IN THE SUPREME COURT OF IOWA

NO. 21-0723

JACQUELINE SUE UHLER,

Plaintiff-Appellant

vs.

THE GRAHAM GROUP, INC.,

Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY CASE NO. LACL145890 HON. SAMANTHA GRONEWALD, JUDGE

DEFENDANT-APPELLEE/ AMENDED FINAL BRIEF

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CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed Defendant-Appellee's Amended Final Brief with the Clerk of the Supreme Court of Iowa by EDMS on the 7th day of October 2021, which constitutes service on all other parties to this appeal pursuant to Iowa Ct. R. §16.315(1)(b) (2018).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1). This brief contains 7,549 words, excluding the parts exempted by Rule 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in font size 14, Times New Roman.

Dated: October 7, 2021

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TABLE OF CONTENTS

Page

have the burden to prove alternative theories to Plaintiff's contentions.

2. Plaintiff's Argument Point III arguing that the evidence, when viewed in the light most favorable to Ms. Uhler, and resolving all inferences in her favor, misses the fact that this is a toxic-tort case, and that Plaintiff must provide reliable expert testimony of causation to survive summary judgment.

3. Plaintiff incorrectly argues in section IV that part of the district court's error was failing to realize that the facts of the case at bar are different than the *Ranes* case.

4. Plaintiff argues in VII and VIII that the District Court failed to consider certain irrelevant arguments.

5. Plaintiff's citation to *Bloomquist* that there was sufficient evidence to generate a jury question on causation is misguided.

6. In Argument Point VI Plaintiff argues Graham has admitted that the drain opener caused there to be injury causing fumes in the building on the day in question.

TABLE OF AUTHORITIES

Cases.

Statutes and Rules.

Published Authorities.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

In this toxic-tort case did the District Court properly enter summary judgment against the Plaintiff when Plaintiff's experts could not prove either general or specific causation; or, stated otherwise, did the district court correctly apply the governing legal standard as stated by the Iowa Supreme Court in *Ranes vs. Adams Labs., Inc.* 778 NW2d 677 (Iowa 2010).

ROUTING STATEMENT

The decision issued by the District Court is a continuation of the development of standards of proof in toxic-tort cases culminating in *Ranes*. This case would be appropriate for disposition by either the Supreme Court or the Court of Appeals.

STANDARD OF REVIEW

Appellate courts review decisions to grant or deny a motion for summary judgment for corrections of errors in law. *Mason v. Vision Iowa Bd.*, 700 NW2d 349 (Iowa 2005).

Motions for summary judgment are governed by Iowa Rule of Civil Procedure 1.981. Rule 1.981(3) states the motion should be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3); *Luana Sav. Bank v. Pro-Build Holdings, Inc.*, 856 N.W.2d 892, 895 (Iowa 2014).

It is proper for the court to grant summary judgment when the only conflict is over the legal consequences of undisputed facts. *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008). The purpose of summary judgment "is to avoid useless trials and streamline the litigation process." *Diamond Prods. Co. v. Skipton Painting & Insulating, Inc.*, 392 N.W.2d 137, 138 (Iowa 1986).

Significantly, in the case at bar, an inference to create a triable issue in response to a motion for summary judgment cannot be based on conjecture or speculation. *Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011); *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983); *see also Korte v. Mead Johnson & Co.*, 824 F. Supp. 2d 877, 889 (S.D. Iowa 2010). "In considering a motion for summary judgment, ... [a]ll reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable." *Castro*, 795 N.W.2d at 795 (citing *Blackstone v. Shook & Fletcher Insulation Co.,* 764 F.2d 1480, 1482 (11th Cir.1985)); *see also Henchey v. Dielschneider*, No. 10-0346, 2011 WL 227642, at *3-4 (Iowa Ct. App. 2011). "Speculation is not sufficient to generate a genuine issue of fact." *Hlubek v. Pelecky,* 701 N.W.2d 93, 96 (Iowa 2005).

