NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0142

FRANCIS ROBERTSON, ET AL.

VERSUS

DOUG ASHY BUILDING MATERIALS, INC., ET AL.

Judgment Rendered: DEC 23 2014

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 532,769

Honorable Robert Burns, Judge Ad Hoc

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

WELCH, J.

Plaintiffs, Frances Robertson, Phillis Castille, Leslie Robertson, and Stewart Robinson, appeal a judgment granting defendant Union Carbide Corporation's motion for summary judgment on the issue of causation and dismissing plaintiffs' claims with prejudice. In connection with that appeal, plaintiffs also appeal an interlocutory order limiting the testimony of Dr. Eugene Mark.[1] We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

The relevant factual and procedural history of this case was set forth by this court in three earlier companion opinions, **Robertson v. Doug Ashy Bldg. Materials, Inc.**, 2010-1547 (La. App. 1st Cir. 10/4/11), 77 So.3d 323, writ denied, 2011-2468 (La. 1/13/12), 77 So.3d 972 (referred to hereafter as "**Robertson I**"), **Robertson v. Doug Ashy Bldg. Materials, Inc.**, 2010-1551 (La. App. 1st Cir. 10/4/11), 77 So.3d 360, writ denied, 2011-2431 (La. 1/13/12), 77 So.3d 973 (referred to hereafter as "**Robertson II**") and **Robertson v. Doug Ashy Bldg. Materials**, 2010-1552 (La. App. 1st Cir. 10/4/11), 77 So.3d 339, writs denied, 2011-2468, 2011-2430 (La. 1/13/12), 77 So.3d 972 and 973, writs not considered, 2011-2433, 2011-2432 (La. 1/13/12), 77 So.3d 973 and 974 (referred to hereafter as "**Robertson III**"). Because the factual and procedural history of the current dispute is so closely intertwined with our earlier opinions, we shall set forth in detail the relevant factual, procedural, and legal history of this litigation contained in our prior opinions.

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[1] In two companion cases also rendered this date, plaintiffs separately appealed the trial court's grant of summary judgment in favor of Sherwin-Williams Company, **Robertson v. Doug Ashy Bldg. Materials, Inc.**, 2014-0141 (La. App. 1st Cir. --/--/--), ___So.3d ___(**Robertson IV**) and Union Carbide Corporation, **Robertson v. Doug Ashy Bldg. Materials**, 2014-0143 (La. App. 1st Cir. --/--/--), ___ So.3d ___(**Robertson VI**). The instant appeal is referred to in the companion appeals as **Robertson V.**

Prior Proceedings

On June 30, 2004, Harris Robertson was diagnosed with mesothelioma and died from the disease on November 27, 2004. Claiming that Robertson's mesothelioma was caused by his exposure to asbestos-containing joint compound products while working as a sheetrock finisher, Robertson's wife and children filed this lawsuit against numerous defendants they claimed were responsible for manufacturing, supplying, or selling those products, including Georgia-Pacific, LLC (Georgia-Pacific), Union Carbide Corporation (Union Carbide), and Sherwin-Williams Company (Sherwin-Williams). Plaintiffs alleged that Georgia-Pacific manufactured and sold asbestos-containing products, that Union Carbide sold, distributed, and supplied raw asbestos to joint compound manufacturers, and Sherwin-Williams was a supplier or distributor of asbestos-containing products. In their petition, plaintiffs alleged that Robertson was regularly exposed to asbestos from the joint compound products and did inhale and ingest asbestos dust and fibers, which became airborne during the sheetrock finishing process. **Robertson II,** 77 So.3d at 362; **Robertson III**, 77 So.3d at 342-343.

It is well-settled that to prevail in an asbestos case, a plaintiff must show, by a preponderance of the evidence, that he was exposed to asbestos from the defendant's products and that he received an injury that was substantially caused by that exposure. **Rando v. Anco Insulations, Inc.**, 2008-1163 (La. 5/22/09), 16 So.3d 1065, 1088. Louisiana courts employ a "substantial factor" test to determine whether exposure to a particular asbestos-containing product was a cause in fact of a plaintiff's asbestos-related disease. In an asbestos case, the claimant must show that he had significant exposure to the product complained of to the extent that it was a substantial factor in bringing about an injury. **Rando**, 16 So.3d at 1091.

In **Robertson II**, this court considered the propriety of a motion for summary judgment filed by Union Carbide, in which it contested plaintiffs' ability

to prove that Robertson was actually exposed to Union Carbide's asbestos. Specifically, it asserted that plaintiffs had no evidence to support a finding that Robertson was exposed to any, let alone, frequent and regular exposure to Union Carbide's asbestos, so that such exposures could be found to constitute a substantial contributing factor in the development of Robertson's mesothelioma. According to Union Carbide, at best all plaintiffs could show was that Union Carbide was one of multiple suppliers of raw asbestos to Georgia-Pacific and United States Gypsum (the manufacturers of joint compound products to which plaintiffs claimed that Robertson had been exposed); however, it insisted that plaintiffs could not prove that Union Carbide's asbestos was actually present in the joint compound products Robertson did use.

Evidence was submitted in support of and in opposition to the motion for summary judgment. The trial court granted Union Carbide's motion for summary judgment and plaintiffs appealed. After thoroughly analyzing all of the evidence, this court found that plaintiffs' evidence showed that Robertson had used joint compounds manufactured by Georgia-Pacific and Gold Bond joint compounds, manufactured by United States Gyspum, during the sheetrock finishing process. **Robertson II**, 77 So.3d at 368-369. We observed that plaintiffs offered evidence of the timeline during which Robertson was exposed to joint compound finishing products, evidence that during at least part of that time, Georgia-Pacific's drywall finishing products contained asbestos, and evidence showing that Robertson breathed in dust created during the sheetrock finishing process. We stressed that plaintiffs' failure to offer affirmative evidence pinpointing a specific product, at a specific time, and at a specific location, to which Robertson had been exposed, did not entitle Union Carbide to summary judgment. We found that plaintiffs offered evidence showing that Robertson had been exposed to Georgia-Pacific products, Georgia-Pacific's drywall finishing products contained chrysotile asbestos from

the time it began manufacturing them in 1965 through 1977, Union Carbide targeted the joint-compound product market for the sale of its Calidria asbestos, and Georgia-Pacific purchased raw asbestos fibers to manufacture its asbestos-containing drywall products from Union Carbide. This court concluded that this evidence was sufficient to create an inference that the Georgia-Pacific products to which Robertson had been exposed contained asbestos supplied by Union Carbide. Thus, we found that the evidence was sufficient to create a factual issue as to whether Robertson had been exposed to asbestos supplied by Union Carbide while working as a sheetrock finisher, precluding the entry of summary judgment in favor of Union Carbide on the issue of actual exposure. **Robertson II**, 77 So.3d at 374.

