

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Jansen, P.J., and Meter and Beckering, JJ.)

CHANCE LOWERY

Plaintiff-Appellee

vs

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

Defendants-Appellants

Supreme Court No. 151600

Court of Appeals No. 319199
Calhoun CC: 2011-003414-NO

AMICUS CURIAE BRIEF ON
BEHALF OF THE
MICHIGAN ASSOCIATION FOR JUSTICE

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INTEREST OF AMICUS CURIAE

The Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association for Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. Although this case does not present a novel issue of law, this Court's decision could have far-reaching consequences that affect civil litigants across the state.

INTRODUCTION

The issues raised in this Court's March 30, 2016 Order Granting Leave to Appeal are issues that frequently arise in civil litigation. Causation is a concept that must be established in every personal injury action. Likewise prevalent in personal injury litigation are issues related to motions for summary disposition, sufficiency of the proofs, and the admissibility of expert witness testimony. As the issues are currently framed by this Court, this case has the potential to impact every personal injury action, whether it be an ordinary negligence case, a medical malpractice case, or a toxic tort case.

Given the potential ramifications of this case, Michigan Association for Justice felt it important to raise before this Court by way of an Amicus Curiae Brief a critical component of the record that is missing: a Daubert Hearing. Throughout the proceedings before the trial court and the Court of Appeals there is significant discussion about Dr. Jerry Nosanchuk and whether his opinions are sufficient in light of MCR 2.116(C)(10). Absent from that discussion, however, is any fact-based analysis as to Dr. Nosanchuk's qualifications or the scientific basis for his opinions. Both the trial court and the Court of Appeals majority opinion seemed to treat these issues as an afterthought. However, Dr. Nosanchuk's qualifications and the foundational basis for his opinions cannot be treated as an afterthought. Instead of dismissing Plaintiff's case for a lack of evidence, the trial court should have - as it has done in the other Enbridge

cases¹ – scheduled a Daubert Hearing to assess Dr. Nosanchuk’s qualifications and the admissibility of his opinions. Once that evidence was properly before the trial court, then – and only then – would the trial court have everything that it needed to properly evaluate the plaintiff’s causation theories.

LEGAL ARGUMENT

- I. **The record before this Court is insufficient to determine the general and specific causation concerns raised in the Order Granting Leave to Appeal. The trial court never performed its essential gate-keeping role by inquiring into the qualifications of Dr. Nosanchuk and the scientific reliability of his opinions. This Court should remand this case for a Daubert Hearing before further considering the merits of this appeal.**

The trial court should have ordered a Daubert Hearing based on the very first statements made by defense counsel at oral argument: “I think there are three questions before the court here; **one is whether Plaintiff can proceed without a qualified expert on causation. . . .**” (Exhibit 1, Trial Court Transcript, p. 3, emphasis added). Plaintiff had a causation expert: Jerry Nosanchuk, D.O. From the record, it appears that Dr. Nosanchuk is a physician who is licensed to practice medicine in Michigan and has a medical specialty in family medicine. Family medicine is a field of medicine that includes the provision of acute, chronic, and preventative medical care services; the management of chronic medical conditions; preventative care; and

¹ On Page 4 of the trial court transcript, Judge Kingsley acknowledges a related Enbridge case where the plaintiff retained a toxicologist and how they were going to hold a Daubert Hearing to determine the reliability of that expert’s opinions.

personalized counseling on maintaining a healthy lifestyle.² Family Medicine physicians care for a wide array of medical maladies and must be well-versed in countless areas of medicine. While there was much postulating throughout the hearing as to whether Dr. Nosanchuk was capable of rendering the opinions that he gave in this case, there was never any examination by the trial court as to whether Dr. Nosanchuk's background allowed him to render a causal connection between the toxic fumes from the Enbridge spill and Mr. Lowery's ruptured gastric artery. The trial court should have requested a Daubert Hearing on Dr. Nosanchuk's qualifications and the admissibility of his opinions before dismissing Plaintiff's case. It did not.

The Court of Appeals majority appeared to recognize, but did not decide, that Dr. Nosanchuk's qualifications were at issue. In its analysis, the majority stated "Defendants contend that the testimony of plaintiff's medical expert was inadequate." (Exhibit 2, Opinion, p. 2). The majority, however, did not explore that issue further based on its interpretation of *Genna v Jackson*, 286 Mich App 413; 781 NW2d 124 (2009). Based on its understanding of *Genna*, the majority believed that there was a strong enough logical sequence of cause and effect for the jury to reasonably conclude, without expert testimony, that the plaintiff's exposure to the fumes caused his vomiting and ultimate gastric artery rupture. (Exhibit 2, p. 3). That conclusion was based in large part on the court's interpretation "that direct expert testimony that the toxin was the cause of the plaintiff's injury was not required to provide causation in a toxic tort case."

² This description was provided by the American Board of Family Medicine through the ABMS website: <http://www.certificationmatters.org/abms-member-boards/family-medicine.aspx>

(Exhibit 2, p. 2). Here, unlike *Genna*, the plaintiff had a causation expert. Because Plaintiff had a causation expert, who rendered a causation opinion, the majority should have recognized the need for a Daubert Hearing and remanded the case back to the trial court to determine whether Dr. Nosanchuk was qualified to render his opinions and the admissibility of those opinions.

It is a basic tenant of Michigan jurisprudence that only a qualified expert can render an opinion. MRE 702 requires that to be recognized as an expert, a witness must be qualified to render reliable opinion testimony “by knowledge, skill, experience, training, or education.” *Craig v Oakwood Hosp*, 471 Mich 67, 78; 684 NW2d 296 (2004). To be qualified, “the witness must have sufficient qualifications ‘as to make it appear that his opinion or inference will probably aid the trier in the search for truth.’” *People v Smith*, 425 Mich 98, 105-106; 387 NW2d 814 (1986) citing McCormick, Evidence (3d ed), § 13, p. 33. “An expert who lacks ‘knowledge’ in the field at issue cannot ‘assist the trier of fact.’” *Gilbert v DaimlerChrysler, Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004). The *Gilbert* court provided the following analogy in explaining expert qualification:

Where the subject of the proffered testimony is far beyond the scope of an individual’s expertise – for example, where a party offers an expert in economics to testify about biochemistry – that testimony is *inadmissible* under MRE 702.

