**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

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| **VERNON DAVIS BAGGETT** | **CIVIL ACTION** |
| **VERSUS** | **NO: 17-3030** |
| **BP EXPLORATION & PRODUCTION INC, et al.** | **SECTION: "T"(5)** |

**ORDER**

Before the Court are two motions filed by Defendants, BP Exploration & Production Inc. and BP America Production Company (collectively "BP"), namely a *Daubert Motion to Exclude the Causation Testimony of Plaintiff's Expert, Dr. Jerald Cook* and a *Motion for Summary Judgment*.[1] Plaintiff Vernon Baggett filed a response to both motions.[2] For the following reasons, the motions are **GRANTED**.

**BACKGROUND**

In 2010, the Deepwater Horizon oil rig exploded, causing a massive oil spill in the Gulf of Mexico. Following the incident, hundreds of individuals brought "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)."[3] Originally, these matters were part of a multidistrict litigation. However, after the Court approved the Deepwater Horizon Medical Benefits Class Action Settlement Agreement, many individuals,

[1] R. Docs. 68, 69.
[2] R. Docs. 72, 73. Defendants have also filed replies. R. Docs. 75 and 76.
[3] *See In re Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2021 WL 6053613, at *10 (E.D. La. Apr. 1, 2021).

known as "B3 plaintiffs," either opted out of the class action settlement agreement or were excluded from its class definition.[4] Now, those plaintiffs have brought suit individually. To recover outside of the settlement framework, "B3 plaintiffs must prove that the legal cause of [their] claimed injury or illness is exposure to oil or other chemicals used during the response."[5] This "require[s] an individualized inquiry" and is typically the "make-or-break issue of many B3 cases."[6]

Vernon Baggett, one of the B3 plaintiffs, was "employed to perform the decontamination of vessels" involved in the oil spill response.[7] Mr. Baggett maintains that such work "exposed" him to crude oil and chemical dispersants, leading to a host of medical issues, including "sinus problems, breathing difficulties, headaches, eye irritation, skin irritation, rashes, [and] itching."[8] To prove his injuries were caused by exposure to contaminants from the spill, Mr. Baggett relies on the expert testimony of Dr. Jerald Cook.[9] Dr. Cook is a retired Navy physician with a master's degree in environmental toxicology and a fellow of the American College of Occupational and Environmental Medicine.[10] Used by many of the B3 plaintiffs, Dr. Cook produced a general causation report.[11] Generally, Dr. Cook's report evaluates three categories of the B3 plaintiff's alleged injuries, namely respiratory, dermal, and

[4] *Id.* at *2, *10, n.3.
[5] 2021 WL 6053613, at *11.
[6] *Id.*
[7] R. Doc. 1-1 at 2.
[8] *Id.* at 8.
[9] R. Doc. 68-4.
[10] *Id.* at 5. Additionally, he is board certified in occupational medicine, public health, and general preventative medicine.
[11] R. Doc. 68-1 at 3.

ocular, to conclude such injuries may have been caused by exposure to crude oil or dispersants.[12] In his report, Dr. Cook does not mention any plaintiff by name, does not address any particular plaintiff's work on the spill, and does not detail the nature of any plaintiff's exposure to any particular toxins. Furthermore, his report does not opine on any link between particular chemical compounds and any specific disease.

In the present motions, BP asks this Court to exclude the testimony of Dr. Cook and, due to the lack of causation evidence, dismiss Mr. Baggett's claims. The Court will address each motion in turn.

## LAW & ANALYSIS

### I. The *Daubert* Motion

Federal Rule of Evidence 702 provides: "A witness who is qualified as an expert by knowledge, skill experience, training, or education, may testify in the form of opinion or otherwise, if: (a) the expert's scientific, technical, or other specialized knowledge will assist 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."[13]

In *Daubert*, the Supreme Court established a two-part test for judges to perform in determining the admissibility of expert testimony.[14] First, the court must

[12] *See* R. Doc. 68-4.
[13] Fed. R. Evid. 702*; see Daubert v. Merrell Dow Pharms.*, Inc., 509 U.S. 579, 588, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *United States v. Hitt*, 473 F.3d 146, 148 (5th Cir. 2006).
[14] *Daubert*, 509 U.S. at 588; *Hitt*, 473 F.3d at 148.