In **Robertson II**, this court noted that plaintiffs' remaining burden on causation was to establish that Robertson's mesothelioma was substantially caused by that exposure. *Id.* We concluded that when the evidence on the motion for summary judgment was considered in light of the well-established medical and legal principles establishing a causal connection between asbestos exposure and mesothelioma, along with the absence of evidence indicating that such exposures were medically significant, a genuine issue of material fact existed as to whether the exposures were a substantial contributing cause of Robertson's mesothelioma, precluding the entry of summary judgment on that issue as well. **Robertson II**, 77 So.3d at 376.

In a companion appeal, **Robertson III**, this court addressed the admissibility of the causation opinion of Dr. Eugene Mark, an expert pathologist on whose opinion plaintiffs intended to rely to establish that Robertson's exposure to asbestos-containing joint compound products was a substantial factor in the development of his mesothelioma. Dr. Mark's causation opinion was set forth in a report and a January 21, 2010 affidavit. On December 18, 2009, Sherwin-

Williams filed a motion strike a portion of Dr. Mark's causation opinion to preclude Dr. Mark from offering what it claimed to be "unreliable testimony" that "any fiber" or "every exposure above background" was a "substantial contributing factor" in causing Robertson's mesothelioma. **Robertson III**, 77 So.3d at 344; **Robertson I**, 77 So.3d at 328. Union Carbide joined in the motion to strike filed by Sherwin-Williams. **Robertson II**, 77 So.3d at 376.

On February 23, 2010, the trial court entered judgment granting Sherwin-Williams' motion to strike a portion of Dr. Mark's testimony to prohibit the doctor from offering testimony that "each of the exposures to asbestos which occurred prior to the occurrence of the malignancy was a substantial contributing factor in the causation" of Robertson's mesothelioma, or "any similar opinion which advances or incorporate the "any exposure above background" or "every fiber" theory." **Robertson III**, 77 So.3d at 344. In so doing, the trial court found that there was no foundation supporting Dr. Mark's causation opinion because Dr. Mark had no epidemiological study to rely on and did not know what the dose of exposure would have been as to any particular defendant. **Robertson I**, 77 So.3d at 329; **Robertson III**, 77 So.3d at 353.

Plaintiffs appealed the trial court's ruling in all of the companion appeals. In **Robertson III**, this court reversed the trial court's ruling limiting the testimony of Dr. Mark. This court thoroughly analyzed Dr. Mark's expert report and his January 21, 2010 affidavit and found that the trial court had mischaracterized the substance of Dr. Mark's testimony. **Robertson III**, 77 So.3d at 354. Regarding Dr. Mark's opinions, this court stated as follows:

> ... Dr. Mark was asked to review the case of Harris Robertson and authored a letter (or expert report) dated August 5, 2008, which was attached as an exhibit to the affidavit. Based on his review of the material, he concluded that Harris Robertson was diagnosed with malignant mesothelioma. As stated in his expert report, Dr. Mark concluded that based on the exposure history, "all special exposures to asbestos contributed to and caused this lethal diffused malignant

mesothelioma." Further, in his opinion, all of Harris Robertson's "special exposures to asbestos were significant contributing factors in the development of his diffused malignant mesothelioma."

Dr. Mark stated that all of his statements in his expert report and in his affidavit were made with a reasonable degree of medical certainty, were based on his knowledge, experience and training, and were based on the materials described in the affidavit. He further stated that the facts stated in the affidavit were sufficient to form a reliable basis for his opinion, that he was familiar with all of the literature cited in the affidavit that were used to formulate his medical opinions in the case, and that the methodology and basis for his opinions were not novel and were generally accepted in the medical and scientific community.

Dr. Mark stated that in formulating his opinion in this case, he reviewed: defense expert reports received by counsel for the plaintiffs, Harris Robertson's medical and billing records, the deposition testimony of Bobby Robertson, Harold Robertson, Raymond Robertson, Frances Robertson, and Octave Otto Gutekunst, and medical studies and literature further detailed in the affidavit.

According to these materials, it was [Dr. Mark's] understanding that Harris Robertson was a career drywall finisher and painter (in residential construction) from the early 1960s through the time of his diagnosis; that the entire drywall finishing process, including the mixing of the dry joint compound, the application of mud, the sanding of the mud, and the clean-up process, was very dusty; and that Harris Robertson and his brothers routinely or mainly used Gold Bond, Welcote, and Georgia–Pacific joint compound (or sheetrock mud). Additionally, he stated that in reaching his opinions, he took into account Harris Robertson's use of a dust mask and respirator during the course of his drywall finishing work.

Dr. Mark emphasized in his affidavit that he did "not believe that exposure to a *single* asbestos fiber can cause mesothelioma or any other asbestos related disease" but rather it was his opinion that "every *special exposure* to asbestos contributes to cause mesothelioma." In determining the relative contribution of any exposure to asbestos, Dr. Mark stated that it is important to consider a number of factors, including, but not limited to: the nature of exposure, the level of exposure and the duration of exposure, whether a product gives off respirable asbestos fibers, whether a person was close or far from the source of fiber released, how frequently the exposure took place, how long the exposure lasted, whether engineering or other methods of dust control were in place, whether respiratory protection was used, the chemistry and physics of asbestos fibers, the pathophysiology of breathing, the movement of asbestos fibers in the lung, the molecular pathology of tumor development, and other scientific disciplines. Additionally, he stated that the "dose response model" for risk assessment has been used by OSHA, NIOSH, and other governmental entities for more than two decades, and that he relied upon the attribution criteria espoused in the

"**Consensus Report, Asbestos, Asbestosis, and Cancer: The Helsinki Criteria for Diagnosis and Attribution,** Scan J. Work Environ Health, 23:311–6 (1997) as applied to the factual evidence" of Harris Robertson's exposures.

Additionally, in Dr. Mark's affidavit, he explained that diffuse malignant mesothelioma is a dose response disease—the more someone is exposed to asbestos, the greater their risk for development of the disease. He stated that he believes there is a dose response relationship between the amount of asbestos to which an individual is exposed and the risk of developing mesothelioma and that this concept is generally accepted in the medical and scientific communities. He further explained that because asbestos dust is so strongly associated with mesothelioma, proof of significant exposure to asbestos dust is proof of specific causation, that the causal relationship between exposure to asbestos dust and the development of mesothelioma is so firmly established in the scientific literature that it is "accepted as a scientific 'fact,' " and that diffuse malignant mesothelioma is known as a "Signal Tumor" for asbestos exposure and indicates prior asbestos exposure, even when the victim cannot recall the exposure which may have occurred years previously or may not have been apparent at the time. Dr. Mark stated that it was his opinion that diffuse malignant mesothelioma is a dose response disease and that the resulting disease is the cumulative result of the exposures to asbestos that a person receives.

Dr. Mark explained that the exposures to asbestos described by Harris Robertson's co-workers (brothers) were not low dose exposures, as the exposures they described in their depositions were high level exposures that occurred for prolonged periods of time, and that each exposure to asbestos-containing dust from the use of products, above background levels, contributes to cause diffuse malignant mesothelioma.