Id. at 789.

Defendants’ contention in the trial court that Dr. Nosanchuk lacked the requisite expertise to render his opinions is something that required further inquiry. The trial court never inquired about that issue and, instead, dismissed the case. The Court of

Appeals majority mentioned the issue but also failed to address it (likely because it had an insufficient record). The trial court must analyze Dr. Nosanchuk's qualifications. Once the trial court determines Dr. Nosanchuk's qualifications, any reviewing court would consider that testimony and apply the abuse of discretion standard. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002).³ However, the trial court must first be given the opportunity to hold a Daubert Hearing, hear the testimony about Dr. Nosanchuk's qualifications, and render its decision. Only then can the reviewing court have an appropriate record to consider. As the record is now, neither this Court nor the Court of Appeals have sufficient information. A Daubert Hearing on Dr. Nosanchuk's qualifications is necessary.

If Dr. Nosanchuk possesses the requisite qualifications to be an expert witness, further inquiry must also be undertaken regarding the reliability of his opinions. 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). *Edry v Adelman*, 486 Mich 634, 639-640; 786 NW2d 567 (2010) citing *Gilbert*, 470 Mich at 781. Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Edry*, 486 Mich at 640 citing *Daubert*, 509 US at 589, 113 S Ct 2786.

³ Whether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony are within the trial court's discretion. *Franzel v Kerr Mfg, Co*, 234 Mich App 600, 620; 600 NW2d 346 (2002).

MRE 702 states as follows:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id. “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.” *Edry*, 486 Mich at 642. Similarly, a claim of knowledge without establishing a sound foundation for that knowledge, so that the testimony can be deemed reliable, is insufficient. *Id.* “It is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate.” *Id.* at n. 6 (citation, brackets, and quotation marks omitted).

This Court most recently addressed the reliability component of expert testimony in *Elher v Misra*, 499 Mich 1; 878 NW2d 790 (2016). This Court upheld the trial court's finding that the plaintiff's expert was unqualified because the expert's “opinion was based on his own beliefs [and] there was no evidence that his opinion was generally accepted within the relevant expert community.” *Id.* at 26. In discussing the inquiry that must be undertaken to determine the validity of an expert's opinion, the Court stated:

This rule requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable. MRE 702 incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v. Merrell Dow Pharm., Inc.*, in

order to interpret the equivalent federal rule of evidence. “Under *Daubert*, ‘the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.’ ” A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony. “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.”

MCL 600.2955(1) requires the [circuit] court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert, and by considering seven factors

Elher, 499 Mich at 22–23, citations omitted, emphasis added.

The importance of the trial court's gate-keeping role was also a focus of this Court's analysis in *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007). There, similar to what should be done here, this Court remanded the case back to the trial court to complete its analysis of the § 2955 factors. The *Clerc* court found that the trial court failed to perform its gatekeeper function of assessing the threshold reliability of the expert's opinions. In explaining its decision to remand, this Court stated:

Here, the trial court did not consider the range of indices of reliability listed in MCL 600.2955. Rather, it focused on its concern that plaintiff could not present specific studies on the growth rate of untreated cancer. Therefore, the court did not fulfill its gate keeping role because it failed to consider other factors such as, for example, whether the methodology used by plaintiff's experts is “generally accepted within the relevant expert community,” is relied upon as a “basis to reach the type of opinion being proffered” by experts in the field, or is “relied upon by experts outside of the context of litigation.” MCL 600.2955(1)(e)-(g).

Accordingly, we remand to the Chippewa County Circuit Court to complete the proper inquiry.

Clerc, 477 Mich at 1068. The importance of the trial court's gate-keeping role is further underscored by the Staff Comments to MRE 702. The Staff Comments cite to *Daubert* and state "The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." See also *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994).

This is a Court of discretionary jurisdiction that is assigned the difficult task of deciding matters of large scale public import. MCR 7.305(B). Because the decisions of this Court will extend far beyond Chance Lowery and his ability to recover for his abdominal surgery, it is of critical importance that this Court has before it a proper record containing all of the information necessary to decide this case. That record is not presently before this Court. The record before this Court lacks any analysis by the trial court of Dr. Nosanchuk's qualifications. The record before this Court also lacks any analysis by the trial court of the scientific basis underlying Dr. Nosanchuk's opinions regarding the causal relationship between Mr. Lowery's exposure to the toxic fumes and his gastric artery rupture. The record before this Court is incomplete.

Before considering the issues raised in this Court's March 30, 2016 Order Granting Leave to Appeal, this Court should remand this case to the trial court for a Daubert Hearing. The trial court needs to be instructed of his gate-keeping role and the need to analyze the qualifications and opinions of Dr. Nosanchuk. Only once an appropriate record is made by the trial court can this Court (if it retains jurisdiction) or the Court of Appeals truly determine "whether the plaintiff in this toxic tort case

sufficiently established causation to avoid summary disposition under MCR 2.116(C)(10). . . .”

CONCLUSION

Based on the concerns expressed above, Amicus Curiae the Michigan Association for Justice respectfully requests that this Honorable Court vacate its earlier order granting leave to appeal and enter an order remanding this case back to the Calhoun County Circuit Court for a Daubert Hearing on the qualifications of Jerry Nosanchuk, D.O., and the scientific reliability of the causation opinions that he intends to offer.

Respectfully Submitted,

FIEGER, FIEGER, KENNEY &
HARRINGTON, P.C.

Dated: September 1, 2016

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EXHIBIT 1

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CALHOUN
CHANCE LOWERY,
PLAINTIFF,
VS. FILE NO. 11-3414
ENBRIDGE ENERGY,
DEFENDANT.

-----/

HEARING
THE HONORABLE JAMES KINGSLEY, CIRCUIT JUDGE
BATTLE CREEK, MICHIGAN - NOVEMBER 4, 2013

APPEARANCES:

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REPORTED BY: TAMARA KEENAN, CPE, RPR, CSR-4187
OFFICIAL COURT REPORTER

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I N D E X

WITNESSES:
(NONE)

EXHIBITS:
(NONE)

1 BATTLE CREEK, MICHIGAN

2 NOVEMBER 4, 2013 - 9:05 A.M.

09:06:45 3 R E C O R D

09:06:45 4 THE COURT: WE'LL TAKE UP CHANCE LOWERY
09:06:47 5 VERSUS ENBRIDGE ENERGY. THIS IS DOCKET 2011-3414.

