United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 27, 2026
Thomas B. Plunkett, III
Clerk

No. 23-60361

RICHARD ALLEN DUFOUR, JR.,

Plaintiff—Appellant,

versus

BP EXPLORATION & PRODUCTION, INCORPORATED; BP AMERICA PRODUCTION COMPANY,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:19-CV-591

Before RICHMAN, OLDHAM, and RAMIREZ, *Circuit Judges*.

PRISCILLA RICHMAN, *Circuit Judge*:

Richard DuFour, Jr., sued BP Exploration & Production, Inc. and BP America Production Company (collectively, BP) for injuries allegedly caused by DuFour's exposure to toxic substances during cleanup efforts following the 2010 *Deepwater Horizon* oil spill. The district court excluded DuFour's causation experts and granted summary judgment in favor of BP. We affirm.

I

As recounted in many decisions of this court, what has become known as the BP Oil Spill occurred as a result of a blowout of a well drilled by the *Deepwater Horizon* oil rig. The well released enormous amounts of crude oil into the Gulf of Mexico. DuFour was employed by BP Enterprises as a cleanup worker for almost three years. He worked in Pascagoula, Mississippi, performing shoreline cleanup and boom decontamination. He was exposed to crude oil and chemical dispersants through inhalation, as well as airborne and direct contact. DuFour alleges that the substances to which he was exposed were toxic and caused chronic worsening of his asthma.

DuFour filed suit in the Eastern District of Louisiana pursuant to the Back-End Litigation Option (BELO) of the Medical Settlement Agreement (MSA) in the *Deepwater Horizon* class-action litigation. The parties filed a joint stipulation asserting that the appropriate venue was the Southern District of Mississippi, and the court transferred the case.

Under the MSA, a BELO plaintiff must prove, among other things, that his injuries were "legally caused by" exposure to substances during response efforts. DuFour proffered two experts—Dr. Michael Freeman and Dr. Shawn French—to prove causation. BP filed motions to exclude their testimony and opinions and moved for summary judgment. DuFour requested an evidentiary hearing to present live testimony to prove the admissibility of his experts' testimony.

The district court denied the request for an evidentiary hearing, granted the motions to exclude Dr. Freeman and Dr. French, and granted BP's motion for summary judgment. DuFour timely appealed.

II

An initial question is what law should be applied in resolving DuFour's claims. The settlement agreement provides that "[n]otwithstanding the law applicable to the underlying claims, which the PARTIES dispute, this MEDICAL SETTLEMENT AGREEMENT and the RELEASE hereunder shall be interpreted in accordance with General Maritime Law." DuFour's exposure occurred in Pascagoula, Mississippi. However, neither party has argued that Mississippi law should apply. To the contrary, DuFour maintains, and BP agrees, that maritime law governs this case.

DuFour asserts in his briefing in our court, as he did in the district court, that there is diversity jurisdiction and that "this Court has jurisdiction under 28 U.S.C. § 1331 based on Federal Question for the federal judiciary to hear all cases of admiralty and maritime jurisdiction." His briefing in our court, as he did in the district court, additionally asserts "this Court has jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 30101 which extends the admiralty and maritime jurisdiction of the United States to 'cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.'" In the district court, he asserted that "[t]his matter is governed by maritime law. As a result, under maritime law, if Mr. Dufour proves that this exposure caused a permanent exacerbation of his chronic condition, asthma, then Mr. Dufour would be entitled to [monetary compensation]."

DuFour's Second Amended Complaint alleges that "BP Defendants are at fault for the Oil Spill and *Deepwater Horizon Incident*." It further alleges:

> As part of its response to the *Deepwater Horizon Incident*, BP Defendants directed the use of vessels to, *inter alia*, recover oil

> coming to the surface of the Gulf of Mexico; skim oil from the surface of the water; and conduct in-*situ* burning of oil that reached the surface of the water. BP Defendants also employed vessels to tow and deploy booms—floating barriers intended to contain, deflect, or hold back oil floating in the water's surface. BP also employed an army of people to clean oil from the beaches and barrier islands.

DuFour additionally alleged that "[a]s part of the Response Activities, BP Defendants purchased highly noxious chemical dispersants" that "were applied over large areas using various methods, including but not limited to . . . spraying from vessels, and subsea injection."

BP agrees that maritime law governs DuFour's claims. Its Answer to the Second Amended Complaint said "BP Parties admit that Plaintiff's claims sound in maritime law." Its Answer also asserted that "[m]aritime law preempts all state law claims that are or may be asserted in this action."

DuFour has conceded on appeal that "[w]ithout an expert, DuFour could not prove the central issue in this litigation—the level, extent, and duration of his exposure to harmful substances during the relevant times of the Oil Spill." He additionally states in his briefing in our court that he "was required to prove the following factors as to legal causation: (1) the scientific knowledge of the harmful level of exposure to a particular chemical, and (2) that he was exposed to such quantities." In support, he cites an unpublished opinion from our court, *Seaman v. Seacor Marine L.L.C.*,[1] that considered claims "under the Jones Act and general maritime law."[2]

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[1] 326 F. App'x 721 (5th Cir. 2009).

[2] *Id.* at 723.

In *Seaman*, a captain of vessels alleged that he developed bladder cancer as a result of chemical exposures,[3] including exposure to diesel exhaust and Ferox for more than a decade.[4] In addressing causation, our court said, "[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."[5] We then said, "[a] plaintiff in such a case cannot expect lay fact-finders to understand medical causation; expert testimony is thus required to establish causation."[6] For this latter proposition, we cited toxic tort cases,[7] but we also cited a Second Circuit decision[8] authored by then-JUDGE SOTOMAYOR, *Wills v. Amerada Hess Corp*oration,[9] which adjudicated claims brought under the Jones Act and general maritime law.[10] In *Wills*, the widow of a seaman claimed that her husband's cancer was caused, in part, by exposure to benzene and polycyclic aromatic hydrocarbons while working aboard Amerada Hess's vessels.[11] The widow maintained that "by granting summary judgment in favor of defendants on the ground that she failed to proffer admissible evidence on the issue of causation," the district court

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[3] *Id.*

[4] *Id.* at 725.

