposure assessment and epidemiology are the current, best, and state-of-the-art scientific literature on the exposure and health effect outcomes of BP Oil Spill responders."

Dr. Birnbaum also addressed the suggestion that it was possible to quantify a BP Oil Spill responder's specific level of exposure to specific chemicals. She stated that, based on the data that was collected during the BP Oil Spill response, "it is not plausible" to assert that exposure at a specific level to a specific chemical can be quantified.[17] She also attested that the proposition that utilizing "studies of other oil spills and non-oil spill related studies of exposure to crude oil" to quantify exposure is also "not plausible."[18] She

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[16] The Coast Guard Cohort study program has also been funded by the National Institutes of Health, through theNIEHS. https://grantome.com/grant/NIH/R01-ES020874-05

[17] ROA.22-30779.11527-11528.

[18] Part of the problem with using other oil spill studies is

continued that if such a quantitative assessment were possible, "the GuLF STUDY scientists with all of their expertise, time, and funding would have done it."[19]

Dr. Birnbaum's statements discredit the notion that it is possible to quantify BP responder exposure levels to specific chemicals. Yet this is the standard to which the trial court in this case held Dr. Cook. Critically, Dr. Birnbaum explained that for such a quantification to be done, there would have had to have been read time biomonitoring (*e.g.*, blood testing, urine testing, and dermal wipe testing) of the workers during the oil spill response. Such biomonitoring and dermal exposure monitoring were ever done for the BP Oil Spill responders.

Accordingly, Dr. Cook utilized the peer-reviewed exposure and epidemiological studies published through the GuLF STUDY and Coast Guard Cohort study programs. In addition to peer review of the literature, both programs underwent National Institutes of Health institutional review. Both programs are dedicated solely to the study of BP Oil Spill clean-up workers like Mr. Prest. Thus, Mr. Prest is a member of the same exposure group being studied in the peer reviewed science on which Dr. Cook relies

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that the weathered crude oil from the DWH is a mixture of approximately 10,000 different chemicals and its composition is subject to change by mixing with sea water, weathering processes and the use of dispersants. *Id*. at 6. *See* https://ph.ucla.edu/faculty/jones

[19] ROA.22-30779.11528.

to support his opinions. Neither the GuLF STUDY nor the Coast Guard Cohort use quantitative exposure assessment because there was no exposure data recorded during the spill response on which quantitative exposure assessments could validly be based. Because of the dearth of such data, these programs have utilized a qualitative measure of exposure.

Dr. Cook's general causation methodology follows that of the of the GuLF STUDY and the Coast Guard Cohort, both of which use qualitative measures of exposure. Nonetheless, the trial court excluded Dr. Cook's opinion because he did not provide a quantified exposure measure to a specific chemical at a specific level for his dose calculation. As discussed *supra*, this requirement is not scientifically possible. Nor does it comport with the methodology utilized in the peer-reviewed, published scientific literature which has also been subject to institutional review in compliance with the procedures of the NIH for the very same spill responder population of which Mr. Prest is a member.

It is simply not reasonable to hold Dr. Cook's causation opinions to a level of scientific rigor which is not even applicable to the scientific literature published by the top world's top exposure and epidemiology scientists on the population of BP Oil Spill response workers. A testifying expert can show no better evidence of methodological reliability and faithfulness to the scientific method than to strictly follow the methods prescribed in the peer-reviewed and published literature. *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). And this is exactly what Dr. Cook did by using the exposure

assessment criteria of the GuLF STUDY and the Coast Guard Cohort. Showing reliability "requires some objective, independent validation of the expert's methodology."[20] There is likely no more objective or independent source of validation of Dr. Cook's reliance on the GuLF STUDY and Coast Guard Cohort than the statements of Dr. Birnbaum. When the subject plaintiff is a member of the cohort studied in the peer-reviewed and published literature, what more can a causation expert do methodologically than deploy that literature in support of their opinions?

3. *Fifth Circuit Precedent is Flawed*

The object of *Daubert* is "to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167.

The Fifth Circuit, however, has gone beyond the requirements of *Daubert* and has effectively made it impossible for a plaintiff to survive summary judgment in certain scenarios. More specifically, the Fifth Circuit requires a plaintiff to provide "scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, [as] minimal facts necessary to sustain [a] plaintiff's burden in a toxic tort case." *Allen*, at 199 *citing Wright v. Willamette Industries, Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996).

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[20] *Id.*

The sole precedential authority the district court cited for its "harmful dose" requirement was this Court's decision in *Allen*. The fault that this Court found with the expert testimony in the relevant portion of *Allen* was that, because the experts lacked "evidence of the level of [the plaintiff's] exposure" to a suspected carcinogen, they had an insufficient factual basis from which to draw a reliable conclusion as to specific causation. *Id.* at 198.

It was in this context that the Court cited *Wright v. Willamette Industries*, Inc., for the proposition that "[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 the plaintiff['s] burden in a toxic tort case." *Allen,* 102 F.3d at 199. Read in context, nothing about this statement suggests that an expert opinion on general causation is unreliable if it fails to pinpoint with quantitative precision the threshold at which exposure to a particular substance becomes harmful.

Rather, *Allen* echoes *Wright's* modest observation that a finding of specific causation must rest on evidence that "the plaintiff was exposed to levels of [a substance] that are known to cause the kind of harm that the plaintiff claims to have suffered." *Wright*, 91 F.3d at 1107. Indeed, even in the specific-causation context, *Wright* refused to "require a mathematically precise table equating levels of exposure with levels of harm" and demanded no more than "evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular

plaintiff the kind of harm of which he or she complains." *Id.*

Notably, in the Fifth Circuit's decision in *Moore v. Ashland Chemical,* 151 F.3d at 287-288 (5th Cir. 1998), a dissent joined by three judges forewarned of the of the wide "lethal swath" that could result from the seemingly non-controversial rule requiring toxic tort experts proffer "scientific knowledge" regarding the harmful level of exposure. Quoting the Federal Reference Manual on Scientific Evidence, the dissenting judges observed that "Only rarely are humans exposed to chemicals in a manner that permits a quantitative determination of adverse outcomes.

Human exposure occurs most frequently in occupational settings where workers are exposed to industrial chemicals like lead or asbestos; however, even under these circumstances, it is usually difficult, if not impossible, to quantify the amount of exposure." *Moore* quoting Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, p. 187 (1994))

If it is difficult, if not impossible, to quantify exposure amounts in standard industrial environments, such efforts are exponentially more difficult in emergency situations. While *Daubert* sought to ensure scientific reliability while maintaining flexibility, the toxic tort jurisprudence as applied in the Fifth Circuit has created a bright-line rule that permits the lower courts to bypass the difficult work of engaging in a *Daubert* analysis if they can determine that the expert fails to identify the

dose of the toxic chemicals necessary to cause the complained-of health effects, notwithstanding that there is substantial non-quantitative evidence establishing that an agent increases the incidence of disease in a group. This has transformed the trial court's role from a gatekeeper that is tasked with ensuring scientific rigor into a categorical bar to recovery in cases such as the present.

