

STATE OF MICHIGAN  
IN THE SUPREME COURT

CHANCE LOWERY,

Plaintiff-Appellee,

v.

ENBRIDGE ENERGY, LIMITED  
PARTNERSHIP and ENBRIDGE ENERGY  
PARTNERS, L.P.,

Defendants-Appellants.

Docket No.

Court of Appeals No. 319199

Calhoun Circuit Court  
LC No. 11-003414-NO  
Hon. James C. Kingsley  
(succeeded by Hon. Sarah  
S. Lincoln

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**DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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**ORDER APPEALED AND RELIEF SOUGHT**

Defendants-Appellants Enbridge Energy, Limited Partnership and Enbridge Energy Partners, L.P. (“Enbridge”) seek leave to appeal from the Court of Appeals’ April 2, 2015 opinion reversing, in a 2-1 decision, the trial court’s grant of summary disposition in Enbridge’s favor as to Plaintiff-Appellee Chance Lowery’s lawsuit claiming personal injuries as a result of exposure to oil fumes following the July 26, 2010 release of crude oil from Enbridge’s Line 6B pipeline into the Talmadge Creek and Kalamazoo River.

Enbridge requests that the Court grant leave to appeal or, in the alternative, that it enter an order pursuant to MCR 7.302(H)(1) peremptorily reversing the Court of Appeals majority’s decision and reinstating the trial court’s order granting summary disposition to Enbridge for the reasons stated in the Court of Appeals dissent, which properly concluded that Lowery lacked sufficient expert testimony on the issue of causation, and thus could not establish a genuine issue of material fact for trial.

Enbridge’s application was timely filed within 42 days of the Court of Appeals’ April 2, 2015 opinion.

**QUESTION PRESENTED FOR REVIEW**

Enbridge contends that the following question warrants this Court's review under MCR 7.302(B):

Can a plaintiff demonstrate injury from alleged exposure to toxic chemicals without testimony from a qualified expert or other evidence permitting a reasonable inference that the plaintiff was actually exposed to a dosage or level that is harmful and that the exposure in fact caused the plaintiff's alleged injury?

In a 2-1 decision, the Court of Appeals majority answered: Yes.

The Court of Appeals dissent answered: No.

Enbridge answers: No.

I. **INTRODUCTION AND SUMMARY OF THE REASONS THE COURT SHOULD GRANT LEAVE TO APPEAL**

This case presents the Court with the opportunity to address an issue as to which there is very little guidance from either this Court or the Court of Appeals: to what extent is expert testimony required to establish causation in a toxic tort case? The only published decision on the subject, *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), “decline[d] to adopt” a blanket requirement of expert testimony, *id.* at 418, but *Genna* was an unusual case in which the plaintiffs’ children became seriously ill after being exposed to “massively high levels” of mold toxins in their home, and got better as soon as they moved out. Under those circumstances, *Genna* held that causation could be reasonably inferred without the assistance of an expert.

This case, like most toxic tort exposure cases, is not premised on the unique circumstances presented in *Genna*. On July 26, 2010, a leak on Enbridge’s Line 6B oil pipeline located in Marshall, Michigan, released crude oil that eventually migrated into the Talmadge Creek and Kalamazoo River. At the time, Plaintiff Chance Lowery lived in the vicinity of the river, but was more than ten miles away from the release site. Lowery claims that volatile organic compounds (VOCs) in the oil, including benzene, caused him to experience headaches, nausea, and vomiting that led to the rupture of his gastric artery. That was three weeks after the incident, and, according to Lowery, more than a week after the smell of oil went away.

In support of his claim, Lowery relied on the testimony of a family medicine doctor (and his attorney’s lifelong friend), Jerry Nosanchuk, D.O. However, Dr. Nosanchuk acknowledged that he had no training or experience in either toxicology or vascular medicine, that he had “no idea” about the levels of VOC exposure necessary to cause the symptoms that Lowery alleged, and did not know or attempt to ascertain his actual level of exposure, if any, to toxic chemicals. Dr. Nosanchuk failed to review any of the thousands of air monitoring and sampling results

taken under the direction of the EPA which measured the VOCs throughout the area for months after the initial release. Instead, Dr. Nosanchuk simply assumed that exposure to oil fumes caused Lowery's symptoms because "[h]e wasn't having the problems before and he was having the problems after." Dr. Nosanchuk reached that conclusion without examining Lowery and despite the fact that Lowery has a history of migraine headaches and nausea that he and his doctors have long attributed to his use of the antidepressant drug Lamictal, and had taken a Vicodin just before he started vomiting (one of its side effects is nausea). Lowery told emergency room doctors and the surgeon who repaired his artery (and who declined to speculate about the cause of Lowery's ruptured artery) that he thought the Vicodin caused it, and was so convinced of this that he was reluctant to take Vicodin after his surgery. Despite those potential alternative causes for Lowery's headaches, nausea, and vomiting, Dr. Nosanchuk testified in his deposition that he could not remember considering "anything specifically," and that he rejected other potential causes based on his "clinical judgment."

The trial court concluded that Lowery could not "link up the etiology of the ruptured aorta [sic]" and granted summary disposition in Enbridge's favor, but the Court of Appeals reversed in a 2-1 opinion. (**Tab A**). The Court of Appeals majority acknowledged Enbridge's position that Dr. Nosanchuk's testimony was "inadequate" to establish causation, but concluded on the basis of *Genna* that expert testimony was not necessary because there was a "strong enough logical sequence of cause and effect for a jury to reasonably conclude that plaintiff's exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture." The Court of Appeals dissent argued that Lowery's "theory of causation was attenuated," and that "without sufficient expert testimony on the issue of causation, [Lowery]

could not establish a genuine issue of material fact concerning whether the Kalamazoo River oil spill proximately caused his ruptured artery and internal bleeding.”

The Court of Appeals dissent had it exactly right. Federal courts have widely recognized that in order to establish causation in a toxic tort case, a plaintiff is required to provide evidence of exposure to toxic chemicals at a level that was harmful and known to cause the symptoms being alleged, and that the plaintiff’s exposure was in fact the cause of his or her symptoms. Though there may be unique cases where expert testimony is not needed to establish this causal link, that is the exception, not the rule. As the Sixth Circuit has explained, causation in toxic tort cases ordinarily involves “scientific assessments that must be established through the testimony of a medical expert.” *Pluck v BP Oil Pipeline Co*, 640 F3d 671, 677 (CA 6, 2011). That is precisely the case here.

Lowery lived miles from the release site and claims to have experienced headaches and vomiting three weeks after the oil leak. Yet there were thousands of individual air sampling and air monitoring results taken, and those results showed that there were inadequate levels of VOCs to warrant a mandatory evacuation even immediately after the initial release, let alone weeks later after the oil had traveled for miles in waterways with the oil fumes dissipating along the way. Moreover, there are other potential causes for the symptoms Lowery alleges. The Court of Appeals dissent correctly observed that “whether the fumes released by the oil spill caused plaintiff’s vomiting, and whether plaintiff’s vomiting in turn caused his abdominal artery to rupture, are not matters within the common understanding of average jurors,” and that Lowery needed an expert to establish causation.

Dr. Nosanchuk, however, conceded that he did not know the “the medical effects of exposure to toxic chemicals and volatile organic compounds, and that he had never treated a

patient with a ruptured abdominal artery resulting in internal bleeding.” More importantly, Dr. Nosanchuk did not know or attempt to ascertain Lowery’s actual level of exposure to VOCs, despite the ready availability of extensive air monitoring and sampling data taken at the time of the oil leak. Dr. Nosanchuk’s assumption that exposure to oil fumes must have caused Lowery’s alleged symptoms since there was an oil release and Lowery claimed to have experienced symptoms is a classic example of the logical fallacy “*post hoc, ergo propter hoc*,” i.e., the assertion of a cause and effect relationship simply because one event follows the other in time. This Court and others around the country have consistently rejected such logic and instead required scientific evidence demonstrating causation, not conjecture. See, e.g., *Craig v Oakwood Hosp*, 471 Mich 67, 93; 684 NW2d 296 (2004) (“[I]t is error to infer that A causes B from the mere fact that A and B occur together.”); *Abbott v Federal Forge*, 912 F2d 867, 875 (CA 6, 1990) (“[P]ost hoc, ergo propter hoc is not a rule of legal causation.”).

Under MCR 7.203(B)(3), this Court’s review is proper if “the issue involves legal principles of major significance to the state’s jurisprudence.” This Court has never addressed the requirements for establishing causation in a toxic tort case, or the extent to which expert testimony is required. Indeed, until *Genna* was decided, there was “no published Michigan caselaw on this subject.” *Genna*, 286 Mich App at 418. But *Genna* is not controlling here, as it does not suggest that causation can be established, with or without expert testimony, in the absence of *any* evidence of exposure. Instead, *Genna* stands for the proposition that with sufficient circumstantial evidence of exposure that would allow a reasonable inference as to causation, expert testimony on causation may not be necessary. Here, Dr. Nosanchuk’s opinion cannot bridge the gap between the oil incident and Lowery’s alleged symptoms because there is simply no evidence of exposure. In nevertheless finding “genuine issues of material fact to be

resolved by a jury,” the Court of Appeals majority’s decision is “clearly erroneous and will cause material injustice” to Enbridge, which should not be forced to go through a trial at which the jury is permitted to speculate about causation. MCR 7.302(B)(5).