[5] *Id.* at 723 (quoting *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)); *see also Allen*, 102 F.3d at 195, 199 (affirming motions for judgment "as a matter of law" in favor of defendants sued by "a maintenance worker at Baton Rouge General Hospital" in a toxic tort case).

[6] *Seaman*, 326 F. App'x at 723.

[7] *Id.* at 723 n.6.

[8] *Id.*

[9] 379 F.3d 32 (2d Cir. 2004).

[10] *Id.* at 36.

[11] *Id.* at 37.

"undermined 'the right of the jury to pass upon the question of fault and causation,' a right that in Jones Act cases 'must be most liberally viewed.'"[12] Similarly, the widow contended that, "in excluding her proposed expert testimony on the issue of causation," the district court "failed to appreciate her reduced burden to prove causation."[13] The Second Circuit rejected these arguments, holding "where an injury has multiple potential etiologies, expert testimony is necessary to establish causation, even in view of plaintiff's reduced burden to prove causation," pointing out that "this court has never held that a Jones Act plaintiff can survive summary judgment in a toxic tort case without admissible expert testimony on the issue of causation."[14]

In *Gowdy*, a published opinion involving claims under both the Jones Act and general maritime law, our court cited our unpublished decision in *Seaman* with approval for the proposition that "[i]n toxic tort cases, expert testimony is often required."[15] In *Gowdy*, we drew a distinction between those cases in which "the causal link . . . can be understood by jurors based on everyday knowledge and experience" and those in which it cannot.[16] The causal link between chemical exposure and exacerbation of preexisting asthma is more akin to "developing cancer after years of toxic tort exposure" than to "breaking one's leg after being hit by a car."[17] Our *Gowdy* decision also recognized that "in *Wills v. Amerada Hess Corporation*, the Second

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[12] *Id.* at 45 (quoting *Oxley v. City of New York*, 923 F.2d 22, 25 (2d Cir. 1991)).

[13] *Id.*

[14] *Id.* at 46.

[15] *Gowdy v. Marine Spill Response Corp.*, 925 F.3d 200, 206 (5th Cir. 2019).

[16] *Id.* at 208.

[17] *Id.*

Circuit explained that expert testimony was needed on the question of whether exposure to toxic chemicals caused squamous cell carcinoma because that causal link was 'sufficiently beyond the knowledge of the lay juror.'"[18]

Our decision in *Seaman v. Seacor Marine L.L.C.*,[19] although unpublished, was well-reasoned and clearly in line with decisions in our circuit and in other circuits that have applied maritime law. We expressly agree with its holding. DuFour's claims are among the class of non-readily observable injuries, or those with multiple possible etiologies, that traditionally require an expert to survive summary judgment on legal causation.

We note that we have applied the toxic tort causation standard from *Knight v. Kirby Inland Marine Inc.*[20] in at least one published BELO decision,[21] as well as unpublished decisions.[22] This standard requires the

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[18] *Id.* at 206 (quoting *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 46 (2d Cir. 2004) (SOTOMAYOR, J.)).

[19] 326 F. App'x 721 (5th Cir. 2009).

[20] 482 F.3d 347, 351 (5th Cir. 2007).

[21] *See, e.g.*, *Williams v. BP Expl. & Prod., Inc.*, 143 F.4th 593, 598 (5th Cir. 2025) ("This circuit recently applied the toxic tort standard for causation to a case concerning an illness allegedly caused by the DWH oil spill," requiring "'a plaintiff to show both general and specific causation in toxic tort cases.'") (quoting *Prest v. BP Expl. & Prod., Inc.*, No. 22-30779, 2023 WL 6518116, at *2 (5th Cir. Oct. 5, 2023))).

[22] *See, e.g.*, *Wunstell v. BP, P.L.C.*, No. 23-30859, 2024 WL 4100496, at *2 (5th Cir. Sept. 6, 2024) ("In toxic-exposure cases like this one, a plaintiff 'must prove both general and specific causation.'") (quoting *Braggs v. BP Expl. & Prod., Inc.*, No. 23-30297, 2024 WL 863356, at *2 (5th Cir. Feb. 29, 2024))); *id.* ("The expert must show 'that the chemical at issue is actually capable of harming individuals in the general population.' To make this showing, the expert must 'determine not only whether a chemical can cause certain health effects, but also at what level of exposure those health effects appear.'"(internal citations omitted) (quoting *Braggs*, 2024 WL 863356, at *2)); *Barrington v. BP Expl. & Prod., Inc.*, No. 23-30343, 2024 WL 400191, at *1 (5th Cir. Feb. 2, 2024); *Prest*, 2023 WL 6518116 at

district court to first "determine whether there is . . . admissible general-causation evidence," then "determine whether there is admissible specific-causation evidence."[23] While the *Knight* standard derives from Texas law,[24] the *Knight* decision applied that standard to a Jones Act claim,[25] even though, as already discussed above, in Jones Act cases, there is a distinct body of law regarding the burden for establishing causation.[26]

We further note that the Eleventh Circuit has "formally recognize[d] in the maritime context that non-readily observable injuries require medical expert testimony to prove causation" as a matter of general maritime law.[27] In that case, the Eleventh Circuit affirmed summary judgment in favor of the defendant because the plaintiff "failed to adduce sufficient medical evidence to satisfy proximate cause."[28] The Eleventh Circuit discussed principles of toxic tort liability, including general and specific causation, and applied those

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*2; *Byrd v. BP Expl. & Prod., Inc.,* No. 22-30654, 2023 WL 4046280, at *2 (5th Cir. June 16, 2023); *McGill v. BP Expl. & Prod., Inc.*, 830 F. App'x 430, 433-34 (5th Cir. 2020).