REASONS FOR GRANTING THE PETITION

Concerns about the impact of unreliable science on a litigant's right to a fair trial animated the Supreme Court's holdings in the *Daubert* trilogy, supra. Emphasizing "the 'gatekeeper' role of the trial judge in screening [scientific] evidence" for reliability, *Joiner*, 522 U.S. at 142, "Daubert attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other." *United States v. Lavictor*, 848 F.3d 428, 441 (6th Cir. 2017); *see also McKiver v. Murphy-Brown LLC*, 980 F.3d 937, 1008 (4th Cir. 2020) (*Daubert* "attempted to ensure that courts screen out junk science") (internal quotation marks omitted); *United States v. Machado-Erazo*, 47 F.4th 721, 734 (D.C. Cir. 2018) (*Daubert* was "spawned by 'junk science' masquerading as science").

Concurring in *Kumho Tire*, Justice Scalia cautioned "that the discretion [the Court] endorses — trial-court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function . . . [or] to perform the function inadequately." 526 U.S. at 158-59 (Scalia, J., concurring). "Rather, it is discretion to choose

among reasonable means of excluding expertise that is fausse and science that is junky." *Id.* at 159.

The Fifth Circuit's precedent creates a bright-line rule that undermines *Daubert* and its progeny, along with Rule 702. This case presents this Court with an opportunity to correct the abuse of discretion that occurred below and to provide better guidance to the lower courts regarding their gatekeeping functions under Rule 702. The following details why allowing the Fifth Circuit holdings to tend will create perverse incentives that harm first responders, then it details how this case offers the Court an opportunity to reconsider the standard of review that applies to Daubert reviews and to better elucidate the type of analysis that must be conducted under *Daubert*.

A. Allowing general causation standard to stand will create perverse incentives that will harm first responders.

The dismissal of Mr. Prest's claims—and potentially hundreds like him—will result in a windfall to the BP Defendants at the expense of hundreds of claimants like Mr. Prest who are suffering as a result of the chemical exposures they endured during the spill response. These rulings are effectively the canary in the coal mine.

The potential problems will be particularly acute in emergency scenarios, where immediate life-saving actions take precedence over documenting multiple chemical interactions and exposure pathways that may occur simultaneously. More specifically, The Courts' requirement that "[a] plaintiff must show

'[s]cientific knowledge of the harmful level of exposure to a chemical' to satisfy general causation" becomes particularly problematic in industrial accidents involving multiple chemical releases will incentivize companies not to collect vital sample data.

Consider a massive industrial fire where rising temperatures trigger multiple container explosions. A firefighter seeking to establish general causation must demonstrate not merely that they were exposed to harmful chemicals, but must provide scientific knowledge establishing the specific harmful level for each chemical present. This burden becomes exponentially more complex when multiple chemicals combust and combine.

The firefighter would need to present scientific studies establishing harmful levels not just for individual chemicals, but for the unique chemical combinations created through combustion. Such studies likely do not exist, as the infinite potential combinations of chemicals and conditions make it impossible to have pre-existing scientific literature establishing harmful levels for every possible interaction. Moreover, many combustion products may be novel compounds formed under high-temperature conditions, for which no established scientific knowledge of harmful levels exists at all.

The scientific literature rarely, if ever, contains studies examining such specific combinations under real-world conditions. Regardless, studies in controlled laboratory settings, cannot account for the synergistic effects of multiple chemicals interacting under unusual environmental conditions.

The general causation requirement as it was applied to Mr. Prest, and hundreds like him, creates an insurmountable barrier where novel agents and exposure routes are involved, as it demands scientific knowledge that often cannot exist due to the infinite possible combinations of chemicals, exposure routes, and environmental conditions. The standard requires a level of scientific certainty that is fundamentally at odds with the realities of toxic exposure in emergency scenarios and complex environmental releases and represents a judicial overreach that goes well beyond *Daubert's* goal of weeding out junk science.

The Fifth Circuit's stringent causation standard has created a particularly cruel irony for Vessels of Opportunity (VoO) workers like Mr. Prest who responded to the BP Oil Spill. These were often multigenerational fishermen who, precisely because of their extensive maritime experience and intimate knowledge of Gulf waters, were recruited to assist in response efforts in the most heavily impacted areas.

Their expertise meant they were frequently deployed to the worst-contaminated zones, where oil, dispersants, and weather conditions created a toxic soup of chemicals. The VOO workers' valuable knowledge of local waters and weather patterns - the very expertise that made them essential to the response - led to their deployment in areas where exposure was likely highest and most complex.

Yet under the Fifth Circuit's toxic tort precedent, these workers face nearly impossible evidentiary burdens precisely because of the intensity and chaos of their exposure scenarios. They would need to

provide scientific knowledge of harmful levels for not just crude oil, but also for dispersants like Corexit, their breakdown products, and the countless chemical combinations created when these substances mixed in Gulf waters and aerosolized in sea spray.

Most cruelly, those VoO workers who spent the most time in the most heavily contaminated areas, often working through severe weather conditions to contain the spill, face the highest barriers to recovery precisely because the extreme nature of their work environment. The result is a perverse legal framework where the responders who sacrificed the most, working in the most dangerous conditions to mitigate one of the nation's worst environmental disasters, are effectively barred from seeking legal remedy for their injuries.

B. The questions presented are vitally important and squarely presented.

The present writ application squarely presents important issues in a unique context and point in in time. It has been more than 20 years since this Court squarely addressed the admission of expert testimony at a broad level. The recent updates to Rule 702, which serve to re-emphasize the trial court's role as gatekeeper, make it timely.

Further, there are several things about the underlying posture of the present matter that serve to make the present application an attractive candidate for this Court's attention. First, the widespread science supporting the health impacts on those workers who were exposed during their work on BP's

Deepwater Horizon spill is well documented by comprehensive studies conducted by world-class scientists. This is not a case where a plaintiff relied on junk science.

Notwithstanding, the trial court and the Fifth Circuit dismissed the claims of Mr. Prest—and hundreds of workers who were similarly situated to him without any real consideration of the extensive work performed by Dr. Cook and similar experts. A review of the underlying record makes clear that the trial court's consideration—and the Fifth Circuit's review—of Dr. Cook's report was cursory, at best. It reviewed the report to determine whether Dr. Cook provided quantified exposure levels of oil and dispersants that cause injuries to the general population. When it determined that Dr. Cook failed to provide such data—even though top scientists could not provide such data—its analysis ended.

Critically, BP did not complain about Dr. Cook's credentials, nor make any extensive critique of his underlying methods. There was no *Daubert* hearing held by the trial court, nor any opportunity for oral argument in the trial or appellate courts, despite repeated requests by Mr. Prest for such. Likewise, the Fifth Circuit failed to engage Mr. Prest's arguments because it determined that the trial court did not abuse its discretion—despite the fact that it exercised no real discretion.