09:06:58 6 MR. VARTANIAN: GOOD MORNING, YOUR HONOR.

09:06:58 7 MR. BLOOM: GOOD MORNING.

09:07:00 8 THE COURT: GO RIGHT AHEAD.

09:07:00 9 MR. VARTANIAN: THANK YOU, YOUR HONOR THIS
09:07:02 10 IS OUR MOTION FOR SUMMARY DISPOSITION. THE ISSUE IS
09:07:06 11 BASED ON THIS RECORD WHETHER PLAINTIFF HAS SUFFICIENT
09:07:10 12 PROOF OF CAUSATION TO ALLOW THE CASE TO GO TO THE JURY.

09:07:13 13 I THINK THERE ARE THREE QUESTIONS BEFORE THE
09:07:15 14 COURT HERE; ONE IS WHETHER PLAINTIFF CAN PROCEED WITHOUT
09:07:20 15 A QUALIFIED EXPERT ON CAUSATION, IF -- AND WE DO NOT
09:07:25 16 BELIEVE THAT UNDER MICHIGAN LAW THAT THEY CAN. THIS
09:07:30 17 CASE IS SIGNIFICANTLY DIFFERENT THAN THE GENNA CASE, AND
09:07:34 18 I'LL GET TO THE THAT IN A MINUTE.

09:07:36 19 SECOND QUESTION --

09:07:36 20 THE COURT: LET ME SAY -- I THINK YOU BETTER
09:07:39 21 GET TO THIS BECAUSE, FRANKLY, UNTIL I READ THIS MORNING
09:07:44 22 THE SUPPLEMENT TO THE PLAINTIFF'S REPLY BRIEF -- IT
09:07:49 23 WASN'T IN THE FILE WHEN I WENT THROUGH EVERYTHING
09:07:52 24 YESTERDAY -- UNTIL I READ THAT THIS MORNING,
09:07:54 25 MR. VARTANIAN, I THOUGHT MR. BLOOM WAS GOING TO LOSE, I

09:07:57 1 WOULD GRANT YOUR MOTION. THEN I READ WHAT HE SUPPLIED
09:08:00 2 THIS MORNING AND GENNA IS ON POINT. THE DOCTOR'S
09:08:07 3 TESTIMONY IS SOMEWHAT SPECIFIC. MR. BLOOM ACKNOWLEDGES
09:08:10 4 THAT HE DOES NOT HAVE A TOXICOLOGIST, BUT ABSENT THE
09:08:15 5 TOXICOLOGIST -- AND I KNOW MR. MAYHALL IN HIS CASES HE
09:08:20 6 HAS THE TOXICOLOGIST FROM TEXAS. WE'RE STILL GOING TO
09:08:25 7 DO THE DAUBERT HEARING YET. BUT WHY DOESN'T GENNA FIT
09:08:28 8 MR. BLOOM'S CASE?

09:08:29 9 **MR. VARTANIAN:** WELL, SEVERAL REASONS.
09:08:32 10 FIRST OFF, IN GENNA THERE WAS EXPERT TESTIMONY THAT
09:08:36 11 THERE WERE HIGH LEVELS OF MOLD IN THE HOME. SO WE HAD
09:08:39 12 THAT TESTIMONY. WE DON'T HAVE THAT TESTIMONY HERE.
09:08:44 13 UNDER THE FACTS OF THIS CASE THE SPILL OCCURRED IN JULY,
09:08:49 14 JULY 26TH. MR. LOWERY WENT TO THE HOSPITAL ON
09:08:52 15 AUGUST 18TH, SOME -- MORE THAN THREE WEEKS LATER. AND
09:08:56 16 BECAUSE HE HAD EXTREME VOMITING APPARENTLY AT THAT DATE,
09:09:00 17 WE DON'T KNOW WHAT MR. LOWERY'S EXPOSURE WAS AT ANY TIME
09:09:06 18 AROUND AUGUST 18TH. THEY HAVE NO WITNESS THAT WILL
09:09:09 19 TESTIFY THAT HE WAS EXPOSED TO ANY LEVELS OF THOSE
09:09:17 20 VOLATILE OR DANGEROUS COMPOUNDS, MUCH LESS LEVELS THAT
09:09:21 21 WERE DANGEROUS. SO ABSENT THAT I THINK MICHIGAN LAW IS
09:09:25 22 PRETTY CLEAR THAT YOU CANNOT PROCEED ON THE CASE.

09:09:30 23 I THINK WHAT THEY HAVE HERE AT BEST IS A
09:09:34 24 CORRELATION, TEMPORAL CORRELATION. I THINK IT'S A
09:09:39 25 STRETCH BECAUSE THIS SURGERY -- THE RUPTURED ARTERY

09:09:44 1 OCCURRED, AS I SAY, MORE THAN THREE WEEKS AFTER THE OIL
09:09:49 2 INCIDENT AND MORE THAN A NUMBER OF DAYS -- TEN DAYS OR
09:09:53 3 MORE AFTER HE TESTIFIED HE STOPPED HAVING HEADACHES.

09:09:57 4 **THE COURT:** EXCUSE ME. EXCUSE ME ONE
09:09:58 5 MOMENT, IF I MAY. MR. BLOOM, ARE YOU SOMEHOW DRAGGING
09:10:01 6 IN THIS SURGERY, OR ARE YOU TALKING ONLY ABOUT THE
09:10:05 7 MIGRAINES, THE COUGHING, THE IRRITANT AND SO ON?

09:10:08 8 **MR. BLOOM:** THE WHOLE THING, SURGERY THAT HE
09:10:10 9 HAD TO HAVE -- AND WHAT HE JUST SAID ISN'T CORRECT, BUT
09:10:14 10 I'M WAITING TO --

09:10:15 11 **THE COURT:** ALL RIGHT. GO AHEAD THEN,
09:10:17 12 MR. VARTANIAN.