[23] *Knight*, 482 F.3d at 351.

[24] *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997)); *see also Ruffin v. BP Expl. & Prod., Inc.*, 176 F.4th 855, 860-61 & n.1 (5th Cir. 2026) (applying *Knight* while recognizing that "*Knight*'s general-causation standard is drawn from Texas law, which neither party suggests applies here," but assuming arguendo that the BELO claim at issue arose under general maritime law, explaining that "we have still previously required general and specific causation for toxic-tort claims arising under general maritime law, and we see no reason to depart from that here.").

[25] *Knight*, 42 F.3d at 350.

[26] *See Brister v. A.W.I., Inc.*, 946 F.2d 350, 354 (5th Cir. 1991) ([T]he Jones Act contains a liberal causation requirement. If the defendant's negligence played any part, however small, in producing the seaman's injury, it results in liability.").

[27] *Willis v. Royal Caribbean Cruises, Ltd.*, 77 F.4th 1332, 1338 (11th Cir. 2023).

[28] *Id*. at 1333.

principles to BELO claims in *In re Deepwater Horizon BELO Cases*.[29] As already discussed, our circuit has applied these same toxic tort principles in BELO cases.

Moreover, the federal common law of admiralty is not immutable. As JUSTICE KAVANAUGH explained, writing for the Court in *Great Lakes Insurance SE v. Raiders Retreat Realty Co.*,[30] "[u]nder the Constitution, federal courts possess authority to create and apply maritime law."[31] The *Great Lakes* decision set forth how maritime law may be created and applied: "To maintain that uniform system, federal courts 'make decisional law' for maritime cases."[32] "When a federal court decides a maritime case, it acts as a 'federal common law court, much as state courts do in state common-law cases.'"[33] "Exercising that authority, federal courts follow previously 'established' maritime rules."[34] "No bright line exists for determining when a federal maritime rule is 'established,' but a body of judicial decisions can suffice."[35] "In the absence of an established rule, federal courts may create uniform maritime rules."[36]

We conclude that there is either (1) "a body of judicial decisions" that "suffice" to establish the maritime rule that causation principles that have

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[29] 119 F.4th 937, 940-43, 945-46 (11th Cir. 2024).

[30] 601 U.S. 65 (2024).

[31] *Id.* at 69.

[32] *Id.* (quoting *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23 (2008)).

[33] *Id.* (quoting *Air & Liquid Sys. Corp. v. DeVries*, 586 U.S. 446, 452 (2019)).

[34] *Id.* at 70 (quoting *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955)).

[35] *Id.* (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 89-90 (1955)).

[36] *Id.* (citing *Norfolk S. Ry. Co.*, 543 U.S. at 23).

been applied in certain types of non-maritime toxic tort cases for decades[37] apply under maritime law in cases like the present one, or (2) at least in this circuit, as well as the Second and Eleventh Circuits, federal courts have created that maritime rule. The district court did not err in applying widely accepted toxic tort causation principles as part of maritime law to the facts of this case.

III

As a preliminary matter, we also address how the toxic tort causation principles established in *Daubert* and subsequent Supreme Court decisions interact with the federal summary judgment rule embodied in Federal Rule of Civil Procedure 56 and the Supreme Court's decision in *Celotex Corp. v. Catrett*.[38] Provided that the case is in the correct procedural posture, courts should apply *Daubert* to disqualify experts at the summary judgment stage of a proceeding.

Toxic tort cases in federal district courts (and state courts for that matter) typically have a scheduling order. A district court may set deadlines for the conclusion of discovery, and for filing expert reports, and may set a date by which any motions for summary judgment must be filed. When such deadlines are in place, the plaintiff knows that if he does not have expert testimony sufficient to raise a fact question on causation by the deadline for filing dispositive motions, summary judgment may be rendered against him. If, at the summary judgment stage, the district court concludes the plaintiff's expert's report or testimony is inadmissible under Federal Rule of Evidence 702, the plaintiff could conceivably ask that the deadlines be extended to

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[37] *See, e.g.*, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and its progeny.

[38] 477 U.S. 317 (1986).

permit the plaintiff to obtain additional or different expert evidence. But, at some point, a district court may establish a deadline by which sufficiently reliable and otherwise admissible evidence must be identified, or else summary judgment may be entered.

In the present case, the district court entered a scheduling order setting a discovery-cutoff date, deadlines for expert designations, and a date by which dispositive motions were to be filed. The order was amended several times. To survive BP's motion for summary judgment, DuFour was required to present reliable expert evidence that his asthma was aggravated by the chemicals he alleged he came into contact with during the *Deepwater Horizon* oil spill cleanup. Rule 56 requires that he do so by "citing to particular parts of materials in the record."[39] The district court excluded DuFour's causation experts. DuFour did not contend in the district court, and does not contend on appeal, that with more time, he could present additional or different expert evidence. So, his claim rises or falls on the record presently before us.

The Supreme Court expressly recognized in *Daubert* that if a trial court concludes that the scientific evidence "presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true," the court is "free to direct a judgment, and likewise to grant summary judgment."[40] The Supreme Court cited the Sixth Circuit's decision in *Turpin v. Merrell Dow Pharmaceuticals, Inc.*,[41] and the

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[39] FED. R. CIV. P. 56(c)(1)(A).

[40] *Daubert*, 509 U.S. at 596 (internal citations omitted) (citing FED. R. CIV. P. 50(a), 56).

[41] 959 F.2d 1349 (6th Cir. 1992).