1. Offer Guidance re Gatekeeper Role

The bench and bar would benefit from this Court's input and guidance on the type of analysis that must

be performed by the trial court in the course of exercising its gatekeeping function. In that regard, there are multiple examples of courts that have embraced their rules as a gatekeeper of scientific evidence and conducted the type of thorough analysis that demonstrates a thorough engagement and understanding of the gatekeeping function.

One such case is Chief Judge Nancy Rosenstengel's recent opinion in which she evaluated an experts proffered opinion in *In re Paraquat Products Liab. Litig*., No. 3:21-MD-3004-NJR, 2024 WL 1659687, at *6 (S.D. Ill. Apr. 17, 2024). The 97-page Memorandum and Order—the court's "Daubert Order"—is a model for how district courts should assess the reliability of proffered expert testimony "on the critical issue general causation"—in that case, testimony "offering an opinion that occupational exposure to paraquat," an extensively studied, U.S. EPA-regulated herbicide, "can cause Parkinson's disease."

The district court provides a textbook example of how judges are to assess expert evidence under this Rule 702. The judge embraced her "gatekeeper" role, applied the "more likely than not" standard, and determined whether each "expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Ord. at 8-9, n.8 (citing *Robinson v. Davol, Inc*., 913 F.3d 690, 696 (7th Cir. 2019) (instructing judges to be "vigorous gatekeeper[s]")). To do so, the trial judge took extensive briefings from the parties, held a four-day hearing on the proffered expert testimony, and issued a 97-page ruling setting forth detailed reasons that elucidated her understanding and consideration of the issues.

2. Standard of Review must Change

The appellate standard of review for Rule 702 rulings is abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). "This standard is not monolithic: within it, embedded findings of fact are reviewed for clear error, questions of law are reviewed de novo, and judgment calls are subjected to classic abuse-of-discretion review." *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 83 (1st Cir.2010); *see also Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 251–52 (1st Cir.1998) (noting these three dimensions of the abuse of discretion standard in reviewing exclusion of expert testimony).

"While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court," as reflected in Rule 702, "has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999).

In those cases where the district judge holds hearings and fulfills its gate-keeping role, there is no reason that the abuse of discretion standard should not apply. In cases such as Mr. Prest's, however, the abuse of discretion review unnecessarily limits the Court of Appeal from engaging in the substance of a

Rule 702 rulings. *Daubert* by its nature was intended to be flexible and to apply to the myriad of circumstances that it might apply. Likewise, the review of 702 rulings would benefit from similar flexibility, such that the Circuit courts are permitted, if not encouraged, to conduct reviews of 702 rulings de novo if it is clear from the record that the trial court did not exercise any significant discretion in fulfilling its gatekeeping role.

CONCLUSION

Mr. Prest urges this Court to grant his writ of certiorari.

Respectfully submitted,

TIMOTHY J. FALCON
Counsel of Record
Falcon Law Firm
5044 Lapalco Boulevard
Marrerro, LA 70072
(504) 341-1234
tim@falconlaw.com

Counsel for Petitioner

October 28, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-30779

KIRK PREST,

Plaintiff-Appellant,

versus

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC Nos. 2:10-MD-2179, 2:17-CV-3409

October 5, 2023, Filed

Before STEWART, DENNIS, and WILSON, *Circuit Judges.*

PER CURIAM:*

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Appendix A

The district court excluded the causation opinions of Kirk Prest's medical experts and granted summary judgment in favor of Defendants (collectively, BP). Because Prest's medical experts failed to show general causation, we affirm.

I.

This is a toxic tort case arising from Prest's exposure to crude oil and dispersants while assisting with cleanup of the *Deepwater Horizon* oil spill. Prior to the disaster, Prest operated a fishing and hunting charter business near Venice, Louisiana.[1] The oil spill "decimated" Prest's business. Consequently, he chartered his boat to BP and agreed to help with the cleanup. From May 3 to October 30, 2010,[2] Prest performed a variety of tasks for BP, including wildlife search and rescue, oil search and reporting, and monitoring bird scare cannons. During that time, Prest was continuously exposed to crude oil and dispersants in the water and the air. In one specific incident, an aircraft sprayed Prest and his crew with dispersant. They immediately started coughing and gasping for air and experienced a burning sensation in their eyes and

1. We review a summary judgment de novo, construing "all facts and inferences in the light most favorable to the nonmoving party. . . ." *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005). Accordingly, the facts are primarily drawn from Prest's complaint and his responses in opposition to BP's motions.

2. The district court stated that Prest performed clean-up work from May 16 to November 26, 2010. Because the dates are immaterial to Prest's claims, we use the dates from Prest's complaint and brief.

sinuses. Prest did not seek medical attention after the incident, however.

Before the oil spill, Prest had "perfect 20/20 vision" and had not experienced any problems with his eyes. However, in September 2010, Prest began experiencing headaches and blurred vision. His ophthalmologist, Dr. Robert Ross, advised him to stop working on the cleanup effort. Prest took Ross's advice and stopped performing cleanup work on October 30. Shortly thereafter, Ross diagnosed Prest with Central Serous Retinopathy (CSR).[3] Since then, Prest's condition has progressively worsened.

In 2021 and 2022 Prest began experiencing memory problems, blurred vision, and increased ocular pain. He returned to Dr. Ross, who determined Prest's issues extended beyond his CSR diagnosis. In spring 2022, Prest visited Dr. Tere Vives, a specialist in neuro-ophthalmology. She noted that Prest had recently been suffering from a progressive loss of eyesight, ocular pain, and mild optic nerve swelling, and she determined he might need surgery to remove a cyst in his sinuses. She also testified that she could not determine whether his current conditions were caused by his cleanup work until his condition stabilized.

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3. CSR occurs when fluid builds up behind the retina. This can cause the retina to detach, leading to vision loss. *See* Cleveland Clinic, *Central Serous Retinopathy*, my.clevelandclinic.org/health/diseases/24335-central-serous-retinopathy, (last visited October 4, 2023).

In 2017, Prest filed this lawsuit against BP.[4] He alleged his exposure to crude oil and dispersants during the cleanup effort caused his CSR, as well as other long term health issues. Additionally, he alleged he suffered "temporary injuries" and emotional distress when he was sprayed with dispersant. Prest designated Dr. Ross and Dr. Jerald Cook to testify as to causation in support of his exposure claim.

BP moved to exclude Dr. Ross's and Dr. Cook's causation opinions and then moved for summary judgment. The district court granted the motions. It found that Ross and Cook failed to establish general causation, and BP was thus entitled to summary judgment as to Prest's exposure claim. Additionally, it found that BP was entitled to summary judgment as to Prest's emotional distress claim because he was not within a "zone of danger" while he was performing cleanup work. Prest timely appealed.

II.