As discussed further below, Enbridge requests that the Court grant leave to appeal to consider these important issues or, in the alternative, enter an order peremptorily reversing the Court of Appeals majority’s decision and reinstating the trial court’s order granting summary disposition to Enbridge for the reasons stated in the Court of Appeals dissent.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. A leak on Enbridge’s Line 6B oil pipeline resulted in a release of crude oil that eventually migrated into the Kalamazoo River.**

On July 26, 2010, Enbridge Energy, Limited Partnership reported a leak on its Line 6B oil pipeline, approximately one mile downstream of Enbridge’s pumping station in Marshall, Michigan. The crude oil eventually migrated into the Talmadge Creek and Kalamazoo River. Because the Kalamazoo River was in flood stage, the oil was carried in the water some forty miles through Calhoun and Kalamazoo Counties up to where the Kalamazoo River meets Morrow Lake.

Within hours of the release, air sampling and air monitoring was commenced under the direction of the EPA to determine if any health hazard was presented and whether an evacuation of the area would be required. Based on the results, there was never a mandatory evacuation but only a voluntary evacuation in proximity to the release site, miles away from where Plaintiff resided. The air monitoring and air sampling continued for months, resulting in thousands of data points measuring the VOCs that had been released from the crude oil.

**B. Plaintiff filed a lawsuit claiming that he suffered headaches, coughing, nausea, and vomiting as a result of exposure to toxic fumes from the oil, and that his vomiting led to the rupture of his gastric artery.**

At the time of the release, Plaintiff Chance Lowery lived at 279 Silver Street in Battle Creek, which was about thirteen miles from the release site. Lowery testified at his deposition that he smelled oil within twelve hours of the July 26, 2010 pipeline leak, and that the smell was strong for three to five days. (Lowery Dep at 42-43, attached at Tab 1 to Enbridge's COA Br, **Exhibit B**). On the second day, Lowery claimed that he started getting migraine headaches that were so severe he was "bedridden" ten hours a day. (*Id.* at 46-47, 49).<sup>1</sup> Lowery testified that this lasted for five to seven days, after which the smell went away. (*Id.* at 43, 49).<sup>2</sup>

On August 18, 2010, Lowery experienced another migraine and decided to take Vicodin that he received from a friend. (*Id.* at 47). Lowery testified that after taking the Vicodin, he vomited and experienced severe abdominal pain. (*Id.* at 49). This was some *two weeks* after Lowery testified the smell of oil had gone away. Lowery drove himself to Bronson Battle Creek Hospital, where he had emergency surgery to repair his ruptured gastric artery, which was causing internal bleeding. (Bronson Hospital medical records attached as Tab 3 to Enbridge's Court of Appeals Br). Lowery's surgeon, John Koziarski, M.D., who is board certified in both surgery and phlebology (i.e., vein diseases), testified that he could not determine the cause of Lowery's ruptured gastric artery:

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<sup>1</sup> This testimony was contradicted by that of Lowery's friend, Michael Condon, who said that during the three weeks between the oil incident and Lowery's surgery, he and Lowery met up every couple of days because Lowery did not want to be at home near the smell of oil. (Michael Condon Dep at 8-10, attached at Tab 4 to Enbridge's COA Br). Condon further testified that during the time period when Lowery claims to have been bedridden all day, they met to play disc golf, basketball, watch movies, or hang out at Condon's house. (*Id.* at 9, 25).

<sup>2</sup> In response to Enbridge's motion for summary disposition, Lowery submitted an affidavit stating that the smell of oil was "almost unbearable" for "two weeks."

- Q. And in this instance, you testified earlier that you could not determine the actual medical cause of Mr. Lowery's torn artery or avulsed artery; is that correct?
- A. That is correct. [Koziarski Dep at 8, 36-37, attached at Tab 6 to Enbridge's COA Br.]
- C. Plaintiff has a long history of migraine headaches and nausea that preexisted the oil leak.**

During discovery, it was revealed that Lowery actually has a history of migraines and nausea. Lowery has long suffered from depression and bipolar disorder, and was being treated with an antidepressant drug called Lamictal. (Lowery Dep, 34:24-35:14; 37:7-17; see also Summit Pointe medical records, attached at **Tab 2** to Enbridge's Court of Appeals Brief). Lowery's medical records from Summit Pointe Community Mental Health in Battle Creek contain various references to his complaints about getting headaches, nausea, and "dry heaves" from his Lamictal, especially when he smoked cigarettes or was around smoke, as well as migraines when "stressed" and from his "impacted wisdom teeth".<sup>3</sup>

**November 29, 2007 "Medication Review"**

I believe I have him diagnosed as a bipolar disorder and started him on a trial of Lamictal. He comes in today saying that Lamictal at 100 mg a day is helpful to him. He says in the past where he would have gone off or been upset he is calmed by the medication. However he has nausea and dry heaves [sic] however it only occurs if he smokes or is around smoke.

\* \* \*

I discussed with the patient that the medication appears helpful that it should not be stopped, that he should stop smoking and to continue to take the Lamictal . . . .

**January 16, 2008 "Medication Check"**

Chief complaints:

Morning headache/nausea with Lamictal increased from 75 to 100 mg. daily

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<sup>3</sup> Lowery smoked medical marijuana and was a regular cigarette smoker. (Lowery Dep at 39-40, 57; Bronson Hospital Records).

**February 11, 2010 “Summit Pointe Assessment”**

Gets migraines when stressed . . .

\* \* \*

. . . He has . . . “something like migraines” which he attributes to impacted wisdom teeth. . . .

**D. Plaintiff told emergency room doctors and his surgeon that an antidepressant drug was causing migraines, and that he vomited after taking Vicodin to relieve one of them; he never mentioned the oil leak.**

Lowery’s history of severe headaches and difficulties with Lamictal are also well-documented in his Bronson Hospital records. Lowery told Dr. Koziarski that he believed Lamictal was causing his migraines, and that he became nauseous and vomited after taking a Vicodin. In fact, Lowery was so convinced that the Vicodin caused his vomiting that he was reluctant to take it after his surgery when he complained of yet another migraine:

**August 18, 2010 “Operative Procedure Report”**

[Lowery] states that earlier this afternoon, he developed a migraine. He took Vicodin for this. He then developed some nausea and had violent vomiting. . . .

**August 20, 2010 “Progress Note”**

He is starting to get a migraine again. He is reluctant to take Norco or Vicodin as this is what made him throw up the first time. . . . He is going to restart on is Lamictal that he was taking as an outpatient for bipolar disorder. He is wondering about changes [to] his Lamictal as this maybe was causing his migraines. . . .<sup>4</sup>

Lowery told doctors in the emergency room the same thing:

**August 18, 2010 “ED Physician Notes”**

He has a history of kidney stones and bipolar disorder as well as migraine headaches. He said he had a migraine headache today and he took 1 of his oral

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<sup>4</sup> See Bronson Hospital records, attached at **Tab 3** to Enbridge’s COA Br; Koziarski Dep at 17, 20-21.

Vicodin, which is pretty typical for him. He says he got nauseous and started vomiting. . . .<sup>5</sup>

Based on Lowery's reports that his Lamictal was causing his migraines, Dr. Koziarski requested a psychiatric consult with Dr. Anoop Thakur to determine if the medication could be changed. (See Koziarski Dep at 22-23 and August 18, 2010 "Consultation" (part of the Bronson Hospital records attached at Tab 3 to Enbridge's COA Br)). Nowhere in Lowery's Bronson Hospital records is there any mention of the oil leak, and Dr. Koziarski testified in his deposition that when Lowery came to the hospital on August 18, 2010, he did not say anything about oil exposure, the alleged smell, the leak, or living close to the Kalamazoo River. (Koziarski Dep at 24-25).

**E. The trial court granted summary disposition to Enbridge, concluding that Plaintiff failed to establish a causal connection between the oil leak and the rupture of his gastric artery.**

On September 30, 2013, Enbridge filed a motion for summary disposition arguing that Lowery did not have sufficient evidence to establish a causal link between the oil leak and either his alleged headaches and vomiting or the rupture of his gastric artery. (See Defendants' Motion for Summary Disposition, attached at Tab 9 to Enbridge's COA Br).<sup>6</sup>

In response, Lowery relied on the testimony of his medical expert, Jerry Nosanchuk, D.O., who opined that "fumes from the oil spill caused Chance Lowery to have the migraines headaches, extreme coughing and nausea as well as vomiting. Ultimately, these problems caused a tear of the short gastric artery resulting in hemorrhage within the abdominal cavity." (Nosanchuk Dep at 48, attached at Tab 7 to Enbridge's COA Br). Lowery also relied on (1)

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<sup>5</sup> See Bronson Hospital records.

