NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 0143

FRANCES ROBERTSON, ET AL.

VERSUS

DOUG ASHY BUILDING MATERIALS, INC., ET AL.

Judgment Rendered: DEC 2 3 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 Georgia-Pacific LLC's motion for summary judgment on the issue of causation and dismissing plaintiffs' claims with prejudice. In connection with that appeal, plaintiffs also challenge an interlocutory order limiting the testimony of plaintiffs' causation expert, Dr. Eugene J. Mark.[1] For the reasons that follow, we reverse both judgments of the trial court and remand for further proceedings.[2]

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**, 2014-0142 (La. App. 1st Cir. --/--/--), ___ So.3d ___(**Robertson V**). The instant appeal is referred to in the companion appeals as **Robertson VI**.

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 asserted 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 I**, 77 So.3d at 325, **Robertson III**, 77 So. 3d at 342.

It is well-settled that in order 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.

Georgia-Pacific, which manufactured joint compound products used in connection with sheetrock finishing that contained asbestos during various years of manufacture, filed two motions for summary judgment (sometimes collectively referred to as Georgia-Pacific's "first motion for summary judgment.") Therein, Georgia-Pacific asserted that plaintiffs, who bore the burden of demonstrating that Robertson sustained significant asbestos exposure from its products, had "no evidence of any exposure to asbestos, much less any significant exposure to asbestos from any Georgia-Pacific product. **Robertson I**, 77 So.3d at 326.

In connection with the motion for summary judgment, both sides introduced evidence regarding Robertson's actual exposure to Georgia-Pacific asbestos-containing joint compound products. This court thoroughly reviewed the evidence and found that the evidence offered by plaintiffs, while largely circumstantial, was sufficient to create a factual dispute as to whether Robertson was exposed to and did inhale or ingest asbestos-containing Georgia-Pacific sheetrock finishing products, precluding summary judgment in favor of Georgia-Pacific on the issue of actual exposure. **Robertson I**, 77 So.3d at 335. Specifically, we found that testimony relied on by Georgia-Pacific from Robertson's co-workers in support of its motion actually provided evidence that Robertson had been exposed to Georgia-Pacific's products while working as a sheetrock finisher. We further stressed that plaintiffs offered evidence of the timeline during which Robertson was exposed to certain Georgia-Pacific sheetrock finishing products through the testimony of his co-workers and brothers, as well as evidence of the time frame during which Georgia-Pacific's sheetrock finishing products contained asbestos through Georgia-Pacific's own answers to interrogatories. Lastly, we noted that plaintiffs' evidence showed that Robertson and his co-workers breathed in dust generated from the sheetrock finishing process. **Robertson I**. *Id.*

In **Robertson I**, this court observed that plaintiffs' remaining burden in a mesothelioma case was to demonstrate that Robertson's mesothelioma was substantially caused by that exposure. Considering the evidence of Robertson's actual exposure to Georgia-Pacific asbestos-containing joint compound products, in light of the well-established medical and legal principles establishing a causal connection between asbestos exposure, along with the absence of any evidence indicating such exposures were medically insignificant or that some "safe" level of exposure to those products had not been exceeded, we concluded that a genuine issue of material fact existed as to whether Robertson's exposures were a substantial contributing cause of his mesothelioma, thus precluding summary judgment in favor of Georgia-Pacific. **Robertson I**, 77 So.3d at 336-337.

In a companion appeal, **Robertson III**, this court addressed the admissibility of the causation opinion by 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 to 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 343-345; **Robertson I**, 77 So.3d at 328. Georgia-Pacific joined in the motion to strike, arguing that plaintiffs' failure to offer actual evidence of Robertson's exposure to its asbestos-containing products rendered Dr. Mark's opinion moot; however, it submitted that even if Robertson was exposed to some of its products, Dr. Mark's opinion that "every exposure" to asbestos contributed to Robertson's disease

should be stricken because it is junk science and patently insufficient to carry plaintiffs' burden on causation. **Robertson I**, 77 So.3d at 328, fn.3.