We review a district court's exclusion of expert testimony for abuse of discretion and "do not disturb the court's decision unless it is 'manifestly erroneous.'" *Smith v. Chrysler Grp., L.L.C.*, 909 F.3d 744, 748 (5th Cir. 2018) (quoting *In re Complaint of C.F. Bean L.L.C.*,

4. Prest originally filed a "Short Form Joinder" in 2011 to join the multi-district litigation arising from the oil spill. In 2017, the presiding judge ordered the plaintiffs who had not settled to file individual lawsuits. After consolidated discovery, the presiding judge severed the cases, and Prest's case was assigned to Judge Barry Ashe.

841 F.3d 365, 369 (5th Cir. 2016)). We review a summary judgment *de novo*, applying the same legal standards as the district court. *Certain Underwriters at Lloyd's London v. Axon Pressure Prods. Inc.*, 951 F.3d 248, 255 (5th Cir. 2020). Summary judgment is appropriate when "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). "We construe all facts and inferences in the light most favorable to the nonmov[ant]. . . ." *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005). "We may affirm the district court's grant of summary judgment on any ground supported by the record and presented to the district court." *Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422, 430 (5th Cir. 2022).

We first address Prest's exposure claim and then his emotional distress claim.

A.

Our caselaw requires a plaintiff to show both general and specific causation in toxic tort cases. *See*, *e.g.*, *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007). "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." *Johnson v. Arkema, Inc.*, 685 F.3d 452, 468-69 (5th Cir. 2012) (quoting *Knight*, 482 F.3d at 351). "Evidence concerning specific causation in toxic tort cases is admissible only as a follow-up to admissible general-causation evidence."

Knight, 482 F.3d at 351. A plaintiff must show "[s]cientific knowledge of the harmful level of exposure to a chemical" to satisfy general causation. *Allen v. Pa. Eng'r Corp.*, 102 F.3d 194, 199 (5th Cir. 1996). Because neither Dr. Cook nor Dr. Ross satisfied the general causation requirement, the district court did not abuse its discretion by excluding their testimony.

Prest does not contest that Cook and Ross failed to offer scientific evidence of the level of exposure to crude oil or dispersant that would cause CSR—or any of his other medical conditions—in the general population. Rather, he contends the district court erred "when it mechanically applied the Fifth Circuit's toxic tort jurisprudence." He asserts the district court should have applied—and we should apply on appeal—a different standard based on the "unique circumstances" of the BP oil spill. Prest's arguments fail for two reasons.

First, a district court does not abuse its discretion when it properly analyzes the law and applies it to the facts of the case. *See Thomas v. Hughes*, 27 F.4th 363, 367 (5th Cir. 2022) (quoting *Maiz v. Virani*, 311 F.3d 334, 338 (5th Cir. 2002)). Prest does not cite any toxic tort cases where we have not required the plaintiff to show the harmful level of exposure to a chemical in the general population.[5]

5. Prest offers *Mcgill v. BP Expl. & Prod., Inc.*, 830 F. App'x 430, 433 (5th Cir. 2020); *Clark v. Kellogg Brown & Root L.L.C.*, 414 F. App'x 623, 627 (5th Cir. 2011); and *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 671 (5th Cir. 1999), to argue that we have stated "it is not necessary for an expert to establish the precise level of exposure." But those cases discuss *specific* causation.

Accordingly, the district court would have erred if it had *not* applied our toxic tort precedent and instead created a new standard. *See Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) ("A district court abuses its discretion if it bases its decision on an erroneous view of the law. . . .").

Second, Prest's arguments are based on a flawed understanding of the general causation requirement. The crux of Prest's argument is that BP's failure to conduct biomonitoring of oil spill workers and preserve data "ma[de] it impossible" for Prest "to reliably recreate dosage levels" or otherwise quantify his exposure to the chemicals that caused his alleged injuries. But Prest puts the cart before the horse. BP's alleged failure to conduct biomonitoring and preserve data has no bearing on general causation. Rather, "[e]xposure data collected (or not) from the incident almost always bears on *specific* causation. It does not bear on whether, per the scientific literature, exposure to a chemical can cause a specific injury in the *general population*." *Byrd v. BP Expl. & Prod., Inc.*, No. 22-30654, 2023 U.S. App. LEXIS 15107, 2023 WL 4046280, at *2 (5th Cir. June 16, 2023).[6] Thus, "even assuming that BP had an affirmative duty to [conduct biomonitoring or preserve data] after the oil spill, the lack of this information is not what renders Dr. Cook's [and Dr. Ross's] expert report[s] unreliable, unhelpful, and inadmissible." *Id.* In other words, even

6. Although unpublished opinions are non-precedential, we cite them as persuasive. *Byrd* is particularly relevant because it involves a similarly situated plaintiff, the same defendant, and one of the same expert witnesses—Dr. Cook.

if Cook and Ross had quantified Prest's exposure to the chemicals that allegedly caused his injuries, their expert testimony would still fail to satisfy general causation. *See Johnson*, 685 F.3d at 468-69 (finding no abuse of discretion in excluding an expert witness's causation opinion when the expert provided a differential diagnosis without satisfying general causation requirement). Accordingly, the district court did not abuse its discretion in excluding their opinions.

And without Dr. Cook's and Dr. Ross's testimony, Prest cannot establish causation for his chemical exposure claims. *See Allen*, 102 F.3d at 199 (requiring not just knowledge, but *scientific* knowledge). Accordingly, the district court did not err in granting summary judgment for BP as to Prest's exposure claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

B.

Prest also contends the district court erred in dismissing his "temporary injury" and emotional distress claims based on his being sprayed with dispersant. He reasons that expert testimony is not required for those claims. But he cites no authority to support his argument that expert testimony is not required for his temporary injuries. Instead, he only references his opposition to BP's motion for summary judgment. A party cannot simply point to a district court filing to support an argument

on appeal. *See* FED. R. APP. P. 28(a)(4). "Our court has resoundingly rejected such a tactic." *E.R. by E.R. v. Spring Branch Indep. Sch. Dist.*, 909 F.3d 754, 763 (5th Cir. 2018) (citing *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993)). Accordingly, Prest waived any argument that expert testimony is not required to substantiate temporary injuries. *See id.; see also United States v. Fernandez*, 48 F.4th 405, 412 (5th Cir. 2022) ("[F]ailure adequately to brief an issue on appeal constitutes waiver of that argument.").

As for his emotional distress claim, Prest contends the district court erred by finding that he was not in a zone of danger. As a threshold matter, "[w]e have 'repeatedly declined to adopt or preclude the zone-of-danger theory' for general maritime law." *SCF Waxler Marine, L.L.C. v. Aris T M/V*, 24 F.4th 458, 476 (5th Cir. 2022). Assuming *arguendo* that plaintiffs can recover under such a theory, Prest's claim nonetheless fails.