determine whether the expert's testimony reflects scientific knowledge, is derived by the scientific method, and is supported by appropriate validation.[15] Therefore, the court must examine the expert's methodology. Second, the court must determine whether the testimony will assist the trier of fact in understanding the evidence.[16] "A district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject."[17] However, "Rule 702 does not mandate that an expert be highly qualified in order to testify about a given issue."[18] Courts should use caution, however, because "[v]igorous crossexamination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means" of questioning an expert's testimony.[19]

As an initial matter, BP emphasizes that "seven EDLA judges" so far have excluded Dr. Cook's "medical causation reports" and related opinions as "unreliable."[20] Judge Africk identified several shortcomings in Dr. Cook's opinions, including an outright failure to follow accepted methodologies.[21] Judge Ashe found that Dr. Cook, at the very least, failed to properly identify the exposure levels relevant to this case.[22] Specifically, Judge Ashe found that Dr. Cook had failed to identify a

[15] *Daubert*, 509 U.S. at 590.
[16] *Daubert*, 509 U.S. at 591.
[17] *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009) (quoting *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999)).
[18] *Huss*, 571 F.3d at 452.
[19] *See Daubert,* 509 U.S. at 596.
[20] R. Doc. 68-1 at 7.
[21] *See Novelozo v. BP Expl. & Prod.*, No. 13-1033, 2022 WL 1460103 (E.D. La. May 9, 2022) (Africk, J.).
[22] *See Johns v. BP Expl. & Prod. Inc.*, No. 17-3304, 2022 WL 1811088 (E.D. La. June 2, 2022) (Ashe, J.); *Johnson v. BP Expl. & Prod. Inc.*, No. 17-3308, 2022 WL 1811090 (E.D. La. June 2, 2022) (Ashe, J.); *Macon v. BP Expl. & Prod. Inc.*, No. 17-3548, 2022 WL 1811135 (E.D. La. June 2, 2022) (Ashe, J.); *Murray v. BP Expl. & Prod. Inc.*, No. 17-3582, 2022 WL 1811138 (E.D. La. June 2, 2022) (Ashe, J.); *Street v. BP Expl. & Prod. Inc.*, No. 17-3619, 2022 WL 1811144 (E.D. La. June 2, 2022) (Ashe, J.).

"particular chemical" or the "level of exposure to any such chemical as would be necessary to cause the specific symptoms . . . that is to say, the dose necessary to cause the reported reaction."[23] Judges Barbier, Vance, Morgan, Zainey, and Milazzo concluded similarly.[24]

Here, the Court turns to the same issue identified by the other Judges of this Court, namely Dr. Cook's failure to identify any particular chemical or level of exposure to any such chemical that would be necessary to cause Mr. Baggett's particular health conditions. As Judge Barbier noted, under Fifth Circuit precedent, "'[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 plaintiffs' burden in a toxic tort case."[25] Per this standard, an expert's testimony will "not establish general causation" if they "provide[] no clue regarding what would be a harmful level of [chemical] exposure."[26] Ultimately, to show causation, a plaintiff "must prove, at a minimum, that exposure to a certain level of a certain substance for a certain period of time can cause a particular condition in the general population."[27]

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[23] *Johns*, 2022 WL 1811088, at *5.
[24] *See Barkley v. BP Expl. & Prod. Inc.,* No. 13-995 (E.D. La. June 29, 2022); R. Doc. 68-1 at 9-10.
[25] *See Id.; Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996) (citing *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996)) (emphasis added).
[26] *Seaman v. Seacor Marine*, 326 F. App'x 721, 726 (5th Cir. 2009). In another case, an expert witness's opinions were excluded because he failed "to answer requestions regarding how much time [the plaintiff] spent scooping up oil, how, where, or in what quantity [the chemical] was used, how exposure levels would change once substance were diluted in seawater, or how [the plaintiff's] protective equipment would affect exposure." *McGill v. BP Expl. & Prod., Inc.*, 830 F. App'x 430, 433 (5th Cir. 2020).
[27] *Williams v. BP Expl. & Prod.*, No. 18-9753, 2019 WL 6615504, at *8 (E.D. La. Dec. 5, 2019) (citing *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007)).