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 incorporates the 'any exposure above background' or 'every fiber' theory." **Robertson III**, 77 So.3d at 353. In granting the motion to strike, the 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 III**. *Id.*

In **Robertson III**, this court reversed the trial court's ruling limiting the testimony of Dr. Mark. In so doing, 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."
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> 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, 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 **State 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 I**, this court reversed the summary judgment rendered in favor of Georgia-Pacific 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 I**, 77 So.3d at 337.

Proceedings on Remand and the Present Appeal

On remand, Georgia Pacific, Sherwin-Williams, and Union Carbide 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.[3] Thereafter, the trial court conducted an evidentiary **Daubert** hearing, at which the court received testimonial evidence from Dr. Mark, Dr. Suresh Moolgavkar, Dr. Michael Graham, Dr. William Dyson, as well as volumes of documentary evidence. At the conclusion of the hearing, the trial court rendered judgment granting the motion 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

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

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.

Thereafter, on December 5, 2012, Georgia-Pacific filed a motion for summary judgment in which it asserted that under Louisiana jurisprudence, plaintiffs must prove three things: (1) Robertson sustained significant exposure to asbestos from a particular defendant's product; (2) the type of asbestos contained in the defendant's product is capable of causing the injury sustained (described as the "general causation" by element of an asbestos claim by Georgia-Pacific); and (3) the exposure to asbestos from that particular defendant's product was a substantial contributing factor in bringing about the injury (described as the "specific causation" element of an asbestos claim by Georgia-Pacific). In its motion, while disputing that plaintiffs could meet their burden on any element, Georgia-Pacific moved for summary judgment on the basis that plaintiffs could not, as a matter of law, meet their burden of proving that Robertson's exposure to its products was a substantial contributing factor in bringing about his injury.

Georgia-Pacific asserted that summary judgment on the causation issue was warranted on two bases. First, it submitted that in order to establish specific causation, plaintiffs must submit expert evidence, and plaintiffs are unable to do so because Dr. Mark's testimony regarding "special exposures" had been stricken by the court. Georgia-Pacific insisted that Dr. Mark's testimony on special exposures was crucial to Dr. Mark's causation opinion, and without that testimony, Dr. Mark's causation opinion is meaningless.

In its second attack on plaintiffs' ability to prove the causation element of their claim, Georgia-Pacific argued that there is no evidence in the record that Robertson's exposure to its joint compounds, if any, increased his risk of developing mesothelioma. Georgia-Pacific asserted that evidence of dose and fiber

type is necessary when assessing causation in an asbestos case and plaintiffs failed to offer evidence quantifying Robertson's alleged dose from Georgia-Pacific joint compound, choosing instead to rely on Dr. Mark's special exposure theory. According to Georgia-Pacific, without evidence on dose, plaintiffs cannot meet their burden of proving that exposure to Georgia-Pacific joint compound contributed to cause Robertson's mesothelioma. Georgia-Pacific maintained that the undisputed evidence in this case establishes that there is a level of exposure to chrysotile asbestos below which there is no demonstrated risk of developing mesothelioma. It further asserted that these specific facts demonstrate Robertson's exposure to its asbestos-containing products, if any, did not increase his risk of developing mesothelioma: (1) there is evidence that a mild dose of amphibole asbestos will increase the risk of developing mesothelioma, while a much higher exposure to chrysotile is required to increase that risk; (2) Georgia-Pacific's joint compound products contained a relatively small percentage of chrysotile and undisputedly did not contain commercial amphiboles; (3) Robertson's use of a respirator likely reduced any alleged exposures by 80% or more; and (4) Robertson's exposures to Georgia-Pacific joint compound, if any, would have comprised only a portion of his overall exposure to joint compound and, therefore, would be lower than his total exposure to joint compound.