To recover under a zone of danger theory, a plaintiff's emotional injuries must be "a reasonably foreseeable consequence of the defendant's alleged negligence." *Id.* Prest avers that he has "constantly [had] flashbacks and nightmares from all [he] [has] endured . . . whether it's [his] mental or physical health, [his] family/friends enjoyment (or lack thereof), the estuary, [their] business, or the future that [their] one-and-only son would have had if not for BP. It has forever changed [Prest] both mentally and physically." He also states more broadly that "he has . . . suffered substantial mental pain and suffering and loss of enjoyment of life related to the

Oil Spill." We do not question the seriousness of Prest's alleged emotional injuries, but, by his own testimony, they are not a foreseeable consequence of being sprayed with dispersant by the airplane. Rather, they pertain to the BP oil spill generally. Prest does not articulate any emotional injuries related directly to being sprayed with dispersant. Accordingly, Prest's emotional distress claims not only fail under a zone of danger theory, but "under any known theory of recovery—even the most liberal." *See Plaisance v. Texaco, Inc.*, 966 F.2d 166, 168 (5th Cir. 1992).

III.

Prest also challenges the district court's order denying his motion to amend the scheduling order and continue trial. He asserts there was good cause to continue the trial based on Dr. Vives's testimony that she could not determine if Prest's recent medical issues were the result of his oil spill work until those conditions stabilized. *Id.*

District courts have broad discretion in enforcing the deadlines in their scheduling orders. *Batiste v. Lewis*, 976 F.3d 493, 500 (5th Cir. 2020). "We will not lightly disturb a court's enforcement of those deadlines." *Id.* (quoting *Geiserman v. MacDonald*, 893 F.2d 787, 792 (5th Cir. 1990)). We consider several factors to determine whether a district court abused its discretion to exclude evidence as a means of enforcing its scheduling order: "(1) the explanation for the failure to . . . [comply with the scheduling order]; (2) the importance of the [evidence]; (3) potential prejudice in allowing the [evidence]; and (4) the availability of a continuance to cure such prejudice."

Id. (quoting *Squyres v. Heico Cos.*, 782 F.3d 224, 237 (5th Cir. 2015)).

All four factors weigh against Prest, but we focus on the importance of Dr. Vives's evidence. Vives's potential testimony is less important because it relates to specific causation—and thus does not remedy Prest's inability otherwise to show general causation. Vives does not purport to have evidence that exposure to crude oil or dispersants causes neurological issues in the general population. Thus, even if she testified that there was a connection between Prest's recent medical issues and his oil spill work, summary judgment would still be appropriate. Consequently, the district court did not abuse its discretion in denying Prest's motion for a continuance.[7]

IV.

For the reasons stated, the judgment of the district court is

AFFIRMED.

7. Prest also argues for the first time on appeal that the district judge erred by refusing to recuse. "That argument was not raised in the district court, so it is forfeited." *U.S. ex rel. Drummond v. BestCare Lab'y Servs., L.L.C.*, 950 F.3d 277, 285 (5th Cir. 2020) (citing *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003)).

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED NOVEMBER 10, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 17-3409 SECTION M (4)

KIRK PREST

VERSUS

BP EXPLORATION & PRODUCTION, INC., *et al.*

JUDGMENT

In accordance with this Court's Order & Reasons (R. Doc. 72) granting the motion for summary judgment of defendants BP Exploration & Production Inc., BP America Production Company, and BP p.l.c.,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendants DISMISSING the claims of plaintiff Kirk Prest, with prejudice.

New Orleans, Louisiana, this 10th day of November, 2022.

/s/ Barry W. Ashe
BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED NOVEMBER 9, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 17-3409 SECTION M (4)

KIRK PREST

VERSUS

BP EXPLORATION & PRODUCTION INC., *et al.*

November 8, 2022, Decided;
November 9, 2022, Filed

ORDER & REASONS

Before the Court is a motion by defendants BP Exploration & Production Inc., BP America Production Company ("BP America"), and BP p.l.c. (collectively, "Defendants") to strike and exclude the medical causation opinions of plaintiff's treating ophthalmologist, Dr. Robert Ross, for failure to comply with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure and Rule 702 of the Federal Rules of Evidence.[1] Plaintiff Kirk Prest responds in opposition,[2] and Defendants reply in further support of their motion.[3]

1. R. Doc. 50.

2. R. Doc. 58.

3. R. Doc. 67.

Also before the Court is Defendants' motion for summary judgment arguing that Prest cannot prove general causation without an admissible expert opinion.[4] Prest responds in opposition,[5] and Defendants reply in further support of their motion.[6]

Having considered the parties' memoranda, the record and the applicable law, the Court grants both motions and dismisses Prest's claims with prejudice.

I. BACKGROUND

This case is one of the "B3 cases" arising out of the *Deepwater Horizon* oil spill that occurred on April 20, 2010.[7] The B3 plaintiffs all make "claims for personal injury and wrongful death due to exposure to oil and/or other chemicals used during the oil spill response (e.g. dispersant)."[8] These cases were originally part of a multidistrict litigation ("MDL") pending in another section of this court before Judge Carl J. Barbier. When Judge Barbier approved the *Deepwater Horizon* medical benefits class action settlement agreement, the B3 plaintiffs either opted out of the settlement or were excluded from the

4. R. Doc. 51.

5. R. Doc. 59.

6. R. Doc. 69.

7. R. Doc. 6 at 1-2, 50.

8. *Id.* at 50.

class definition.[9] Judge Barbier then severed the B3 cases from the MDL, and those cases were reallotted among the judges of this court.[10]

Prest alleges that, on April 30, 2010, he joined the "vessels of opportunity" program by entering into a master vessel charter agreement with BP America for the use of his 24-foot vessel in oil-spill cleanup work.[11] Between May 16 and November 26, 2010, Prest performed oil-spill cleanup work consisting mostly of wildlife rescue operations near Venice, Grand Isle, and Port Fourchon.[12] Prest alleges that he was exposed to crude oil and dispersants while engaged in the cleanup efforts and had adverse health conditions or symptoms including, but not limited to, "blinding" eye injury, skin injuries, respiratory issues, neurological damages, and stress.[13] He also claims Central Serous Retinopathy ("CSR") and other eye complications; hypertension and related cardiovascular issues; anxiety and depression; skin, nasal, and respiratory issues; and other neurological

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9. *Id.* at 51 n.3.

10. *Id.* at 1-58.

11. R. Doc. 1 at 2.

12. *Id.* at 2-3; R. Doc. 40-3 at 3, 5. The complaint says that he did the work from May 3 to October 30, 2010. R. Doc. 1 at 2. The dates listed in the text above are found in Prest's "PTO 66 Particularized Statement of Claim for Remaining B3 Plaintiffs." R. Doc. 40-3 at 3, 5.