STATEMENT OF THE CASE

Introduction

This is a toxic-tort case. It seems that the Plaintiff-Appellant, Jacqueline Uhler, has always had a fundamental misunderstanding that the legal case is a toxic-tort case. However, the District Court properly saw the case for what it was, a toxic-tort case.

The basic contention of Plaintiff-Appellant is that "fumes" from two cups of liquid drain cleaner being poured into a clogged water-filled restroom sink basin on the lower level of Methodist Medical Plaza 1 (hereinafter; "Plaza 1") traveled up four floors in the medical office building and that those "fumes" caused injury to Plaintiff, who was working at her desk on the fourth level of the building. That is a classic toxic-tort case.

A toxic-tort case has proof requirements as prescribed by the Iowa Supreme Court in *Ranes vs. Adams Labs., Inc.* 778 NW2d 677 (Iowa 2010).

Plaintiff was required, in this toxic-tort case, to produce expert testimony as to whether the liquid drain cleaner used with in the fact pattern of this case could, and then did, cause lung damage to Plaintiff who was working in Plaza 1, four (4) floor levels above where 1 or 2 cups of the drain opener was poured into a clogged sink filled with water.

The District Court stated in its ruling granting summary judgment, the issue for summary judgment presented to the Court was "whether Draynamite (the toxic material in this case) at the concentration level allegedly experienced by Jacqueline Uhler on October 16, 2017, 1) can cause lung damage and 2) did cause the injuries alleged by Jacqueline." (Underlining by this writer).

As noted in the Court's thoughtful summary judgment ruling, Plaintiff did not present the required expert testimony as to whether two cups of the Draynamite Liquid Drain Opener even had the ability to travel the distance alleged. And then, assuming the fumes could travel that far, whether the fumes having travel that far even had the ability or toxicity level to produce the alleged injury. No expert was able to provide reliable expert testimony on that.

STATEMENT OF FACTS

The important facts of this case can be initially laid out by reviewing the District Court's ruling on facts found.

The District Court considered all of Plaintiff's allegations in consideration of the Motion for Summary Judgment. The Court's ruling beginning at page 1 of the ruling concisely states:

> Uhler worked for UnityPoint Health on the third floor [fourth level] of the Methodist Medical Plaza 1 building, located at 1212 Pleasant Street, Des Moines, Iowa, (the building). Graham Group owned and managed the building. On October 16, 2017, someone called the Graham Group

maintenance manager, Toby George (George), to tell him about a clogged sink in a restroom on the lower level of the building. George sent a Graham Group maintenance man, Brad Grismore ("Grismore"), to attend to the issue. Grismore used a liquid drain opener called Draynamite to attempt to unclog the sink. (Bracketing added by this writer).

Following Grismore's use of Draynamite, at least 11 people on the upper floors of the building, including Uhler, complained of a noxious "rotten egg" smell that made them sick. Due to the fumes, Uhler went home sick, and an entire clinic closed. After people complained, George tried to manipulate the airflow in the building to clear out the fumes. After October 16, 2017, Uhler's asthma worsened, and her ability to breathe, speak, and be active became more difficult. Uhler suffers from asthma and restrictive lung disease. (Footnote citations to the record made by the district court omitted).

On October 7, 2019, Uhler filed her petition for premises liability, alleging (1) negligence and (2) punitive damages. Uhler alleges Graham Group negligently caused her lung damage with its use of Draynamite on October 16, 2017, by failing to exercise reasonable care in maintaining the premises, failing to ventilate the building adequately, failing to warn tenants of the danger in a timely and safe fashion, and failing to minimize and contain the chemical exposure.

On March 17, 2021, Graham Group filed a motion for summary judgment. Graham Group contends there is no material factual dispute in that its use of Draynamite did not cause Uhler's lung damage. Graham Group believes Uhler presented insufficient evidence as a matter of law to show causation. It argues Uhler's expert witnesses will not be able to show how a small amount of Draynamite used on the lower level caused Uhler's injury four levels above and across the building. Further, Graham Group believes Uhler's experts are unqualified and unreliable.