09:10:17 13 **MR. VARTANIAN:** WELL, I THINK THAT IS A KEY
09:10:20 14 DISTINCTION BETWEEN GEMMA AND THIS CASE AND AS MR. BLOOM
09:10:25 15 ACKNOWLEDGED THE OPINION OF THIS DOCTOR IS THAT THE
09:10:30 16 EXPOSURE TO THE OIL CAUSED SEVERE VOMITING WHICH THEN
09:10:35 17 CAUSED THE RUPTURE OF THIS ARTERY. HE IS NOT QUALIFIED
09:10:38 18 TO MAKE THAT OPINION ON AT LEAST SEVERAL LEVELS. ONE,
09:10:42 19 HE IS NOT A TOXICOLOGIST. HE DOESN'T -- HE IS NOT
09:10:46 20 QUALIFIED TO SAY THAT THE VOMITING THAT OCCURRED ON
09:10:51 21 AUGUST 18TH, SOME THREE WEEKS AFTER THIS OIL INCIDENT
09:10:54 22 WAS RELATED AND CAUSED BY EXPOSURE TO THE OIL. HE CAN'T
09:10:59 23 DO THAT BECAUSE HE'S NOT QUALIFIED BECAUSE THERE'S NO
09:11:05 24 RELIABLE BASIS FOR HIS OPINION, AND THE ONLY BASIS THAT
09:11:09 25 WOULD SUPPORT HIS OPINION THAT, A, IT CAN CAUSE SEVERE

09:11:14 1 VOMITING, AND I DON'T KNOW THAT THERE'S ANYTHING IN THIS
09:11:17 2 RECORD THAT SAYS IT DOES; AND B, THAT HE WAS EXPOSED TO
09:11:23 3 A LEVEL THAT COULD CAUSE THAT. SO ON ALL THOSE FRONTS I
09:11:27 4 THINK HE FALLS SHORT.

09:11:30 5 AND, YOUR HONOR, I DON'T KNOW WHAT IT IS
09:11:33 6 ABOUT HIS RESPONSE THAT YOU WERE INTERESTED IN, AND I'D
09:11:37 7 BE HAPPY TO ADDRESS IT BUT I DO THINK THAT ALL WE HAVE
09:11:43 8 HERE IS THAT UNDER SOME NIOSH DOCUMENTS CERTAIN SYMPTOMS
09:11:49 9 COULD BE CAUSED BY EXPOSURE TO THE OIL.

09:11:51 10 **THE COURT:** WELL, THIS REALLY HAS FOCUSSED
09:11:58 11 BEYOND WHAT I FIRST THOUGHT WHEN I READ THE SUPPLEMENT
09:12:01 12 THIS MORNING. THE QUESTION IS -- AND THIS IS PAGE 27 --
09:12:06 13 I THINK WE HAVE ALREADY TALKED ABOUT THEM. I JUST WANT
09:12:10 14 TO GO OVER IT AGAIN. WHAT IS YOUR UNDERSTANDING ABOUT
09:12:13 15 THE TYPES OF SYMPTOMS THAT CAN BE CAUSED BY EXPOSURE TO
09:12:17 16 VOLATILE ORGANIC COMPOUNDS IN CRUDE OIL?

09:12:22 17 **ANSWER:** MY UNDERSTANDING IS THAT FROM MY
09:12:25 18 STANDPOINT IN THE SHORT TERM WE'RE TALKING ABOUT SHORT
09:12:29 19 TERM EFFECTS IS THAT THEY ARE AN IRRITANT. I DON'T
09:12:33 20 REALLY UNDERSTAND THE TOXICOLOGY. I KNOW THAT THEY'RE
09:12:37 21 IRRITANTS, AND I KNOW THAT THEY'RE CAPABLE OF CAUSING
09:12:43 22 COUGH, NAUSEA, VOMITING, IRRITATION OF THE EYES, AND ANY
09:12:46 23 OTHER MUCOUS MEMBRANES. I ALSO KNOW THIS ON A PERSONAL
09:12:51 24 LEVEL. IF I, FOR INSTANCE, WAS PUMPING GAS IN MY CAR
09:12:54 25 AND GOT TOO CLOSE TO THE FUMES THERE WAS NO BREEZE AT

09:12:58 1 ALL AND I HAVE TO MOVE BECAUSE TWO THINGS, ONE, YOU
09:13:02 2 MIGHT COUGH BECAUSE I AM SUSCEPTIBLE TO THAT; TWO, I
09:13:05 3 LITERALLY START TO GET NEUROLOGIC CONDITIONS. I MIGHT
09:13:10 4 GET DIZZY BECAUSE I'M STANDING TOO CLOSE TO THE FUMES
09:13:12 5 PARTICULARLY IF IT'S WARM OR SOMETHING AND THE FUMES ARE
09:13:15 6 MORE VOLATILE.

09:13:17 7 NOW QUESTION: DO YOU KNOW WHAT SPECIFIC
09:13:21 8 LEVELS OF EXPOSURE ARE REQUIRED TO CAUSE ANY OF THOSE
09:13:21 9 SYMPTOMS?

09:13:26 10 ANSWER: I DON'T THINK THAT'S A QUESTION
09:13:28 11 THAT COULD BE ANSWERED UNTIL YOU ARE SPEAKING OF A
09:13:32 12 SPECIFIC PERSON AND YOU WOULD HAVE TO -- YOU WOULD HAVE
09:13:35 13 TO GAUGE THAT IN RETROSPECT BECAUSE EVERYONE IS
09:13:39 14 DIFFERENT I THINK. I BELIEVE THAT TO BE TRUE.

09:13:41 15 NOW, YOU'VE GOT A DOCTOR AND THIS WAS DR.
09:13:49 16 JERRY NOSANCHUK -- A DOCTOR OF OSTEOPATHY -- YOU'VE GOT
09:13:53 17 A DOCTOR SAYING THAT EXPOSURE CAN CAUSE THESE FUMES.
09:13:59 18 AND I GUESS I NEED TO HEAR FROM MR. BLOOM AS TO WHERE
09:14:02 19 THE LINKAGE BETWEEN NAUSEA AND A RUPTURED AORTA, DOES
09:14:11 20 THAT APPEAR ANY PLACE IN THE DEPOSITION?

