

**IN THE SUPREME COURT OF MICHIGAN  
APPEAL FROM THE COURT OF APPEALS  
JANSEN, P.J., AND METER AND BECKERING, JJ.**

**CHANCE LOWERY**  
Plaintiff-Appellee,

Docket No. 151600

vs.  
**ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP and ENBRIDGE  
ENERGY PARTNERS, L.P.,**  
Defendants-Appellants.

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**AMICUS BRIEF OF GREAT LAKES ENVIRONMENTAL LAW CENTER IN  
SUPPORT OF PLAINTIFF-APPELLEE**

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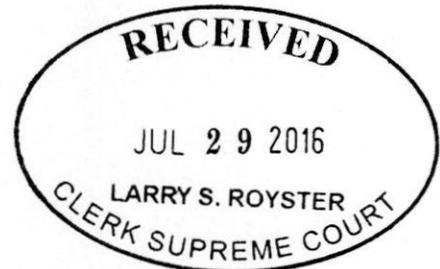


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**STATEMENT OF PROCEEDINGS AND FACTS**

Amicus Curiae, Great Lakes Environmental Law Center, relies upon the Statement of Proceedings and Facts as set forth in Plaintiff-Appellee's Brief on Appeal. The Great Lakes Environmental Law Center now files this Amicus Brief in support of Plaintiff-Appellee's Brief on Appeal.

### INTEREST OF AMICI CURIAE

The **Great Lakes Environmental Law Center** (“GLELC”) is a Michigan nonprofit organization founded to protect the world’s greatest freshwater resource and the communities that depend on it. Based in Detroit, the GLELC has a board and staff of dedicated and innovative environmental attorneys to address our most pressing environmental challenges. The GLELC was also founded on the idea that law students can and must play a significant role in shaping the future of environmental law. The GLELC works in all three branches of government to promote the conservation, protection, and wise use of Michigan’s natural resources.

## INTRODUCTION

Amicus curiae submits this brief to address two significant legal issues: (1) whether the plaintiff in this toxic tort case sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10); and (2) whether the plaintiff was required to present expert witness testimony regarding general and specific causation.

Plaintiff, Mr. Chance Lowery, was exposed to toxic volatile organic compounds (VOCs) when eight hundred forty thousand (840,000) gallons of crude oil was released near Talmadge Creek as a result of Enbridge's negligence. (Brief on Appeal- Plaintiff-Appellee Chance Lowery at 5). Almost immediately after the spill, Lowery reported a powerful and nauseating odor around his home that lingered for weeks. (Brief on Appeal- Plaintiff-Appellee Chance Lowery at 6). As a result of the odor, Lowery began to experience headaches and uncontrollable fits of coughing and vomiting. (App 31a-34a). After weeks of suffering, Lowery ruptured his short gastric artery and had to seek emergency medical surgery. (App 58a-60a). Lowery attributed his injuries to the VOCs that he was exposed to as a result of Defendant's negligence. (App 164a). Defendant has suggested that Plaintiff must provide expert witness testimony from a qualified toxicologist to prove that he was exposed to VOCs and that the exposure was the cause of his injuries. (Brief on Appeal- Plaintiff-Appellee Chance Lowery at 29). Defendant has vehemently denied responsibility for Plaintiff's injuries and has gone to great lengths to discredit the legitimacy of Plaintiff's expert testimony provided by his family physician. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 29).

This case has the potential to raise the evidentiary threshold necessary to avoid summary disposition by requiring a clear showing of causation. Granting summary

disposition in favor of the Defendant would set a precedent that will preclude future plaintiffs from obtaining relief for the injuries they have suffered at the hands of toxic tortfeasors. This Court has not previously required a plaintiff to definitively prove causation in order to avoid a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In order to preserve the integrity of our judicial system, plaintiffs must be able to bring genuine claims to the court without corporate interests setting their own standards for summary disposition.

**(1) Plaintiff in this Toxic Tort Case Has Sufficiently Established Causation to Avoid Summary Disposition Under MCR 2.116(C)(10).**

Summary disposition is only proper when “there is no genuine issue as to any material fact.” MCR 2.116(C)(10). Here a genuine issue regarding a material fact exists and the trial court erred in granting summary disposition to Defendant. Plaintiff has provided sufficient circumstantial evidence that, along with Defendant’s admitted negligence, could reasonably allow Plaintiff to recover at trial. The Court of Appeals was correct to reverse the trial court’s dismissal and this case should be remanded and proceed to trial.