Dr. Mark then concluded that it was his opinion with a reasonable degree of medical certainty that the ongoing exposure to dust from asbestos-containing finishing products, including joint compound, as described by Harris Robertson's co-workers (brothers), and such cumulative exposures from Harris Robertson's work with and around such products substantially contributed to the development of his malignant mesothelioma. Dr. Mark also specifically opined that to the extent that the Gold Bond, Welcote, and Georgia–Pacific products contained asbestos, Harris Robertson's exposure to those finishing products was a substantial contributing factor in his development of malignant mesothelioma. Lastly, Dr. Mark noted that his opinions with regard to the specific causation of Harris Robertson's malignant mesothelioma were based on his review of the evidence of exposure in this case, the medical and scientific literature cited in the affidavit concerning asbestos exposure and disease, and his knowledge, skill, experience and training as a physician who has studied in asbestos diseases for over four decades.

Robertson III, 77 So.3d at 355-357.

After reviewing Dr. Mark's affidavit and expert report, this court concluded that the trial court failed to comply with the mandates of La. C.C.P. art. 1425(F) prior to excluding Dr. Mark's opinion and failed to evaluate or analyze Dr. Mark's opinion under **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993), as adopted by the Louisiana Supreme Court in **Sate v. Foret**, 628 So.2d 1116 (1993). Finding legal error in the trial court's ruling, this court conducted a *de novo* review of Dr. Mark's expert opinion on causation and concluded that Sherwin-Williams failed to meet its burden of proving that Dr. Mark's expert opinions with regard to specific or medical causation were unreliable. **Robertson III**, 77 So.3d at 359.

In **Robertson II**, this court reversed the summary judgment rendered in favor of Union Carbide and reversed the February 23, 2010 judgment granting the motion to strike Dr. Mark's testimony based on the reasons set forth in **Robertson III**. We remanded the case to the trial court for proceedings consistent with our opinion. **Robertson II**, 77 So.3d at 376-377.

Proceedings on Remand and the Present Appeal

Following remand, Union Carbide, Sherwin-Williams, and Georgia-Pacific filed a motion for a **Daubert** hearing on Sherwin-Williams' motion to strike portions of the opinion of Dr. Mark. Although the plaintiffs objected to another **Daubert** hearing on the basis it was unnecessary given this court's decision in **Robertson III**, after a hearing, the trial court granted the motion.[2] Thereafter, the trial court conducted an evidentiary **Daubert** hearing, during which the trial court received testimonial evidence from Dr. Mark, Dr. Suresh Moolgavkar, Dr. Michael Graham, and Dr. William Dyson, as well as volumes of documentary evidence. At the conclusion of the hearing, the trial court rendered judgment granting the motion

[2] From this ruling of the trial court, the plaintiffs filed an application for supervisory writs, which this court denied. (23:5172; 36:8200) See **Robertson v. Doug Ashy Building Materials, Inc.**, et al, 2012-1017 (La. App. 1st Cir. 8/9/12)(*unpublished writ action*).

in part and denying the motion in part. On August 21, 2012, the trial court signed a "**Daubert** order" (or judgment) in accordance with its oral reasons, specifically providing that the trial court was prohibiting testimony from Dr. Mark that each "special exposure" to asbestos constituted a significant contributing factor in the development of the disease, that Dr. Mark was prohibited from giving his definition of "special exposure," but otherwise, that Dr. Mark was allowed to give causation opinions.

On December 7, 2012, Union Carbide filed a motion for summary judgment asserting that plaintiffs could not meet their burden of specific medical causation as to Union Carbide. Specifically, Union Carbide claimed that plaintiffs failed to produce sufficient evidence that Robertson had significant exposure to Georgia-Pacific or Gold-Bond asbestos-containing products that contained Union Carbide asbestos, such that the exposures were a substantial factor in bringing about his injury. They insisted that even if plaintiffs had evidence of exposure to such products (which it denied), plaintiffs could not demonstrate that the asserted exposure to Union Carbide asbestos, if any, was of sufficient frequency, intensity, and duration to constitute a substantial contributing factor to the development of Robertson's disease.

Union Carbide argued that plaintiffs lacked sufficient evidence to demonstrate that Robertson encountered any risk of developing mesothelioma from its Calidria Absestos for the following reasons: (1) plaintiffs cannot establish a dose of its asbestos to which Robertson was exposed because they have not retained an industrial hygienist and have insufficient evidence to calculate or evaluate Robertson's dose exposure; and thus, the failure of plaintiffs to utilize industrial hygiene or epidemiology experts to present some quantification of exposure and risk results in a wholesale failure to meet their burden of proving medical causation; (2) there is significant evidence that Calidria asbestos does not

cause or contribute to the development of pleural mesothelioma (although it notes that there is a continuing and vigorous debate in the scientific community whether chrysotile asbestos can cause mesothelioma at any level of exposure); (3) if it is determined that Calidria asbestos could have contributed in any manner to the development of mesothelioma, then the dose level required to establish causation would be "huge," making it essential for plaintiffs to come forward with concrete evidence of the dates and durations of use of joint compounds that actually contained Union Carbide Calidria asbestos and to offer evidence of long, frequent, and intense exposure to support a large dose attributable to Union Carbide, which plaintiffs have not done; (4) plaintiffs' only expert, Dr. Mark, is unable to establish specific causation as to Union Carbide, as his "special exposure" theory of causation had been stricken by the trial court, leaving plaintiffs with only a flawed and unsupported causation opinion from Dr. Mark. In short, although Union Carbide acknowledged that the record may support Dr. Mark's conclusion that all cumulative joint compound work may have been sufficient to increase Robertson's risk of developing mesothelioma, it insists that plaintiffs cannot establish medical causation because they have hung their entire case on Dr. Mark's "special exposure" theory and have made no effort to evaluate the potency or potential contribution of Robertson's individual alleged exposures as they relate to Union Carbide.