Fifth Circuit's decision in *Brock v. Merrell Dow Pharmaceuticals, Inc.*,[42] for these propositions.[43] In *Turpin*, the district court had granted summary judgment in favor of the defendant after concluding that the expert evidence was insufficient to raise a fact question as to causation,[44] and the circuit court affirmed.[45] In *Brock*, our court reversed a district court judgment that, after a jury trial, had awarded $550,000 in damages.[46] We rendered judgment in favor of the defendant.[47]

In *Kumho Tire Co., Ltd. v. Carmichael*,[48] the Supreme Court upheld a summary judgment that the Eleventh Circuit had reversed.[49] The Supreme Court examined in detail the testimony and opinions proffered by an expert in tire failure analysis, concluding that the district court did not err in excluding the testimony of the witness at the summary judgment stage.[50]

With this background in mind, we proceed to consider whether the district court erred in excluding DuFour's expert witnesses.

IV

DuFour maintains that the district court erred by declining to hold an evidentiary hearing on the admissibility of his experts' testimony (commonly

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[42] 874 F.2d 307 (5th Cir. 1989).

[43] *Daubert*, 509 U.S. at 596.

[44] 959 F.2d at 1349-50.

[45] *Id.* at 1361.

[46] 874 F.2d at 308.

[47] *Id.* at 315.

[48] 526 U.S. 137 (1999).

[49] *Id.* at 142, 158.

[50] *Id.* at 153-58.

called a *Daubert* hearing). We review the district court's decision not to hold a *Daubert* hearing for abuse of discretion.[51]

The district court explained its reasoning: "Given the thoroughness of the parties' briefs and exhibits, as well as the Court's familiarity with the issues raised, the Court finds that neither a hearing nor oral argument would be helpful or otherwise warranted." DuFour objects that this is a scientifically complex case involving a new set of expert opinions relying on new data. He contends the district court abused its discretion by denying his experts the opportunity to explain any deficiencies the district court saw in their proffered testimony.

"[T]he law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination."[52] DuFour cites no case holding that a district court erred because it denied a *Daubert* hearing over a party's assertion that the case is complex and the proffered expert could explain their testimony. Indeed, we have observed that "a district court is not always required to hold a formal *Daubert* hearing"—a district court must "perform its gatekeeping function by performing some type of *Daubert* inquiry and by making findings about the witness's qualifications to give expert testimony."[53] The trial court has "considerable leeway" to "decide whether or when special briefing or other proceedings are needed."[54]

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[51] *See, e.g.*, *Carlson v. Bioremedi Therapeutic Sys., Inc.*, 822 F.3d 194, 201 (5th Cir. 2016) (reviewing a decision not to conduct a *Daubert* inquiry for abuse of discretion).

[52] *Kumho Tire*, 526 U.S. at 142.

[53] *Carlson*, 822 F.3d at 201.

[54] *Kumho Tire*, 526 U.S. at 152.

The district court did not abuse its discretion by declining to hold a *Daubert* hearing. The district court explained that it could resolve the *Daubert* motions on the parties' thorough presentations and its familiarity with the *Deepwater Horizon* litigation. Because the record included depositions, declarations, and reports from the relevant experts, the district court had an adequate basis to determine the reliability of the experts' opinions without a live hearing. We see nothing that indicates the court abused its "considerable leeway."[55]

V

DuFour contends the district court erred in excluding Dr. Freeman's and Dr. French's expert testimony. "We review 'a district court's exclusion of expert testimony for abuse of discretion,'"[56] and an "appellate court will not reverse . . . unless the ruling is manifestly erroneous."[57]

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony.[58] The Supreme Court's decision in *Daubert* "provides the analytical framework for determining whether expert testimony is admissible

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[55] *Id.*

[56] *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.*, 841 F.3d 365, 369 (5th Cir. 2016)).

[57] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997); *see also Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962) (explaining that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous"); *Congress & Spring Co. v. Edgar*, 99 U.S. 645, 658 (1878) ("Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous.").

[58] FED. R. EVID. 702.

under Rule 702 . . . ."[59] Under *Daubert*, the trial judge must "determine whether the expert testimony is both reliable and relevant."[60] Even were substantive Mississippi law applicable rather than maritime law, the Mississippi Supreme Court has applied *Daubert*-based principles in toxic tort cases.[61] In a benzene case, that court upheld the exclusion of expert testimony or opinion when several of the studies relied upon did not provide a dose-response ratio.[62] The Mississippi court concluded that "a dose-response ratio is needed to indicate the level of exposure to benzene of the subjects of the study [and] is crucial under the case-study methodology to show specific causation so that [the plaintiff's] level of exposure could be specifically compared to subjects with similar exposure."[63]

Dr. Freeman relied on three studies. The district court observed that different studies that examine the same exposure-disease relationship generally should yield similar results. The district court found it "problematic" that the three studies referenced in Dr. Freeman's original report did not examine the same exposure-disease relationship. The district court concluded that the three studies upon which Dr. Freeman relied did not all address the same conditions, and none of them "appear[ed] to address the specific worsening of preexisting chronic asthma that is the central issue in DuFour's case."

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[59] *Burleson v. Tex. Dep't of Crim. Just.*, 393 F.3d 577, 583 (5th Cir. 2004) (quoting *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243 (5th Cir. 2002)).

[60] *Id.* at 584.

[61] *See Watts v. Radiator Specialty Co.*, 990 So.2d 143, 147, 149-50 (Miss. 2008).

[62] *See id*. at 146-48.

[63] *Id*. at 147 n.9.

Nor were the studies based upon the same exposures. "Dr. Freeman's analysis focused on one study's findings concerning inhalational exposure from oil spills," "while the other two studies did not appear to be limited to inhalation exposure, nor did they differentiate between methods of exposure." The district court concluded that "[t]he discrepancies in the underlying data used to support the exposure-disease relationship in the Original Report, along with Dr. Freeman's *ipse dixit* statements" "indicate that Dr. Freeman did not reliably apply the relevant criteria." The district court concluded, "There is simply too great of an analytical gap between the data and the conclusions in the Original Report that DuFour's chronic asthma worsened due to exposure to chemicals associated with his oil spill cleanup efforts."