On April 7, 2021, Uhler filed a resistance. Uhler argues that causation is a question for the jury, except in very exceptional cases. Uhler contends Graham Group already admitted Draynamite caused Uhler's injuries, through George's statements to others and Graham executive Jeff Hatfield's deposition. Uhler argues the presence of Draynamite in the building, the complaints and sickness of 11 employees, and Graham

> Group's unprecedented actions to air out the building are enough to establish causation. Uhler believes Dr. Stoken is qualified, because she has treated many patients who experienced injuries from the inhalation of fumes and has worked extensively in pulmonary and intensive care. Uhler believes Dr. Dodge is qualified as a pulmonologist. Uhler argues she designated them as causation witnesses by their answering "yes" about whether Draynamite exposure on October 16, 2017, caused Uhler's injuries and by disclosing that they would testify about Uhler's injuries. Uhler argues Dr. Hicklin's notes are reliable evidence. (Footnote citations to the record made by the district court omitted).
>
> (App. P. 451-453)

Additional facts not needed by the District Court to rule, but are informational and not noted in Appellant's Brief

The only facts that are of significance in this review of summary judgement relate to Plaintiff's experts and their inability to provide a prima facia case to sustain the requirements of a toxic-tort case.

However, Graham will provide certain other general facts so that the reader is provided some context when reviewing the appeal.

Plaza 1, where Ms. Uhler worked, is a five-floor medical office building adjoining Methodist Hospital at 1215 Pleasant Street, Des Moines, Iowa. Graham Group manages the building and is responsible for most maintenance in the building. This maintenance would include attending to clogged toilets and sinks within many of the tenant suites including that of Iowa Pathology P.C., designated Suite LL3 and located on the lowest level of the building. (App P. 157, Depo. P. 19, ln. 15 – P. 22, ln. 13). Graham maintenance staff has an office in the Medical Office Building.

On October 16, 2017, the Iowa Pathology, P.C. noted in the sentence above, called Graham Group maintenance to report a clogged sink in one of its suite's restrooms. (App. P. 158, Depo P. 23, ln. 17-21). Brad Grismore, a Graham maintenance staff-person with 6 years' experience working as a maintenance person in that building (App. P. 122, Depo. P. 12, ln. 17-23) was tasked with the job of attending to the clogged sink drain. (App. P. 158, Depo P. 23, ln. 17-21); (App. P. 129, Depo. P. 39, Ln. 4-10). Brad arrived at the restroom on the lower level and observed there was standing water in the sink. (App. P. 131, Depo. P. 46, ln. 2-23) (App. P. 406 and 407; Exhibits C and D). The first thing Brad tried was to use a plunger on the sink. (App. P. 131, Depo. P. 46, ln. 24-25). That did not work to fix the clog. The next thing Brad did was to get a bottle of Draynamite Liquid Drain Opener that was kept in the storage room. (App. P. 133, Depo. P. 53, ln. 17 - P. 54, Ln. 23).

Brad returned to the restroom in LL3 and proceeded to pour between a cup and two cups (the exact amount is not clear but is immaterial to the analysis) of the liquid drain opener into the restroom sink basin that was still filled with water. (App. P. 133, Depo. P. 55, Ln. 10 – P. 56, Ln. 9). Brad watched the process of the drain opener working for a couple of minutes and returned the drain opener to the storage room. (App. P. 136, Depo. P. 65, Ln 1 P. 66, Ln. 21). Within ten minutes, Brad returned to the restroom and saw that the sink had drained, and no water remained

in the sink. (App. P. 136, Depo. P. 66, Ln. 13-16). Brad then ran water in the sink and noted that the drain was operating, and water was flowing down the drain as it should. (App. P. 136, Depo. P. 67, Ln. 1-4).