In support of the motion for summary judgment, Union Carbide offered the following evidence: (1) the affidavit of Dr. Suresh Moolgavkar, detailing the reasons why, in his opinion, Dr. Mark's causation opinion is based on flawed methodology; (2) Dr. Mark's January 21, 2010 affidavit; (3) excerpts of the depositions of Frances Robertson, Robertson's wife, his co-workers and brothers, Raoul "Bobby" Robertson, Harold Robertson, Raymond Robertson, and contractors for whom Robertson worked, Ray Montgomery and Glenn Pierret; (4)

Georgia-Pacific's answers to interrogatories in which it set forth in detail a listing of its asbestos-containing products and the years those products were or may have been manufactured; (5) a January 3, 2010 letter written by pathologist Dr. Michael Graham, who opined that Robertson's mesothelioma was caused by his exposure to amphibole asbestos at a sugar mill and household exposure resulting from his father's exposure at the mill, and was not caused or contributed to by chrysotile dust derived from Sherwin-Williams' products to which he may have been exposed; (6) excerpts from the testimony adduced at the **Daubert** hearing, including the testimony of: (a) Dr. Moolgavkar (criticizing Dr. Mark for not taking into account the lack of epidemiological evidence that chrysotile uncontaminated with amphibole increases the risk of developing mesothelioma, but not suggesting that he subscribed to the view that exposure to high levels of chrysotile cannot cause mesothelioma); (b) Dr. Graham (discussing flaws in Dr. Mark's causation opinion, the difference in toxicity levels of chrysotile and amphibole asbestos, the characteristics of Calidria asbestos and factors to take into account when assessing whether exposure to it caused or contributed to mesothelioma, the lack of any scientific study showing that chrysotile asbestos causes mesothelioma in humans, and opining that Robertson suffered from an amphibole-based mesothelioma); (c) industrial hygienist, Dr. Dyson (criticizing Dr. Mark's causation opinion; discussing the factors a scientifically valid methodology for mesothelioma risk assessment should take into account, such as respiratory protection, fiber type, pointing out that his reading of the literature suggests that it takes a fairly significant exposure dose to chrysotile asbestos before you begin to see any risk of mesothelioma; providing an example of how he would go about calculating or estimating dose under the facts of this case; and suggesting that there was no Calidria exposure from a Georgia-Pacific joint compound because of testimony that the brothers used a dry-mix compound; according to Dr. Dyson, "a hundred

percent practically" of Georgia-Pacific's dry mix joint compounds did not contain Calidria asbestos from 1970 to 1977, and the brothers used the ready-mix product in the late 1970s, at a time it did not have asbestos[3]); (7) a March 21, 2005 letter setting forth a causation opinion of Dr. Victor Roggli in an unrelated case, in which he opined that even if a paper mill worker had been exposed to Calidria asbestos, such exposure did not contribute to the worker's mesothelioma based on the fiber type and size of the fiber; (8) an excerpt from Dr. Mark's testimony at the **Daubert** hearing; and (9) a copy of this court's **Robertson II** opinion.

In opposition to the motion for summary judgment, plaintiffs argued that Dr. Mark's causation opinion had not been "gutted," but had been restricted by the trial court in a very limited fashion to prohibit the doctor from using the term "special exposure." Plaintiffs submitted that Union Carbide presented the court with a plethora of red herring arguments. They asserted that Union Carbide's arguments regarding actual exposure to its asbestos is contradicted by the evidence, its argument that Union Carbide's Calidria asbestos does not cause mesothelioma has been overwhelmingly rejected by the scientific community, and Union Carbide was essentially seeking an over-extension of the trial court's very limited **Daubert** ruling.

In opposition to the motion for summary judgment, plaintiffs submitted the following exhibits: (1) excerpts of the depositions of Robertson's co-worker brothers, Harold, Raymond, and Bobby, taken in 2007, 2008 and 2009; (2) a certified copy of Robertson's earnings from 1949 through 2004; (3) excerpts of the deposition testimony of Donald Doty, who worked for National Gypsum Company, which manufactured Gold Bond Products, taken in connection with

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[3] In its answers to interrogatories, Georgia-Pacific identified 15 products it manufactured and/or sold in the 1960s and 1970s that contained chrysotile asbestos, including numerous joint compound, texture products, and topping compounds that were sold as dry white powders packaged in bags. Georgia-Pacific also stated that the last year it manufactured its asbestos-containing ready-mix formula was 1977.

another asbestos lawsuit, who testified regarding the dates in which various Gold Bond joint compound products contained SG-210 asbestos supplied by Union Carbide; (4) documents setting forth the chemical composition of ready mix joint compound from 1969-1972 manufactured at a Westwego plant containing SG-210 asbestos; (5) records of Union Carbide's sales of SG-210 asbestos to National Gypsum's Westwego plant in Louisiana from 1969 through 1975; (6) Georgia Pacific's answers to interrogatories identifying its asbestos-containing products by name and the date such products were manufactured; (7) excerpts of the testimony of Oliver Burch regarding if and when various Georgia-Pacific joint compounds contained asbestos taken in connection with other lawsuits; (8) the deposition testimony of C. William Lehnert identifying Georgia-Pacific joint compound products containing Union Carbide SG-210 through the years 1969 through 1977; (9) a Union Carbide brochure advertising its Calidria asbestos SG-210 and suggesting various uses of it for the tape joint compound industry; (10) an excerpt of the deposition testimony of John Myers, a Union Carbide employee, admitting that Union Carbide aimed for the joint compound market for sales of its Calidria asbestos and recalled an October 1968 brochure regarding the use of Calidria asbestos for tape joint compound customers, taken in connection with another lawsuit; (11) Dr. Mark's December 21, 2012 affidavit setting forth his causation opinion in this case without reference to the term "special exposures" and offering his opinion regarding whether Georgia-Pacific and Gold-Bond joint compound was a substantial contributing factor in the development of Robertson's disease assuming certain facts are proven to be true, along with numerous exhibits attached to that deposition, including articles discussing that chrysotile asbestos, along with all other types of asbestos, has caused mesothelioma; (12) additional articles discussing the cancer mortality among workers exposed to amphibole-free chrysotile asbestos and suggesting that short-fiber chrysotile asbestos may be

harmful; (13) the trial court's **Daubert** order and an excerpt of the transcript setting forth the trial court's granting of the motion in a limited fashion; and (14) an excerpt of Dr. Mark's **Daubert** hearing testimony.

Union Carbide filed a reply to plaintiffs' opposition to its motion for summary judgment, arguing that plaintiffs have neither the factual specificity nor an adequate expert opinion to satisfy their burden of proving specific causation as to Union Carbide. Therein, Union Carbide objected to the admission of Dr. Mark's 2012 affidavit on the basis that it is untimely, offers new expert testimony not subject to cross examination, and seeks to circumnavigate the trial court's **Daubert** ruling.[4] Union Carbide attached the following exhibits to the reply memorandum: (1) Dr. Graham's January 3, 2010 letter setting forth his belief that Robertson's mesothelioma was caused by his exposure to amphibole asbestos; (2) the trial court's **Daubert** order; (3) the telephonic deposition of Dr. Dyson taken in connection with another lawsuit regarding the dates that Georgia-Pacific joint compounds may have contained Union Carbide asbestos; (4) a deposition of Dr. C. William Lehnert taken in connection with another lawsuit acknowledging that in 1970, Georgia-Pacific began using Union Carbide's Calidria asbestos in its products and identifying those products containing SG-210 asbestos; (5) an excerpt from Dr. Dyson's testimony at the **Daubert** hearing, stating that at no time was Union Carbide's Calidria asbestos used in every Georgia-Pacific joint compound or every Gold Bond product, and acknowledging that from 1971-1977, the only Georgia-Pacific product containing Calidria asbestos Robertson could have been exposed to was a premixed joint compound, and indicating that National Gypsum began buying Calidria asbestos for use in its joint compound products manufactured at a Louisiana plant beginning in 1968 and ending in 1975; (6)

[4] Union Carbide also filed a motion in limine to prevent Dr. Mark from testifying in a manner inconsistent with the **Daubert** ruling. This motion was denied by the trial court on the basis of mootness.

excerpts of the deposition testimony of C. William Lehnert in other lawsuits regarding his identification of Georgia-Pacific products that contained asbestos; (7) the trial court's case management order; (8) U.S. Gypsum's discovery responses in another asbestos litigation regarding the formulas of products it manufactured and dates thereof; (9) Georgia-Pacific's answers to interrogatories in a California lawsuit; and (10) the deposition testimony of Dr. Donald Doty in another lawsuit discussing the distribution of National Gypsum joint compound products.