13. R. Doc. 1 at 4.

injuries causing migraines, insomnia, and memory loss.[14] Prest opted out of the medical benefits class action settlement agreement.[15] In this action, he asserts claims for negligence with respect to the oil spill and cleanup.[16]

In the case management order for the B3 bundle of cases, Judge Barbier noted that, to prevail, "B3 plaintiffs must prove that the legal cause of the claimed injury or illness is exposure to oil or other chemicals used during the response."[17] He further observed that causation "will likely be the make-or-break issue for many B3 cases," and "the issue of causation in these toxic tort cases will require an individualized inquiry."[18]

Prest, like all other B3 plaintiffs to have appeared before this Court, relied on Dr. Jerald Cook to provide expert testimony as to general causation, *i.e.*, that exposure to oil and dispersants was capable of causing in the general population the kind of health issues he alleges.[19] For most B3 cases, Cook issued an omnibus, non-case-specific general causation expert report that has been used by many B3 plaintiffs and has evolved over time. Prest produced in discovery, and relied upon,

14. R. Doc. 26 at 1.

15. R. Doc. 1-3.

16. R. Doc. 1 at 4-5.

17. R. Doc. 6 at 53.

18. *Id.* at 53-54.

19. R. Doc. 40-5.

Cook's September 30, 2022 report, which includes some information specific to Prest.[20] However, in granting Defendants' motion to exclude Cook's report in this case, this Court concluded that Cook's September 30 report did not cure the previously identified deficiencies in his prior reports; specifically, the September 30 report did not provide admissible opinions concerning general causation.[21]

Cook, however, is not Prest's only purported causation expert. Prest's Rule 26(a)(2)(C) expert disclosures indicate that his treating ophthalmologist, Ross, will testify about Prest's treatment and also render expert opinions regarding the potential causes of CSR, including "type A personality," stress, and exposure to weathered crude oil and dispersants.[22] Defendants now move to strike Ross, arguing that the disclosure is insufficient given his causation opinions.[23] They also move for summary judgment, arguing that once Ross's causation opinions are stricken, Prest has no admissible expert opinions concerning general causation.[24]

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20. *Id.*

21. R. Doc. 49.

22. R. Doc. 50-4 at 1-3.

23. R. Doc. 50.

24. R. Doc. 51.

II. LAW & ANALYSIS

A. Defendants' Motion to Strike Ross

Defendants move to strike Ross, arguing that, because his purported opinions expand beyond facts and knowledge gained in the course of his treating Prest and attempt to delve into the realm of general causation, Ross was required to issue a fulsome expert report pursuant to Rule 26(a)(2)(B).[25] Defendants also argue that Ross cannot survive a challenge under Rule 702 because he does not meet the minimal requirements for rendering reliable general or specific causation opinions.[26] Specifically, Prest's Rule 26(a)(2)(C) disclosure of Ross does not contain the information required for a general causation opinion, "such as (a) an identified association in the literature between exposure and disease, and (b) the harmful dose of a specific toxin necessary to cause a disease or injury in the general population."[27] In sum, Defendants argue that Ross's testimony should be limited to the knowledge he gained during his treatment of Prest.[28]

In opposition, Prest argues that, because Ross is a treating physician, a summary disclosure under Rule 26(a)

25. R. Doc. 50-1 at 3-7.

26. *Id.* at 8-11.

27. R. Doc. 67 at 5.

28. R. Docs. 50-1 at 12; 67 at 2-4.

(2)(C) is all that is required, and it was provided.[29] Prest also argues that Ross satisfies Rule 702 because he opines that it is more probable than not that chronic undue stress caused by the oil spill exacerbated Prest's underlying CSR disease process which "does not reach the issue of toxic exposure, and therefore, does not require both general and specific causation" expert opinions.[30] Finally, Prest argues that Defendants should depose Ross to determine the basis of all his opinions.[31]

Rule 26(a)(2) governs the disclosure of expert testimony. An expert that is retained by a party for purposes of litigation is required to provide an expert report pursuant to Rule 26(a)(2)(B). *See* Fed. R. Civ. P. 26(a)(2)(B). Prior to 2010, non-retained experts, such as treating physicians, were exempt from Rule 26's expert reporting requirements. *Tucker v. United States*, 2019 U.S. Dist. LEXIS 150052, 2019 WL 4198254, at *2 (E.D. La. Sept. 4, 2019) (collecting cases). In 2010, Rule 26(a)(2)(C) was added, which provides a less stringent disclosure requirement for non-retained experts, such as treating physicians. *Id.* Rule 26(a)(2)(C) requires that a party, with respect to a non-retained expert, provide a written disclosure stating: "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected

29. R. Doc. 58 at 1-3.

30. *Id.* at 3-4.

31. *Id.* at 4-5.

to testify." Fed. R. Civ. P. 26(a)(2)(C). A Rule 26(a)(2)(C) disclosure "need not be extensive," but must include "'an abstract, abridgement, or compendium of the opinion *and* facts supporting the opinion.'" *Causey v. State Farm Mut. Auto. Ins. Co.*, 2018 U.S. Dist. LEXIS 82388, 2018 WL 2234749, at *2 (E.D. La. May 16, 2018) (quoting *Rea v. Wis. Coach Lines, Inc.*, 2014 U.S. Dist. LEXIS 141875, 2014 WL 4981803, at *5 (E.D. La. Oct. 3, 2014)) (internal quotation marks omitted; emphasis in original).

Although a Rule 26(a)(2)(C) summary disclosure generally suffices for a treating physician, a more comprehensive report that complies with Rule 26(a)(2)(B) is required when such a witness intends to render opinions based on scientific, technical, or other specialized knowledge. *See Hooks v. Nationwide Hous. Sys., LLC*, 2016 U.S. Dist. LEXIS 89534, 2016 WL 3667134, at *3 (E.D. La. July 11, 2016). "For example, testimony as to causation or as to future medical treatment has been considered the province of expert testimony subject to the requirements of section (a)(2)(B)." *Id.* (citing *Rea*, 2014 U.S. Dist. LEXIS 141875, 2014 WL 4981803, at *2). Further, "where physicians' testimony is prepared in anticipation of litigation by the attorney or relies on sources other than those utilized in treatment, courts have found that the treating physician acts more like an expert and must submit a report under Rule 26(a)(2)(B)." *Id.*

"Failure to comply with the deadline for disclosure requirements results in mandatory and automatic exclusion under Federal Rule of Civil Procedure 37(c)(1)." *Tucker*, 2019 U.S. Dist. LEXIS 150052, 2019 WL

4198254, at *2 (quotation marks and citations omitted). And the excluded witnesses may not offer testimony "to supply evidence on a motion, at a hearing, or at a trial, unless the failure [to provide Rule 26 disclosures] was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). In determining whether the failure was substantially justified or harmless, courts consider: "(1) the explanation for the failure to adhere to the deadline; (2) the importance of the proposed modification of the scheduling order; (3) the potential prejudice that could result from allowing the modification; and (4) the availability of a continuance to cure that prejudice." *Leggett v. Dolgencorp. LLC*, 2017 U.S. Dist. LEXIS 175796, 2017 WL 4791183, at *2 (E.D. La. Oct. 24, 2017) (citing *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990)).

If an expert is properly disclosed, the district court must determine whether the proposed testimony is admissible under Rule 702 of the Federal Rules of Evidence. *General Elec. Co. v. Joiner*, 522 U.S. 136, 139, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). Rule 702 provides:

> 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. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Supreme Court held that Rule 702 requires a district court to act as a gatekeeper to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable."

