

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0208

BLAKE AND COURTNEY FREEMAN, INDIVIDUALLY AND ON BEHALF  
OF THEIR MINOR CHILDREN

VERSUS

FON'S PEST MANAGEMENT, INC. AND ABC INSURANCE CO.

Judgment rendered: OCT 02 2017

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On Appeal from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
No. 164252

The Honorable Randall L. Bethancourt, Judge Presiding

\* \* \* \* \*

James C. Carver  
Baton Rouge, LA  
Victoria A. Guidry  
Lafayette, LA

Attorneys for Plaintiffs/Appellants  
Blake and Courtney Freeman,  
and their minor children

Kevin P. Landreneau  
Johanna R. Landreneau  
Baton Rouge, LA

Attorneys for Defendants/Appellees  
Fon's Pest Management, Inc., LIPCA,  
Inc., and Certain Underwriters at  
Lloyd's London

\* \* \* \* \*

BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

*WJC by JEW  
Crain J.  
JEW  
Welch J.*

*concur in result by JEW  
concur in part and dissent in part,  
with reasons.*

**HOLDRIDGE, J.**

In this personal injury action, the district court granted the defendants/appellees Fon's Pest Management, Inc., LIPCA, Inc., and Certain Underwriters at Lloyd's of London motions in limine to exclude certain expert testimony based upon the failure to meet the admissibility standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and further found that, absent the excluded testimony, the defendants were entitled to summary judgment. For the following reasons, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

In January of 2001, the plaintiffs purchased a home in Houma, Louisiana that contained prior termite damage.<sup>1</sup> While renovating their kitchen in July of 2010, the plaintiffs discovered additional termite damage and subsequently contacted Fon's, a certified pest control operator, to inspect and treat their home for termites. On July 26, 2010, an employee of Fon's spot treated the home for termites using Termidor-SC, a termiticide containing fipronil.<sup>2</sup> The plaintiffs contacted Fon's again on July 28, 2010, after finding additional termite damage to their kitchen cabinets. The Fon's employee treated an area for termite damage by drilling holes through the concrete slab and injecting termiticide into the soil under the slab. Following the treatments by Fon's, the plaintiffs allegedly experienced headaches, nausea, dizziness, and confusion. Blaine and Seth Freeman allegedly

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<sup>1</sup> The house at issue was under a termite contract before the plaintiffs purchased the home wherein Fon's annually performed a visual inspection for termites. In September of 2000, the prior owner of the home found live termites and Fon's performed a termite treatment.

<sup>2</sup> Fipronil is a neurotoxin that is odorless and colorless. It is a widely used termiticide that has been on the market since 1996 and has been approved by the Louisiana Structural Pest Control Commission for indoor use.

developed chronic neurological injuries. The plaintiffs moved out of the home on October 23, 2010.

On July 7, 2011, the plaintiffs filed a petition for damages against Fon's and LIPCA, Inc.<sup>3</sup> alleging that they suffered "grievous personal injury" and damages from an alleged exposure to fipronil that was contained in the termiticide that was applied in their home by Fon's. On February 19, 2013, the plaintiffs amended their petition to name as a defendant "Certain Underwriters at Lloyd's of London to policy # LLB-17-17-215000962-02" (collectively referred to as Fon's).

Fon's subsequently filed several pre-trial motions, including four at issue in this appeal. First, Fon's filed a "Daubert Motion to Exclude And/Or Motion in Limine to Strike and Limit Testimony of Plaintiffs' Proposed Experts ...", which was to exclude the plaintiffs' three experts, Michael LeBas, an engineer, Lawrence Durio, an industrial hygienist, and Christina Todd, a professional counselor.<sup>4</sup> Fon's alleged that all of the experts' opinions should be excluded because they lacked the methodology as required by Daubert, 509 U.S. at 580, 113 S.Ct. at 2786.

Secondly, Fon's filed a motion in limine to exclude any evidence of the results and contents of an LSU Agriculture Research Center and Extension Laboratory Report (LSU Ag Report) because the sampling was done by Courtney Freeman, who was not a qualified industrial hygienist. Two years after leaving the plaintiffs home, Courtney Freeman allegedly took forty scoops of dirt from under the slab of the plaintiffs' home to be tested by the LSU AgCenter and Extension Laboratory (LSU AgCenter). Therefore, Fon's argued that because the sampling

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<sup>3</sup> LIPCA, Inc. was the insurance agency that issued Fon's insurance policy from Certain Underwriters at Lloyd's of London and was improperly named as a party in this matter.

<sup>4</sup> In order to obtain a pre-trial ruling as to the admissibility of an expert witness, the party must file a motion in accordance with La. C.C.P. art. 1425. Fon's complied with the requirements of La. C.C.P. art. 1425(F).

was not performed by a certified industrial hygienist, the results were not scientifically reliable data and did not comply with the Daubert standard.

Fon's then filed a "Motion to Exclude (Daubert Motion), and/or Motion in Limine ..." to limit the testimony of the plaintiffs' three toxicologists experts, Dr. Robert Geller, Dr. Lawrence Guzzardi, and Dr. Jason Richardson. Fon's alleged that the three toxicologist should not be permitted to testify on medical causation of any alleged damages or injuries to the plaintiffs because the methods the experts used in arriving at their opinions were speculative, unsupported by medical science, and were unreliable.