BP maintains that, despite being excluded in other courtrooms, Dr. Cook's report "still fails to identify the specific toxin that causes injury" and does not "identify a harmful dose of exposure."[28] This Court agrees. Simply put, the Fifth Circuit requires that, in toxic tort cases like the B3 matters, an expert identify a harmful level of exposure for each chemical and each corresponding condition in question. No such identification exists in Dr. Cook's report.[29] In response, Mr. Baggett raises practical and economic concerns.[30] While this Court is sensitive to such considerations, they cannot excuse Dr. Cook's use of unreliable methodologies. Mr. Baggett maintains that Dr. Cook and the scientific community at-large were required to opine without "dose data," or specific exposure information, because BP prevented the memorialization of such data.[31] However, in raising such an argument, Mr. Baggett fails to appreciate that identification of a harmful level of exposure is one of the "minimal facts necessary to sustain [the plaintiff's] burden in a toxic tort case."[32]

Per Mr. Baggett's burden, he must put forth evidence of "general causation," or proof that a "substance is capable of causing a particular injury or condition in the general population."[33] Dr. Cook's report fails to do so. The report does not identify a single chemical, but instead generally discusses oil, dispersants, and other compounds. As Judge Barbier noted, "even if Dr. Cook's report were to identify a specific chemical present in the crude oil, weathered crude oil, or dispersants, his

[28] R. Doc. 68-1 at 10-11.
[29] As Judge Ashe noted, Dr. Cook's report failed to include even a single mention of a specific chemical. *See, e.g.*, *Johns*, 2022 WL 1811088, at *5.
[30] R. Doc. 73 at 5-6.
[31] *Id.* at 6-11.
[32] *Allen*, 102 F.3d at 199.
[33] *Knight*, 482 F.3d at 35.

report fails to establish a harmful level of any chemical to the general population."[34] Therefore, as Dr. Cook cannot establish "scientific knowledge of the harmful level of exposure to a chemical" in question, his opinions cannot pass muster under Fifth Circuit precedent.[35] Accordingly, because his report is unreliable and inadmissible, the motion to exclude Dr. Cook's causation opinion is **GRANTED**.[36]

## II. Motion for Summary Judgment

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[37] The court must find "a factual dispute to be 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party and a fact to be 'material' if it might affect the outcome of the suit under the governing substantive law."[38] The party seeking summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact and all reasonable inferences are drawn in favor of the nonmoving party. [39] When assessing whether a dispute as to any material fact exists, the court considers "all of the evidence in the record but refrains from making credibility determinations or

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[34] *Barkley,* No. 13-995 at *9.
[35] *Id.*
[36] "Five other sections of the Eastern District of Louisiana have excluded Dr. Cook based on this same report before the Court. After carefully and thoroughly reviewing those decisions, and for the same reasons articulated by Judges Ashe, Vance, Barbier, Morgan, and Zainey, the Court grants Defendants' Motion in Limine." *Reed*, 17-3603, R. Doc. 67 at 7-8. Additionally, this Court adopts Judge Barbier's discussion of the spoliation doctrine, if necessary, in *Barkley*, No. 13-995.
[37] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56(c)).
[38] *Voelkel McWilliams Const., LLC v. 84 Lumber Co.*, 2015 WL 1184148, at *5 (E.D. La. Mar. 13, 2015) (quoting *Beck v. Somerset Techs., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989)).
[39] *Celotex,* 477 U.S. at 323.

weighing the evidence."[40] However, "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment."[41]

As in the cases decided by Judges Africk, Ashe, Barbier, Milazzo, Morgan, Vance, and Zainey, the exclusion of Dr. Cook's report leaves Mr. Baggett with no evidence to support his general causation argument. Consequently, Mr. Baggett cannot point to a genuine issue of material fact regarding the cause of his injuries. Accordingly, the motion for summary judgment is **GRANTED**.

## CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Defendants' motion to exclude the causation opinions of Dr. Jerald Cook is **GRANTED.**

**IT IS FURTHER ORDERED** that Defendants' motion for summary judgment is **GRANTED.**

**IT IS FURTHER ORDERED** that all claims of the Plaintiff against Defendants, BP Exploration & Production Inc. and BP America Production Company, are **DISMISSED WITH PREJUDICE.**

New Orleans, Louisiana, this 13th day of September, 2022.

Greg Gerard Guidry
United States District Judge

[40] *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008).
[41] *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).