In support of its motion for summary judgment, Georgia-Pacific offered the following evidence: (1) the trial court's **Daubert** Order; (2) a publication entitled "Reference Manual on Scientific Evidence" published by the Federal Judicial Center; (3) Dr. Mark's January 21, 2010 affidavit; (4) excerpts of testimony of Drs. Mark, Moolgavkar, and Dyson adduced at the **Daubert** hearing; and (5) Georgia-Pacific's discovery response to plaintiffs' interrogatories and requests for production, along with a verification of the information contained therein.

In opposition to the motion for summary judgment, plaintiffs argued that contrary to Georgia-Pacific's assertions, Dr. Mark's causation opinion had not been "gutted," but had merely been restricted by the trial court, noting that the trial court stated it was not striking Dr. Mark's causation opinion except in a very limited fashion. Plaintiffs submitted that the fundamental facts of this case are that Robertson was a career painter and sheetrock finisher and Dr. Mark has opined that the products Robertson used during the course of his career each constituted a substantial contributing factor in his development of mesothelioma. Plaintiffs argued that Georgia-Pacific presented the court with a plethora of red herring arguments in its motion for summary judgment that have been contradicted by Robertson's brothers' testimony and by its own answers to interrogatories. Finally, plaintiffs argued that Georgia-Pacific attempted to over-extend the trial court's **Daubert** order.

In opposing the motion for summary judgment, plaintiffs submitted the following evidence: (1) excerpts from the deposition testimony of Robertson's brothers, Harold and Raymond, who worked with Robertson doing sheetrock finishing work; (2) records of the Social Security Administration setting forth Robertson's statement of earnings from 1949 through 2004; (3) Georgia-Pacific's response to its interrogatories and requests for production; (4) excerpts of the deposition and trial testimony of Georgia-Pacific employee Oliver Burch taken in connection with other asbestos lawsuits; (5) excerpts of the deposition testimony of C. William Lehnert, a Georgia-Pacific employee, taken in connection with another asbestos lawsuit; (6) Dr. Mark's December 21, 2012 affidavit[4] and a host of articles on asbestos and mesothelioma accompanying that affidavit; (7) additional

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[4] In the 2012 affidavit, Dr. Mark attested that he had been asked to assume certain facts are proven true regarding Robertson's use of Georgia-Pacific joint compound products and the percentages of chrysotile asbestos found in those products. Under the hypothetical posed to Dr. Mark, he opined that if the facts were proven to be true, this exposure would be a substantial contributing factor in the development of Robertson's disease.

published articles on asbestos and mesothelioma; (8) the trial court's **Daubert** order; (9) excerpts from the **Daubert** hearing transcript including Dr. Mark's testimony and the trial court's ruling; and (10) a 1986 communication regarding removal of asbestos approval for certain respirators.

In a reply memorandum, Georgia-Pacific attacked the admissibility of Dr. Mark's 2012 affidavit, arguing that it is untimely because it constituted a "new" expert report submitted outside the case management deadlines and because it sets forth entirely new opinions based on facts not supported by the evidence. Georgia-Pacific also argued that plaintiffs were improperly relying on the "market share theory of product liability," which has not been adopted in Louisiana, and that plaintiffs failed to present evidence to satisfy their burden of proving specific causation. Lastly, Georgia-Pacific pointed out that plaintiffs failed to provide a list of material facts they contend are genuinely in dispute in response to Georgia-Pacific's statement of uncontested facts, and claimed that as a result, all of the facts set forth by Georgia-Pacific in its statement of undisputed facts, which are properly supported by the evidence should be deemed true, warranting a grant of summary judgment in its favor. Alternatively, Georgia-Pacific moved for a continuance of the trial in the event that the trial court did not strike Dr. Mark's 2012 affidavit. Georgia-Pacific attached the following exhibits to its reply memorandum: (1) the trial court's case management order; (2) a 2008 letter written by Dr. Mark; (3) an excerpt of a telephone deposition of Dr. Mark taken on January 7, 2010; (4) an excerpt of Dr. Mark's testimony at the **Daubert** hearing; (5) and an excerpt of Harold Robertson's 2009 deposition.