On May 28, 2015, Fon's filed a motion for summary judgment alleging that there were no genuine issues of material fact and that it was entitled to summary judgment as a matter of law. In its motion for summary judgment, Fon's asserted that because the plaintiffs did not have expert testimony in support of their claims, they could not meet their burden of proving the applicable standard of care at trial. The district court set hearings for the motions on June 22-26, 2015.

The district court conducted a Daubert hearing<sup>5</sup> on June 22, 23, and 26, then rendered judgment in open court granting Fon's: 1) motion in limine and/or Daubert motion to strike and/or limit the testimony of the plaintiffs' experts<sup>6</sup> 2) motion in limine to exclude the LSU Ag Report; and 3) motion in limine and/or

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<sup>5</sup> Upon a timely filed and sufficiently alleged motion for a Daubert hearing, the court shall hold a contradictory hearing. La. C.C.P. art. 1425(F)(2). At the hearing, the court shall consider the qualifications and methodologies of the proposed witness based upon the provisions of Articles 104(A) and 702 through 705 of the Louisiana Code of Evidence. See Daubert, 509 U.S. at 579, 113 S.Ct. at 2786; Boudreaux v. Bollinger Shipyard, 15-1345 (La. App. 4 Cir. 6/22/16), 197 So.3d 761, 770.

<sup>6</sup> The district court held that Mr. LeBas was allowed to testify; however; his testimony was limited in his area of expertise in engineering and he was not allowed to give any opinion on his alleged health issues or conditions after his inspection of the plaintiffs' home. The district court also limited Ms. Todd's testimony in that she was not allowed to testify regarding her opinion that Seth Freeman's alleged post traumatic stress disorder (PTSD) and learning disorders were caused by a fipronil exposure.

Daubert motion to exclude the testimonies of the plaintiffs' three toxicologist experts.<sup>7</sup> On June 30, 2015, the district court provided reasons for judgment.<sup>8</sup>

After ruling in open court on Fon's motions in limine, the district court then heard arguments on Fon's motion for summary judgment.<sup>9</sup> Thereafter, on July 6, 2015, the district court signed a judgment granting Fon's motion for summary judgment and dismissing with prejudice the plaintiffs' claims. The plaintiffs now appeal assigning as error:

1. The trial court erred in granting defendants' motion for summary judgment because movers failed to meet their initial burden to show there is insufficient factual support for plaintiffs' claims for chronic personal injury.
2. The trial court erred in granting defendants' motion for summary judgment because issues of material fact remain in dispute, and defendants are not entitled to judgment as a matter of law.
3. The trial court erred in granting defendants' motion for summary judgment dismissing all claims by plaintiffs because two claims, acute personal injury and property damage, were not before the Court and movers failed to show there is insufficient factual support for plaintiffs' claims for acute personal injury or property damage.
4. The trial court erred in granting defendants' motion to exclude the testimony of plaintiffs' experts Robert Geller, MD (medical toxicologist), Lawrence Guzzardi, MD (medical toxicologist), Jason Richardson, Ph.D. (toxicologist) and Laurence Durio (Certified Industrial Hygienist) by failing to apply properly the Daubert test based solely on evaluation of their methodologies.

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<sup>7</sup> We note that the district court combined the judgment and reasons for judgment in the same document in granting Fon's motion in limine to exclude the testimony and evidence of the plaintiffs' three toxicologists. The Code of Civil Procedure does not require an interlocutory judgment, such as a motion in limine, to be reduced to writing and provides that the rendition of an interlocutory judgment in open court constitutes notice to all parties. La. C.C.P. art. 1914; White v. Claire's Boutique, Inc., 05-653 (La. App. 5 Cir. 2/27/06), 924 So.2d 1078, 1080.

<sup>8</sup> Under La. C.C.P. art. 1425(F), the district court is required to give its reasons for accepting or rejecting expert testimony. The ruling on admissibility of the expert evidence is subject to appellate review as provided by law. La. C.C.P. art. 1425(F)(5).

<sup>9</sup> Normally, the district court would not have a hearing on a motion for summary judgment on the same day as ruling on motions in limine; however, in this case, the parties stipulated to have both hearings on the same date.

5. The trial court erred by not applying the proper legal standard for determining reliability of data and information required for an expert opinion.
6. The trial court erred in granting defendants' motion to limit the testimony of expert Christina Todd, MS LPC (Licensed Professional Counselor), who counseled Seth Freeman, from giving her diagnosis of PTSD.
7. The trial court erred in granting defendants' motion to limit the testimony of Michael LeBas, PE, who inspected the Freemans' home, from providing personal factual testimony about his suffering from asthma-like symptoms when he entered the Freemans' home.
8. The trial court erred in granting defendants' motion to exclude the LSU Ag Report when it arbitrarily disregarded two sworn affidavits verifying the legitimacy of the sample results, when movers offered no contravening affidavits and failed to produce other evidence at the hearings

## **DISCUSSION**

### **Motions in Limine**<sup>10</sup>

The plaintiffs argue in their fourth, sixth, and seventh assignments of error that the district court erred in granting Fons' motions in limine to limit or exclude the testimony of the plaintiffs' experts on the grounds that they were unqualified and used improper methodologies. Specifically, the plaintiffs argue that the district court erred in limiting or excluding the testimony of Dr. Geller, Dr. Guzzardi, Dr. Richardson, Mr. Durio, Ms. Todd, and Mr. LeBas.