<sup>6</sup> On October 7, 2013, the trial court granted partial summary disposition to Lowery as to the duty and breach elements of his negligence claim, leaving only proximate cause and damages issues.

information from a Centers for Disease Control “Pocket Guide” about the VOCs found in crude oil (including benzene, xylene, and toluene), (2) testimony from one of his neighbors in another case about a “bad smell” after the oil leak, (3) testimony from a friend, David Condon, that he could smell oil at Lowery’s house, and (4) the fact that Lowery and his girlfriend, Ashlee Green, saw cleanup workers in “hazmat suits.” (See Plaintiff’s Brief in Opposition to Defendants’ Motion for Summary Disposition and Supplement, attached at Tabs 11 and 12 to Enbridge’s COA Br).

In its reply brief, Enbridge argued that none of Lowery’s evidence was sufficient to create a genuine issue of material fact regarding causation, as there was no evidence that Lowery had been exposed to VOCs at a level sufficient to cause the symptoms he was alleging. (See Reply Brief in Support of Defendants’ Motion for Summary Disposition, attached at Tab 10 to Enbridge’s COA Br). As for Lowery’s reliance on Dr. Nosanchuk’s testimony, Enbridge argued that in addition to lacking training or experience in either toxicology or vascular surgery, Dr. Nosanchuk’s causation opinion was speculative because he did not know anything about Lowery’s actual exposure to VOCs, if any, and failed to properly rule out alternative causes for his headaches and vomiting, such as Lowery’s use of Lamictal and Vicodin. (*Id.*).

On November 4, 2013, the trial court held a hearing on Enbridge’s motion for summary disposition. (See Tab 15 to Enbridge’s COA Br). The trial court was satisfied that Lowery had sufficient evidence to connect his “vomiting and headaches” to the oil leak, but that Lowery had failed to “link up the etiology of [his] ruptured aorta [sic]”:

THE COURT: But in the Defendant’s brief they say medical records from Mr. Lowery’s hospitalization which contain contemporaneous statements of his condition indicate that he never even mentioned to any of his doctors that the fumes from the oil, were allegedly causing him so much discomfort and illness. Instead he told doctors that he thought the migraines were caused by his bipolar medication, and that the nausea and vomiting was caused by Vicodin he had been

taking. Since Mr. Lowery has no evidence of causation either specific, specific or general, Enbridge is entitled to summary disposition of his negligence claim.

I will acknowledge that in other cases I have made the determination based upon the witnesses in those cases that exposure can cause headaches and general discomfort, causing people to go to their doctor. That first chasm has been bridged, but to go from that point to surgery, how do I get there . . . ?

\* \* \*

What I'm going to do, gentlemen, I will grant partial summary disposition as it relates to any ailment or physical problem that Mr. Lowery had beyond the vomiting and headaches. I just don't have anything, Mr. Bloom, to link up the etiology of ruptured aorta [sic]. [*Id.* at 12-15.]

Although the trial court initially intended to grant partial summary disposition only as to Lowery's claim relating to his ruptured gastric artery, Mr. Lowery's counsel requested that the trial court grant summary disposition in its entirety because "we never really made a claim for the nausea and headaches . . . this whole case is all about the surgery, so if you are going to grant the motion, grant it totally, so that I can then appeal it." (*Id.* at 14). The trial court thus granted summary disposition as to all of Lowery's claims, and a final order was entered on November 8, 2013. (See Order Granting Defendants' Motion for Summary Disposition, attached at Tab 16 to Enbridge's COA Br).

**F. In a 2-1 decision, the Court of Appeals majority reversed, holding that Lowery did not need expert testimony and that his claim "goes beyond mere speculation."**

On April, 2, 2015, the Court of Appeals issued a 2-1 opinion reversing the trial court's decision and remanding the case for further proceedings. (COA Op, Tab 1). The Court of Appeals majority, citing *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), concluded that Lowery did not need "direct expert testimony" to prove causation because "there was a strong enough logical sequence of cause and effect for a jury to reasonably conclude that plaintiff's exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture." (*Id.* at 2). Though the Court of Appeals majority acknowledged "that there are

other plausible explanations for plaintiff's injury," the majority reasoned that "this only serves to highlight that there are genuine issues of material fact to be resolved by a jury." (*Id.* at 3).

Judge Kathleen Jansen dissented, arguing that Lowery needed expert testimony because "whether the fumes released by the oil spill caused plaintiff's vomiting, and whether plaintiff's vomiting in turn caused his abdominal artery to rupture, are not matters within the common understanding of average jurors." (COA Dissent at 1). The dissent further argued that Dr. Nosanchuk was not qualified to opine on causation, and that "[w]ithout sufficient expert testimony," a jury could only "speculate on the issue of causation." (*Id.* at 2).

### III. ARGUMENT

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

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

In reviewing a ruling made under this court rule, a court tests the factual support [for a plaintiff's claim] by reviewing the documentary evidence submitted by the parties. We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 567-568 (citations and internal quotation marks omitted).]

#### B. **Testimony from a qualified expert is required to prove causation in a toxic tort case.**

The Court of Appeals majority plainly erred in concluding that Lowery did not need testimony from a qualified medical expert to establish a causal connection between his alleged exposure to oil fumes and the nausea and vomiting that Lowery claims led to the rupture of his gastric artery. Expert testimony is essential in a case like this, particularly where the alleged exposure is neither proximate in time nor distance to the actual release of the toxic substance. In other words, this is not a case where there was immediate exposure to a known

toxic substance in a confined area. Rather, Lowery claims he was exposed to toxins weeks after the release of crude oil, more than ten miles downriver from the release, and where the crude oil has traveled in a rapidly flowing waterway.

Although decided in a slightly different context, this Court's decision in *Woodard v Custer*, 473 Mich 1; 702 NW2d 525 (2005), aptly illustrates how expert testimony is necessary to resolve questions such as these, which are outside the common understanding or average jurors. *Woodard* was a medical malpractice case in which the plaintiff's infant son was admitted to the Pediatric Intensive Care Unit at the University of Michigan Hospital for treatment for a respiratory problem. "When the infant was moved to the general hospital ward, physicians in that ward discovered that both of the infant's legs were fractured." *Id.* at 3. The plaintiff sued the hospital and the treating physician, alleging that the fractures were the result of the "the improper placement of an arterial line in the femoral vein of the infant's right leg and the improper placement of a venous catheter in the infant's left leg." *Id.* Reversing the Court of Appeals' decision that expert testimony was not necessary, this Court held that "whether a leg may be fractured in the absence of negligence when placing an arterial line . . . in a newborn's leg is not within the common understanding of the jury." *Id.* at 9. See also *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 429; 684 NW2d 864 (2004) (finding "the risk of asphyxiation posed by a bedding arrangement" to be a matter requiring expert testimony).

The Court of Appeals has similarly recognized the need for expert testimony to resolve causation questions that are "scientific in nature." In *Nelson v American Sterilizer Co*, 223 Mich App 485; 566 NW2d 671 (1996), the Court observed that "[t]he question whether chronic inhalation exposure to EtO causes steatohepatitis in humans is scientific in nature, and it is to the scientific community that the law must look for the answer." See also *Schaendorf v Consumers*

*Energy Co*, unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009; 2009 WL 563904, \*8 (Docket No. 281001) (“We conclude that plaintiffs’ theory of liability in the case at bar, i.e., stray voltage negatively affecting the milk production of a dairy herd, presents technical issues that are beyond the common experience and understanding of the average juror, making expert testimony necessary to establish the negligence cause of action.”) (attached at Tab 17 to Enbridge’s COA Brief).

Although this Court has not had occasion to address causation in toxic tort cases such as this one, other courts have done so extensively, and have consistently recognized that expert testimony is ordinarily required. For example, in *Pluck v BP Oil Pipeline Co*, 640 F3d 671 (CA 6, 2011), the Sixth Circuit, applying Ohio law, explained that “the plaintiff must establish both general and specific causation through proof that the toxic substance is capable of causing, and did cause, the plaintiff’s alleged injury.” *Id.* at 676-677. The court stressed that “[b]oth causation inquiries involve scientific assessments that must be established through the testimony of a medical expert,” and that “[w]ithout this testimony, ‘a plaintiff’s toxic tort claim will fail.’” *Id.* (citation omitted). Similarly, in *Wills v Amerada Hess Corp*, 379 F3d 32 (CA 2, 2004), the Second Circuit found “the causal link between exposure to toxins and other behavior and squamous cell carcinoma” to be “sufficiently beyond the knowledge of the lay juror that expert testimony is required to establish causation.” *Id.* at 46. As the Eleventh Circuit observed in *Rink v Cheminova, Inc*, 400 F3d 1286 (CA 11, 2005), “toxic tort cases . . . are won or lost on the strength of the scientific evidence presented to prove causation.” *Id.* at 1297 (citation omitted). See also *Allen v Pennsylvania Engineering Corp*, 102 F3d 194, 199 (CA 5, 1996) (“Scientific knowledge of the harmful level of exposure, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs’ burden in a toxic tort

case.”); *In re Paoli RR Yard PCB Litigation*, 916 F2d 829, 838 (CA 3, 1990) (“Plaintiffs set out to prove that their personal injuries were proximately caused by their exposure [to PCBs] . . . . Their case depends upon expert testimony pertaining to exposure and causation.”).