On January 8, 2013, a hearing on the motion for summary judgment was held. At the hearing, Georgia-Pacific argued that plaintiffs, with only the testimony of Dr. Mark as limited by the trial court, did not have any competent evidence to establish specific causation as to Georgia-Pacific at trial. The trial

court agreed with Georgia-Pacific's arguments and granted the motion, finding that plaintiffs failed to come forward with evidence that Robertson's exposure to Georgia-Pacific products was a substantial contributing factor in the development of Robertson's disease. The court stated that looking at the type of asbestos fiber in Georgia-Pacific products and dose, the evidence showed that any exposure Robertson had to Georgia-Pacific joint compound did not increase his risk of developing mesothelioma. It then concluded that the only evidence plaintiffs had on causation was Dr. Mark's "general causation" opinion (that exposure to asbestos causes mesothelioma) and that opinion did not "carry the day."

On January 29, 2013, the trial court signed a judgment granting Georgia-Pacific's motion for summary judgment and dismissing all of plaintiffs' claims with prejudice. The judgment further decreed that in light of the court's grant of summary judgments filed by all of the remaining defendants on January 8, 2013, there were no remaining issues or parties in the case, the case was effectively dismissed in its entirety, and the judgment is a final judgment pursuant to La. C.C.P. art. 1915.

Plaintiffs now appeal the January 29, 2013 judgment dismissing their claims against Georgia-Pacific, as well as the August 21, 2012 interlocutory judgment (or **Daubert** order) limiting the testimony of Dr. Mark.[5] (52: 11920) In this appeal, Georgia-Pacific filed a motion for leave to file supplemental citations in support of its original brief; the motion is hereby granted, and we order that the supplemental citations be filed into the record of this proceeding.

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[5] 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).

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 VI)**, and in the appeals in this matter taken by Sherwin-Williams (**Robertson IV**) and Union Carbide (**Robertson V**), 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 I**, 77 So.3d at 335; **Robertson III**, 77 So.2d at 349, n.14; 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 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. *Id.* 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. *Id.*

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, 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 347 and 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 1090-102; **Watts v. Georgia-Pacific Corp.**, 2012-0620 (La. App. 1st Cir. 9/16/13), 135 So.3d 53, 62, writs denied, 2013-2442, 2013-2444 (La. 1/27/14), 131 So.3d 59.[6] Thus, the 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 element of plaintiffs' claim, plaintiffs will bear the burden of proving that Robertson had significant exposure to Georgia-Pacific's asbestos-containing joint compound products to the extent that it was a substantial factor in bringing about his injury. **Robertson I**, 77 So.3d at 334; **Rando**, 16 So.3d at 1091. To meet this burden, plaintiffs rely on the expert

[6] 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).

opinion of Dr. Mark to establish that Robertson's significant exposure to asbestos-containing joint compounds manufactured by Georgia-Pacific was a substantial factor in brining about or causing his mesothelioma—in other words, that Robertson's asbestos exposures were medically significant.

Georgia-Pacific's motion for summary judgment questioned plaintiffs' ability to meet its burden of proving this element of their case particularly in light of the trial court's limitation on plaintiffs' causation expert's testimony. Because the trial court's limitation of Dr. Mark's causation opinion is at the heart of Georgia-Pacific's motion for summary judgment, we must address the propriety of the trial court's evidentiary ruling before addressing the trial court's grant of summary judgment in favor of Georgia-Pacific.