The admissibility of expert testimony is governed by Louisiana Code of Evidence article 702, which provides that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Before an expert's testimony is admitted, the district court is required

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<sup>10</sup> This court finds that the district court properly applied the Daubert standard in admitting expert testimony. Therefore, the plaintiffs' fifth assignment of error has no merit.

to perform a gatekeeping function to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. This gatekeeping obligation applies not only to scientific testimony, but to all expert testimony. See Arceneaux v. Shaw Group., Inc., 12-0135 (La. App. 1 Cir. 9/24/12), 103 So.3d 1086, 1091, writ denied, 12-2732 (La. 3/1/13), 108 So.3d 1117.

In Daubert, 509 U.S. at 113 S.Ct. at 2786, the United States Supreme Court established the standard for determining the admissibility of expert testimony. Daubert set forth four non-exclusive factors to guide the Court to fulfill its gatekeeping function with respect to admitting expert testimony. Those factors include:

1. whether the theory or technique has been tested;
2. whether it has been subject to peer review;
3. whether there is a known or potential rate of error; and
4. whether the methodology has gained general acceptance.

Daubert, 509 U.S. at 593-94, S.Ct. at 2786.

In Cheairs v. State ex rel. Department of Transportation and Development, 03-0680 (La. 12/3/03), 861 So.2d 536, 542, the Louisiana Supreme Court further specified the admission of expert testimony by adopting the following three-part inquiry for determining whether the admission of expert testimony is proper:

1. whether the expert is qualified to testify competently regarding the matters he intends to address;
2. whether the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert;<sup>11</sup> and
3. will the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue?

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<sup>11</sup> See Daubert, 509 U.S. at 579, 113 S.Ct. at 2786.

A district court is accorded broad discretion in determining whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert. The factual basis for an expert's opinion determines the reliability of the testimony. See Robertson v. Doug Ashy Building Materials, Inc., 14-0141 (La. App. 1 Cir. 12/23/14), 168 So.3d 556, 567, writ denied, 15-0365 (La. 4/24/15), 169 So.3d 364; see also Jouve v. State Farm Fire and Casualty Co., 10-1522 (La. App. 4 Cir. 8/17/11), 74 So.3d 220, 225, writ denied, 11-2250 (La. 11/13/11), 76 So.3d 1157 (a trial court's decision to qualify an expert will not be overturned absent an abuse of discretion); Everhardt v. Louisiana Department of Transportation and Development, 07-0981 (La. App. 4 Cir. 2/20/08), 978 So.2d 1036, 1048 (whether an expert meets the qualifications of an expert witness and the competency of the expert witness to testify in specialized areas is within the sound discretion of the trial court). An appellate court should not disturb a trial court's evidentiary ruling on the admissibility of expert opinion evidence at summary judgment absent an abuse of discretion. Jones v. Black, 13-1889 (La. App. 1 Cir. 5/2/14), 145 So.3d 402, 410-11, writ denied, 14-1116 (La. 9/19/14), 148 So.3d 954.<sup>12</sup>

In the instant matter, Fon's argues that the methods the plaintiffs' experts used in arriving at their opinions are speculative, unsupported by medical science, are based on neither scientific facts nor data, are unreliable and irrelevant, are based upon insufficient and inadmissible facts and/or data, and are based on unsupportable assumptions and speculations on causations regarding the health issues claimed to have been caused by the plaintiffs alleged fipronil exposure. In

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<sup>12</sup> 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. Babineaux v. University Medical Center, 15-292 (La. App. 3 Cir. 11/4/15), 177 So.3d 1120, 1123.



sum, Fon's alleges that the plaintiffs' experts testimonies do not meet the requirements for admissibility under La. Code of Evid. art. 702, Daubert, and Cheairs.

After reviewing the record, this Court finds no abuse of the district court's discretion in ruling that the plaintiffs' three toxicologist experts (Dr. Geller, Dr. Guzzardi, and Dr. Richardson) and Mr. Durio, the industrial hygienist, opinions and testimonies fail to satisfy the admissibility requirements of Daubert. After conducting a Daubert hearing, the district court determined that the experts testimonies should be excluded because: 1) none of the experts are experts regarding fipronil, the termiticide that allegedly caused the plaintiffs' injuries 2) none of the experts wrote or contributed to any peer-reviewed articles concerning the effects of pesticides in humans or the effects of fipronil in humans 3) none of the experts attempted a dose reconstruction to determine the amount of fipronil to which the plaintiffs; either collectively or individually, were allegedly exposed 4) none of the experts had access to any biological data or air quality data that conclusively establishes that the plaintiffs were exposed to an appreciable level of fipronil; and 5) no articles or studies reviewed by the experts proves a causal connection between fipronil and the plaintiffs' claims.

Moreover, the plaintiffs' experts had conflicting testimonies. Dr. Geller<sup>13</sup> suggested that the fipronil exposure was through inhalation while Mr. Durio<sup>14</sup> believes that fipronil cannot be inhaled. Dr. Richardson alleges that the fipronil exposure was dermal (skin) exposure. Dr. Geller states that, while there is no data

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<sup>13</sup> Dr. Geller solely relied on the LSU Ag Report in providing scientifically reliable evidence to establish the degree of the plaintiffs' fipronil exposure in the plaintiffs' home, which was properly excluded by the district court.