In light of this Court’s precedents and established case law from other jurisdictions stressing the need for expert testimony to establish causation in toxic tort cases, the Court of Appeals majority erred in holding that Lowery did not need expert testimony to survive summary disposition. Although the majority relied on *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009), in reaching that conclusion, *Genna* is easily distinguishable because in that case there was ample evidence of exposure such that the jury could reasonably infer causation without expert assistance. In *Genna*, the plaintiffs and the defendant lived in neighboring condominiums that “shared a foundation, walls, an attic, and a plumbing stack.” *Id.* at 415. While the defendant was away from home for several months visiting her brother in Florida, her water heater ruptured, resulting in an infestation of toxic mold. As the *Genna* described it:

There were patches of mold of all different colors all over the walls and ceilings in her kitchen, family room, and dining area. The hot water tank was spewing water a few feet from the shared foundation wall and there were several inches of standing water on the floor and surface mold throughout the entire basement. [*Id.*]

As a result, the defendant’s condominium was “so grossly contaminated” that “[m]old experts concluded that the interior of defendant’s condominium . . . needed to be demolished.” *Id.* at 416. The plaintiffs also presented evidence from a microbial expert who analyzed mold samples taken from *both the plaintiffs’ and the defendant’s condominiums*. The expert identified two different molds – penicillium and aspergillus – that are highly toxic, and concluded that “the levels of these two molds were unusually high, to the extent that both plaintiffs’ and defendant’s condominiums would not be healthy environments in which to live.” *Id.*

In affirming a jury verdict in the plaintiffs' favor, *Genna* found that “[w]hile no doctor was able to testify specifically that the [plaintiffs’] children were ill because of their exposure to toxic mold,” there was sufficient evidence of causation because (1) “all the microbial evidence showed massively high levels of surface and airborne mold toxins in both plaintiffs’ and defendant’s condominiums,” (2) there was evidence “that the molds in the units were toxic and are known to be toxic to humans and that they can cause toxic reactions in people,” and (3) the children’s allergy doctor concluded that the mold was a “probable confounding factor,” particularly because “the children had been otherwise healthy before their mold exposure and their symptoms resolved after they moved from their home.” *Id.* at 420-421. In light of this evidence, *Genna* concluded that “[i]t does not take an expert to conclude that . . . [the defendant] more likely than not [is] responsible for [the plaintiffs’] injuries.” *Id.* at 421 (citation omitted).

In support of its decision, *Genna* cited the Sixth Circuit’s decision in *Gass v Marriott Hotel Services, Inc*, 558 F3d 419 (CA 6, 2009), a similarly unusual case in which the plaintiffs claimed that during their stay at the defendant’s hotel, the defendant’s employees “sprayed their belongings with an unknown pesticide and filled their hotel room with toxic vapors, causing [them] to become ill.” *Id.* at 422. While the defendants were administering the pesticides, one of the plaintiffs walked into the hotel room. That plaintiff testified that there was a “thick, horrid, acrid, putrid, odor” in the room and that the “haze of chemicals in the room was so thick that she could ‘see it, smell it, taste it, [and] feel it.’” *Id.* The other plaintiff immediately returned to the room and each plaintiff remained in the room to remove their belongings. Both of the plaintiffs began to feel sick immediately after their exposure and later endured symptoms that were consistent with exposure to the neurotoxins in pesticides. *Id.* at 422-424. Given the unique

circumstances of the plaintiffs' exposure, the Sixth Circuit found that expert testimony regarding specific causation was not necessary. *Id.* at 433.

This case is nothing like *Genna*, or *Gass* for the matter. The plaintiffs in *Genna* presented evidence, including expert testimony, that their home was infested with mold to the extent that it was considered unsafe to live, while the plaintiffs in *Gass* presented evidence that they both became sick after walking into a room that had just been sprayed with pesticides containing neurotoxins known to cause the very symptoms the plaintiffs experienced within *fifteen minutes* of being exposed. *Gass*, 558 F3d at 423-424. Here, on the other hand, *Lowery does not have a shred of evidence* concerning the levels of VOCs (if any) to which he might have been exposed in the days and weeks following the oil leak. Moreover, Lowery lived more than ten miles away from the release site, and the vomiting that Lowery claims led to the rupture of his gastric artery occurred more than *three weeks* after the oil leak and more than a week after Lowery said the smell of oil went away. (See discussion, *supra* at 6). Likewise, the crude oil here was traveling in a flood-stage waterway, and not in a confined area.

Finally, whereas there was no other plausible explanation for the plaintiffs' symptoms in *Genna* and *Gass*, here Lowery's alleged headaches, nausea, and vomiting are more readily explained by his use of Lamictal and the Vicodin he took right before he starting vomiting the day his gastric artery avulsed. (*Id.* at 7-9). As federal courts have recognized, "where an injury has multiple potential etiologies, expert testimony is necessary to establish causation." *Wills*, 379 F3d at 46. See also *Brown v Burlington Northern Santa Fe Railway Co*, 765 F3d 765, 771 (CA 7, 2014) ("[W]hen there is no obvious origin to an injury and it has multiple potential etiologies, expert testimony is necessary to establish causation."); *Howell v Centric Group, LLC*, 508 Fed Appx 834, 837 (CA 10, 2013) (same).

Despite the Court of Appeals majority's assertion, Lowery's testimony concerning his alleged exposure was not sufficient to permit a jury to make "reasonable inferences" of causation. *Genna* and *Gass* illustrate how causation may *sometimes* properly be inferred by a jury without the assistance of an expert, but that is not the norm, and it certainly is not the case here. As the Court of Appeals dissent properly recognized, Lowery's "theory of causation was attenuated. It required both (1) proof that the fumes from the oil spill caused plaintiff's vomiting, and (2) proof that plaintiff's vomiting caused his resulting vascular injury." (COA Dissent at 1). These "are not matters within the common understanding of average jurors." (*Id.*). "Because an untrained layperson would not be qualified to intelligently resolve these particular issues without enlightenment from someone with specialized knowledge of the subject, expert testimony was necessary." (*Id.*). In holding otherwise, the Court of Appeals majority clearly erred. This Court should grant leave to provide guidance on this issue.

**C. Lowery's evidence, including his expert's proffered causation opinion, consists of speculation and is insufficient to create a genuine issue of material fact for trial.**

The Court of Appeals majority further erred in concluding, with or without the testimony of Dr. Nosanchuk, that "there was a strong enough logical sequence of cause and effect for a jury to reasonably conclude that plaintiff's exposure to oil fumes caused his vomiting, which ultimately caused his short gastric artery to rupture." (COA Op at 3). As support for its conclusion, the majority reasoned that Lowery lived "in the vicinity of the oil spill" and allegedly experienced symptoms consistent with VOC exposure around the time of the incident:

Plaintiff lived in the vicinity of the oil spill and was aware of an overpowering odor and was aware that "the news just kept saying that headaches and nausea [sic]." A reasonable reading of plaintiff's testimony is that he had an approximately weeklong spell of severe migraines that started the day after the spill and then, approximately a week after that, he experienced a several-days-long bout of vomiting. During a fit of vomiting, plaintiff felt a sharp pain in his abdomen, and it turned out that his short gastric artery (which runs between the

stomach and the spleen) had ruptured, requiring surgery. Given the proffered evidence, the claim that the already-adjudged negligence of defendants in the release of oil into the Kalamazoo River caused the artery rupture goes beyond mere speculation. [*Id.*]

Far from establishing a “logical sequence of cause and effect,” Lowery’s “proffered evidence” is based on speculation and conjecture, especially when viewed in light of his history of migraine headaches and nausea when taking Lamictal, as well as the Vicodin he took immediately before vomiting. In *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), this Court explained the role of circumstantial evidence in demonstrating causation and “the basic legal distinction between a reasonable inference and impermissible conjecture”:

As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence. [*Id.* at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).]

Wishing to “make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation,” *Skinner* emphasized that “at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present *substantial evidence* from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Id.* at 164-165 (emphasis added), citing *Kaminski*. While “the evidence need not negate all other possible causes,” it must “exclude other reasonable hypotheses with a fair amount of certainty.” *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684

NW2d 296 (2004) (citation and internal quotation marks omitted). In sum, there must be “more than a mere possibility or a plausible explanation.” *Id.* at 87.