09:14:14 21 IN OTHER WORDS -- AND I GO BACK TO OTHER
09:14:18 22 CASES I'VE HEARD, ALL I'VE DEALT WITH, FRANKLY, IS THE
09:14:24 23 HEADACHE AND THE NAUSEA AND SO ON. AND THE DOCTOR IN
09:14:29 24 MR. MAYHALL'S CASES CLEARLY LINKED THOSE UP, AND MR.
09:14:33 25 MAYHALL HAS THE TOXICOLOGIST TO TESTIFY TO THE LEVELS,

09:14:36 1 BUT MR. BLOOM HAS POINTED OUT THAT UNDER GENNA YOU DON'T
09:14:39 2 NEED A TOXICOLOGIST.

09:14:41 3 BUT HOW DO WE MAKE THIS SUBSTANTIAL LEAP
09:14:46 4 THREE WEEKS LATER -- AND CORRECT ME IF I'M WRONG -- BUT
09:14:50 5 IT'S MY UNDERSTANDING THAT MR. BLOOM'S CLIENT ALSO HAD
09:14:54 6 SOME CONCERN ABOUT VICODIN THAT HE WAS TAKING. HE DID
09:14:57 7 NOT WANT TO FOLLOW DIRECTIONS OF MEDICATION AND HAS A
09:15:01 8 HISTORY OF DIFFICULTY. HOW DO WE BRIDGE THAT GAP IN
09:15:05 9 YOUR VIEW OR NOT BRIDGE IT, MR. VARTANIAN, FROM NAUSEA
09:15:11 10 THREE WEEKS LATER TO HAVING SURGERY, BECAUSE OF A
09:15:14 11 RUPTURED AORTA?

09:15:17 12 **MR. VARTANIAN:** WELL, I DON'T THINK HE CAN
09:15:18 13 BRIDGE IT. I DON'T THINK HE CAN BRIDGE IT FOR SEVERAL
09:15:20 14 REASONS, NOT THE LEAST OF WHICH IS GIVEN THE PASSAGE OF
09:15:26 15 TIME, WHAT CIRCUMSTANCES WERE THERE ON THE 18TH OF
09:15:30 16 AUGUST WHEN THIS APPARENT SEVERE VOMITING STARTED, WHAT
09:15:35 17 CIRCUMSTANCES WERE THERE WITH RESPECT TO THE OIL
09:15:37 18 EXPOSURE THAT EXISTED. WE DON'T HAVE ANY EVIDENCE AS TO
09:15:42 19 WHETHER THERE WERE ELEVATED LEVELS OF VOLATILE ORGANIC
09:15:48 20 COMPOUNDS THAT HE WAS EXPOSED TO ON THAT DATE, MUCH LESS
09:15:52 21 DANGEROUS LEVELS, MUCH LESS LEVELS THAT COULD CAUSE
09:15:55 22 VOMITING.

09:15:55 23 WHAT WE DO HAVE IN THE RECORD IS THAT HE
09:15:59 24 TOOK VICODIN THAT DAY AND THAT HIS SURGEON TESTIFIED
09:16:02 25 THAT VICODIN CAN CAUSE VOMITING. THE SURGEON WASN'T

09:16:06 1 REALLY EVEN GONNA OFFER AN OPINION OR DIDN'T OFFER AN
09:16:11 2 OPINION AS TO WHAT CAUSED THE RUPTURE. NOW WE HAVE THE
09:16:13 3 DOCTOR -- I'LL MISPRONOUNCE HIS NAME -- NOSANCHUK. HE
09:16:18 4 IS A D.O. HE IS NOT A SURGEON. HE HASN'T EXAMINED MR.
09:16:24 5 LOWERY. HE IS OFFERING OPINIONS BASICALLY ON THE BASIS
09:16:27 6 THAT THERE'S SOME CORRELATION IN TIME AND AS WE KNOW
09:16:33 7 FROM MICHIGAN SUPREME COURT IN THE -- I BELIEVE IT'S
09:16:36 8 EITHER THE CRAIG OR THE GILBERT CASE -- WE'VE CITED
09:16:40 9 IT -- THAT THIS IS INSUFFICIENT AS A MATTER OF LAW.
09:16:48 10 IT'S THE CRAIG CASE WHICH -- WHICH THE COURT STATED
09:16:51 11 CORRELATION IS NOT CAUSATION. IT IS ERROR TO INFER A
09:16:56 12 CAUSE, B, FROM THE MERE FACT THAT A AND B OCCUR
09:17:00 13 TOGETHER. THAT'S ABOUT ALL THE TESTIMONY WE HAVE HERE
09:17:04 14 IN THIS CASE, THAT SOMEHOW THERE WAS AN EXPOSURE TO OIL
09:17:09 15 AND AT SOME UNSPECIFIED TIME PRIOR TO AUGUST 18TH HE HAD
09:17:14 16 VOMITING. HE HAD A RUPTURED AORTIC ARTERY -- OR GASTRIC
09:17:20 17 ARTERY. THERE WAS ACCORDING TO THEIR EXPERT CAUSE AND
09:17:25 18 EFFECT. MICHIGAN SUPREME COURT CASE SAYS NO AND.
09:17:28 19 PARTICULARLY IN THIS CASE -- AND I RESPECTFULLY DISAGREE
09:17:32 20 THAT THIS IS ANYWHERE CLOSE TO THE GENNA CASE. WE DON'T
09:17:35 21 KNOW WHAT HAPPENED ON AUGUST 18TH IN RELATION TO
09:17:39 22 EXPOSURE TO THE TOXIC CHEMICALS. THAT IS FATAL TO THEIR
09:17:44 23 CASE.

09:17:44 24 THE COURT: ALL RIGHT.

09:17:46 25 MR. BLOOM: YOUR HONOR.

09:17:47 1 THE COURT: YES, GO AHEAD, MR. BLOOM.