<sup>14</sup> After inspecting the plaintiffs' home in 2013, Mr. Durio reported through visual and photographic evidence that an excessive amount of fipronil was injected by Fon's and a significant amount of the chemical came out of the floor in the plaintiffs' home. Despite his report, Mr. Durio never completed an environmental assessment of the plaintiffs' home.

to support his opinion, dermal exposure would not have caused the symptoms the plaintiffs allege, but Dr. Richardson disagrees. Additionally, the experts have conflicting testimonies on the effects of the exposure of the fipronil. Dr. Richardson suggests that fipronil caused neuropsychiatric conditions in Blake Freeman, but admits that there is no scientific data to support his opinion. However, Dr. Guzzardi disagrees that Blake Freeman has psychiatric conditions.

Accordingly, we hold that the district court did not abuse its discretion in finding that Dr. Geller, Dr. Guzzardi, Dr. Richardson, and Mr. Durio's opinions and testimonies fail to satisfy the requirements of La. Code of Evid. art. 702 as interpreted in Cheairs and Daubert, as the experts' opinions are unreliable because there is no scientific evidence to support their opinions and the probative value is substantially outweighed by the danger of unfair prejudice and misleading the jury as to their opinions' scientific validity. *See* La. Code of Evid. arts. 104, 403. Therefore, the district court did not abuse its discretion in excluding the experts' opinions and the plaintiffs' fourth assignment of error has no merit.

Furthermore, the plaintiffs offered Ms. Todd, Seth Freeman's school counselor as an expert to testify regarding his alleged PTSD and learning disabilities. Ms. Todd began counseling Seth Freeman over three years after his alleged fipronil exposure occurred. As Seth Freeman's counselor, Ms. Todd kept an ongoing report of his diagnosis while meeting with him on a regular basis. Ms. Todd's report states that Seth Freeman has major recurrent depressive episodes, panic disorders, and PTSD affiliated with reported toxic poisoning of his family. Her report further states that Seth Freeman has a fear of losing his parents and possibly developing a brain tumor. Ms. Todd's report also states that Seth Freeman has educational and academic problems affiliated with a toxicity case.

Fon's alleges that Ms. Todd's testimony and opinion should be limited or excluded because the plaintiffs offered no evidence that fipronil caused Seth Freeman's PTSD or that fipronil causes learning disabilities. Fon's further argues that because Seth Freeman's treating psychiatrist, Dr. Jason Wuttke, did not diagnose Seth Freeman with PTSD, Ms. Todd's testimony should be limited or excluded.

At the conclusion of the Daubert hearing,<sup>15</sup> the district court granted Fon's motion in limine, striking Ms. Todd's testimony in regard to her opinion that Seth Freeman suffers from PTSD and that he has any conditions, learning disabilities, or psychiatric issues caused by the exposure to or the existence of fipronil in the plaintiffs' home. After reviewing the record, this court finds that the district court did not abuse its discretion in limiting Ms. Todd's testimony and opinion, as her report on Seth Freeman contains evidence that is unreliable and unsupported by medical evidence. *See* La. Code of Evid. art. 702.<sup>16</sup>

Additionally, Ms. Todd's testimony and opinion were stricken by the district court because its probative value is substantially outweighed by the danger of unfair prejudice to Fon's and misleading the jury as to its scientific validity and credibility. *See* La. Code of Evid. arts. 104 and 403. Thus, we find that the district court did not abuse its discretion in making this ruling and the plaintiffs' sixth assignment of error has no merit.

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<sup>15</sup> Ms. Todd did not testify at the Daubert hearing nor did the plaintiffs provide deposition testimony or an affidavit from her to satisfy the requirements of La. C.C.P. art. 1425.

<sup>16</sup> This court notes that Ms. Todd's report should also be excluded from evidence under La. C.C.P. art. 1425, as her report is an unverified document that is not certified or attached to an affidavit. *See Fin & Feather, LLC v. Plaquemines Parish Government*, 16-0256 (La. App. 4 Cir. 9/28/16), 202 So.3d 1028, 1032. Because the plaintiffs timely objected to the admissibility of Ms. Todd's report under Daubert, this court finds that her report should be stricken. It is well settled under Louisiana law that an objection to the admissibility of evidence is not preserved for appellate review unless a contemporaneous objection to the evidence is entered on the record at the trial or hearing. La. Code of Evid. art. 103; Brown v. Schwegmann, 05-0830 (La. App. 4 Cir. 4/25/07), 958 So.2d 721, 724, writ denied, 07-1094 (La. 9/21/07), 964 So.2d 333.

The plaintiffs also offered Mr. LeBas, a civil engineer, as an expert.<sup>17</sup> Mr. LeBas inspected the plaintiffs' home in May of 2012, almost two years after Fon's treated the plaintiffs home, and determined that there was an excessive disbursement of fipronil in the home coming through the concrete slab. However, Mr. LeBas did not take any samples from the plaintiffs' home nor did he do any type of testing. After inspecting the plaintiffs' home, Mr. LeBas also claimed to experience symptoms of acute sinusitis<sup>18</sup> and attributed those symptoms to either fungal growth and/or residual elements of the fipronil disbursement in the home. Mr. LeBas did not see a doctor after experiencing his alleged symptoms, so there is no medical diagnosis.