*Craig* provides a useful example of these principles. The plaintiff in *Craig* was born with cerebral palsy, which his expert opined was attributable to traumatic injury to the plaintiff’s brain during his mother’s labor and delivery. *Id.* at 91. As support, the expert relied on an MRI image showing the plaintiff’s “brain tissue had developed asymmetrically.” *Id.* at 92. The expert, however, never explained “how exactly the mechanisms he described led to cerebral palsy (as opposed to any other neurological impairment) and how they were connected to the asymmetric brain development depicted in [the] plaintiff’s MRI.” *Id.* This Court held that without evidence supplying this connection, the jury could only engage in improper speculation based on the mere *correlation* between the plaintiff’s alleged head injury and his cerebral palsy:

It is axiomatic in logic and in science that correlation is not causation. This adage counsels that it is error to infer that A causes B from the mere fact that A and B occur together. Given the absence of testimony on causation supplied by Dr. Gabriel, the jury could have found for plaintiff only if it indulged in this logical error—concluding, in effect, that evidence that plaintiff may have sustained a head injury, combined with evidence that plaintiff now has cerebral palsy, leads to the conclusion that the conduct that caused plaintiff’s head injury also caused his cerebral palsy.

Such indulgence is prohibited by our jurisprudence on causation. . . . [*Id.* at 93.]

As discussed below, this is *exactly* the sort of speculation that the Court of Appeals majority’s decision in this case has authorized.

**1. Lowery and his expert offered no evidence of actual exposure to VOCs.**

In order to establish causation in a toxic tort case,<sup>7</sup> it is widely recognized that “[t]he plaintiff must show that [he or she] was exposed to the toxic substance and that the level of exposure was sufficient to induce the complained-of medical condition (commonly called a ‘dose-response relationship’).” *Pluck*, 640 F3d at 677. “[T]he mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause plaintiff’s symptoms.” *Id.* at 679. As the Eighth Circuit explained in *Wright v Willamette Industries, Inc*, 91 F3d 1105 (CA 8, 1996):

It is therefore not enough for a plaintiff to show that a certain chemical agent sometimes causes the kind of harm that he or she is complaining of. At a minimum, we think that there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered. We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant’s emission has probably caused a particular plaintiff the kind of harm of which he or she complains before there can be a recovery. [*Id.* at 1107.]<sup>8</sup>

Applying these principles, federal courts have consistently held that causation cannot be established without evidence demonstrating a plaintiff’s level of exposure to potentially harmful chemicals. For example, in *Wright*, the plaintiffs claimed that they suffered “headaches, sore throats, watery eyes, running noses, dizziness, and shortness of breath” as a result of their exposure to formaldehyde emissions from the defendant’s nearby plant. The Eighth Circuit

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<sup>7</sup> Enbridge does not dispute that the VOCs found in crude oil are *capable* of causing headaches, nausea, and vomiting at sufficient levels of exposure, i.e., *general* causation. Thus, Enbridge’s focus in this case has always been on Lowery’s failure to present evidence of *specific* causation, i.e., that exposure *did* cause his alleged symptoms. See *Pluck*, 640 F3d at 676-677.

<sup>8</sup> See also *McClain v Metabolife Int’l Inc*, 401 F3d 1233, 1242 (CA 11, 2005) (observing that causation “requires not simply proof of exposure to the substance, but proof of enough exposure to cause the plaintiff’s specific illness”).

reversed a jury verdict in favor of the plaintiffs because there was no evidence that they were exposed to a “hazardous level” of emissions. Thus, the jury could “only have speculated about whether the amount of formaldehyde from Willamette’s plant to which each plaintiff was exposed was sufficient to cause their injuries or, indeed, any injuries at all.” *Id.* at 1108. See also *Nelson v Tennessee Gas Pipeline Co*, 243 F3d 244, 252-253 (CA 6, 2001) (holding that even levels of PCBs “in excess of allowable limits” could not establish causation absent evidence that the plaintiffs were “exposed at a level that could cause neurological and lung impairments”).

Similarly, in *Cowan v Arkema Inc*, Nos. 04-71143, 04-72564; 2007 WL 3203249 (ED Mich, 2007), the plaintiffs claimed that a fire at the defendant’s chemical plant resulted in the release of sulfur dioxide and caused them to suffer various respiratory injuries. However, the plaintiffs’ experts failed to state the threshold levels of exposure that would cause these symptoms and did not attempt to ascertain the plaintiffs’ levels of exposure. Rather, the experts provided material handling sheets and testimony that “any exposure to this toxic chemical will necessarily cause the symptoms that were undisputedly suffered by the Plaintiffs.” *Id.* at \*1 (citation omitted). In finding this testimony insufficient, the court held that the plaintiffs “failed to show, directly or inferentially, that their exposure exceeded safe levels for any of the released chemicals.” *Id.* at \*2. The court noted that neither “the experts nor the doctors knew or attempt[ed] to ascertain [the] [p]laintiffs’ level of exposure. They, instead, *presumed* cause and effect because there was a chemical release which could cause respiratory illness and Plaintiffs were symptomatic.” *Id.* (emphasis in original). The court concluded, however, that the fact that the plaintiffs “had symptoms consistent with toxic exposure is insufficient to establish the requisite causal connection.” *Id.* This is consistent with the Court’s decision in *Craig*, which emphasized that it is not enough to simply show a *correlation* between alleged chemical

exposure and symptoms; in other words just because there was an event in proximity to the alleged injuries, causation has not been established. As *Craig* observed, “[i]t is axiomatic in logic and in science that correlation is not causation,” and thus “*it is error to infer that A causes B from the mere fact that A and B occur together.*” *Craig*, 471 Mich at 93 (emphasis added).

Yet this is *precisely* what the Court of Appeals majority has permitted in this case. Despite opining that “the fumes from the oil spill were the sole cause of Chance Lowery’s migraine, extreme coughing, nausea and vomiting,” Dr. Nosanchuk admittedly has no knowledge of Lowery’s *actual exposure* to VOCs, if any. This is because Dr. Nosanchuk did not review *any* of the available air monitoring results or sampling data gathered after the Line 6B incident, let alone samples taken from the vicinity of Lowery’s home. (Nosanchuk Dep at 30-31, attached at Tab 7 to Enbridge’s COA Br).<sup>9</sup> Thus, despite the extensive air monitoring and sampling activity conducted along the Kalamazoo River, Dr. Nosanchuk did not identify a single piece of data or other evidence suggesting that VOCs were actually detected near Lowery’s residence at any time, including on and around August 18, 2010, much less that VOCs were present at levels considered to be capable of causing the sorts of symptoms Lowery alleges.<sup>10</sup>

Instead, when asked to supply the basis for his assumption that Lowery had been exposed to VOCs in the air surrounding his home, Dr. Nosanchuk responded only that he understood that

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<sup>9</sup> Not only did Lowery fail to request during discovery any of the extensive air monitoring or air sampling data, but most of the data was publically available on the U.S. Environmental Protection Agency’s (“EPA”) website. See <<http://www.epa.gov/enbridgespill/data/index.html>> (last accessed April 24, 2015).

<sup>10</sup> The materials from the Centers for Disease Control and Prevention (CDC) that Dr. Nosanchuk referenced in his deposition indicate that certain symptoms that *may* occur with certain levels of exposure to the chemicals found in crude oil, but they obviously do not shed any light on whether Lowery was actually exposed to those chemicals, whether he was exposed at levels sufficient to cause his alleged symptoms, or whether any exposure *did* cause those symptoms.

there were VOCs “in the water” and that Lowery smelled oil. (*Id.* at 30-31). Yet Dr. Nosanchuk did not know (1) where the release site was, (2) the emission rates of the VOCs found in crude oil, (3) that Lowery lived more than ten miles downstream from the release site,<sup>11</sup> or (4) what being able to “smell” oil says about a person’s exposure to VOCs, if anything. (*Id.* at 27-30). Dr. Nosanchuk simply assumed that there were VOCs in the air based on what he “read in the medical records, I mean, my interpretation was that there was some degree of irritation or odor or smell based on his response”,<sup>12</sup> and Lowery’s claim that “[h]e wasn’t having the problems before and he was having the problems afterwards.” (*Id.* at 30-31, 50). This Court, however, has expressly rejected mere *correlation* as an improper basis on which to establish *causation*. *Craig*, 471 Mich at 93. See also *Nelson*, 243 F3d at 254 (rejecting the “circular reasoning that the plaintiffs must have been exposed to PCBs because PCBs were present in the environment and plaintiffs showed symptoms”).<sup>13</sup>

Moreover, this is not a case where it is impossible to determine the levels of VOCs. Within hours of the discovery of the release, air monitoring and air sampling was commenced

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<sup>11</sup> This is significant because in support of his opinion, Dr. Nosanchuk cited congressional testimony by a scientist from the National Institutes of Health, Scott Masten, Ph.D., about the chemical nature of crude oil and the potential for human health effects. One of the things Dr. Masten noted was that “[t]he oil nearest the source of a spill contains higher levels of some of the more volatile hazardous components.” (See Exhibit E to Plaintiff’s Court of Appeals Reply Br).

<sup>12</sup> Despite Dr. Nosanchuk’s statement that he read about Lowery’s complaints of “odor or smell” of oil in his medical records, the fact is that those records do not say any such thing, or mention the oil incident in any way. (See Bronson Records, attached at Tab 3 to Enbridge’s COA Br).