Admissibility of Dr. Mark's Causation Opinion

Georgia-Pacific submits that Dr. Mark's opinion that Georgia-Pacific joint compound substantially contributed to Robertson's disease was not arrived at through valid scientific methodology, and therefore, the trial court correctly excluded Dr. Mark's "special exposure" theory. Georgia-Pacific contends that without Dr. Mark's "special exposure" theory that every exposure above background is "special" and therefore causative, plaintiffs lack the requisite expert testimony to establish that Robertson's alleged exposures to chrysotile fibers from its joint compound products were a substantial contributing factor in the development of his mesothelioma. Therefore, Georgia-Pacific argues, since plaintiffs have no other admissible expert evidence sufficient to meet their burden on causation, their claims must fail as a matter of law.

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**, this court agreed with plaintiffs' arguments and held that the trial court abused its discretion in limiting Dr. Mark's causation 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. **Robertson IV**, ___ So.3d ___.

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 phase 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, many of which have been reiterated and relied upon by Georgia-Pacific as supporting its motion for summary judgment. **Robertson IV**, ___ So. 3d ___.

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**. **Robertson IV**, ___ So.3d at ____.

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 issue 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.

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.

For all of the reasons set forth in **Robertson IV**, we hold that the trial court abused its discretion in granting Georgia-Pacific'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 "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 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. *Id.* La. C.C.P. art. 966(C)(2). 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.*

We have already determined that Dr. Mark may testify at trial that each "special exposure" to asbestos contributes to case mesothelioma. Dr. Mark has opined that with reasonable degree of medical certainty, the ongoing exposure to dust from asbestos-containing joint compound products, described by Robertson's co-workers (brothers) and such cumulative exposures from Robertson's work with and around such products substantially contributed to the development of his mesothelioma, and that to the extent that Georgia-Pacific, Welcote, and Gold Bond finishing products contained asbestos, Robertson's exposure thereto would be substantial contributing factors in the development of his disease. Thus, Dr. Mark may provide the requisite expert medical testimony that Robertson's exposures asbestos contained in Georgia-Pacific joint compound products was a substantial contributing factor in causing his mesothelioma.

Of course, to succeed at trial, plaintiffs must demonstrate that Robertson was in fact exposed to Georgia-Pacific asbestos-containing joint compound products. Plaintiffs submit that in the instant motion for summary judgment, Georgia-Pacific essentially raises the same issues this court resolved in the prior appeal. Plaintiffs point out that Georgia-Pacific's new motion focuses on the lack of evidence of a dose of asbestos to which Robertson was exposed, a point this court squarely rejected in **Robertson III**, and the only "new" issue raised in the motion is whether chrysotile asbestos, the type of asbestos used in Georgia-Pacific's joint compounds, is harmful; however, there is a factual dispute on this issue as well, precluding the entry of summary judgment in favor of Georgia-Pacific.

We agree. Georgia-Pacific's prior and present motions for summary judgment assert that there is no evidence in the record that Robertson's exposure to its joint compound products increased his risk of developing mesothelioma. Both motions essentially contend that plaintiffs cannot prove that Robertson was exposed to a sufficient quantity of asbestos from its joint compound products to

support the conclusion that Robertson's exposure to Georgia-Pacific's asbestos-containing products was a contributing factor in the development of Robertson's mesothelioma.[7]

In the instant motion for summary judgment, Georgia-Pacific focuses on the plaintiffs' lack of evidence of dose or an estimate of a dose of asbestos to which Robertson was exposed. Georgia-Pacific insists that plaintiffs have no evidence quantifying Robertson's alleged dose of asbestos and argue that without evidence of dose or an estimate of dose, plaintiffs cannot prove that Robertson's exposure to its products was "substantial," as opposed to trivial, and therefore, they cannot meet their burden of proving that exposure to Georgia-Pacific's joint compound products contributed to cause Robertson's mesothelioma. However, 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, stating that that the fiber years of asbestos exposure Robertson would have had was certainly long—19 years, and the dose to which he would have been exposed would have been heavy during the time he was breathing

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[7] Georgia-Pacific points out in its brief that it still believes the record supports its position that plaintiffs do not evidence Robertson was exposed to asbestos-containing products manufactured by it; however, it claims that its argument in this appeal is different: that is, even assuming that Robertson sometimes worked with Georgia-Pacific's joint compound products, there is no admissible evidence to meet plaintiffs' burden to prove that any such exposure was a substantial contributing cause of his mesothelioma.

in dust, noting that chrysotile would have been released when Robertson was doing sanding and clean-up as a drywall worker.