Moreover, Mr. LeBas does not have any training or expertise in the areas of termite treatment, termites, or pesticide labeling to be familiar with the symptoms from exposure to fipronil. The following exchange occurred during Mr. LeBas' deposition:

Q. Do you have any training in biology?

A. No.

Q. In termites?

A. No.

Q. Termite treatment?

A. No.

Q. Medicine?

A. No.

Q. Termidor [the pesticide used to treat the plaintiffs' house]?

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<sup>17</sup> Mr. LeBas did not testify at the Daubert hearing; however, his deposition testimony complies with La. C.C.P. art. 1425.

<sup>18</sup> The symptoms include sinus congestions, sore throat, and itchy-watery eyes.

A. No.

Q. Pesticide labeling?

A. No.

Q. The identification of molds?

A. No.

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Q. Do you know the symptoms from exposure to Termidor?

A. No.

Mr. LeBas uses mere speculation in his report to make conclusions that fipronil was coming up through the floors of the plaintiffs' home, as he performed no testing on the plaintiffs' home nor did he have any training or expertise in the areas of termite treatment, termites, or pesticide labeling. Instead Mr. LeBas' expert opinion is based on his speculation regarding his personal experience. In disallowing Mr. LeBas' expert opinion, the district court determined that his testimony did not employ "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238 (1999).

Finding that Mr. LeBas was not a medical expert, an expert in chemistry or chemical treatments for termites, the district court did not abuse its discretion in limiting his testimony to his area of expertise in engineering and striking any testimony, opinions, or conclusions of any alleged health issues or conditions that Mr. LeBas claims to have personally experienced during and following the inspection of the plaintiffs home. To ensure reliability, the Daubert standard requires that the expert's opinion be grounded in methods and procedures of science, rather than just subjective belief or unsupported speculation. *See*

Arceneaux, 103 So.3d at 1093. Accordingly, the plaintiffs' seventh assignment of error has no merit. *See* La. Code of Evid. arts. 104 and 403.

**LSU Ag Report**

The plaintiffs also assign as error the district court's refusal to consider the LSU Ag Report as evidence, which contains an analysis of soil samples that Courtney Freeman brought to be tested by the LSU AgCenter two years after Fon's treated the plaintiffs' home for termites. The crux of the plaintiffs' argument is that even though Courtney Freeman is not a qualified industrial hygienist, the data contained in the LSU Ag Report is valid and it cannot be unduly prejudicial nor can it mislead the jury.

Fon's argues that the LSU Ag Report lacks any scientific reliability, lacks probative value, is inadmissible as scientific testing, and should be excluded as evidence under La. Code of Evid. art. 702. Fon's further argues that Courtney Freeman has no training or education in toxicology nor does she have any specialized qualifications that qualify her to extract or perform soil sampling. Therefore, Fon's argues that the soil samples that Courtney Freeman extracted are unscientifically reliable and inadmissible under the Daubert standard. Additionally, Fon's argues that the district court properly excluded the LSU Ag Report pursuant to La. Code of Evid. art. 403 because the report was self-serving, unreliable, and the prejudicial effect outweighs the probative value and would mislead the jury.

Moreover, Fon's offered Stuart Webster's affidavit, a certified industrial hygienist, to support its position that the LSU Ag Report is unreliable. In his affidavit, Mr. Webster states that the LSU Ag Report has no reliability as a scientifically accurate measure of fipronil around the plaintiffs' home. Mr. Webster further asserts that the LSU Ag Report has no reliability as an

environmental assessment for any sort of scientifically accurate measure of the amount of fipronil to which the plaintiffs may have been exposed. Mr. Webster states that the LSU Ag Report is unreliable because it: 1) does not indicate whether the analysis was performed by a certified laboratory 2) lacks details as to what methods were used to analyze the soil samples 3) lacks general quality assurance and quality control data such as percent recovery data 4) does not have a statement regarding the condition of the samples when reversed; and 5) does not have any information as to whether the soil was analyzed wet or dry.

After reviewing the record, this court has determined that the district court did not abuse its discretion in excluding the LSU Ag Report because its methodology and contents are not scientifically accurate or reliable and do not comply with the Daubert standard. This court agrees with the district court's reasoning that "Courtney Freeman [was] ... an unqualified person to do scientific sampling ... [and] her actions were not witnessed and cannot be objectively verified, are self-serving, are not scientifically reliable, have no indicia of reliability, and any probative value is substantially outweighed by the danger of unfair prejudice to [Fon's] and misleading the jury as to their scientific reliability and validity." Therefore, the plaintiffs' eighth assignment of error has no merit.

### **Summary Judgment**

In their second assignment of error, the plaintiffs argue that the district court erred in granting Fon's motion for summary judgment because Fon's failed to sustain its burden of proving that summary judgment is warranted and that no genuine issues of material fact remain. The crux of Fon's argument is that the plaintiffs failed to establish that they would be able to meet their burden of proving the essential element of their claim, that any act by Fon's was the cause of the alleged damages.

We review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. LUBA Casualty Insurance Co. v. Hygenic Corporation, 47,395 (La. App. 2 Cir. 9/20/12), 131 So.3d 890, 892. A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, admitted for purposes of the summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).<sup>19</sup>

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point 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, if the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. *See* La. C.C.P. art. 966(C)(2); Janney v. Pearce, 09-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 288-289, writ denied, 10-1356 (La. 9/24/10), 45 So.3d 1078.