Following a hearing on the motion for summary judgment, the trial court concluded that plaintiffs' evidence did not support the conclusion that Union Carbide's products were a substantial causative factor in the development of Robertson's mesothelioma. The court stated that plaintiffs could not overcome summary judgment with Dr. Mark's causation opinions, plaintiffs do not have causation evidence linking Union Carbide products to Robertson for any duration of time, and plaintiffs do not have evidence establishing any type of frequent regular exposure of Robertson to Union Carbide asbestos that would support a finding that the Union Carbide's Calidria asbestos was a substantial factor in causing Robertson's disease. According to the trial court, Dr. Mark's testimony simply "does not carry the day" because it is of a general nature, and because plaintiffs did not have any evidence of specific causation, the court could not allow the case to go before a jury.

On January 8, 2013, the trial court signed an order granting Union Carbide's motion for summary judgment on specific medical causation and dismissing all of plaintiffs' claims against Union Carbide with prejudice.[5] On January 29, 2013, the trial court signed another judgment granting Union Carbide's motion for summary

[5] The trial court certified the January 8, 2013 judgment as a final judgment pursuant to La. C.C.P. art. 1915, noting there was no just reason for the delay.

judgment on specific medical causation and dismissing all of plaintiffs' claims with prejudice.

This appeal, taken by plaintiffs, followed. Plaintiffs appeal the January 29, 2013 judgment granting Union Carbide's motion for summary judgment and the trial court's interlocutory **Daubert** order limiting the testimony of Dr. Eugene Mark signed on August 21, 2012.[6]

LAW AND DISCUSSION

The issues raised in the previous appeals of this matter, **Robertson I**, **Robertson II**, and **Robertson III**, in the instant appeal **(Robertson V)**, and in the appeals in this matter taken by Sherwin-Williams **(Robertson IV)** and Georgia-Pacific **(Robertson VI)**, have essentially revolved around plaintiffs' burden of proving the cause-in-fact element of their action for damages. Cause-in-fact is a question of fact. **Robertson III**, 77 So.3d at 347; **Rando**, 16 So.3d at 1087.

There is a universally recognized causal connection between asbestos exposure above background levels and the occurrence of mesothelioma. **Robertson III**, 77 So.2d at 349, n.14; **Robertson (I)**, 77 So.3d at 335; see also **Landry v. Avondale Industries, Inc.**, 2012-0950 (La. App. 4th Cir. 3/6/13), 111 So.3d 508, 511. Brief exposures to asbestos may cause mesothelioma in persons decades later and every non-trivial exposure to asbestos contributes and constitutes a cause of mesothelioma. See **Rando**, 16 So.3d at 1091; **Robertson I**, 77 So.3d at 335; **Landry**, 111 So.3d at 511; **Francis v. Union Carbide Corporation**, 2012-1397 (La. App. 4th Cir. 5/8/13), 116 So.3d 858, 862, writ denied, 2013-1321 (La. 9/20/13), 123 So.3d 177. The causal link between asbestos exposure and mesothelioma contraction has been demonstrated to such a high degree of probability, while at the same time, few if any other possible causes have been

[6] Although an interlocutory judgment is generally not appealable, an appellate court may consider the correctness of an interlocutory judgment in connection with the appeal of a final judgment. **People Of the Living God v. Chantilly Corporation**, 251 La. 943, 947-948, 207 So.2d 752, 753 (1968).

identified, that if one is diagnosed as having mesothelioma and that person was exposed to asbestos, that exposure is recognized to be the cause of the mesothelioma. **Robertson I**, 77 So.3d at 335-336.

However, due to the lengthy latency period between exposure to asbestos and manifestation of the asbestos-related disease, cause-in-fact of the plaintiffs' injuries by a particular defendant is considered the "premier hurdle" faced by plaintiffs in asbestos litigation. **Robertson III**, 77 So.3d at 347; **Rando**, 16 So.3d at 1088. To prevail in an asbestos case, the plaintiff must show by a preponderance of the evidence that he was exposed to asbestos and that he received an injury substantially caused by that exposure. **Robertson III**, 77 So.3d at 347; **Rando**, 16 So.3d at 1088. When multiple causes of injury are present, a defendant's conduct is a cause-in-fact if it is a substantial factor in generating plaintiff's harm. **Robertson III**, 77 So.3d at 347; **Rando**, 16 So.3d at 1088.

Mesothelioma can develop after fairly short exposures to asbestos. **Rando**, 16 So.3d at 1091. Simply because a plaintiff suffered asbestos exposure while working only a short period for an employer and had longer exposures while working for others, it cannot be said the relatively short asbestos exposure was not a substantial factor in causing his mesothelioma. *Id.*

In **Robertson III**, 77 So.3d at 347 and 359, this court noted that the Louisiana Supreme Court addressed the causation problem in asbestos-related disease cases in **Rando**, 16 So.3d at 1091, by relying on the reasoning of **Borel v. Fibreboard Paper Products Corporation**, 493 F.2d 1076, 1094 (5th Cir. 1973), cert. denied, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974), an asbestosis case, which provided as follows:

> [I]t is impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to Borel. It is undisputed, however, that Borel contracted asbestosis from inhaling asbestos dust and that he was exposed to the products of all of the defendants on many occasions. It was also established that

> the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury. We think, therefore, that on the basis of strong circumstantial evidence[,] the jury could find that each defendant was the cause in fact of some injury to Borel.