The reliability inquiry requires a court to assess whether the reasoning or methodology underlying the expert's testimony is valid. *See id.* at 592-93. In *Daubert*, the Supreme Court listed several non-exclusive factors for a court to consider in assessing reliability: (1) whether the theory has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the general acceptance of the methodology in the scientific community. *Id.* at 593-95. However, a court's evaluation of the reliability of expert testimony is flexible because "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (quotations

omitted). In sum, the district court must ensure "that an expert, whether basing testimony upon professional studies or personal experiences, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. The party offering the testimony must establish its reliability by a preponderance of the evidence. *See Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

Rule 702 also requires that an expert be properly qualified. Generally, if there is some reasonable indication of qualifications, the district court may admit the expert's testimony, and then the expert's qualifications become an issue for the trier of fact. *Rushing v. Kan. City S. Ry. Co.*, 185 F.3d 496, 507 (5th Cir. 1999), *superseded in part by statute on other grounds as noted in Lester v. Wells Fargo Bank, N.A.*, 805 F. App'x 288, 291 (5th Cir. 2020). A witness qualified as an expert is not strictly confined to his area or practice but may testify regarding related applications; a lack of specialization goes to the weight, not the admissibility of the opinion. *Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 753 F. App'x 191, 195-96 (5th Cir. 2018).

Here, Prest's Rule 26(a)(2)(C) disclosure of Ross states that Ross will testify as to the effects of stress and its related biological processes that caused or contributed to Prest's CSR.[32] Assuming these specific causation opinions related to Prest's CSR are within Ross's expertise as an ophthalmologist and constitute knowledge that would have

32. R. Doc. 50-4 at 2.

been gained during his treatment of Prest, such opinions may be properly included in a Rule 26(a)(2)(C) summary disclosure.[33]

The disclosure also indicates, however, that Ross will testify and render opinions about the "transmission path pertinent to Mr. Prest's exposure, including but not limited to, the fact that weathered crude oil and dispersants that were evaporated into the air, aerosolized by wave action, wind action and turbulence with significant inhalation and dermal exposures," thereby exposing him "to volatile organic compounds, polycyclic aromatic hydrocarbons (PAH), N-hexane and Corexit dispersant."[34] Thus, Prest represents that Ross will testify and render opinions as to the chemicals to which Prest was allegedly exposed and the effects those chemicals may have on the body, culminating in the opinion that "there were multiple pathways for Mr. Prest's exposure to Corexit and weathered crude oil during the BP Oil Spill cleanup, including possible CSR causation and exacerbation, and potential direct retinal and optic nerve toxicity with mild

33. Because the Court holds that Prest has not provided the necessary expert opinion on general causation, the Court does not now determine whether the specific causation opinions are admissible, even assuming they were properly disclosed. For example, "one of the factors courts consider under *Daubert* for specific causation is whether the expert has adequately accounted for alternative explanations." *Collett v. Weyerhaeuser Co.*, 512 F. Supp. 3d 665, 674 (E.D. La. 2021). Defendants are right to question whether Prest has satisfied this requirement to support Ross's specific causation opinions. R. Docs. 50-1 at 11-12; 67 at 5.

34. *Id.*

papilledema reported by Dr[.] Vives, to cause Mr. Prest's vision degradation."[35] To the extent these opinions purport to be general causation opinions, they do not arise from Ross's treatment of Prest, and thus were required to be disclosed in an expert report compliant with Rule 26(a)(2)(B). *See*, *e.g.*, *Hooks*, 2016 U.S. Dist. LEXIS 89534, 2016 WL 3667134, at *3 (noting that expert opinion as to causation is subject to the more fulsome requirements of Rule 26(a)(2)(B)). Moreover, Prest's summary disclosure of Ross's opinions does not even comply with Rule 26(a)(2)(C) because there is no explanation of the facts supporting these opinions. The report cites articles Ross supposedly reviewed, but it does not mention a single fact supporting his opinions.[36] The failure to provide a proper Rule 26(a)(2)(B) expert report – or, for that matter, a proper Rule 26(a)(2)(C) expert report – is sufficient to exclude Ross's general causation opinions. *Collett*, 512 F. Supp. 3d at 674 (noting that a treating physician's failure to provide a Rule 26 expert report on subjects outside of treatment would justify exclusion).

Even if Prest had complied with the disclosure requirements, however, Ross's general causation opinions for his exposure claims would be excluded because they do not comply with Rule 702 and *Daubert*. General causation requires identifying "the harmful dose of any chemical to which [a plaintiff] was exposed that would cause the development in the general population of the adverse health conditions or symptoms . . . allege[d]." *Carpenter*

35. *Id.* at 2-4.

36. *Id.*

v. BP Expl. & Prod., 2022 U.S. Dist. LEXIS 124533, 2022 WL 2757416, at *5 (E.D. La. July 14, 2022). Expert evidence establishing the dose-response relationship is one of the "'minimal facts necessary to sustain the plaintiff's burden in a toxic tort case.'" 2022 U.S. Dist. LEXIS 124533, [WL] at *6 (quoting *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)). Ross's summary disclosure does not do this. Indeed, it provides no information about the duration or dose of Prest's alleged exposure, much less the effects of any such duration or dose within the general population.[37] Moreover, Ross is an ophthalmologist, not an immunologist, toxicologist, neurologist, or epidemiologist and, thus, apparently lacks the education, training, and experience regarding the significance or effect of chemical exposure. *Collett*, 512 F. Supp. 3d at 674. Likewise, even if Ross's general causation opinion is limited to an opinion that chronic exposure to undue stress can exacerbate the CSR disease process, he fails to identify any medical or scientific studies or literature of sufficient relevance and reliability as would support that opinion.[38]

In sum, Ross's general causation opinions must be excluded because they were not properly disclosed under Federal Rule of Civil Procedure 26(a)(2)(B) and are unreliable under Federal Rule of Evidence 702 and *Daubert*.

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37. *Id.*

38. In addition, any such opinion would not be helpful to the trier of fact because physical injuries "caused by non-physical stress are not compensable" under maritime law. *See*, *e.g.*, *Duet v. Crosby Tugs*, 2008 U.S. Dist. LEXIS 83607, 2008 WL 4657786, at *3 (E.D. La. Oct. 20, 2008). *See also infra* at 11-12.

B. Defendants' Motion for Summary Judgment

Defendants argue that they are entitled to summary judgment because Prest lacks general causation expert testimony. This Court previously excluded Cook[39] and has now excluded Ross as a general causation expert. Thus, all of Prest's claims arising from direct chemical exposure must be dismissed with prejudice. *See*, *e.g.*, *Brister v. BP Expl. & Prod.*, 2022 U.S. Dist. LEXIS 149816, 2022 WL 3586760 (E.D. La. Aug 22, 2022); *Burns v. BP Expl. & Prod.*, 2022 U.S. Dist. LEXIS 132199, 2022 WL 2952993 (E.D. La. July 25, 2022); *Carpenter v. BP Expl. & Prod.*, 2022 U.S. Dist. LEXIS 124533, 2022 WL 2757416 (E.D. La. July 14, 2022); *Johns v. BP Expl. & Prod.*, 2022 U.S. Dist. LEXIS 98369, 2022 WL 1811088 (E.D. La. June 2, 2022).