<sup>13</sup> While Dr. Nosanchuk did not cite this as evidence of exposure, Lowery also submitted affidavits from himself and his girlfriend attesting that they saw cleanup workers in “hazmat” suits at some unspecified place and time. (See Tab 18 to Enbridge’s COA Br). Needless to say, this does not establish that VOCs were present at Lowery’s home three weeks after the oil incident, let alone that he was actually exposed to such VOCs and at levels sufficient to cause his alleged symptoms.

under the direction of the EPA and other governmental agencies. Literally thousands of data points were available that showed the levels of VOCs from the time of the release until months afterwards. To simply ignore the scientific data available and instead assume that there must have been exposure is the worst form of “junk science,” and is precisely why qualified and reliable expert testimony is necessary to establish causation.

The Court of Appeals majority failed to recognize these evident deficiencies in Lowery’s causation theory despite striking similarities between this case and one that Enbridge cited prominently in its brief and at oral argument – *Trice v Oakland Development Ltd*, unpublished opinion per curiam of the Court of Appeals, issued Dec 16, 2008; 2008 WL 7488023 (Docket No. 278932) (attached at Tab 17 to Enbridge’s COA Brief). Though unpublished, *Trice*’s analysis is both correct and compelling. In *Trice*, the plaintiff alleged that exposure to pesticides that the defendants applied “at or around her apartment” exacerbated certain medical conditions, including her asthma. *Id.* at \*1. The Court of Appeals, however, affirmed the dismissal of plaintiff’s claim because she failed to present any evidence “that she was exposed to toxic levels known to cause the types of symptoms she has suffered”:

In her complaint, plaintiff alleged that she was exposed “to pyrethrinbased insecticides, other pesticides and hazardous substances” while she lived in defendant’s apartment complex. However, all of plaintiff’s experts acknowledged that the dose of chemicals to which plaintiff had been exposed had not been determined, either through blood, urine, dermal contact or exhaled breath testing analysis, or stated that they were not aware if such testing had been done. Furthermore, plaintiff herself acknowledged that she was not aware of any studies of the quantity or duration of any exposure she may have had to any harmful chemicals. Without such testing, it is not certain that plaintiff was exposed to harmful chemicals at all, let alone that she was exposed to chemicals at a dosage or level that would be harmful. At the very least, plaintiff was required to present evidence that she was exposed to some chemical at some level. Without any testing of her body, there was no evidence that plaintiff was exposed to such chemicals at all, let alone evidence of the dose or level of any chemical to which she may have been exposed. In the absence of such evidence, plaintiff was unable

to establish that any exposure to harmful chemicals specifically caused her symptoms. [*Id.* at \*11.]<sup>14</sup>

Similarly here, given the lack of evidence that Lowery was actually exposed to *any* VOCs, let alone levels sufficient to cause his alleged symptoms, Dr. Nosanchuk's causation theory is entirely speculative. In its motion for summary disposition, Enbridge challenged the reliability of Dr. Nosanchuk's opinion under MRE 702 and MCL 600.2955.<sup>15</sup> The trial court did not address whether Dr. Nosanchuk's testimony would be admissible at trial, and there is no need to resolve that issue here. Suffice it to say that Dr. Nosanchuk's testimony is insufficient to support Lowery's claim. As an initial matter, the Court of Appeals dissent correctly noted that Dr. Nosanchuk "testified at his deposition that his practice was limited to the treatment of routine medical conditions, [and] that he had no expertise regarding the medical effects of exposure to toxic chemicals and volatile organic compounds." (COA Dissent at 1). Thus, Dr. Nosanchuk is simply not qualified to opine on the causation issue. See *Plourde v Gladstone*, 190 F Supp 2d 708, 719-720 (D Vt, 2002), *aff'd* 69 Fed Appx 483 (CA 2, 2003) (finding that the plaintiff's toxicologist was not qualified to testify "that the herbicides sprayed by [the defendant] caused

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<sup>14</sup> While the *Trice* panel relied in part on the district court's decision in *Gass*, which was later reversed on other grounds, this in no way undermines the Court's analysis, which is entirely consistent with federal case law. Indeed, *Trice* also cited *Allen v Pennsylvania Engineering Corp*, 102 F3d 194 (CA 5, 1996) and *McClain v Metabolife Int'l Inc*, 401 F3d 1233 (CA 11, 2005), which Enbridge has cited as well.

<sup>15</sup> As the Court well knows, MRE 702 requires trial courts to "ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). In *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), the Court explained that "MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)." *Id.* at 639. In cases involving "injury to a person or property," MCL 600.2955(1) further underscores the requirements of MRE 702 and *Daubert*, providing that a "scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact."

the injuries experienced by the [plaintiffs] and their livestock” because he professed “no experience or training in diagnosing and treating patients”); *Sutera v Perrier Group of Am*, 986 F Supp 655, 667 (D Mass, 1997) (finding that the plaintiff’s oncology/hematology expert was not qualified to testify that exposure to benzene caused the plaintiff’s leukemia, where the doctor had no special expertise in benzene exposure and, while qualified to diagnose leukemia, was not qualified to render an opinion as to its specific cause).

More importantly, Dr. Nosanchuk freely acknowledged that he did not know anything about Lowery’s potential exposure to VOCs, if any. (See Nosanchuk Dep at 27-31, 48-52). Without that information, Dr. Nosanchuk’s testimony regarding the cause of Lowery’s alleged symptoms was only speculation, which is plainly insufficient to create a genuine issue of material fact for trial. See *Pluck*, 640 F3d at 679 (rejecting the plaintiffs’ expert’s causation opinion and affirming summary judgment because he “did not ascertain Mrs. Pluck’s level of benzene exposure, nor did he determine whether she was exposed to quantities of benzene exceeding the EPA’s safety regulations”); *Nelson*, 243 F3d at 252-253 (observing that the plaintiffs’ expert “made no attempt to determine what amount of PCB exposure the . . . subjects had received and simply assumed that it was sufficient to make them ill”).

**2. Lowery’s expert failed to account for, let alone rule out, alternative causes for Lowery’s alleged symptoms.**

The other critical omission from Dr. Nosanchuk’s causation opinion – further exposing his theory, and Lowery’s entire case, as speculative – is his failure to properly rule out Lowery’s use of Lamictal and Vicodin as potential alternative causes of the alleged headaches and vomiting that he claims led to the rupture of his gastric artery. Lowery was not an otherwise healthy individual who suddenly became ill. Instead, Lowery’s medical records reflect a history of migraine headaches that he has long attributed to taking Lamictal for his depression. Lowery

even complained of a migraine the day *after* his surgery, and once again blamed it on the Lamictal, leading his surgeon to seek a psychiatric consult. And Lowery was resistant to taking Vicodin to treat his migraine because he thought it was what caused him to start vomiting the day his gastric artery ruptured. (See discussion above at pp 6-8).

The Court of Appeals majority dismissed these other “plausible explanations” for Lowery’s alleged symptoms as only serving “to highlight that there are genuine issues of material fact to be resolved by a jury.” (COA Op at 3). But such reasoning defies this Court’s precedents. As *Skinner* explained, “[t]here may be 2 or more plausible explanations as to how an event happened or what produced it; *yet, if the evidence is without selective application to any 1 of them, they remain conjectures only.*” *Skinner*, 445 Mich at 164 (citation omitted; emphasis added). This means that “if [the] evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.” *Id.* at 166-67 (citation omitted). In other words, courts “cannot permit the jury to guess.” *Id.* at 166 (citation omitted; emphasis added).

As the Sixth Circuit explained in *Pluck*, experts commonly use differential diagnosis to assist in determining the likely cause for an illness. In a toxic tort case, the two critical steps in any differential diagnosis are (1) the “ruling in” of chemical exposure, which requires evidence of the dose of chemicals to which the plaintiff was exposed, and (2) the “ruling out” of alternative causes “based on a physical examination, clinical tests, and a thorough case history.” *Pluck*, 640 F3d at 678 (citation omitted).<sup>16</sup> In performing a proper differential

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<sup>16</sup> See also *Trice*, 2008 WL 7488923, \*12 (“Differential diagnosis is considered a near universal technique to determine the specific cause of disease, defined as a physician’s consideration of alternative diagnoses that may explain a patient’s condition.”), quoting *Cano v Everest Minerals Corp*, 362 F Supp 2d 814, 837 (WD Tex, 2005); *Dengler v State Farm Mut Ins Co*, 135 Mich App 645, 649; 354 NW2d 294 (1984) (“[D]ifferential diagnosis . . . is simply a method by which

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diagnosis, the physician “should seek more than a patient’s self-report of symptoms or illness and . . . should . . . determine that a patient is ill and what illness the patient has contracted.”

*Best v Lowe’s Home Centers, Inc*, 563 F3d 171, 179 (CA 6, 2009) (citation omitted).