The **Borel** court also stated that "[w]hether the defendant's conduct was a substantial factor is a question for the jury, unless the court determines that reasonable men could not differ." *Id.*

In **Rando**, the supreme court then noted, that "[b]uilding upon this early observation [in **Borel**], Louisiana courts have employed a 'substantial factor' test to determine whether exposure to a particular asbestos-containing product was a cause-in-fact of a plaintiff's asbestos-related disease." **Rando**, 16 So.3d at 1091. Thus, in an asbestos case, the claimant must show he had significant exposure to the product complained of to the extent that it was a substantial factor in bringing about his injury. **Robertson III**, 77 So.3d at 359; **Rando**, 16 So.3d at 1091. In meeting this burden of proof on causation, the plaintiff is not required to prove the quantitative level of exposure, *i.e.*, the exact or cumulative dose of asbestos or the concentration of asbestos to which the plaintiff was exposed (vis-à-vis air sampling or similar means). See **Robertson III**, 77 So.3d at 359 and **Rando**, 16 So.3d at 1090-1091. Rather, a qualitative evaluation of the exposures to asbestos, *i.e.*, the level, frequency, nature, proximity, and duration of the exposures at issue, can sufficiently prove causation. See **Rando**, 16 So.3d at 1090-1902; **Watts v. Georgia-Pacific Corp.**, 2012-0620 (La. App. 1st Cir. 9/16/13), 135 So.3d 53, 62, writs denied, 2013-2442 and 2013-2444 (La. 4/27/14), 131 So.3d 59.[7] Thus, a

[7] See also **Arabie v. CITGO Petroleum Corp.**, 2010-2605 (La. 3/13/12), 89 So.3d 307, 321-322 (in a toxic chemical exposure case, the plaintiffs' expert did not know the quantitative level of exposure to the chemicals, but instead relied on qualitative information to reach the conclusion that the plaintiffs were exposed to a substantial amount of the toxic chemicals, and further, the defendant's argument that the plaintiffs were required to prove exposure to the chemicals by means of scientific evidence, such as air monitoring data, was specifically rejected).

plaintiff can meet its burden of proving causation through either a *quantitative* or a *qualitative* assessment of asbestos exposure. **Robertson IV**, ____ So.3d ____.

Cause-In-Fact in the Present Case

In this case, with regard to cause-in-fact of Robertson's mesothelioma, plaintiffs will bear the burden of proving that Robertson had significant exposure to the products complained of to the extent that it was a substantial factor in bringing about his mesothelioma. Plaintiffs rely on the expert opinion of Dr. Mark to establish that Robertson's exposure to asbestos-containing joint compounds was a substantial factor in bringing about or causing his mesothelioma—in other words, that Robertson's asbestos exposures were medically significant. As to Union Carbide, plaintiffs must show that Robertson's exposure to Union Carbide asbestos was significant to the extent that it was a substantial factor bringing about his mesothelioma. **Robertson I**, 77 So.3d at 334; **Robertson III**, 77 So.3d at 352. Union Carbide's motion for summary judgment questioned plaintiffs' ability to meet this burden at trial, particularly in light of the trial court's limitation on Dr. Mark's causation opinion testimony. Union Carbide argued in its motion for summary judgment that the court's striking of Dr. Mark's "special exposure" theory left plaintiffs with a flawed and unsupported causation opinion. Before addressing the propriety of the summary judgment, we must determine whether the trial court erred in striking Dr. Mark's causation opinion.

Admissibility of Dr. Mark's Causation Opinion

Much of Union Carbide's brief is devoted to attacking Dr. Mark's causation opinion, which it claims was correctly struck by the trial court because Dr. Mark's opinions on causation are unreliable, circular, and confusing. According to Union Carbide, without any evaluation of the exposure dose relating specifically to Union Carbide, and without the "fictional crutch" of Dr. Mark's "special exposure"

theory, Dr. Mark cannot testify that Robertson's mesothelioma was substantially attributable to Union Carbide's Calidria asbestos.

Plaintiffs contend that the trial court abused its discretion in partially granting defendants' **Daubert** motion to prohibit Dr. Mark from using the term "special exposure" or defining that term because Dr. Mark's use of this phrase was not a methodology, but rather a grammatical choice of words to more precisely express a well-established legal and medical principle. Plaintiffs also argue that Dr. Mark's causation analysis is not circular and that his methodology is soundly based on the scientific method.

In **Robertson IV**, ___ So.3d___, this court agreed with plaintiffs' arguments and held that the trial court abused its discretion in limiting Dr. Mark's testimony. We found that, based on our review of the record, the criticisms or objections that defendants and their experts made with regard to Dr. Mark's causation opinion did not relate to Dr. Mark's methodology and the conclusions derived from the application of that methodology. This court summarized the main focus of the testimony and evidence at the **Daubert** hearing as following: (1) Dr. Mark's use of the term "special exposures;" (2) the medical and scientific studies that Dr. Mark did or did not rely on when formulating his opinion on causation; (3) Dr. Mark's assumption that absent radiation or erionite exposure, mesothelioma is caused by asbestos exposure, without regard to the possibility of spontaneous or idiopathic mesothelioma; (4) whether Dr. Mark took into account the potency of different asbestos fiber types—i.e., chrysotile vs. amphibole asbestos; and (5) Dr. Mark's failure to quantify dose. *Id.*

This court concluded that Dr. Mark's use of the term "special exposure" was simply intended to reflect the exposures that Dr. Mark considered, based on a qualitative assessment of the exposures, to have substantially contributed to causing mesothelioma and the exposures that could be excluded as having

substantially contributed to it. We concluded that the term "special exposure" was a phrase chosen by Dr. Mark to express the results of his methodology for determining causation of mesothelioma, and it was not part of his methodology. *Id.*

Regarding the methodology employed by Dr. Mark in reaching his conclusion that Robertson's mesothelioma was caused by his special or cumulative exposures to asbestos, this court found that the evidence established that Dr. Mark followed and based his opinion on a scientifically valid method and that he properly applied that method in this case. In reaching this conclusion, this court considered defendants' expert witnesses' attacks on Dr. Mark's causation opinion.

First, we discussed Dr. Moolgavkar's criticism that Dr. Mark did not review and consider all of the available epidemiological evidence on the issue of chrysotile exposure and mesothelioma. We noted that Dr. Moolgavkar admitted that Dr. Mark had relied on epidemiological studies, but simply disagreed that those studies supported Dr. Mark's conclusions. We concluded that to the extent that Dr. Mark may not have reviewed all of the epidemiological evidence Dr. Moolgavkar deemed appropriate and to the extent that Dr. Mark relied on case studies that Dr. Moolgavkar deemed inappropriate, these factors affect only the weight to be afforded to Dr. Mark's conclusions and may serve as a basis for attack by the defendants during cross-examination of Dr. Mark at trial; however, such factors did not make Dr. Mark's opinion evidence unreliable or inadmissible under **Daubert**. *Id.*

We also addressed Dr. Moolgavkar and Dr. Graham's criticism of Dr. Mark for, in their opinion, failing to take into account the fact that amphibole asbestos is a far more potent mesotheliogen than chrysotile asbestos. We noted that Dr. Mark did acknowledge that there were physical, chemical, and potency differences between various fiber types; however, Dr. Mark believed that, in accordance with

scientific and cancer research organizations, **all** commercial types of asbestos were capable of causing diffuse mesothelioma and there was no known safe level of exposure to asbestos. We further observed that the issue of the potency difference between the two types of asbestos fibers was a factual matter for the jury to consider in determining whether, in this case, there was sufficient exposure to chrysotile asbestos to substantially contribute to Robertson's mesothelioma. *Id.*