Prest urges, however, that expert testimony is not required to support his claim that stress indirectly related to chemical exposure exacerbated his CSR.[40] In support of his argument, Prest cites *Walker v. BP Expl. & Prod., Inc.*, 2022 U.S. Dist. LEXIS 106512, 2022 WL 2160409, at *5 (E.D. La. June 15, 2022), in which another section of this court stated that if a plaintiff claims he "experiences depression and anxiety due to the hardship of his alleged ordeal with exposure and various physical injuries and conditions," as opposed to depression and anxiety caused by physical neurological changes resulting from chemical exposure, "such allegations would sound more in the

39. R. Doc. 49.

40. R. Doc. 59 at 7-9.

register of damages for 'mental pain and suffering,' or possibly 'loss of enjoyment of life.'" *Id.* (alteration omitted). Nevertheless, the *Walker* court did not address the plaintiff's purported claim for emotional distress because the parties did not discuss the issue with specificity in the briefing before the court. *Id.*

Here, Prest asserts that he experienced stress, anxiety, and depression – emotional issues – not due to neurological changes caused by chemical exposure, but rather as side-effects of dealing with the oil spill. Generally, a plaintiff may not recover for emotional injuries absent an accompanying physical injury. *SCF Waxler Marine, L.L.C. v. M/V Aris T*, 24 F.4th 458, 476 (5th Cir. 2022). However, under a zone-of-danger tort theory (which the Fifth Circuit has not adopted or precluded under general maritime law), a plaintiff can recover for emotional injuries if he is "placed in immediate risk of physical harm by [a defendant's negligent] conduct." *Id.* (quotation omitted). The Fifth Circuit explained in *SCF Waxler*:

> Even assuming *arguendo* that plaintiffs can recover under the zone-of-danger theory in general maritime law, analogous case law from other contexts state that a plaintiff must establish that "the claimant was objectively within the zone of danger; claimant feared for his life at the time of the accident or person was in danger, and his emotional injuries were a reasonably foreseeable consequence of the defendant's alleged negligence." To be

> in the zone of danger, a plaintiff must be in "immediate risk of physical harm."

Id. (quoting, first, *Owens v. Global Santa Fe Drilling Co.*, 2005 U.S. Dist. LEXIS 6225, 2005 WL 840502, at *3 (E.D. La. Apr. 8, 2005), and then *CONRAIL v. Gottshall*, 512 U.S. 532, 548, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994)). The Fifth Circuit explained further that federal appellate courts addressing the zone-of-danger test in maritime cases hold that "a plaintiff was objectively within the zone of danger if he (1) was at the same location where people got injured by the alleged negligent conduct . . . ; (2) could not leave the dangerous area . . . ; or (3) experienced a near-miss collision." *In re Deepwater Horizon*, 841 F. App'x 675, 680 (5th Cir. 2021).

Because Prest does not plead any of these scenarios, he was not in any zone of danger and may not recover for emotional injuries. He worked cleaning up oil on or near the coast (many miles from the *Deepwater Horizon* accident site) and began work a few weeks after the initial explosion. Indeed, the Fifth Circuit affirmed the district court's dismissal of the claims for emotional distress made by fishermen who responded to the *Deepwater Horizon* accident to aid with rescue efforts. *Id.* The court reasoned that dismissal was proper because the fishermen were not in the zone of danger as they remained 100 feet or more from the rig and could have moved away from the area. *Id.* The same can certainly be said of Prest. Accordingly, Prest was not in the zone of danger and cannot recover for emotional injuries under the prevailing law.

III. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS ORDERED that Defendants' motion to strike Ross (R. Doc. 50) is GRANTED.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment (R. Doc. 51) is GRANTED, and Prest's claims against them are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 8th day of November, 2022.

/s/ Barry W. Ashe
BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED OCTOBER 18, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 17-3409 SECTION M (4)

KIRK PREST

VERSUS

BP EXPLORATION & PRODUCTION INC., *et al.*

October 18, 2022, Filed

ORDER & REASONS

Before the Court is a *Daubert* motion *in limine* to exclude the general causation opinions of plaintiff's medical expert Dr. Jerald Cook filed by defendants BP Exploration & Production Inc., BP America Production Company, BP p.l.c. (collectively, "Defendants").[1] Plaintiff Kirk Prest responds in opposition.[2]

Defendants' motion here is nearly identical to the *Daubert* motions regarding Cook filed by Defendants,

1. R. Doc. 40.

2. R. Doc. 44.

and granted by this Court, in other B3 cases.[3] *See, e.g.*, *Carpenter v. BP Expl. & Prod., Inc.*, 2022 WL 2757416 (E.D. La. July 14, 2022); *Johns v. BP Expl. & Prod. Inc.*, 2022 WL 1811088 (E.D. La. June 2, 2022); *Johnson v. BP Expl. & Prod. Inc.*, 2022 WL 1811090 (E.D. La. June 2, 2022); *Macon v. BP Expl. & Prod. Inc.*, 2022 WL 1811135 (E.D. La. June 2, 2022); *Murray v. BP Expl. & Prod. Inc.*, 2022 WL 1811138 (E.D. La. June 2, 2022); *Street v. BP Expl. & Prod. Inc.*, 2022 WL 1811144 (E.D. La. June 2, 2022).

Accordingly, for the reasons stated in the Orders & Reasons issued in those cases,

IT IS ORDERED that Defendants' *Daubert* motion to exclude Cooke (R. Doc. 40) is GRANTED.

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3. Dr. Cook updated his report on September 30, 2022. R. Doc. 40-5. The Court has reviewed the new report and concludes that it does not cure the previously identified deficiencies in Cook's prior reports; specifically, the September 30 report does not provide admissible general causation opinions. *Id.* Prest admits in his opposition memorandum that applying the Court's prior reasoning in similar motions to this one would lead to the same result, namely, exclusion of Cook's opinions. R. Doc. 44 at 6. Prest advocates for a different approach that ignores Fifth Circuit toxic tort precedent and blames Defendants for the lack of dose-response data. *Id.* at 6-25. The Court is not persuaded by these arguments.

Appendix D

New Orleans, Louisiana, this 18th day of October, 2022.

/s/ Barry W. Ashe
BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-30779

KIRK PREST,

Plaintiff-Appellant,

versus

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA PRODUCTION COMPANY; BP, P.L.C.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC Nos. 2:10-MD-2179, 2:17-CV-3409

July 29, 2024, Filed

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before STEWART, DENNIS, and WILSON, *Circuit Judges*.*

* Judges Jerry E. Smith, James C. Ho, and Dana M. Douglas did not participate in the consideration of the rehearing en banc.

Appendix E

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.