When a motion for summary judgment is made and supported, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in La. C.C.P. art. 967, must set

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<sup>19</sup> Louisiana Code of Civil Procedure article 966 was recently amended by 2015 La. Acts 422, § 1; however, the new version of article 966 does not apply to this case as the amendment did not become effective until January 1, 2016. Accordingly, we apply the prior version of Article 966 to the instant matter. *See* Acts 2015, No. 422, §§ 2 and 3.



forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967(B). Mere conclusory allegations, improbable inferences, and unsupported speculation will not support a finding of a genuine issue of material fact. Richard v. Liberty Mutual Insurance Co., 13-26 (La. App. 3 Cir. 10/9/13), 123 So.3d 345, 348.

As set forth above, Fon's filed a motion for summary judgment alleging that the plaintiffs failed to present admissible and reliable evidence and that there exists no genuine issue of material fact as to causation. In Fon's motion for summary judgment, it claimed that "[t]he plaintiffs have failed to present admissible, competent, relevant and reliable evidence that satisfies the requirements of *Daubert* for reliability ... [and] because the facts are undisputed, [the] [p]laintiffs have failed to meet their burden of proof[.]" In relying on the district court's Daubert exclusions of the plaintiffs' experts, Fon's claims in its motion for summary judgment that there is an absence of factual support for the plaintiffs' claim because the plaintiffs do not have any evidence or experts to prove causation.

In support of its motion for summary judgment, Fon's offered the deposition of Dr. Russell Henry, the Freeman's family physician, which provided the medical background on the plaintiffs. Dr. Henry's medical records on Blake Freeman reveal that Blake Freeman has a prior history of depression, headaches, lymph node swelling, and sinus infections dating back to nine years before the application of the termite treatment in the plaintiffs' home. Dr. Henry performed blood test on Blake Freeman in January and May of 2012 in an attempt to determine if he had any chemical exposure. Dr. Henry testified that all tests results were normal.

Additionally, Dr. Henry's medical records of Courtney Freeman reveal that she also has a history of headaches, sinus infections, and psychiatric conditions.

Her medical records further reveal that she did not have any complaints related to any alleged chemical exposure. Dr. Henry also saw Blaine Freeman in June of 2011 and March of 2012 and stated that “[he] had no suspicion” that Blaine Freeman’s symptoms were related to a fipronil exposure. Moreover, there is no evidence supporting the plaintiffs’ contention that Seth Freeman suffered from any health conditions or personal injuries allegedly caused by fipronil as there is no evidence in the record that he was exposed to fipronil.

We find that Fon’s established through testamentary and documentary evidence that there was an absence of factual support for an essential element of the plaintiffs’ claim *i.e.*, causation. The burden then shifted to the plaintiffs to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial. *See* La. C.C.P. art. 966(C)(2). The plaintiffs produced no evidence as to causation in opposition to Fon’s motion for summary judgment. All of the evidence that the plaintiffs may have used to prove causation for either their personal injury or property damage claims were excluded by the district court in the motions in limine, which were heard on the same day as Fon’s motion for summary judgment. While the better practice would have been for the district court to hear the motions in limine first and then allow the plaintiffs an opportunity to appeal the district court’s ruling<sup>20</sup> or obtain new experts prior to the hearing on the motion for summary judgment, the parties stipulated that the hearing on the motion for summary judgment and the motions in limine would be heard on the same day.

A complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial and mandates the entry of summary judgment for the moving party. Celotex Corp. v.

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<sup>20</sup> A ruling allowing or disallowing an expert opinion may be appealed under La. C.C.P. art. 1425(F)(5).

Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265 (1986). Because of the district court's ruling disallowing all of the plaintiffs' expert witnesses, the plaintiffs have failed to produce any evidence or factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial regarding causation. Therefore, we affirm the district court's judgment granting summary judgment in favor of Fon's. Considering the evidence before the court, summary judgment dismissing plaintiff's claim is appropriate. *See* La. C.C.P. art. 966(C)(2).

### **DECREE**

After a thorough review of the record, we affirm the granting of the motions in limine, as it pertains to the motion for summary judgment. We also affirm the motion for summary judgment in favor of Fon's dismissing the claims of the plaintiffs, with prejudice. All costs of this appeal are assessed against the plaintiffs, Blake and Courtney Freeman individually and on behalf of their minor children, Blaine and Seth Freeman.

**AFFIRMED.**

BLAKE AND COURTNEY FREEMAN,  
INDIVIDUALLY AND ON BEHALF  
OF THEIR MINOR CHILDREN

NO. 2016 CA 0208  
COURT OF APPEAL

VERSUS

FON'S PEST MANAGEMENT, INC.  
AND ABC INSURANCE CO.

FIRST CIRCUIT  
STATE OF LOUISIANA

 WELCH, J., concurring in part and dissenting in part.

I respectfully concur in part and dissent in part with the opinion in this matter. I agree with the opinion insofar as it affirms the July 6, 2015 judgment of the trial court granting the motion in limine to exclude the LSU Ag report and samples and affirms that portion of the July 17, 2015 judgment of the trial court granting the motion in limine to strike the opinion testimony of Ms. Christina Todd and limiting the testimony of Mr. Michael LeBas to his area of expertise (engineering). As to all other issues, *i.e.*, the trial court's ruling granting the motion in limine and striking the opinion testimony of Dr. Geller, Dr. Guzzardi, Dr. Richardson, and Mr. Durio, I respectfully disagree and would reverse that portion of the July 17, 2015 judgment of the trial court. I also disagree with the opinion with regard to the summary judgment, as I would reverse the July 6, 2015 judgment of the trial court granting the defendant's motion for summary judgment and dismissing the plaintiffs' action against the defendants.