**(2) Plaintiff Was Not Required to Present Expert Witness Testimony Regarding General and Specific Causation.**

In certain toxic tort cases involving ample circumstantial evidence, expert testimony is not required to prove general and specific causation. *Genna v Jackson*, 286 Mich App 413, 418; 781 NW2d 124 (2009). The Court of Appeals has granted Plaintiff partial summary disposition in regards to the Defendant’s negligence, and Plaintiff has overwhelming evidence to suggest that he suffered harm as a result of that negligence. *Chance Lowery v Enbridge Energy Ltd. Partnership*, 2015 Mich App, [April, 2, 2015] (Docket No. 151600) at 2. Lowery experienced common symptoms that result from

exposure to the VOCs Toluene, Benzene, and Xylene. (App 170a-175a). Lowery suffered uncontrollable bouts of coughing and vomiting for weeks before his gastric artery ruptured. (App 58a-60a). Defendant has admitted that VOCs were present in the negligently spilled oil, and Plaintiff suffered from the very symptoms known to originate from exposure to VOCs. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 3). Given the unique characteristics of this case, expert testimony is not required to prove general and specific causation. To hold otherwise would unreasonably raise the evidentiary threshold necessary to prove a genuine dispute of material fact.

## ARGUMENT

### **I. Plaintiff has sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10).**

#### **A. Standard of Review**

The grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich 109, at 118.

#### **B. The Court of Appeals was correct in reversing the trial court's improper grant of summary disposition to the Defendant.**

Pursuant to MCR 2.116(C)(10), summary disposition is only proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In the instant case, there is a genuine issue regarding Defendant's culpability in causing Plaintiff's injuries. An issue of material fact exists where "reasonable minds could differ on an issue after viewing the record." *Allison v AEW Capital Mgt., LLP*, 481 Mich 419, 425, 751 NW2d 8 (2008). To successfully oppose a motion for summary disposition, Plaintiff must "present more than conjecture and speculation . . . [in] establishing a genuine issue of material fact." *Bennett v Detroit Police Chief*, 274 Mich App 307, 319, 732 NW2d 164 (2006). In the present case, Defendant has vehemently denied responsibility for Plaintiff's injuries, whereas Plaintiff has presented overwhelming evidence to suggest that Defendant's negligent conduct was the cause of his harm.

Despite Defendant's admitted negligence in spilling eight hundred forty thousand (840,000) gallons of crude oil near Talmadge Creek, Defendant audaciously maintains that Plaintiff failed to establish an issue of material fact when he claimed that Defendant's conduct caused his harm. (Brief on Appeal-Plaintiff-Appellee Chance

Lowery at 3). Defendant does not deny that toxic VOCs were present in the fumes emitted from their negligently spilled oil or that Plaintiff lived approximately two hundred fifty (250) yards away from a portion of the Kalamazoo River that was polluted with crude oil. *Id.* Instead, Defendant has suggested that a causal link between Defendant's negligent conduct and Plaintiff's harm could not be inferred without the expert witness testimony of a qualified toxicologist. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 29).

Plaintiff claims that he suffered his harm from exposure to the VOCs present in the fumes emitted from Defendant's crude oil. Plaintiff reported suffering with uncontrollable bouts of coughing, headaches, and vomiting (App 31a-34a). Following weeks of vomiting, Plaintiff ruptured his short gastric artery, which he also attributes to his exposure to VOCs. (App 164a). Further, Plaintiff provided eyewitness testimony confirming that, for several weeks, after the oil spill, odors emitted from the crude oil could be smelled in the area where Plaintiff lived. (App 224a; App 85b-87b). The Court of Appeals correctly inferred the causal link between Defendant's negligent conduct and Plaintiff's subsequent injuries when it held that there is "no dispute that Defendant breached its duty of care to Plaintiff and that Plaintiff suffered harm." *Chance Lowery*, [April, 2, 2015] (Docket No. 151600) at 2. Given the substantial evidence produced by Plaintiff, there exists more than conjecture and speculation that a genuine issue of material fact is present.

Furthermore, upholding the grant of summary judgment in favor of Defendant would set a dangerous precedent by insulating tortfeasors from liability and have a chilling effect on injured plaintiffs from bringing future claims. This result would

establish an unnecessarily high evidentiary standard for future plaintiffs who would be required to prove causation definitively in the early stages of litigation as opposed to establishing a genuine issue of fact.