Lastly, we discussed Drs. Moolgavkar and Dr. Graham's criticism of Dr. Mark's failure to make a quantitative cumulative assessment of the dose of asbestos to which Robertson was exposed. We noted that Dr. Mark admitted that he had made no quantitative calculation of Robertson's cumulative exposure to asbestos because the data was not available. However, the record revealed that Dr. Mark did a qualitative assessment of Robertson's exposures; that is, he evaluated the exposures based on their frequency, based on their proximity, and based on their intensity, and determined that Robertson had substantial, sequential, incremental, heavy exposures to chrysotile fibers for long periods of time (19 years) and that these exposures constituted special exposures. *Id.*

For all of the reasons expressed in **Robertson IV**, we hold that the trial court abused its discretion in granting, in part, Union Carbide's motion to strike and prohibiting Dr. Mark from testifying that each "special exposure" to asbestos constituted a significant contributing fact and in prohibiting Dr. Mark from giving his definition of the term "special exposure". Accordingly, the August 21, 2012 judgment of the trial court is hereby reversed.

Summary Judgment Law

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Robertson III**, 77 So.3d at 345. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is

no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); **Robertson III**, 77 So.3d at 345-346.

Summary judgments are reviewed on appeal *de novo*. **Robertson III**, 77 So.3d at 346. Thus, this court uses the same criteria as the trial court in determining whether summary judgment is appropriate—whether there is a genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. *Id.*

On a motion for summary judgment, the initial burden of proof is on the moving party. If, however, the moving party will not bear the burden of proof at trial on the matter before the court, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the non-moving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); **Robertson III**, 77 So.3d at 346. Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Robertson III**, 77 So.3d at 346; see also La. C.C.P. art. 967(B). Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. **Robertson III**, 77 So.3d at 346.

A "genuine issue" is a "triable issue," that is, an issue on which reasonable persons could disagree. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. *Id.* In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Id.*

A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Id.* Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can only be seen in light of the substantive law applicable to the case. *Id.*

On the issue of causation, plaintiffs have submitted an expert medical opinion that Robertson's exposures to dust from asbestos-containing finishing products, such as those described by Robertson's co-workers and such cumulative exposures from his work with and around such products, substantially contributed to Robertson's development of mesothelioma. According to Dr. Mark, to the extent that Gold Bond and Georgia-Pacific's joint compound products contained asbestos, Robertson's exposure to those finishing products was a substantial contributing factor in the development of his disease. In his affidavit, Dr. Mark explained that the exposures to asbestos described by Robertson's brothers in their depositions were not low level exposures, but were high level exposures that occurred for prolonged period of times, and that each exposure to asbestos-containing dust from the use of these products, above background levels, contributed to cause Robertson's mesothelioma. See **Robertson III**, 77 So.3d at 335-357. Thus, in light of our ruling in **Robertson IV**, Dr. Mark may provide the requisite expert medical testimony to support a finding that Robertson's exposures to Georgia-Pacific and Gold Bond's joint compound products that contained Union Carbide Calidria asbestos was a substantial contributing factor in causing his mesothelioma.

To succeed at trial against Union Carbide, plaintiffs must demonstrate that joint compound products to which Robertson was exposed contained Union Carbide asbestos. Plaintiffs submit that Union Carbide's most recent motion for summary judgment essentially raises the same issues that this court resolved in

Robertson II, as both motions assert that plaintiffs did not prove that Robertson was exposed to a specific quantity of Union Carbide asbestos sufficient to result in the exposure's contribution to his mesothelioma. They point out that Union Carbide's motion attacks plaintiffs' lack of evidence of "dose" of exposure; however, they note that Louisiana law does not require a proof of a "dose" or amount of asbestos in order to prove that the exposure was a substantial factor, so long as the exposure is a non-trivial, above-background exposure. Lastly, plaintiffs submit that there are material issues of fact in dispute regarding the only "new" issue in Union Carbide's motion, that is, whether its particular kind of asbestos causes mesothelioma.[8] We agree.

Both of Union Carbide's motions for summary judgment assert that plaintiffs lack evidence that Robertson's exposure to its Calidria asbestos played any part, let alone that it was a substantial factor, in increasing Robertson's risk of developing mesothelioma. In this appeal, Union Carbide contends that plaintiffs do not have sufficient factual information to identify a specific Georgia-Pacific or Gold Bond product containing Union Carbide asbestos that Robertson was exposed to in relation to a specific time period. Union Carbide asserts that plaintiffs' failure to identify a specific product in relation to a specific time period precludes plaintiffs from establishing medical causation with respect to Union Carbide.

In **Robertson II**, this court specifically found that plaintiffs' failure to offer evidence pinpointing a specific product, at a specific time, to which Robertson had been exposed, did not entitle Union Carbide to summary judgment

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[8] Plaintiffs submitted Dr. Mark's December 2012 affidavit in opposition to the motion for summary judgment. According to plaintiffs, that affidavit removed Dr. Mark's "special exposure" terminology, Dr. Mark posited hypothetical questions about the type of exposure at issue, and Dr. Mark offered his opinion that the exposure, if it occurred, was a contributing cause because it was a substantial factor in bringing about Robertson's mesothelioma. Union Carbide objected to the admissibility of this affidavit on a number of grounds and attacks the affidavit in this appeal. Because we have upheld the admissibility of Dr. Mark's causation opinion as reflected in his earlier affidavit and in his **Daubert** testimony, the December 2012 affidavit is not necessary to defeat Union Carbide's motion for summary judgment, and we do not address Union Carbide's challenges to the December 2012 affidavit in this appeal.

on the issue of exposure to its asbestos. We concluded that the evidence submitted by plaintiffs in opposition to Union Carbide's motion for summary judgment was sufficient to create an inference that the Georgia-Pacific products to which Robertson was exposed contained asbestos manufactured by Union Carbide. **Robertson II**, 77 So.3d at 376. Furthermore, in **Robertson II**, this court stressed that plaintiffs submitted evidence in opposition to Union Carbide's motion for summary judgment on the exposure issue showing that Robertson's co-workers identified Gold Bond joint compound products as products they and Robertson worked with during the 1960s and 1970s. **Robertson II**, 77 So.3d at 364.