During no time did Brad feel any ill effects from his unclogging of the drain. (App. P. 391, Numbered Paragraph 3). The restroom in LL3 as do the other restrooms in the building has a dedicated exhaust vent that pulls air form the restroom directly up a dedicated ventilation shaft that then runs vertically to exit out above the roof. (App. P. 396, Numbered paragraphs 16-20). (See App. P. 408, 409, Exhibits E and F).

Additionally, the Pathology suite, LL3, is the only medical suite in the entire building which has an overall exhaust unit to pull air from inside the suite directly to the outside of the building. (App. P. 400, Numbered paragraphs 55-57). (See App. Pages 412, 413, 414, Exhibits I, J, and K).

On October 16, 2017, not only did Brad not feel effects from his use of the liquid drain opener (App. P. 391, numbered paragraph 3), but not one person working in Suite LL3, where the drain opener was used, complained of a smell or of feeling ill. (App. P. 391, Numbered paragraph 4). (see App. P. 415 and 416, Exhibits L and M). Likewise, no one in the halls of other medical suites on the lower level of the building complained of smells or ill effects. (App. P. 391, Numbered paragraph 6). That goes for both employees and patients or visitors.

No one on the floor above them complained of smelling any odors or feeling ill effects. (App. P. 391, numbered paragraph 5). That floor contains the main entrance to MMP1. (See App. P. 419, Exhibit P).

Each floor level in MMP1 is separated by concrete floors. (App. P. 398, Numbered paragraph 28). The only opening between floors is through a concrete stairwell and the elevator. (App. P. 397, Numbered paragraph 23).

Plaza 1 has only two ways of access from floor to floor. The stairwells or the elevators.

The two stairwells in the building (one on the east side of the building and one on the west side) all have automatic closing fire doors which separate the stairwell from the building. (See App. P. 418, Exhibit O).

Likewise, the two side-by-side elevators in the building are surrounded by a concrete elevator shaft so that no air from the building could seep into the elevator shaft from the building itself other than the elevator door openings. The elevator shaft does not draft at the top and therefore there is no tendency to pull air into the elevator shaft. (See App. P. 417, Exhibit N).

Prior to the date of the alleged incident, Toby, Keith, and Brad had all used the Draynamite Liquid Drain Opener in Plaza 1 for a total of at least 36 to 78 times and at no time had there ever been any complaints of odor or ill health effects by anyone in Plaza 1 from the use of the Draynamite. (App. P. 394, numbered

paragraphs 2-4; App. P. 65-66, Numbered Paragraphs 2-7; App. P. 134, Depo. P. 57, Ln. 9-10).

At no time during their prior use of the Draynamite Liquid Drain Opener did any of those three men ever experience any ill health effects. (App. P. 394, Numbered paragraph 4); (App. P. 394, Numbered paragraph 3); (App. P. 65-66, Numbered paragraphs 2-7).

No employees in Plaza 1 on the floor above, Floor 1, noticed any odor or complained of any ill effects. (App. P. 399, Numbered Paragraph 44). Floor 1 is also the main entry to the offices in Plaza 1 and no patient or visitor complained of noticing any odor or feeling any ill effects. (App. P. 399, Numbered Paragraph 41, 47). The first floor of the Plaza 1 includes a Respiratory Clinic and the Asthma Center. (App. P. 420, Exhibit Q), (App. P. 399, Numbered Paragraphs 45-47).

The restroom on the lower level of Plaza 1, where the product was used, is on the west half of the building. Suite 204 and the Plaintiff, who was on the third floor, are located on the east side of the building. (App. P. 396, Numbered paragraph 15).

Not only did Plaintiff work four (4) floors above the restroom sink where the liquid drain opener was used, she worked 50 or 60 feet east/west from the bathroom. (App. P. 196, Depo P. 37, ln. 3-13).

Plaza 1 has two independent heating, cooling, and exhaust systems. One exhaust system covers the west half of the building, and another covers the east half of the building. (App. P. 395, Numbered paragraphs 9-11).