**II. The Court of Appeals was correct in holding that the Plaintiff was not required to present expert witness testimony regarding general and specific causation of his injuries. Given the proffered evidence, the claim that the already-adjudged negligence of Defendant in the release of oil near Talmadge Creek caused the Plaintiff's arterial rupture goes beyond mere speculation.**

**A. Standard of Review**

Questions of law are reviewed de novo. *Maiden*, 461 Mich 109, at 118.

**B. There is no dispute that Defendant breached its duty of care to Plaintiff and that Plaintiff suffered harm as a result.**

In order for a plaintiff to recover on a negligence claim, he is required to prove (1) that the defendant owed the plaintiff a duty of care, (2) that the defendant breached that duty, (3) that the plaintiff suffered harm, and (4) that the defendant's breach caused the harm. *Henry v Dow Chem. Co.*, 473 Mich 63, 71-72, 701 NW2d 684 (2005). In the present case, the Court of Appeals has held that there is "no dispute that Defendant breached its duty of care to Plaintiff and that Plaintiff suffered harm; the only dispute is whether Defendant's negligence was a proximate cause of Plaintiff's arterial rupture." *Chance Lowery*, [April, 2, 2015] (Docket No. 151600) at 2. This Court has held that proving causation requires proof of both cause in fact and proximate cause. *Case v Consumers Power Co.*, 463 Mich 1, 615 NW2d 17 (2000). Further, this Court has held that "cause in fact requires that the harmful result would not have come about but for the

defendant's negligent conduct." *Haliw v Sterling Hts.*, 464 Mich 297, 310; 627 NW2d 581 (2001).

Here, Plaintiff's harm would not have occurred but for the Defendant's negligence in spilling eight hundred forty thousand (840,000) gallons of heavy crude oil near Talmadge Creek. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 3). As a result of Defendant's negligence, Plaintiff was exposed to a cocktail of VOCs and suffered from episodes of coughing, headaches, and vomiting - commonly known symptoms associated with exposure to the fumes emitted from crude oil. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 1-2). In fact, the trial court was sufficiently convinced that exposure to VOCs could have caused Plaintiff to suffer with coughs, headaches and vomiting. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 2). Plaintiff argues that Defendant's negligent oil spill was both the cause in fact and proximate cause of his injuries. In *Genna*, the Court of Appeals held that cause in fact could be established by circumstantial evidence, so long as the proof "facilitates reasonable inferences of causation, not mere speculation." 781 NW2d 124, 128, quoting *Skinner v Square D. Co.*, 445 Mich 153, 164; 516 NW2d 475 (1994).

Defendant argues that Plaintiff's medical doctor was not qualified to prove that Plaintiff came into contact with VOCs or was adversely affected by any potential exposure. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 29). Defendant thereafter suggested that Plaintiff could not survive a motion for summary disposition without the additional expert testimony of a qualified toxicologist. (Brief on Appeal-

Plaintiff-Appellee Chance Lowery at 29). The NIOSH Pocket Guides<sup>1</sup> to the chemicals Toluene, Benzene, and Xylene, which are known components of crude oil, provide that those chemicals cause the specific symptoms of coughing, headaches, and vomiting. (App 170a-175a). In the instant case, Plaintiff has provided sufficient circumstantial evidence to establish that Defendant breached their duty to Plaintiff and that Plaintiff suffered common symptoms as a result of Defendant's negligent conduct. (App 251a). Due to the specific facts of the present case, additional expert testimony from a toxicologist is not necessary to facilitate a reasonable inference of causation.

**C. Direct expert witness testimony is not required here to prove that exposure to VOCs was the cause of Plaintiff's injuries.**

A plaintiff must present substantial evidence that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner*, 445 Mich 153, 164-165. Here, Defendant has ignored this Court's precedent in *Skinner* and rejected any attempts by the Plaintiff to prove causation through circumstantial evidence. Instead, Defendant would like to change Michigan law. Defendant argues that expert testimony from a qualified toxicologist is required to prove that VOCs are capable of causing the injuries that Plaintiff has suffered and that exposure to VOCs was the cause of Plaintiff's injuries. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 18). In *Genna*, the defendant similarly argued that expert testimony was necessary to establish that the plaintiffs' injuries could, and in fact did, result from the defendant's negligence. 781 NW2d 124, 129. However, the Court in *Genna* declined to adopt such a requirement. *Id.*

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<sup>1</sup> The National Institute of Occupational Safety and Health, Centers for Disease Control and Prevention, and the U.S. Department of Health and Human Services, for the purpose of providing information on chemical hazards, prepare NIOSH Pocket Guides.