The district court considered Dr. Freeman's reliance on the Lawrence Study. The court observed, "Dr. Freeman himself undermines confidence in the Lawrence Study by pointing out that '[o]ne limitation of the study is possible misclassification and over reporting of asthma due to the utilization of self-reported wheezing in the case definition.'" When self-reported wheezing was excluded from the definition of asthma, the Lawrence Study concluded, and Dr. Freeman admitted, that the results were "largely attenuated." The district court also observed that the Lawrence Study included certain adults who participated in oil spill response and cleanup work, but it excluded "those who reported an asthma diagnosis prior to April 20, 2010, the onset date of the disaster." The district court reasoned that, "[t]here is no dispute that DuFour has long suffered from asthma, including as a child" and "that he would therefore have been excluded from the Lawrence Study." The district court also concluded, "The fact that the Lawrence Study would not have included DuFour as a participant because of his preexisting asthma demonstrates that he is not on common footing with

any participant in that Study, and as such Dr. Freeman did not reliably apply the Lawrence Study to this case."

The district court additionally explained that "the dose-response discussed by Dr. Freeman in his Original Report concerned the reporting of symptoms, not the diagnosis or worsening of asthma or any other chronic conditions." The district court pointed out that "Dr. Freeman acknowledged in his deposition that while these symptoms are symptoms of asthma, 'they're not specifically asthma worsening.'" Dr. Freeman had himself acknowledged that "[p]eople who have worsening of asthma all have trouble breathing or will feel shortness of breath and wheezing, by definition that's asthma. But not everybody who wheezes or has shortness of breath, et cetera, has asthma."

The dissenting opinion is unpersuaded by the district court's criticism of Dr. Freeman's reports and the Lawrence Study.[64] It points out that Dr. Freeman attempted to address the Study's limitations and emphasizes that the Study found a "linear relationship" between exposure and asthma.[65] The Lawrence Study, however, did not measure its participants' severity of asthma. The linear relationship that it found was between a non-asthmatic worker's level of chemical exposure and their relative risk of developing asthma, defined as self-reported wheezing or a self-reported medical diagnosis. The inferential step that Dr. Freeman failed to establish, in the district court's judgment, was how that trend related to DuFour's alleged injury of pre-existing asthma worsening.

According to the Lawrence Study, the more exposed a non-asthmatic worker was, the higher their risk of reporting either wheezing or an asthma

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[64] *Post*, at 29-30.

[65] *Post*, at 29.

diagnosis. The Study did not conclude that the more exposed a worker with pre-existing was, the more severe their asthma became. Put differently, if one were to picture a graph with X and Y axes, the X-axis in the Lawrence Study is level of exposure and the Y-axis is relative risk of developing asthma. The Y-axis is not, as the dissenting opinion characterizes it, the severity of asthma a worker was expected to develop.

The dissenting opinion also cites the reported p-value, or statistical significance, of the Lawrence Study to support its strength.[66] But as the Federal Judicial Center's Reference Manual on Scientific Evidence makes clear, the fact "[t]hat a study's results are statistically significant says nothing about the magnitude of any association (i.e., the relative risk or odds ratio) or about the biological, clinical, or public health importance of the finding. . . . A large study may find a statistically significant relationship that is quite modest in magnitude."[67] Statistical significance is only a useful metric insofar as the underlying results of the Study capture a meaningful relationship between relevant variables.

The Study's statistical significance alone, therefore, cannot make up for the other limitations that the district court recognized. Most notable among these are its failure to study workers who, like DuFour, already had asthma, and the fact that when self-reported wheezing was excluded from the definition of asthma, the results were "largely attenuated." Although the

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[66] *Post*, at 31.

[67] FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 930 (4th ed. 2025). The dissenting opinion highlights criticism of this latest version of the Reference Manual by some state Attorneys General. *Post*, at 30. This quotation is very similar to language in the uncontroversial third edition of the Reference Manual, and neither versions' discussion of expert witnesses and statistical methods has been criticized. *See* FED. JUD. CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 573 (3rd ed. 2011).

Lawrence Study found a relative risk of greater than 2.0, a common benchmark for reliability under *Daubert*,[68] for some categories of workers, Dr. Freeman did not attempt to demonstrate to the district court that DuFour would have been in one of those categories, even if he had not been excluded from the Study for his pre-existing asthma. Therefore, it was not an abuse of discretion for the district court to conclude that DuFour "was not on common footing with any participant in that Study."

Ultimately, the district court reasoned that "Dr. Freeman has not provided a reasonable basis for using respiratory symptoms alone as a proxy for chronic asthma in opining as to causation in DuFour's case." "His leap from data showing an increased chance of respiratory symptoms based on duration and frequency of exposure to a conclusion 'that exposures to oil spill-associated irritants during [DuFour's] response work were a substantial factor in causing his asthma to worsen during his employment and to persist afterward,'" "constitutes *ipse dixit* testimony and leaves too great of an analytical gap between the data and his causation opinion."

The district court did not abuse its discretion in concluding that "DuFour has not carried his burden of establishing the reliability of Dr. Freeman's opinions or testimony concerning legal causation in this case, whether it be it general, specific, or otherwise."

The district court also excluded the testimony of Dr. French, one of DuFour's treating physicians. Dr. French did not provide a written report. The district court explained that, "When a party does not provide an expert report from a treating physician who will testify at trial, the doctor's

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[68] *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 716 (Tex. 1997) (collecting cases requiring a relative risk of at least 2.0 from the Third, Fourth, and Eighth Circuits and the District of Oregon, Western District of Missouri, District of Maryland, and Northern District of California).