Plaintiff's experts have done no study as to what the concentration level of the Draynamite Liquid Drain Opener may have been, if in fact, it traveled to Suite 204 and then to the fourth level where the Plaintiff was working.

Plaintiff's experts have not conducted any investigation on the distance the Draynamite Liquid Drain Opener would have traveled before allegedly coming into contact with Suite 204 or Suite 300 to where the Plaintiff was, four stories above where the product was used.

On October 16, 2017 no one specifically using the stairs or elevator complained of a smell or ill effects.

While Ms. Uhler who worked on the 4th level did go home the day of the smell, the clinic she officed in, the pediatric clinic, the largest clinic in the building, with had at least 40 employees working that day (App. P. 235, Depo P.38. Ln. 11-13) and only 4 went home. (App. P. 235. Depo. P. 40, Ln. 4-9) No medical personnel on that floor complained of any smell, no medical personnel went home early that day, no patients complained of smells or feeling ill-effects, nor did the large pediatric clinic close that day. (App. P. 235, Depo. P. 37, Ln. 22 – P. 38, Ln. 18); (App. P. 235,

Depo. P. 40, Ln. 4-11).

When asked in interrogatory to describe what actions she took from the time she first noticed the unusual odor until she arrived at a location where she did not notice the odor, Plaintiff Uhler answered Interrogatory 3 that "Plaintiff immediately covered her mouth and nose with a cloth in an attempt to prevent the fumes from entering her airway." Ms. Uhler then asked for permission to leave and left the building. (App. P. 425).

I. APPELLEE'S ARGUMENT

The District Court properly granted Graham summary judgment as Plaintiff's experts were unable to establish proper causation in this toxic-tort case.

The District Court correctly noted at page four (4) of its ruling that, "In toxic-tort cases 'expert medical and toxicological is unquestionably required to assist the jury' in determining general and specific causation'". The District Court correctly cites *Ranes v. Adams Labs* 778 NW2d 677 (Iowa 2010).

This is a case of alleged personal injury flowing from the use of Draynamite Liquid Drain Opener in a sink located in the lower level of the Methodist Medical Plaza 1 ("Plaza 1") building located at 1212 Pleasant Street, Des Moines, Iowa.

Plaza 1 is a 5-story medical office building. The liquid drain opener at issue was used in a vented restroom in the lower level of Plaza 1 and the Plaintiff who claims injury worked four floors above the lower level (plus 50 to 60 feet east/west) where the drain opener was used. Plaintiff claims the fumes were a toxin that caused injury to her. A toxic-tort case.

Plaintiff's claims against Defendant involve complex issues of chemical causation that are outside the general knowledge of laypersons. Iowa law requires that, in such cases, expert witness testimony be offered to establish causation and, after that, that expert testimony that injury from the product was actually inflicted upon Plaintiff.

Plaintiff lacks any expert testimony to satisfactorily establish causation of the product used. Absent expert testimony, Plaintiff, in this toxic-tort case cannot establish a case against Defendant. Accordingly, Defendant is entitled to summary judgment on Plaintiffs' claims.

One of the looming factual issues of proof in this case is whether the product, Draynamite, when used in a restroom sink on the lower level of Plaza 1 could in fact travel to the fourth level of Plaza 1, four floors above the lower level (plus 50 to 60 feet east/west), in a concentration strong enough to cause any harm to the Plaintiff.

These are questions that must be answered by qualified scientific experts expressing scientifically reliable opinions on causation.

Controlling Law

In all circumstances involving expert testimony, the proponent of the evidence has the burden of demonstrating to the court as a preliminary question of law the reliability of the witness's opinion. Iowa R. Evid. 5.014(A); *Ranes v. Adams Laboratories, Inc.* 778 NW 2nd 667 (Iowa 2010). Although it is the within province of the jury to evaluate the credibility of expert witnesses, trial courts have a well-recognized role as guardians of the integrity of expert evidence offered at trials *Ranes v. Adams Laboratories, Inc.* at p. 686.