In its next series of attacks on plaintiffs' ability to prove causation, Georgia-Pacific contends that plaintiffs cannot show that Robertson's alleged exposures to its joint compound products were sufficient to constitute a substantial contributing factor in the development of Robertson's mesothelioma because: (1) the evidence showed that its joint compound products contained a small percentage of chrysotile asbestos (it admits that between 1965 and 1977, it did sell some joint compound products that contained, "at most" 7% chrysotile); (2) the evidence shows amphibole asbestos is more harmful than chrysotile asbestos, a higher dosage of exposure is required to increase the risk of developing mesothelioma, and there is a level of exposure to chrysotile asbestos at which there is no demonstrated increase in the risk of developing mesothelioma; (3) Robertson's use of a respirator would have decreased his exposures by 80% or more; and (4) there is testimony that given the number of joint compound products Robertson's co-workers identified, any presumed exposures to Georgia-Pacific's joint compound products would have comprised only a portion of Robertson's overall exposure to joint compound, and thus, would be even lower than his total exposure to joint compound. In short, Georgia-Pacific claims that given the facts of this case, Robertson's exposure to joint compound products, regardless of brand, was sufficiently low that it did not increase Robertson's risk of developing mesothelioma.

In support of its argument that any exposure Robertson had to Georgia-Pacific joint compound did not increase his risk of developing mesothelioma, Georgia-Pacific introduced and primarily relies on excerpts of the testimony of Drs. Dyson and Moolgavkar adduced at the **Daubert** hearing. Dr. Moolgavkar criticized Dr. Mark's failure to rely on epidemiological studies addressing whether low-dose exposures to chrysotile increased the risk of mesothelioma, although Dr.

Moolgavkar plainly acknowledged that there may be criticism leveled at these studies. The relied upon excerpt also contains Dr. Moolgavkar's testimony that there is very little information regarding the risks associated with any kind of asbestos exposure below about 15 fiber per cubic centimeter (cc) years; he described any asbestos exposure between 3 and 15 fibers per cc years as a "gray zone," and expressed his belief that anything below 10 to 15 fiber years is a low to moderate exposure. He further stated that below 10 fibers per cc years of exposure to chrysotile fibers would be low, which he acknowledged was ten years of exposure to one fiber per cc.

In the relied upon excerpt of Dr. Dyson's testimony, Dr. Dyson stated that his reading of the scientific literature "at least suggests" that it takes a fairly significant exposure dose to chrysotile asbestos before you begin to see any risk of mesothelioma. He stated that the lowest observed adverse effect in the published literature is in the range of 15 to 25 fiber years per cc, and that it was his understanding that below that level, there essentially is no risk from chrysotile exposure. Dr. Dyson made it clear, however, that he was "not one of those who says that chrysotile won't present a risk of mesothelioma." Dr. Dyson also stated his belief that a scientifically-valid mesothelioma risk assessment has to take into account fiber type, fiber size, and use of respiratory protection. According to Dr. Dyson, the use of a mask would eliminate 80% of the asbestos fibers that Robertson would have inhaled and cartridge respirators Robertson may have used would have provided more than an 80% reduction. However, Dr. Dyson acknowledged that single-use respirators were removed from the acceptable respirator list in the 1980s because of the need for more effective respiratory protection in an asbestos environment.[8]

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[8] In its brief, Georgia-Pacific quotes in length a portion of Dr. Dyson's testimony at the **Daubert** hearing that was not included in the attachments to its motion for summary judgment, in which