'testimony is limited to those facts and opinions in his disclosed medical records.'" The district court further reasoned that, "If the medical records of a treating physician who did not provide a written report do not state that a '[p]laintiff's condition is either generally or specifically caused by any particular substance,' that treating physician cannot subsequently offer a causation opinion in the litigation." DuFour did not rely on Dr. French's medical records.

DuFour instead relied on Dr. French's deposition testimony. The district court held that, "Permitting Dr. French, as a treating physician, to introduce causation opinions during his deposition that were not contained in his medical records, without requiring him to prepare a formal written report, would plainly circumvent Rule 26's written report requirement."[69]

The district court additionally concluded that, "Even if there had been a proper disclosure of Dr. French's causation opinions within the meaning of Rule 26(a)(2), DuFour has not shown that this testimony is admissible." First, the district court concluded Dr. French was not qualified to opine on causation in this case: "There is no indication in the record as to what qualifications Dr. French has as a pulmonologist that would qualify him to offer expert opinions on the effects on the human body generally, or upon DuFour specifically, of any of the particular substance(s) at issue in this case, whether at specified or unspecified levels." The district court correctly

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[69] A treating physician is generally not subject to Rule 26(a)(2)(B)'s expert report requirement, but some courts, including district courts in our circuit, "have held that this exception does not apply to 'opinions that the treating physician arrives at after treatment, for the purposes of litigation.'" *United States v. Williams*, No. 20-10433, 2021 WL 2819016, at *3 (5th Cir. July 6, 2021) (quoting *LaShip, LLC v. Hayward Baker, Inc.*, 296 F.R.D. 475, 480 (E.D. La. 2013)). As we recently noted in *Williams*, however, "this question . . . remains unsettled in this circuit." *Id.* Because we conclude the district court reasonably relied on other grounds in excluding Dr. French's testimony, we express no views on this question.

concluded that absent "evidence that Dr. French is qualified to testify on causation in the context of the facts of this case, his opinions should be excluded."

The district court explained that "Dr. French offers no explanation for how he made the determination that a worsening of DuFour's asthma was more likely caused by the oil spill cleanup efforts rather than anything else." "Dr. French does not attempt to relate Du[F]our's purported worsening chronic asthma to any sort of chemical exposure, and he has not shown how his apparent reliance upon temporal connection alone in this case constitutes a reliable methodology." "In the portions of Dr. French's deposition quoted by Du[F]our, he provides nothing more than *ipse dixit* testimony that leaves too great of an analytical gap between the data and causation opinions, rendering his causation opinions inadmissible under *Daubert*." The district court further observed that Dr. French admitted in his deposition "a lack of knowledge concerning substances to which Du[F]our attributes his injuries" and that he failed "to engage in any research as to what might have caused Du[F]our's asthma to worsen." The district court did not abuse its discretion in excluding Dr. French's opinions or testimony regarding causation.

Because the district court did not err by excluding DuFour's experts, it properly granted summary judgment to BP.

* * *

For the foregoing reasons, we AFFIRM.

ANDREW S. OLDHAM, *Circuit Judge*, dissenting:

I am unconvinced that Richard Allen DuFour, Jr., should be poured out of court. My concerns stem from two interrelated problems—the *Daubert* standard and the choice of law ambiguity in the case before us.

I

In 2010, an explosion occurred on the *Deepwater Horizon* oil rig, which sat several miles off the Gulf of America. After the explosion, crude oil and other substances began to flow into the Gulf. This slurry contained various chemicals: ethylbenzene, toluene, xylene, naphthalene, polycyclic aromatic hydrocarbons, and several heavy metals, among other substances. In response, the well's operator, BP (formerly British Petroleum), began to purchase various chemicals to help clean up the mess. These included Corexit® EC9500A and Corexit® EC9527A. These products are hazardous and can cause a variety of serious ailments, ranging from nausea to organ damage.

DuFour was a cleanup worker. He alleged that he was exposed to "oil, other hydrocarbons, chemical dispersants, and other substances when his eyes, nose, mouth, . . . skin, and airways were exposed." ROA.310. DuFour alleged that as a result of exposure to BP's toxic substances, he was diagnosed with asthma secondary to oil spill exposure. DuFour also pleaded that he was diagnosed with other conditions such as depressive disorder.

To support his claims, DuFour submitted several expert reports. Two merit emphasis here.

First, DuFour submitted an expert report and supplemental report from Dr. Michael D. Freeman. ROA.2492–2574; ROA.2576–2592. Most relevant here, Dr. Freeman submitted a scientific study involving 24,937

individuals who worked on the Deepwater Horizon cleanup. This is how Dr. Freeman summarized the study:

> Study authors found that working in the oil spill cleanup effort in any capacity was associated with a higher risk of incident asthma (adjusted risk ratio [RR] 1.60; 95% confidence interval [CI], 1.38, 1.85). Compared to workers with the lowest level of THC [total hydrocarbon] exposure, those with the highest THC exposure had an increased risk for asthma of 2.95 (95% CI, 2.33, 3.74). A linear trend was observed for increasing THC across 5 categories (quintiles), with $p < 0.0001$ after adjustment for age, gender, race, ethnicity, smoking status, pack-years, previous oil spill cleanup work, previous oil industry experience, education, and exposure to burning/flaring oil/gas. Asthma risk also increased with increasing exposure to individual BTEX-H chemicals [benzene, toluene, ethylbenzene, o-, m-, and p-xylenes and n-hexane] and the *chemical mixture*. Each quartile increase in the BTEX-H mixture was associated with an increased asthma risk of 1.45 (95% CI; 1.35, 1.55). They also observed that exposure to $PM_{2.5}$ [particulate matter 2.5 µm and smaller] from burning/flaring was associated with increased asthma risk.

ROA.2577 (emphasis original). That is, in a study involving more than 24,000 Deepwater Horizon cleanup workers, exposure to the chemicals in the BP oil spill was connected to statistically significant increases in asthma. ROA.2578.