In the case at bar, the question is not whether Draynamite could have adverse consequences to someone in close contact to the product that inhaled vapors from the product; but the question is whether that same product could injure a person's lungs more than 40 yards away. It is axiomatic that for a chemical to cause injury to a human's lungs that (1) individual be close enough to the source of the product, (2) that the product reaches the human while still having the degree of toxicity necessary to injure a human and (3) the length of time that a human is exposed to the product is sufficient to cause injury.

The *Ranes* discussion, authored by Justice Cady, without dissent, spoke of the reliability of the scientific knowledge of a qualified expert. In *Ranes*, the expert at

issue offered a differential diagnosis to show both general and specific causation. "In order to determine whether this differential diagnosis is reliable, we must first decide whether a sufficiently reliable scientific foundation existed Dr. Thoman's decision to "rule in" [the drug] as a potential cause of [Plaintiff's] alleged injuries." *Ranes.* The Court began by scrutinizing the expert's opinion on general causation. "Failure to reliably "rule in" the Defendant's drug as a cause of the injuries in a particular case is commonly fatal to Plaintiff's seeking to survive a Summary Judgment in toxic tort cases." *Ranes* at p. 690. (Dr. Thoman was the expert in *Ranes.*)

Ranes is not a one-off decision as Plaintiff would have us believe. The *Ranes* case is a precedent setting case in the field of toxic-tort cases.

Ranes formally adopted the bifurcated general and specific causation as the test for causation in toxic-tort cases in Iowa. Quoting from *Ranes*, the Supreme Court wrote:

> "This bifurcated analysis has not been explicitly used as the standard in Iowa. However, due to its general acceptance among scholars and courts of other jurisdictions, as well as the relative ease of application the analysis offers to courts examining complex issues of causation, we believe it is appropriate for courts to use the bifurcated causation language in toxic-tort cases. In the toxic-tort case before us, both types of causation must be proven, and expert medical and toxicological testimony is unquestionably required to assist the jury."

As noted in *Ranes*, "General causation is a showing that a drug or chemical is capable of causing the type of harm from which the Plaintiff suffers." That is, expert

proof that the liquid drain opener could even cause injury at a distance of over four floors. Plaintiff did not do that.

"Specific causation is evidence that the drug or chemical in fact caused the harm from which Plaintiff suffers." Plaintiff did not do that either.

Neither of plaintiff's experts performed any studies to prove the fumes could cause injury at a distance and neither expert consulted previous studies as to what toxicity level is needed to cause harm and what the toxicity level of any fumes from the lower floor might have if they reached the fourth level.

Plaintiff points to the fact that others on the third and fourth floor smelled an odor and felt effects. Who knows what that was from? Plaintiff ignores the fact that no tenants or visitors on the basement level, where the drain opener actually used noticed any smell or complained of feeling ill effects. Likewise, Plaintiff ignores that no one on the second floor or main floor noticed any smell or felt any ill effects. Plaintiff provided no explanation as to how the "fumes" went to the third and fourth floors yet bypassed the second floor and lower level where the drain opener was actually used.

The *Ranes* Court continued, "Rule 5.702 places a gatekeeping function with the District Court to "[ensure] that evidence submitted to the jury meets [the rules] criteria for relevance and reliability." The evaluation of reliability is a factually

sensitive analysis. The amount of foundation necessary to show reliability necessarily increases with the complexity of the case and the corollary likelihood the expert testimony will have a substantial impact on the fact finder. [Internal Citation]. Yet reliability should be assessed by examining the expert's "principles and methodology not… the conclusions that they generate."