The *Genna* Court held that direct expert testimony was not required to establish a causal link between a plaintiff's exposure to a toxic substance and their resulting injuries. *Id.* Here, as in *Genna*, Plaintiff's only expert testimony is from a family physician. *Id.* at 130. In *Genna* the Court of Appeals found that since the record established that "extremely high levels of mold [were present] and that mold can cause the types of symptoms suffered by the children . . . 'It does not take an expert to conclude that, under these circumstances, defendant more likely than not is responsible for plaintiffs' injuries.'" *Id.*, quoting *Gass v Marriott Hotel Services, Inc.*, 558 F3d 419, 433 (CA6, 2009). In the present case, the record clearly establishes that the Defendant negligently released VOCs near the Plaintiff's home and that the Plaintiff suffered from symptoms characteristic of exposure to VOCs. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 3). Given the Defendant's admitted negligence in releasing VOCs near the Plaintiff's home, and the ample circumstantial evidence to suggest that Plaintiff was exposed to VOCs and suffered harm as a result, expert testimony should not be required to prove causation of Plaintiff's injuries.

In *Kalamazoo River Study Group ("Kalamazoo River")*, the Sixth Circuit required the plaintiff to introduce expert testimony in order to prove causation. *Kalamazoo River Study Group v Rockwell International Corp.*, 171 F3d 1065 (6th Cir. 1999). In *Kalamazoo River*, the plaintiff alleged that defendant negligently contaminated the Kalamazoo River with toxic polychlorinated biphenyls (PCBs). *Id.* at 1065. Although the defendant acknowledged that their facility had a PCB contamination, defendant provided multiple sources of evidence to suggest that PCBs from its facility could not have entered the Kalamazoo River. *Id.* at 1068. The Court subsequently required the plaintiff to

present expert testimony to refute existing evidence that the Kalamazoo River was not contaminated with PCBs from defendant's facility. *Id.* at 1072-73. Unlike *Kalamazoo River*, the Defendant in this case has not provided any evidence to suggest that Plaintiff was not exposed to toxic VOCs. Defendant has not satisfied its evidentiary burden in proving that expert testimony is required.

Quoting *Kalamazoo River*, the Court in *Gass v Marriott Hotel Services, Inc.* held that "though it is certainly reasonable to require a party to refute scientific evidence with scientific evidence, plaintiffs are not required to produce expert testimony on causation." 558 F3d 419. In the present case, Defendant has demanded that Plaintiff provide expert testimony to prove causation even though Defendant has no evidence to refute Plaintiff's claims. Just as in *Genna*, Defendant merely speculates that the Plaintiff's injuries could have arisen from exposure to different substances. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 17). Defendant has not provided substantial proof that Plaintiff's injuries were caused by something other than exposure to VOCs. Defendant's inability to rule out exposure to VOCs only highlights the existence of a dispute regarding material facts.

Plaintiff lived some two hundred fifty (250) yards away from the Kalamazoo River during the largest oil spill in Michigan history. (Brief on Appeal-Plaintiff-Appellee Chance Lowery at 3). Eyewitness testimony confirms that for several weeks after the spill, toxins emitted from crude oil could be smelled in the area where Plaintiff lived. (App 224a; App 85b-87b). As discussed previously, the chemicals Toluene, Benzene, and Xylene are known to be components of crude oil and the NIOSH Pocket Guides provide that those chemicals cause symptoms including coughing, headaches, and vomiting. (App

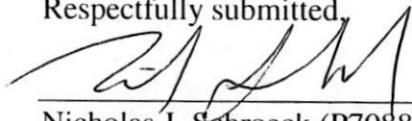
170a-175a). Plaintiff suffered from the most common symptoms associated with the chemicals that he was exposed to in great amounts, and it does not take an expert witness to infer that the Defendant is responsible for Plaintiff's injuries.

**RELIEF REQUESTED**

For the reasons stated above, Amicus Curiae respectfully requests that the Court grant the following relief:

1. Affirm the Court of Appeals' holding to reverse trial court's improper grant of summary disposition under MCR 2.116(C)(10).
2. Remand the case to the trial court to proceed with trial; and
3. Uphold the Court of Appeals' holding that proffering circumstantial evidence to prove causation is sufficient to withstand summary disposition in a toxic tort case, and refrain from elevating the standard to require proof of causation by expert witness testimony regarding general and specific causation;
4. Grant other reliefs as this Court deems fair and just.

Respectfully submitted,



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