Second, DuFour submitted deposition testimony from his treating physician, Dr. Shawn K. French. ROA.3761–3805. Dr. French testified about DuFour's health history, including his asthma history. Dr. French authenticated DuFour's medical record, which read: "Patient involved with oil spill cleanup has significant exposure to oil fumes, previously diagnosed with asthma as a child clinically, may have work-related asthma secondary to oil spill exposure." ROA.3778. Dr. French testified, in his medical opinion,

that DuFour's cleanup work "worsened his lung function." *Ibid.* He testified that DuFour's asthma "got worse" after he started working on the cleanup crew. ROA.3781. And Dr. French testified, "beyond a reasonable degree of medical certainty, that Mr. Du[F]our's asthma in March 2016 was worse because of work he did, [specifically] oil spill cleanup in the 2010 to 2011 time frame." ROA.3779.

The district court struck Dr. Freeman's testimony in full. And the district court excluded all of Dr. French's testimony regarding causation.

II

We cannot uphold the district court's *Daubert* ruling without first identifying the relevant substantive law. That is because Federal Rule of Evidence 702 and *Daubert* depend on the substantive law applicable to the plaintiff's claim. I (A) explain the relevant rules, (B) offer an illustration, and (C) apply the legal principles to this case.

A

Start with Rule 702. It ensures "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*." FED. R. EVID. 702(a) (emphasis added). What are the "fact[s] in issue"? The Federal Rules obviously do not say. That's because the "fact[s] in issue" come from the underlying substantive law that governs the plaintiff's claims.

Daubert itself confirms this:

> The consideration has been aptly described by Judge Becker as one of 'fit.' 'Fit' is not always obvious, and *scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes*. The study of the phases of the moon, for example, may provide valid scientific 'knowledge' about whether a certain night was dark, and if darkness is a fact in issue, the

> knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591 (1993) (emphasis added; citations omitted). That is, Rule 702 and *Daubert* require a "fit" between the expert's opinion and the relevant dispute in the case; the relevant dispute in the case, in turn, is a question of substantive law (not the Federal Rules of Evidence). That is why the Ninth Circuit, on remand in *Daubert*, explained:

> [The Supreme Court's decision] stressed the importance of the 'fit' between the testimony and an issue in the case[] . . . . Here, the pertinent inquiry is causation. In assessing whether the proffered expert testimony 'will assist the trier of fact' in resolving this issue, *we must look to the governing substantive standard*, which in this case is supplied by California tort law.

Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1320 (9th Cir. 1995) (emphasis added).

Take for example *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994)—written by the same JUDGE BECKER who was quoted with approval in *Daubert*. In *Paoli*, the Third Circuit held that Pennsylvania's requirement that a medical causation expert testify with a "reasonable degree of medical certainty" was "an element of [a] plaintiff's burden of proof." *Id.* at 750–51. It did so because a Pennsylvania court had held that "if the plaintiff's expert cannot form an opinion with sufficient certainty so as to make a professional judgment, there is nothing on the record with which a factfinder can make a decision with sufficient certainty so as to make a legal judgment." *Id.* at 751 (quotation omitted). And the court emphasized that, "because we are analyzing reliability for the purposes of litigation not for purposes of science,

the substantive standard of causation can affect the standard of admissibility." *Id.* at 760 n.31; *see also, e.g.*, *Briggs v. Wash. Metro. Area Transit Auth.*, 481 F.3d 839, 845–46 (D.C. Cir. 2007) (holding a plaintiff must provide expert testimony regarding the standard of care because it was required by District of Columbia law).

B

Consider an illustration. A plaintiff, James, alleges that he used to be perfectly healthy. Then, while staying at a hotel in State A, James felt a pinch on his arm and saw a spider scamper away. The next day, James's arm is swollen and painful, and it features a puncture wound. The State A Supreme Court previously held: "A plaintiff in a spider-bite suit has not shown causation without expert testimony relying on a peer-reviewed study in which the plaintiff would have been an eligible participant. The study must show a particular kind of spider can cause a particular kind of injury." *Hypothetical Plaintiff v. Hypothetical Defendant* (State A 1999). James brings his spider-bite suit in federal court, invoking its diversity jurisdiction. The court applies State A's law, including the *Hypothetical Plaintiff* decision. James offers causation testimony from two Ph.D. arachnologists, but neither can point to a study in which James would be eligible to participate: James is a lifetime smoker, and the relevant studies excluded smokers. The district court strikes the arachnologists' testimony and enters summary judgment for the hotelier.

Why? Because State A's causation rule is a substantive rule that frames the "fact[s] in issue." FED. R. EVID. 702(a). It applies in federal court under *Erie* just like any other element of James's state-law claim. And without the kind of expert testimony required by the State A Supreme Court, James cannot meet his burden of proof at trial.

Two years after his first spider bite, James stays at a hotel in State B. State B's courts also require expert causation testimony in spider-bite cases, but don't require a study in which the plaintiff would have been an eligible participant. Ever prone to bad luck, James again suffers a spider bite. And he again sues in federal court—but this time in State B and under State B law. James offers the exact same expert testimony he offered in his State A suit. This time, the district court denies the hotelier's *Daubert* motion.

Why? Because the substantive law underlying James's tort claim in State B allows him to prove causation. The "fact[s] in issue," FED. R. EVID. 702(a)—that is, causation under State B law—can be litigated without regard to James's hypothetical eligibility for his experts' studies. Could the district court sitting in State B nevertheless strike the arachnologists' testimony because Rule 702 requires particular types of expert testimony even when State B's underlying law does not? I am skeptical.

The upshot is that the substantive law governing a tort plaintiff's suit affects the *Daubert* analysis. District courts must reach different *Daubert* rulings when applying State A's law and State B's law to factually identical spider-bite suits. Which raises the question: Whose substantive law applies to DuFour's suit?