09:17:48 2 MR. BLOOM: THERE'S A MISCHARACTERIZATION OF

09:17:50 3 THE TESTIMONY IN THIS CASE WHICH RUINS IT. IF WHAT HE

09:17:55 4 SAID IS CORRECT I HAVE NOTHING TO SAY, BUT EXCEPT THAT

09:17:59 5 THESE ARE QUESTIONS OF FACT. THE TESTIMONY OF CHANCE

09:18:03 6 LOWERY, THE PLAINTIFF HIMSELF, SAID FROM THE DAY THAT

09:18:06 7 THIS SPILL HAPPENED THE SMELL WAS HORRENDOUS. HE WAS

09:18:10 8 SICK ALMOST IMMEDIATELY, ALMOST CONTINUOUSLY. I WOULD

09:18:13 9 SAY HE SAID CONTINUOUSLY, THAT HE WAS NAUSEOUS. HE HAD

09:18:18 10 SEVERE HEADACHES, NOTHING LIKE WHAT HE HAD HAD BEFORE,

09:18:20 11 SEVERE MIGRAINE HEADACHES. THEN ON ONE DAY ON THE 18TH

09:18:27 12 HE THOUGHT -- HE WAS TAKING VICODIN SO HE TOOK VICODIN

09:18:30 13 TO PREVENT THE HEADACHES, AND HE HAD THIS SHORT GASTRIC

09:18:37 14 ARTERY DISRUPTION OR WHATEVER IT IS. HE WENT TO THE

09:18:41 15 HOSPITAL AND THE SURGEON SAID HE DIDN'T KNOW WHAT THE

09:18:45 16 CAUSE OF IT WAS AT ALL, BECAUSE HE'S NEVER SEEN IT

09:18:48 17 BEFORE, AND THERE'S NEVER -- IT'S NEVER HAPPENED. AND

09:18:52 18 MY EXPERT WHO IS A GOOD FRIEND OF MINE, MY DOCTOR FOR

09:18:57 19 40 YEARS WAS -- KEPT ME ALIVE -- SAID THERE'S NO

09:19:00 20 QUESTION. HE SAYS IT'S -- THERE IS A RELATIONSHIP

09:19:03 21 THERE. SO FOR HIM TO SAY THAT ALL THIS OCCURRED ON

09:19:06 22 THREE WEEKS LATER THAT ISN'T TRUE. HE COMPLAINED

09:19:09 23 COMPLETELY.

09:19:09 24 AND JUST ONE OTHER THING AND I WON'T GO ON.

09:19:12 25 ALL THESE OTHER WITNESSES, HIS GIRLFRIEND WHO HE LIVED

09:19:15 1 WITH SAYS -- HE LIVED RIGHT ON THE RIVER -- SAID IT WAS
09:19:19 2 HORRENDOUS THERE. HER PARENTS SAID IT WAS HORRENDOUS.
09:19:22 3 HER BROTHERS SAID THE SAME THING. HIS FRIEND SAID IT
09:19:24 4 WAS HORRIBLE, THEY COULDN'T STAND IT. THEY LEFT AND
09:19:27 5 WHATEVER. AND HE SAID HE WAS THERE FOR -- THERE'S A
09:19:30 6 DISPUTE ABOUT THIS -- THAT HE WAS THERE FOR THREE WEEKS,
09:19:33 7 BUT I'M JUST SAYING THERE'S A CORRELATION THERE.

09:19:35 8 THE GENNA CASE WAS ABSOLUTELY ON POINT.
09:19:38 9 THERE IS NO REQUIREMENT THAT THERE BE A TOX -- IN MY
09:19:40 10 OPINION, NO REQUIREMENT THERE BE A TOXICOLOGIST. SO
09:19:43 11 WHATEVER THEY SAY -- IF YOU TAKE THE TESTIMONY AS IT IS
09:19:47 12 IN THE FILE FROM THE DEPOSITIONS -- THERE'S A QUESTION
09:19:51 13 OF FACT. SHOULD BE DENIED.

09:19:52 14 **THE COURT:** WELL, LET ME -- I WILL ACCEPT
09:19:54 15 WHAT YOU SAY ABOUT THE ODOR, MR. BLOOM. I'VE HEARD SO
09:19:58 16 MUCH ABOUT THAT.

09:19:59 17 **MR. BLOOM:** I KNOW YOU HAVE.

09:20:00 18 **THE COURT:** BUT IN THE DEFENDANT'S BRIEF
09:20:08 19 THEY SAY MEDICAL RECORDS FROM MR. LOWERY'S
09:20:11 20 HOSPITALIZATION WHICH CONTAIN CONTEMPORANEOUS STATEMENTS
09:20:15 21 OF HIS CONDITION INDICATE THAT HE NEVER EVEN MENTIONED
09:20:19 22 TO ANY OF HIS DOCTORS THAT THE FUMES FROM THE OIL WERE
09:20:23 23 ALLEGEDLY CAUSING HIM SO MUCH DISCOMFORT AND ILLNESS.
09:20:29 24 INSTEAD HE TOLD DOCTORS THAT HE THOUGHT THE MIGRAINES
09:20:32 25 WERE CAUSED BY HIS BIPOLAR MEDICATION, AND THAT THE

09:20:35 1 NAUSEA AND VOMITING WAS CAUSED BY VICODIN HE HAD BEEN
09:20:40 2 TAKING. SINCE MR. LOWERY HAS NO EVIDENCE OF CAUSATION
09:20:43 3 EITHER SPECIFIC, SPECIFIC OR GENERAL, ENBRIDGE IS
09:20:47 4 ENTITLED TO SUMMARY DISPOSITION OF HIS NEGLIGENCE CLAIM.

09:20:50 5 I WILL ACKNOWLEDGE THAT IN OTHER CASES I
09:20:53 6 HAVE MADE THE DETERMINATION BASED UPON THE WITNESSES IN
09:20:57 7 THOSE CASES THAT EXPOSURE CAN CAUSE HEADACHES AND
09:21:04 8 GENERAL DISCOMFORT, CAUSING PEOPLE TO GO TO THEIR
09:21:07 9 DOCTOR. THAT FIRST CHASM HAS BEEN BRIDGED, BUT TO GO
09:21:12 10 FROM THAT POINT TO SURGERY, HOW DO I GET THERE IN YOUR
09:21:17 11 VIEW, MR. BLOOM?