With respect to the trial court's ruling that the plaintiffs' three toxicologist experts (Dr. Geller, Dr. Guzzardi and Dr. Richardson) and their industrial hygienist, Mr. Durio, were not admissible because their opinions and testimonies failed to satisfy the requirements of **Daubert**, I believe that the trial court erred as a matter of law and abused its discretion. As the opinion notes, the trial court determined that the experts' testimonies should be excluded because: (1) none of the experts were experts regarding fipronil; (2) none of the experts wrote or contributed to any peer-reviewed articles concerning the effects of pesticides in

humans or the effects of fipronil in humans; (3) none of the experts attempted a dose reconstruction to determine the amount of fipronil to which the plaintiffs were allegedly exposed; (4) none of the experts had access to any biological data or air quality data that conclusively established that the plaintiffs were exposed to an appreciable level of fipronil; and (5) no articles or studies reviewed by the experts proved a causal connection between fipronil and the plaintiffs' claims.

First and foremost, I note that at the **Daubert** hearing, each of the plaintiffs' experts testified as to the methodology they employed in reaching the conclusions that the plaintiffs' exposure to fipronil caused the symptoms complained of (and thus, their damages). Since the defendants were the movers on the motion in limine, they had the burden of proving that the opinions of the plaintiffs' experts were unreliable under the criteria set forth in **Daubert**. See Robertson v. Doug Ashy Building Materials, Inc., 2010-1552 (La. App. 1<sup>st</sup> Cir. 10/4/11), 77 So.3d 339, 354, writs denied, 2011-2468, 2011-2430 (La. 1/13/12), 77 So.3d 972 and 973. However, the defendants did not present the testimony of any expert or otherwise any evidence to contradict or to question the validity of the methodology of the plaintiffs' experts. Thus, the defendants failed to meet their burden of establishing that the plaintiffs' experts' opinions on causation in this case were unreliable and the reversal of the trial court's judgment is warranted on this basis alone. See Robertson, 77 So3d at 354.

Furthermore, with regard to the trial court's finding that none of the experts were experts regarding fipronil, it is well settled that **Daubert** concerns the admissibility of the experts' opinion and not his qualification as an expert in the area tendered. See MSOF Corp. v. Exxon Corp., 2004-0988 (La. App. 1<sup>st</sup> Cir. 12/22/05), 934 So.2d 708, 718, writ denied, 2006-1669 (La.10/6/06), 938 So.2d 78; **Robertson v. Doug Ashy Building Materials, Inc.**, 2014-0141 (La. App. 1<sup>st</sup> Cir. 12/23/14), 168 So.3d 556, 567, writ denied, 2015-0365 (La. 4/24/15), 169 So.3d

364. Therefore, the trial court erred as a matter of law in excluding the experts' opinions under **Daubert** based on the experts' qualifications. Nevertheless, with respect to each experts' qualifications, the record establishes that each of the experts possess the knowledge, skill, experience, and education to provide them with the appropriate qualifications to render an opinion on causation as to whether the plaintiffs' health issues were caused by their exposure to fipronil.

Insofar as the trial court determined that the experts' opinions were not admissible because they did not attempt a dose reconstruction and did not have access to any biological or air quality data establishing that the plaintiffs' were exposed to an appreciable level of fipronil, such information would have only been necessary if the plaintiffs were attempting to meet their burden of proving causation through a *quantitative* assessment of fipronil exposure. However, the plaintiffs were not required to prove the *quantitative* level of exposure, *i.e.*, the exact or cumulative dose of fipronil or the concentration of fipronil to which they were exposed (*vis-à-vis* air sampling other similar means), but rather, a *qualitative* evaluation of the exposures to fipronil, *i.e.*, the level, frequency, nature, proximity, and duration of the exposures at issue, can sufficiently prove causation. See generally **Arabie v. CITGO Petroleum Corp.**, 2010-2605 (La. 3/13/12), 89 So.3d 321-322; **Robertson**, 168 So.3d at 565-566. The testimony at the **Daubert** hearing reflects that the experts at issue did a *qualitative* assessment of the plaintiffs' exposure (*i.e.*, they evaluated the exposures to fipronil that were clinically significant in intensity and duration) and determined that these exposures poisoned the plaintiffs. Since the plaintiffs could meet their burden of proving causation through either a *quantitative* or a *qualitative* assessment of fipronil exposure, the trial court erred in excluding the experts under **Daubert** for failing to perform a *quantitative* assessment.

To the extent that the trial court determined that the plaintiffs' experts should be excluded under **Daubert** because none of the experts personally wrote or contributed to any peer-reviewed articles concerning the effects of pesticides in humans or the effects of fipronil in humans, I note that **Daubert** imposes no such requirement on experts and the record does not establish that writing an article concerning the effects of pesticides is necessary for an expert to have a reliable methodology. Rather, **Daubert** posits the question as to whether the methodology itself has been subjected to peer review or publication. In that regard, because the defendants failed to offer any expert evidence, the record does not reflect whether each of the plaintiffs' experts' methodology *was or was not* subjected to peer review or publication. Therefore, it was improper for the trial court to exclude their opinions on this basis. Moreover, to the extent that the trial court found the methodology of the plaintiffs' expert unreliable because the experts did not review any articles or studies proving a causal connection between fipronil and the plaintiffs' claims, the testimony of the experts establishes that there were no such articles or studies on which the experts could rely. Although the record does not establish that it was improper for the experts not to review any such articles or studies, to the extent that they should have reviewed such articles and studies, that factor affects only the weight to be afforded to those experts' conclusions and may serve as a basis for attack by the defendants on cross-examination at trial, but it does not make his opinion evidence inadmissible under **Daubert**. See **MSOF Corp.**, 934 So2d at 720.