In *Pluck*, for example, the Sixth Circuit held that the plaintiff’s expert did not perform a proper differential diagnosis in reaching his opinion that benzene exposure caused the plaintiff’s non-Hodgkins lymphoma (“NHL”) when an underground pipeline leaked gasoline into the surrounding groundwater. The plaintiffs’ expert simply concluded that “chronic low-level exposure can and does cause NHL” and that “[t]here is no safe level for benzene in terms of causing cancer.” *Id.* The Sixth Circuit rejected that analysis, finding the plaintiff’s mere exposure to be insufficient and observing that “it is well-settled that the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff’s symptoms.” *Id.* The expert also failed to “rule out” alternative causes, such as the fact that the plaintiff had an “extensive smoking habit,” and had potentially been exposed to unidentified “solvents.” *Id.* at 680. See also *Wills*, 379 F3d at 50 (rejecting expert’s opinion that the deceased’s exposure to benzene caused his cancer because the expert failed to account for cigarette smoking, a significant source of benzene exposure); *Moore v Ashland Chem, Inc*, 151 F3d 269, 278-279 (CA 5, 1998) (rejecting expert’s opinion that the plaintiff’s pulmonary illness resulted from his temporary exposure to industrial chemicals while cleaning up a spill because the expert did not know the plaintiff’s level of exposure to the fumes and failed to account for the fact that the plaintiff “smoked approximately a pack of cigarettes a day for approximately twenty years,” had a history of childhood asthma, and had “just returned to work following a bout of pneumonia”).

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all possible causes of a condition are listed and then the various causes are ruled out so as to leave the most likely cause or causes of a particular patient’s problem.”).

Here, Dr. Nosanchuk's testimony suffers from the same flaws. Dr. Nosanchuk failed to rule in VOC exposure as the cause of Lowery's alleged symptoms because he did not have any evidence of actual exposure, and also failed to rule out alternative causes. As an initial matter, Dr. Nosanchuk never even examined Lowery, a fact that the Court of Appeals majority acknowledged. More importantly, Dr. Nosanchuk dismissed, without any explanation, the possibility that Lowery's alleged symptoms could have been explained by his past medical history. When asked about his differential diagnosis, Dr. Nosanchuk initially suggested that he *did not even consider* other potential causes:

Q. So did you rule out other potential causes when you made that determination?

A. I think that other potential causes were very unlikely.

Q. And what is that based on?

A. My clinical judgment.

Q. *Did you consider other potential causes?*

A. *I was not given any other potential causes to consider.*

Q. *So the answer is no?*

A. *No. Well, I take that back. I mean, as a physician in my own practice, I have to be very careful because – I try to be very careful. There's a lot of always possible factors in everything, but you always have to consider the most likely cause and the most relevant exciting factor and the most – in my view, that is what it was. When I think about things with patients, I think about a lot of things. Do I remember thinking about anything specifically, no. This was my clinical judgment. [Nosanchuk Dep at 50-51 (emphasis added).]*

While Dr. Nosanchuk eventually got around to saying he considered and “ruled out” other possible causes, he did so mainly based on his “clinical judgment,” and not on an actual “physical examination, clinical tests, and a thorough case history.” *Pluck*, 640 F3d at 678. Nor did he provide “a reasonable explanation as to why ‘he or she has concluded that [any alternative

cause suggested by the defense] was not the sole cause.’’ *Best*, 563 F3d at 179. For instance, in the face of medical reports that Lowery previously experienced headaches and nausea related to his Lamictal prescription if he smokes or is around smoke, Dr. Nosanchuk summarily excluded Lowery’s use of Lamictal from his differential diagnosis without researching the drug, without any knowledge of the dose Lowery was taking, whether he was increasing or decreasing his dosage at the time, or whether he was consistently taking Lamictal as it was prescribed. (Nosanchuk Dep at 53-55).<sup>17</sup> Moreover, Dr. Nosanchuk did not know the frequency of Lowery’s marijuana use, and did not even know that he was a cigarette smoker. (*Id.* at 80). Yet, Dr. Nosanchuk rejected the possibility of an interaction between Lowery’s medication and smoking based merely on his “clinical judgment.” (*Id.* at 88-89).

Dr. Nosanchuk also dismissed Vicodin as a potential cause of Lowery’s vomiting without any analysis, based only on his predetermined conclusion that exposure to VOCs was the cause:

Q. When you were evaluating Mr. Lowery’s symptoms of headache, nausea, coughing and vomiting, did you consider at all that he may have been having side effects from taking Vicodin?

A. I did not consider that to be a reasonable conclusion.

Q. Why is that?

A. For the reasons I outlined earlier. I think he was exposed to a toxin. I think that is what caused his symptoms and caused him to vomit violently.

...

\* \* \*

Q. So it’s your opinion that Mr. Lowery’s use of Vicodin in this instance did not cause any of his symptoms?

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<sup>17</sup> Dr. Nosanchuk acknowledged that Lowery’s prior reported headaches and nausea while taking Lamictal “may have been something when he was increasing his dose before he was acclimated to the drug.” (Nosanchuk Dep at 54). But, he did not explain why he did not consider that factor in his differential diagnosis when he admitted that he did not know Lowery’s dose of Lamictal or whether he was taking it consistently as prescribed.

- A. I don't believe so.
- Q. And that's just – and it's just because you have ruled it out based on your clinical knowledge?
- A. That's my medical judgment. [*Id.* at 85-87.]

As this exchange demonstrates, Dr. Nosanchuk did not properly rule out Vicodin as a potential cause. As mentioned, Lowery told his surgeon that he believed Vicodin caused his vomiting, and Dr. Nosanchuk confirmed that “Vicodin can certainly cause nausea in susceptible people” (*Id.* at 82). Dr. Nosanchuk also pointed out that “[g]enerally the patients I have that take Vicodin and vomit don't take it again” (*Id.*), yet based on his “medical judgment” he dismissed the fact that Lowery refused Vicodin at the hospital following his surgery for fear he would vomit again.

Dr. Nosanchuk similarly failed to provide any explanation or support for disregarding Lowery's history of migraines. Dr. Nosanchuk asserted that it did not change his opinion because Lowery's prior headaches were less severe. But when asked about the basis for that conclusion, Dr. Nosanchuk responded only that the “basis is the patient's story, as far as I know.” (Nosanchuk Dep at 76). When further pressed to point out exactly what evidence he relied upon, Dr. Nosanchuk could only say that he was “sure there was a communication of some kind, but I don't recall exactly.” (*Id.* at 77). This was despite the fact that Dr. Nosanchuk admittedly never met or spoke to Lowery. (*Id.*). Far from “highlight[ing] that there are genuine issues of material fact to be resolved by the jury,” Dr. Nosanchuk's failure to account for alternative causes of Lowery's alleged symptoms exposes his causation theory as pure speculation.

**3. A jury could only speculate as to what caused Lowery's gastric artery to rupture.**

Finally, even if a jury could reasonably find (as opposed to speculate) that Lowery's alleged nausea, vomiting, and coughing were caused by exposure to oil fumes, Lowery still failed to present evidence that this is what caused the avulsion of his short gastric artery. As

mentioned, the Court of Appeals majority asserted that expert testimony is not needed because there was a “strong enough logical sequence of cause and effect,” but as the Court of Appeals dissent correctly recognized, “whether plaintiff’s vomiting in turn caused his abdominal artery to rupture [is not a matter] within the common understanding of average jurors.” (COA Op at 3 and Dissent at 1). Indeed, *not even Lowery’s own surgeon could say that there was a causal connection.* (Koziarski Dep at 36-37 (Tab 6 to Enbridge’s COA Br) (“Q. And in this instance, you testified earlier that you could not determine the actual medical cause of Mr. Lowery’s torn artery or avulsed artery; is that correct? A. That is correct.”)). To suggest, as the Court of Appeals majority did, that a lay jury could reasonably infer causation without the assistance of an expert defies both common sense and this Court’s decision in *Craig*, which made it abundantly clear that a jury cannot be permitted to “indulg[e]” in the “logical error” that “A causes B from the mere fact that A and B occur together.” *Craig*, 471 Mich at 93.

Instead, Lowery was required to present testimony from a qualified expert in order to create a genuine issue of material fact as to causation, and failed to do so. As an initial matter, the Court of Appeals dissent was right when it found Dr. Nosanchuk to be unqualified to opine on the purported causal connection between Lowery’s alleged coughing and vomiting and the rupture of his artery:

Plaintiff’s proffered expert, Jerry Nosanchuk, D.O., was a family-medicine doctor without experience or training in toxicology or vascular surgery. Nosanchuk testified at his deposition that his practice was limited to the treatment of routine medical conditions, that he had no expertise regarding the medical effects of exposure to toxic chemicals and volatile organic compounds, and that he had never treated a patient with a ruptured abdominal artery resulting in internal bleeding. I simply cannot conclude that Nosanchuk was qualified to opine on the causation of plaintiff’s injury or that his testimony would have assisted the trier of fact in any way. [COA Dissent at 1-2.]

Indeed, Dr. Nosanchuk even admitted that he had to “look this up, I’m not an anatomist.” (See Nosanchuk Dep, p 70 (Tab 7 to Enbridge’s COA Br)). As this Court held in *Gilbert v*

*DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), courts must be vigilant in enforcing the limits of an expert’s purported expertise. *Id.* at 787-788 (finding an expert witness to be unqualified to provide medical causation testimony that was beyond the scope of the witness’s expertise as a social worker).