C

We do not know.

The operative complaint does not tell us if we are supposed to apply general maritime law or state tort law. It invokes both diversity jurisdiction and admiralty jurisdiction. ROA.305. Then it alleges: "Since BP Defendants have stipulated to fault and this is equivalent to negligence, BP Defendants are responsible for any and all damages that were proximately caused as a result of this event." ROA.307. Negligence under whose law? General

maritime law? Some other federal common law? Mississippi law? The law of some other State?

The plaintiff's (and the majority's) invocation of admiralty jurisdiction does not answer the question. It is well settled that "[t]he exercise of admiralty jurisdiction . . . does not result in automatic displacement of state law." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996) (quotation omitted) (maritime tort case); *see also Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313–14 (1955) (holding state law is not automatically displaced in interpreting maritime contracts); *N.H. Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1198 (5th Cir. 1993) (same).

The choice of law clause in the Medical Settlement Agreement also does not resolve the issue. By its terms, the agreement selects general maritime law for the "interpretation" of the agreement and release—not to govern BELO litigation. *Deepwater Horizon* Medical Benefits Class Action Settlement Agreement, as Amended on May 1, 2012, § XXX.P, *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, 295 F.R.D. 112 (E.D. La. 2013) (No. 10-MD-02179), Dkt. No. 6427-1.

The parties' supposed "agreement" on what law applies also does not answer the question. Such an agreement during litigation "is no more binding on us than any pretrial stipulation as to the content" of applicable law—which is to say, not at all. *Ezell v. Hayes Oilfield Const. Co.*, 693 F.2d 489, 492 n.2 (5th Cir. 1982).

And for the majority's part, it sometimes points to general maritime law. *Ante*, at 3. Then it points to Mississippi law. *Ante*, at 14–15. What substantive tort rule in these jurisdictions requires plaintiffs to offer expert testimony over and above what DuFour proffered? The majority does not say.

III

So if we do not know which law applies to DuFour's claim, what is the basis for striking DuFour's experts? The majority seems to fall back on a federal common law causation standard that supposedly governs toxic tort cases generally. Pursuant to that standard, plaintiffs must connect specific dots in specific ways, the majority says. Again, I am skeptical of this analysis.

DuFour offered testimony on causation. Dr. Freeman pointed to the Lawrence Study, a study of more than 24,000 Deepwater Horizon cleanup workers. He relied on the study's finding that exposure to BP's oil spill was associated with a statistically significant increase in asthma. And Dr. French testified that DuFour worked on the Deepwater Horizon cleanup crew and thereafter reported worsened asthma.

The district court nitpicked these reports, but in my view, none of its criticisms are persuasive—even on their own terms.

Take, for example, Dr. Freeman's analysis of the Lawrence Study. He candidly acknowledged: "One limitation of the [Lawrence S]tudy is possible misclassification and over reporting of asthma due to the utilization of self-reported wheezing in the case definition." ROA.2578. The district court seized on this, said it meant the study was irrelevant, and faulted Dr. Freeman for ignoring it: "It was incumbent upon Dr. Freeman to demonstrate that his reliance upon the Lawrence Study was nevertheless reliable despite this study limitation, but he has made no effort to do so." ROA.9643–44. With all respect to the district court, this is objectively false. Dr. Freeman *did* address the potential shortcomings by noting they "fail[ed] to explain the findings described by the [Lawrence Study's] authors, however, *including trend for exposure*." ROA.2578 (emphasis added). That is, the Lawrence Study showed a linear relationship between exposure and asthma—an effect that

cannot be explained by self-reported wheezing because, however asthma is defined, the effect increased linearly.

The majority concedes that both the coefficient and the *p*-value for this study satisfy *Daubert*. *See ante*, at 17–18. I am glad we have agreement on that—but the biased and scandal-ridden "Reference Manual on Scientific Evidence" should have nothing to do with it. *Contra id.* at 17–18 & n.62 (relying on this discredited "Manual"); *see generally* Letter from John B. McCuskey, W. Va. Att'y Gen., et al., to Hon. Robin L. Rosenberg, Dir., Fed. Jud. Ctr. (Jan. 29, 2026), https://perma.cc/A2BN-DHL6 (letter from 27 State Attorneys General detailing the Manual's problems). The majority nevertheless says that this entire case should end now because there's some critical difference between asthma incidence and asthma severity—even though the Lawrence Study shows a statistically significant and linear relationship between oil dose and asthma response. That slices the salami far too thin. If X demonstrably and linearly causes Y, then a factfinder could reasonably find that X exacerbates Y. The majority points to no substantive law—maritime, Mississippi, or otherwise—that prevents a plaintiff from proving causation using this commonsense inference.

Similarly, the district court said the Lawrence Study was irrelevant because it studied 24,000 people who did not have asthma before the Deepwater Horizon spill. Because DuFour had long suffered from asthma, the district court reasoned, he could not have been included in the study; the study was therefore irrelevant; and Dr. Freeman's reliance on it violated *Daubert*. ROA.9644. Again, with deepest respect to the district court, this misses the mark. Neither BP nor my esteemed colleagues in the majority cite any case from any court applying any substantive law that ever held an expert cannot rely on scientific studies unless the plaintiff himself qualified as a subject of the study.

I could go on, but you get the point. The district court struck DuFour's experts without identifying any substantive law that supposedly requires the evidentiary showing it demanded. The district court's criticisms of Dr. Freeman in particular are self-defeating. Dr. Freeman relied on a scientific study of Deepwater Horizon cleanup workers and a reported p-value < 0.0001. In other words, if there were no association between cleanup work and asthma, the probability of observing results this extreme was less than one in ten thousand. Striking that as "*ipse dixit*" in a case involving a Deepwater Horizon cleanup worker, ROA.9645, makes as much sense as striking the report for using a disfavored font.

I respectfully dissent.