In connection with the instant motion for summary judgment, there is evidence showing that National Gypsum, the manufacturer of numerous products used in the sheetrock finishing process under the name Gold Bond, began purchasing Calidria asbestos from Union Carbide around 1968 and by the end of 1975, had removed Calidria from all of its joint compound formulations. Plaintiffs offered evidence that Robertson used Gold Bond joint compound products during the 1960s and 1970s through the testimony of: (1) Harold Robertson, who worked with Robertson in the 1960s through 1970s, and identified Gold Bond dry mix powder and ready-mix joint compound products and Gold Bond texture products as products he and Robertson used; (2) Raymond Robertson, who worked with Robertson in the 1970s and 1980s in Lafayette, and identified Gold Bond dry mix powder as the product they used "all the time" for the walls and also used Gold Bond ready-mix joint compound; some of the specific products he recalled using include two Gold Bond topping compounds, Gold Bond Velvet Triple T compound and Stay Smooth Compound and Gold Bond Quick Treat Joint Compound; and (3) Bobby Robertson, who worked with Robertson in the 1960s and 1970s, and testified that they used Gold Bond dry mix and ready-mix joint compound products, and he observed Robertson mixing, applying, and sanding Gold Bond

joint compound during that time. Plaintiffs also offered evidence that from 1971-1974, Union Carbide supplied SG-210 asbestos to National Gypsum, which was found in the formulas of various Gold Bond joint compound products and that from 1969-1972, a ready-mix joint compound product manufactured at National Gypsum's plant in Westwego, Louisiana, contained SG-210 asbestos from 1969 through 1972. Additionally, plaintiffs offered Union Carbide sales records and invoices showing sales of SG-210 asbestos to the Westwego facility from 1969 through 1975. We find this evidence is sufficient to create an issue of fact as to whether Robertson was exposed to Union Carbide asbestos from Gold Bond joint compound products.[9] Coupled with evidence submitted by plaintiffs with respect to Georgia-Pacific's joint compound products, we find, as this court did in **Robertson II**, that plaintiffs have produced sufficient evidence to defeat Union Carbide's motion for summary judgment on the issue of Robertson's exposure to Union Carbide asbestos in Georgia-Pacific and Gold Bond sheetrock finishing products.

Union Carbide also contends that it is entitled to summary judgment on the issue of causation because plaintiffs lack evidence setting forth a credible assessment of exposure intensity and toxicity, which, Union Carbide claims, is essential to meet plaintiffs' burden of proof on causation. Union Carbide suggests

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[9] See also **Robertson III**, 77 So.2d at 352, wherein this court found that plaintiffs put forth sufficient evidence to defeat Sherwin-Williams' motion for summary judgment on the issue of Robertson's exposure to asbestos-containing joint compounds sold by Sherwin-Williams, finding that there were genuine issues of fact as to whether Gold Bond joint compound products contained asbestos and whether Robertson routinely and regularly used and inhaled (and thus was significantly exposed to) asbestos-containing Gold Bond joint compound products, and whether Robertson purchased the asbestos-containing Gold Bond products from Sherwin-Williams stores. This court observed that the evidence on the motion for summary judgment showed that National Gypsum manufactured numerous Gold Bond joint compounds that contained asbestos and that its dry joint compounds and cements contained asbestos from approximately 1935 through late 1975, that National Gypsum purchased its asbestos fibers from Johns-Manville in the 1960s, and in 1967, began purchasing asbestos from Union Carbide. This court specifically concluded that Sherwin-Williams, which sold Gold Bond products manufactured by National Gypsum, was not entitled to summary judgment on the issue of whether Robertson had substantial asbestos exposure from products purchased at Sherwin-Williams' stores. *Id.*

that the best method of conducting this type of analysis is through some assessment of dose. It cites the fact that plaintiffs have not retained an industrial hygiene expert to testify regarding the intensity of the alleged exposures or to evaluate the potential exposure dose in total or that is associated with each defendant in this litigation. Union Carbide points to the testimony of industrial hygiene expert Dr. Dyson, who testified that four factors must be considered in determining risk with regard to asbestos exposure: (1) exposure dose; (2) asbestos fiber type; (3) asbestos fiber dimensions; and (4) latency period, as well as testimony discussing the importance of respiratory protection in evaluating dose for asbestos exposure. Union Carbide contends that by failing to offer any objective evaluations of exposure intensity or dose, plaintiffs cannot attribute a specific exposure amount, or risk, to a specific defendant. In short, Union Carbide posits, when the "junk science" is stripped away, and the actual evidence is evaluated, plaintiffs are left with nothing but conjecture with regard to Union Carbide as to causation.

In **Robertson IV**, this court squarely rejected the argument that plaintiffs must present evidence of a quantitative estimation of the dose of asbestos to which Robertson was exposed from each of the defendants' products to meet their causation burden. Instead, we held that an asbestos claimant may meet the burden of proving causation through either a *quantitative* or a *qualitative* assessment of asbestos exposure, and that Dr. Mark had done a qualitative assessment of Robertson's exposures in rendering his causation opinion. **Robertson IV**, ___ So.3d ___. In opposition to the motion for summary judgment, plaintiffs presented that portion of Dr. Mark's **Daubert** testimony wherein he provided a qualitative assessment of Robertson's asbestos exposure, stating that the fiber years of asbestos exposure Robertson would have had was long, and the dose to which he would have been exposed would have been heavy during the time he was breathing in dust, noting that chrysotile would have been released when Robertson was doing

sanding and clean-up as a drywall worker. Dr. Mark also stated in his affidavit that he took into account Robertson's use of a dust mask and respirator during the course of his drywall finishing work in rendering his causation opinion.

We have examined all of the evidence submitted in connection with Union Carbide's motion for summary judgment, and we conclude that material issues of fact exist as to whether Robertson was exposed to harmful levels of Union Carbide asbestos in the joint-compound, texture, and topping compound products he used while working as a sheetrock finisher. In determining the relative contribution of Robertson's exposures to Union Carbide asbestos in causing his mesothelioma, there are a host of relevant factors for a trier of fact to consider, including: (1) the nature of the exposure, the level of the exposure, and the frequency and duration of the exposure; (2) whether respiratory protection was used and the effectiveness of the respiratory protection; and (3) the toxicity level of chrysotile asbestos as opposed to amphibole asbestos. This type of inherently fact-intensive inquiry will require assessing the credibility of the witnesses, particularly expert witnesses, and the weighing of all of the evidence. However, in ruling on a motion for summary judgment, a court is prohibited from evaluating the evidence or determining the truth of the matter, and may only determine whether there is a triable issue of fact. **BLPR, Inc. v. National Gaming, Inc.**, 2010-1221 (La. App. 1st Cir. 4/6/11), 64 So.3d 779, 784.

Based on our *de novo* review of the evidence, we find that plaintiffs have sufficiently demonstrated that there are genuine issues of fact as to whether Robertson had significant exposure to Union Carbide asbestos found in Georgia-Pacific and Gold Bond joint compound, topping, and texture products to the extent that it was a substantial factor in bringing about Robertson's mesothelioma. Therefore, Union Carbide is not entitled to summary judgment on the issue of

causation, and we reverse the trial court's judgment granting its motion for summary judgment.

CONCLUSION

Based on the foregoing, the August 21, 2012 "**Daubert** Order" limiting the testimony of Dr. Eugene Mark is reversed, and the January 29, 2013 judgment granting Union Carbide's motion for summary judgment and dismissing plaintiffs' claims against Union Carbide, with prejudice, is reversed. The matter is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to defendant/appellee Union Carbide Corporation.

REVERSED AND REMANDED.