09:21:18 12 **MR. BLOOM:** I ADDRESSED THAT AT THE
09:21:21 13 DEPOSITION OF DR. NOSANCHUK. HE INDICATED -- I DON'T
09:21:24 14 HAVE THE DEPOSITION HERE, I'M SORRY -- BUT I'M SURE
09:21:26 15 THERE WON'T BE ANY ARGUMENT. HE INDICATED THAT PATIENTS
09:21:33 16 OFTEN DON'T KNOW WHAT THE CAUSE IS. CHANCE LOWERY IS
09:21:34 17 NOT A DOCTOR, AND HE DID NOT KNOW WHAT WAS WRONG WITH
09:21:38 18 HIM. HE DID TESTIFY THAT HE HAD THESE EXTREME HEADACHES
09:21:41 19 AND NAUSEA AND VOMITING, WHATEVER, ALL DURING THE WHOLE
09:21:45 20 PERIOD OF TIME, THE THREE WEEKS OR SO THAT -- BETWEEN
09:21:47 21 THE SPILL AND WHEN THE SMELL OCCURRED WHATEVER. THAT
09:21:53 22 MEANS TO ME THAT'S A QUESTION OF FACT.

09:21:54 23 **THE COURT:** BUT, MR. BLOOM, WOULDN'T THAT
09:21:56 24 HAVE BEEN IN MR. LOWERY'S MEDICAL HISTORY THAT WOULD
09:21:59 25 HAVE BEEN PROVIDED TO THE SURGEONS?

09:22:02 1 **MR. BLOOM:** THE SURGEON TOOK OUT -- HE DID
09:22:05 2 NOT KNOW. HE DID SAY THAT HE THOUGHT IT WAS THE
09:22:08 3 VICODIN. THAT'S WHAT -- I'M TALKING CHANCE LOWERY -- I
09:22:10 4 AM BEING HONEST -- HE DID TESTIFY TO THAT, BECAUSE HE
09:22:13 5 DID NOT KNOW UNTIL LATER ON WHEN HE READ IN THE PAPER OR
09:22:17 6 I GUESS THE REPORT WHICH YOU'VE ALREADY EXCLUDED, BUT HE
09:22:21 7 READ IT IN THE PAPER AND SAID HEY, IT'S NOT JUST ME.
09:22:24 8 ALL THESE PEOPLE HAD THIS, THAT HE CONNECTED IT UP AND
09:22:28 9 CONTACTED ME. THAT'S WHY I TOOK THE CASE WHICH I REGRET
09:22:31 10 NOW DUE TO THE -- BUT NO, SO -- BUT THAT'S WHAT
09:22:44 11 HAPPENED.

09:22:44 12 **THE COURT:** ALL RIGHT. THANK YOU.

09:22:45 13 **MR. BLOOM:** THANK YOU.

09:22:46 14 **THE COURT:** MR. VARTANIAN, WHAT'S YOUR
09:22:47 15 RESPONSE TO THAT?

09:22:48 16 **MR. VARTANIAN:** WELL, I DON'T REALLY HAVE
09:22:51 17 MUCH FURTHER TO SAY. I THINK YOUR HONOR IS EXACTLY
09:22:54 18 RIGHT IN LOOKING AT THIS RECORD AS BEING DIFFERENT FROM
09:22:57 19 THE OTHER CASES. THIS IS A SPECIFIC SITUATION WHERE
09:23:03 20 APPARENTLY SEVERE VOMITING OCCURRED ON A SPECIFIC DAY,
09:23:05 21 AND I THINK THEY NEED MUCH MORE EVIDENCE OF WHETHER
09:23:10 22 THERE WERE LEVELS OF EXPOSURE ON THAT DAY THAT TRIGGERED
09:23:15 23 THIS VOMITING, BECAUSE THEY DON'T HAVE ANYTHING. AND ON
09:23:20 24 THE OTHER HAND, THERE IS THE VICODIN, WHICH IS A KNOWN
09:23:24 25 DRUG THAT CAUSES VOMITING. I THINK ALL THEY HAVE IS A

09:23:28 1 CORRELATION IN TIME, AND IT'S A WEAK CORRELATION AT
09:23:32 2 BEST, AND THAT'S INSUFFICIENT UNDER MICHIGAN LAW.

09:23:35 3 **THE COURT:** WHAT I'M GOING TO DO, GENTLEMEN,
09:23:36 4 I WILL GRANT PARTIAL SUMMARY DISPOSITION AS IT RELATES
09:23:40 5 TO ANY AILMENT OR PHYSICAL PROBLEM THAT MR. LOWERY HAD
09:23:47 6 BEYOND THE VOMITING AND HEADACHES. I JUST DON'T HAVE
09:23:52 7 ANYTHING, MR. BLOOM, TO LINK UP THE ETIOLOGY OF RUPTURED
09:24:00 8 AORTA. GO AHEAD.

09:24:00 9 **MR. BLOOM:** I CAN -- I JUST -- ONE THING,
09:24:03 10 YES -- MEAN TO -- I WOULD RATHER YOU JUST GRANT IT. I
09:24:07 11 DON'T WANT YOU TO GRANT A MOTION FOR SUMMARY
09:24:09 12 DISPOSITION, BUT WE NEVER REALLY MADE A CLAIM FOR THE
09:24:11 13 NAUSEA AND HEADACHES. THIS WHOLE CASE IS ALL ABOUT THE
09:24:14 14 SURGERY, SO IF YOU ARE GOING TO GRANT THE MOTION, GRANT
09:24:18 15 IT TOTALLY, SO THAT I CAN THEN APPEAL IT.

09:24:20 16 **THE COURT:** VERY GOOD. I WILL GRANT IT IN
09:24:22 17 ITS ENTIRETY.

09:24:23 18 **MR. BLOOM:** THANK YOU, YOUR HONOR.

09:24:24 19 **THE COURT:** THANK YOU. ALL RIGHT.

09:24:25 20 **MR. VARTANIAN:** THANK YOU, YOUR HONOR.

09:24:26 21 **THE COURT:** YOU KNOW, I HONESTLY I LOOK
09:24:28 22 FORWARD TO A PUBLISHED OPINION --

09:24:31 23 **MR. BLOOM:** I HOPE SO.