Not only is Dr. Nosanchuk unqualified to opine as to what caused Lowery’s gastric artery to avulse, but his causation theory is speculative and lacking support in any medical literature. Dr. Nosanchuk acknowledged that gastric artery rupture is a “relatively rare condition” (Nosanchuk Dep, p 72), and the article abstracts he cited involving artery rupture following vomiting merely confirmed its rarity. (See Tabs 22 and 23 to Enbridge’s COA Br).<sup>18</sup> Neither article purports to establish a causal connection. Instead, they merely address the need for emergency room doctors to recognize the possibility of abdominal bleeding – *regardless of the cause* – when presented with a patient experiencing severe abdominal pain.

As this Court has instructed time and again, it is not enough for an expert simply to cite a study and assert that it supports the expert’s opinion. For example, in *Craig*, 471 Mich at 80-83, the Court observed that although the plaintiff had “produced several articles and authorities” in response to the defendants’ *Daubert* challenge, the plaintiff failed to provide a “single authority that truly supported” the plaintiff’s expert’s causation theory:

. . . Dr. Gabriel’s etiological theory, as summarized by defendant in arguing its motion [in limine], was that “hyperstimulation” of the uterus caused the head of the fetus (plaintiff) to pound against his mother’s pelvic anatomy, thereby producing permanent brain damage. . . .

In response to this motion, plaintiff’s attorney produced several articles and authorities that were meant to demonstrate a link between the use of Pitocin and the type of injury sustained by plaintiff. But while some of these articles described a correlation between the use of Pitocin and generalized brain injury,

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<sup>18</sup> Dr. Nosanchuk did not even read the articles themselves, instead relying on abstracts because obtaining the full articles “would have cost me money, so I didn’t.” (Nosanchuk Dep, p 22).

none of these authorities supported the theory of causation actually put forth by Dr. Gabriel. . . .

\* \* \*

Plaintiff failed to introduce a single authority that truly supported Dr. Gabriel's theory in response to defendant's motion. Instead, plaintiff repeatedly stressed that medical literature amply supported the proposition that Pitocin could cause brain damage--a proposition defendant did not contest--and supplied the court with literature to that effect. But this literature had little to do with Dr. Gabriel's causal theory . . . .

Citing *Craig*, the Court in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), explained that although "a lack of supporting literature" is "not dispositive," it is an "important factor" to determining the reliability of an expert's testimony. *Id.* at 640. In *Edry*, the plaintiff's expert opined that a delay in diagnosing the plaintiff's breast cancer reduced her chances of surviving five years from 95 percent to 20 percent. *Id.* at 637. However, the expert's opinion was contradicted by the opinions of other experts in the case, as well as "published literature on the subject." *Id.* at 640. This Court found the expert's opinion to be "unreliable and inadmissible" in the absence of either supporting literature or "some other form of support":

[N]o literature was admitted into evidence that supported Dr. Singer's testimony. Although he made general references to textbooks and journals during his deposition, plaintiff failed to produce that literature, even after the court provided plaintiff a sufficient opportunity to do so. Plaintiff eventually provided some literature in support of Dr. Singer's opinion in her motion to set aside the trial court's order, but the material consisted only of printouts from publicly accessible websites that provided general statistics about survival rates of breast cancer patients. The fact that material is publicly available on the Internet is not, alone, an indication that it is unreliable, but these materials were not peer-reviewed and did not directly support Dr. Singer's testimony. Moreover, plaintiff never provided an affidavit explaining how Dr. Singer used the information from the websites to formulate his opinion or whether Dr. Singer ever even reviewed the articles.

Plaintiff failed to provide any support for Dr. Singer's opinion that would demonstrate that it has some basis in fact, that it is the result of reliable principles or methods, or that Dr. Singer applied his methods to the facts of the case in a reliable manner, as required by MRE 702. While peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, in this case the lack of supporting literature, combined

with the lack of any other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under MRE 702. Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible. Plaintiff has failed to satisfy her burden regarding the admissibility of Dr. Singer's opinion; therefore, the trial court did not abuse its discretion by excluding Dr. Singer's testimony as unreliable under MRE 702. [*Id.* at 640-642.]

The Court most recently reaffirmed these principles in its peremptory order in *Tondreau v Hans*, 496 Mich 860; 836 NW2d 691 (2013):

The plaintiff's experts Wayne Flye, M.D., and Donald C. Austin, M.D., are of the opinion that the chronic subdural hematoma suffered by Sandra Peetz was caused by the carotid endarterectomy performed by the defendants. While peer-reviewed, published literature is not always necessary to meet the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of any other form of support for these opinions render the opinions unreliable and inadmissible under MRE 702. *Edry v. Adelman*, 486 Mich. 634, 641, 786 N.W.2d 567 (2010).

While *Craig*, *Edry*, and *Tondreau* were all medical malpractice cases, federal courts have recognized that it is just as important to require supporting literature for an expert's opinion that exposure to a chemical caused a plaintiff's injury. See, e.g., *Baker v Chevron USA, Inc*, 680 F Supp 2d 865, 877 (SD Ohio, 2010), *aff'd* 533 Fed Appx 509 (CA 6, 2013) (rejecting expert's opinion that the plaintiffs' injuries resulted from "cumulative exposure to benzene" because none of the studies the expert cited "support[ed] an opinion that benzene can cause the illnesses from which [the] [plaintiffs] suffer[ed] at the extremely low doses or exposures [the plaintiffs] experienced"); *LeBlanc v Chevron USA*, 396 Fed Appx 94, 98-100 (CA 5, 2010) (finding that the studies cited by the plaintiffs' expert as support for his opinion that exposure to benzene at an oil refinery caused their family member's rare bone marrow disease did not provide a sufficiently reliable basis for the expert's conclusion, because they either did not "represent statistically significant results," did not directly assess the relationship between benzene exposure and the disease at issue, or "expressly disclaim[ed] the causal connection" being drawn by the expert).

Here, Dr. Nosanchuk provided no support whatsoever for his opinion that exposure to oil fumes three weeks after the Line 6B incident, and more than ten miles away from the release site, suddenly caused Lowery to cough and vomit so severely that it resulted in the rupture of his gastric artery. While Dr. Nosanchuk claimed to have “looked at some articles on short gastric artery rupture,” he only reviewed the abstracts, and he had no idea whether they were peer-reviewed. (Nosanchuk Dep, p 22 (Tab 7 to Enbridge’s COA Br)). When he was asked why he selected those particular abstracts, Dr. Nosanchuk responded that it was because they were in “understandable English” and “were more believable to me.” (*Id.*).

Even taking the abstracts at face value, they do not support Dr. Nosanchuk’s opinion that Lowery’s “vomiting and retching caused his tear.” (*Id.* at 71). The first abstract reported a “very unusual case” of a patient that suffered a spontaneous tear of his short gastric artery after forceful gagging during teeth brushing, and noted “[s]everal factors such as pregnancy, hypertension and atherosclerosis have been described in association with abdominal apoplexy. Blunt trauma, inflammatory conditions, aneurysm rupture[,] and rarely vomiting are some predisposing conditions.” (See Tab 22 to Enbridge’s COA Br). The second abstract is even more attenuated. (See Tab 23 to Enbridge’s COA Br). It merely reported a patient who presented with “watery diarrhea and abdominal fullness followed by vomiting after the ingestion of alcohol but was later diagnosed with [abdominal bleeding].” (*Id.*). Instead of referencing a causal connection, the abstract simply states that “abdominal apoplexy [hemorrhaging] *should be considered in the differential diagnosis* of unexplained hemorrhagic shock with an abrupt onset of severe abdominal pain associated with vomiting.” (*Id.*) (emphasis added). Neither abstract suggests, let alone establishes, a specific causal connection between vomiting and a tear in the short gastric artery.

A review of Dr. Nosanchuk's deposition testimony reveals quite clearly that as opposed to reliable principles and methods, he simply *assumed* causation based solely on Lowery's claim that he was vomiting at the time he experienced severe abdominal pain. But as *Craig* held, *correlation* is not sufficient to establish *causation*. Nor is it enough for Dr. Nosanchuk to rely on his "clinical judgment." Without "supporting literature" or "any other form of support," Dr. Nosanchuk's causation opinion is speculative and unreliable. And as the Court of Appeals dissent properly recognized, "[w]ithout sufficient expert testimony on the issue of causation, [Lowery] could not establish a genuine issue of material fact concerning whether the Kalamazoo River Oil spill proximately caused his ruptured artery and internal bleeding." (COA Dissent at 2). The Court of Appeals majority's contrary decision to permit Lowery's case to proceed on the basis of speculation and conjecture, as opposed to reasonable inferences of causation, warrants this Court's review.

#### **IV. RELIEF REQUESTED**

For all of these reasons, Enbridge requests that the Court grant leave to appeal, or, alternatively, that it enter a peremptory order reversing the Court of Appeals majority's decision and reinstating the trial court's decision granting summary disposition to Enbridge for the reasons stated in the Court of Appeals dissent.

Respectfully submitted,

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