We have examined all of the evidence submitted in connection with Georgia-Pacific's motion for summary judgment, and we conclude that material issues of fact exist as to whether Robertson was exposed to harmful levels of asbestos from Georgia-Pacific products in this case. In overcoming Georgia-Pacific's initial motion for summary judgment challenging plaintiffs' ability to demonstrate that Robertson was actually exposed to asbestos from Georgia-Pacific's products, plaintiffs offered evidence of a timeline during which Robertson was exposed to Georgia-Pacific sheetrock finishing products, evidence of the timeline during which Georgia-Pacific's sheetrock finishing products contained asbestos, and evidence showing that Robertson breathed in dust generated from the sheetrock finishing process. In **Robertson I**, we found this evidence, while largely circumstantial, was sufficient to create a factual dispute as to whether Robertson was exposed to and did inhale Georgia-Pacific sheetrock finishing products, precluding the entry of summary judgment in favor of Georgia-Pacific on the issue of actual exposure.[9] **Robertson I**, 77 So.3d at 335.

Moreover, plaintiffs have an expert causation opinion from Dr. Mark in which Dr. Mark reviewed the testimony of Robertson's co-workers and concluded that the exposures to joint-compound products described by the brothers were not low-level exposures, but were high level exposures that occurred for prolonged periods of time. Dr. Mark opined that each exposure to asbestos-containing dust from the use of such products, above background levels, contributed to cause Robertson's mesothelioma. He expressed the opinion, with a degree of medical certainty, that the ongoing exposure to dust from asbestos-containing finishing

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Dr. Dyson testified regarding how he would go about giving a dose estimate in this case based upon his appreciation of the evidence. However, this testimony clearly does not establish that Robertson's exposures to Georgia-Pacific asbestos- containing products was so low that such exposures could not be considered a causative factor in bringing about his disease.

[9] Plaintiffs resubmitted evidence originally submitted in connection with the earlier motion for summary judgment on actual exposure in connection with the instant motion for summary judgment.

compounds as described by Robertson's co-workers and such cumulative exposures to such products substantially contributed to the development of his mesothelioma. Dr. Mark specifically opined that to the extent that Gold Bond, Welcote, and Georgia-Pacific products contained asbestos, Robertson's exposure to those finishing products was a substantial contributing factor in causing his disease.

The relative contribution of Robertson's exposure to Georgia-Pacific asbestos in causing his mesothelioma is an inherently fact-intensive inquiry, requiring the fact-finder to consider a myriad of factors, such as: (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 that protection; (3) the toxicity level of chrysotile asbestos as opposed to amphibole asbestos and the amount of the chrysotile asbestos found in Georgia-Pacific's joint compound products; and (4) whether Robertson may have been exposed to chrysotile asbestos from joint-compound products manufactured by other entities. Based on the evidence submitted on the motion for summary judgment and our review of the trial court's **Daubert** order, we are convinced that the issue of causation can only be resolved by assessing the credibility of the witnesses, particularly expert witnesses, and weighing of all of the evidence. In ruling on a motion for summary judgment, however, a court cannot evaluate the weight of the evidence or determine the truth of the matter, but may only determine whether there is a genuine issue of triable 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 Georgia-Pacific asbestos-containing joint compound products to the extent that it was a substantial factor in bringing about

Robertson's mesothelioma. Therefore, Georgia-Pacific was not entitled to summary judgment on the issue of causation, and we reverse the trial court's judgment granting Georgia-Pacific's motion for summary judgment.

CONCLUSION

Based on the foregoing, the August 21, 2012 judgment of the trial court prohibiting certain testimony from Dr. Eugene Mark is reversed and the January 29, 2013 judgment granting Georgia-Pacific's motion for summary judgment and dismissing plaintiffs' claims against Georgia-Pacific, 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, Georgia-Pacific, LLC.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL CITATIONS GRANTED; AUGUST 21, 2012 JUDGMENT REVERSED; JANUARY 29, 2013 JUDGMENT REVERSED; REMANDED.