09:24:32 24 **THE COURT:** -- AS TO WHETHER OR NOT THERE
09:24:34 25 WOULD BE THIS KIND OF REQUIREMENT FOR LINKAGE IN THESE

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09:24:39 1 EXPOSURE CASES. OKAY.

09:24:40 2 MR. VARTANIAN: THANK YOU.

09:24:41 3 THE COURT: YOU PREPARE THE ORDER,

09:24:42 4 MR. VARTANINA

09:24:42 5 MR. VARTANIAN: WILL DO.

09:24:44 6 MR. BLOOM: THANK YOU.

09:24:45 7 (PROCEEDINGS CONCLUDED AT ABOUT 9:24 A.M.)

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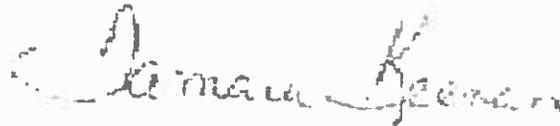
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STATE OF MICHIGAN)

COUNTY OF CALHOUN)

I, TAMARA L. KEENAN, CSR-4187, OFFICIAL COURT REPORTER
IN AND FOR THE 37TH JUDICIAL CIRCUIT COURT, FOR THE
COUNTY OF CALHOUN, STATE OF MICHIGAN, DO HEREBY CERTIFY
THAT THIS TRANSCRIPT WAS PRODUCED USING STENOGRAPHIC
MEANS AND WAS REDUCED TO WRITTEN FORM BY MEANS OF
COMPUTER-ASSISTED TRANSCRIPTION AND COMPRISES A FULL AND
COMPLETE TRANSCRIPT OF THE PROCEEDINGS IN THE MATTER OF
LOWERY VERSUS ENBRIDGE, DOCKET NO. 11-3414 ON NOVEMBER
4, 2013.



JANUARY 15, 2014

TAMARA KEENAN, CSR-4187
OFFICIAL COURT REPORTER
37TH CIRCUIT COURT

EXHIBIT 2

STATE OF MICHIGAN
COURT OF APPEALS

CHANCE LOWERY,

Plaintiff-Appellant,

v

ENBRIDGE ENERGY LIMITED
PARTNERSHIP and ENBRIDGE ENERGY
PARTNERS LP,

Defendants-Appellees.

UNPUBLISHED

April 2, 2015

No. 319199

Calhoun Circuit Court

LC No. 2011-003414-NO

Before: JANSEN, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In this toxic tort case, plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendants under MCR 2.116(C)(10) (no genuine issue of material fact). We reverse and remand for further proceedings.

This case stems from the July 26, 2010, Enbridge Energy oil spill into Talmadge Creek and the Kalamazoo River. At the time of the spill, plaintiff lived in Battle Creek, 250 feet from the Kalamazoo river. Plaintiff alleges that he was injured as a result of being exposed to toxic fumes from the spilled oil. Plaintiff testified by deposition that he began to get headaches within 24 hours of the oil spill and its accompanying release of odor. Although plaintiff's testimony was not entirely clear, a reasonable reading of it is that he had severe migraines for approximately a week after the spill and that he vomited "non stop practically" for almost a week before his hospital admission on August 18, 2010. During a fit of vomiting, plaintiff testified, he experienced sudden and severe abdominal pain. Plaintiff went to Bronson Battle Creek Hospital where a CT scan revealed that he had suffered an "avulsion" of his short gastric artery that led to internal bleeding. Doctors at Bronson repaired the avulsion surgically. Plaintiff testified that he told the treating physicians about his exposure to oil fumes. However, hospital records and the testimony of plaintiff's treating surgeon indicate that plaintiff did not mention oil fumes at the time of treatment.

Plaintiff's medical expert reviewed plaintiff's hospital records and concluded that oil fumes caused plaintiff's headaches, nausea, coughing, and vomiting, and that "the tear in his short gastric artery was caused by violent and uncontrollable bouts of coughing and vomiting which resulted in changes in intra-abdominal pressure and sudden and violent movement of the

upper intra-abdominal organs” The expert did not examine plaintiff, basing his opinion solely on a review of the medical records.

The trial court granted plaintiff’s motion for partial summary disposition under MCR 2.116(C)(10) on the issue of the negligent operation of the oil pipeline. However, the court subsequently granted defendants summary disposition under (C)(10), stating, “I just don’t have anything . . . to link up the etiology of ruptured aorta [sic].”

“On appeal, a trial court’s grant or denial of summary disposition is reviewed de novo.” *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. 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. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

In a negligence case, the plaintiff, in order to recover, 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. *Genna v Jackson*, 286 Mich App 413, 417; 781 NW2d 124 (2009). Here, 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.

“Cause in fact requires that the harmful result would not have come about but for the defendant’s negligent conduct.” *Id.* (citation and quotation marks omitted). “Cause in fact may be established by circumstantial evidence, but such proof must facilitate reasonable inferences of causation, not mere speculation.” *Id.* at 417-418 (citation and quotation marks omitted). “A 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 418.

Defendants contend that the testimony of plaintiff’s medical expert was inadequate. We note, however, that in *Genna*, this Court held that direct expert testimony that the toxin was the cause of the plaintiff’s injury was not required to prove causation in a toxic tort case. *Id.* The Court stated:

Defendant urges this Court to adopt the requirement that, in order to prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like those suffered by the plaintiff in human beings subjected to the same exposure as the plaintiff, and that the toxin was the cause of the plaintiff’s injury. They urge this Court to find that direct expert testimony is required to establish the causal link, not inferences. We decline to adopt this requirement. [*Id.*]

A plaintiff is permitted to prove his case through circumstantial evidence and reasonable inferences. See *id.* at 421. Here, 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. 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.

It is true that there are other plausible explanations for plaintiff's injury and that there are certain facts that could potentially be damaging to plaintiff's case at trial. However, this only serves to highlight that there are genuine issues of material fact to be resolved by a jury. For the purpose of a motion for summary disposition under MCR 2.116(C)(10), there is enough circumstantial evidence to create a genuine issue of material fact.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Jane M. Beckering