In addition, the opinion notes that the plaintiffs' experts had conflicting testimonies as to whether the plaintiffs' exposure to fipronil was dermal exposure or through inhalation, as well as the effects of exposure to fipronil, which the opinion determines further supports the trial court's decision to exclude the expert opinions. However, this is a factual dispute between the experts, and thus, goes to

the credibility of their testimony and not its admissibility or reliability. See Robertson, 168 So.3d at 577.

I recognize that in reviewing the trial court's judgment granting the motion in limine striking the plaintiffs' four experts on causation, it is not this Court's role to weigh the evidence or testimony of the experts and their opinions, but rather to ensure that the trial court properly performed its gatekeeping function when it evaluated the reliability of the plaintiffs' experts under the standards set forth in **Daubert**. As this court noted in **Robertson**, 168 So.3d at 579, "[a]lthough the trial court is afforded broad discretion in determining whether expert testimony is reliable under **Daubert**, that discretion is premised upon an understanding that **Daubert** is intended to protect the sanctity of the fact finding process by assessing the validity of the methodology employed by an expert and not the expert's application of that methodology or his conclusions derived from the application of that methodology. Certainly, not all experts are equal; however, issues involving the credibility of the expert, the weight to be given to the expert's testimony, and the resolution of conflicts between expert opinions testimony are to be assessed by the trier of fact."

In this case, based on my review of the record, it is apparent that the objections the defendants had to the causation opinions of the plaintiffs' experts (and to which the trial court agreed) did not relate to their methodology, but rather involved their conclusions derived from applying that methodology, and thus pertained to the experts credibility and weight of their opinions. The evidence at the hearing established the experts' methodology and no contradictory evidence was offered to suggest that their methodology was improper to formulate an opinion on causation. Therefore, the trial court abused its discretion in granting the motion in limine, striking the opinion testimony of Dr. Geller, Dr. Guzzardi, Dr.



Richardson, and Mr. Durio and that portion of the July 17, 2015 judgment of the trial court should be reversed.

Lastly, with regard to the motion for summary judgment, I note that the plaintiffs will bear the burden of proving causation at trial. The defendants will not bear the burden of proof at trial; however, as the mover on the motion for summary judgment, it had the initial burden of proof, pursuant to La. C.C.P. art. 966(C)(2) to support and point out that there was an absence of factual support for this element of the plaintiffs' claim. As to this issue, since there is no dispute that the plaintiffs were exposed to fipronil, for the defendants to meet its initial burden on summary judgment, the defendants had to either offer evidence that the plaintiffs did not have a causation expert or offer evidence establishing that the plaintiffs' exposures to fipronil did not cause their injuries (or were not medically significant). In the absence of such evidence, a motion for summary judgment on the issue of causation would be unsupported and would not shift the burden to the plaintiffs to demonstrate, at the summary judgment stage, that the plaintiffs' exposures to fipronil caused the plaintiffs injuries (or that they were medically significant).

As the opinion notes, in support of the defendants' motion for summary judgment, the defendants relied on their claim that the plaintiffs' expert opinions were not reliable under **Daubert**, and would thus be excluded. In addition, the defendants relied on the deposition of Dr. Henry, which merely established that the plaintiffs suffered many of the complained of symptoms prior to their fipronil exposure. In opposition to the motion for summary judgment, the plaintiffs relied on their expert opinions, maintaining that these expert opinions were sufficient to establish that they would be able to satisfy their evidentiary burden of proving that their exposures to fipronil caused their damages.

Based on my *de novo* review of the record, I find that the defendants failed to meet their initial burden of pointing out that there was an absence of factual

support for the plaintiffs' claim that their exposure to fipronil caused their damages. The evidence offered by the defendants established only that they had various symptoms prior to their exposure to fipronil. The defendants did not offer, in support of the motion, any evidence to show that the plaintiffs' exposure to fipronil were not medically significant. Instead, the defendants chose to rely on the exclusion of the opinion of the plaintiffs' experts under **Daubert**. Since I believe that ruling should be reversed, and considering the lack of evidence offered by the defendants to establish that the exposures on which the plaintiffs were relying were not medically significant, the defendants' motion for summary judgment was unsupported and was improvidently granted.

Furthermore, even though the defendants unsupported motion for summary judgment did not shift the burden to the plaintiffs to show that there were issues of fact, *i.e.*, that the plaintiffs' exposures to fipronil caused their damages or were medically significant, on *de novo* review, the evidence offered by the plaintiffs in opposition to the motion for summary judgment sufficiently established that there were genuine issues of material fact as to whether the plaintiffs' exposures to fipronil caused their complained of symptoms and damages. Accordingly, the defendants were not entitled to summary judgment and I would reverse the July 6, 2015 judgment of the trial court that granted the defendants' motion for summary judgment and dismissed the plaintiffs' action against the defendants.

Thus, I respectfully concur in part and dissent in part.