To establish general causation, Plaintiff must show the product can cause the injuries she claims. *Ranes* at p. 691. In this case at bar, it is not enough for an expert to simply say that the product in question could cause injury to a user of the liquid drain opener at close proximity as the warning labels on the product contemplate. The proof required is whether this product could injure a person's lungs at a distance of over forty yards from the product. Even with a rudimentary knowledge of chemistry, one would understand that a toxic fume at the source is normally less toxic the further the vapor is from its source. It is also generally known that a potentially toxic gas is less harmful at a lesser concentration level. Plaintiff has the burden to show otherwise. Another point of analysis that must be undertaken is to demonstrate the amount of time exposure to a toxin was required in order to do damage to a person's lungs. Plaintiff claims she immediately placed a scarf over her mouth and nose to protect her airways from injury. None of this has been accomplished by the Plaintiff's experts, thus negating any reliability on their opinion regarding general causation in this case. That is a burden placed upon the Plaintiff.

"General causation is a showing that the drug or chemical is capable of causing the type of harm from which the plaintiff suffers". "Specific causation is evidence that the drug or chemical in fact caused the harm from which the plaintiff suffers." *Ranes.*

The parties do not dispute that the product label says it can cause injury at close distance. Instead, the issue presented by Graham Group's Motion for Summary Judgment which Plaintiff did not prove with expert testimony is "whether Draynamite at the distance Plaintiff was from the drain cleaner and at the concentration level which would allegedly been experienced by Uhler on October 16, 2017, can 1) cause lung damage and 2) did cause the injuries alleged by Uhler."

Plaintiff uses it's brief to firstly, tell that The Graham Group managed the building and to claim that Defendant-Appellee was negligent in its use of the Draynamite product. Graham acknowledges it manages the building and whether Graham was negligent is immaterial to the issue before the Court on this appeal.

Plaintiff conflates the idea that if a material is toxic from 3 feet away it must also be toxic at a distance of four floors. Not one piece of evidence brought forward by the Plaintiff would support the contention that a fume from the liquid drain opener smelled at a distance of over four floor levels is as toxic as it may be at three feet, or whether it is toxic at all at that distance.

Plaintiff uses the phrase "illness causing fumes" throughout its appellate brief.

Calling fumes something one wishes them to be, does not make it so. The repetition is reminiscent of a tale told, full of sound and fury, but signifying nothing. Plaintiff uses the phrase without reference to concentration levels. It is as though the use of Draynamite in the state capital would injure persons working in the Supreme Court Building.

Plaintiff's Experts

The district court's ruling did a thorough job of analyzing Plaintiff's experts and their ability to opine without necessary facts or study.

An example of this lack of expert witness study on the product is contained in an Affidavit from Dr. Stoken. That was noted by the district court. Dr. Stoken is asked to answer yes or no to the question that follows: "Do you agree with Dr. Gloor, as stated in his record of October 20, 2020, that Jacqueline Uhler's "asthma was markedly exacerbated" by her exposure to fumes generated by the use of Draynamite on October 16, 2017?" The fact is that Dr. Gloor's medical record did not state 'fumes generated by the use of Draynamite', but instead the Dr. Gloor medical record actually stated, "it appears from her record that her asthma was markedly exacerbated by her exposure to hydrogen sulfide in 2017." (underlining added by writer) (this is a chart note of October 12, 2020). (App. P. 459).

Likewise, Dr. Stoken was presented with the following question: "Question #6: Do you agree with Dr. Hicklin as stated in his record of September 28, 2018, that

Jacqueline Uhler suffered a "long term permanent worsening of her asthma" as a result of her exposure to fumes generated by the use of Draynamite on October 16, 2017?" However, the actual quote from Dr. Hicklin's September 28, 2018 medical records under "*History of Present Illness"* states "I think that she has had a long term or permanent worsening of her asthma related to a chemical spill." Dr. Hicklin's medical records at no time state that Plaintiff's alleged injury is as a result of her exposure to fumes generated by the use of Draynamite.

In the case at bar, neither Dr. Stoken nor Dr. Daniels reviewed any case studies or case reports on the possibility of Draynamite injuring a human at a distance of 40 yards, or 20 yards, for that matter. Certainly not four floors plus 50 to 60 feet.

The Iowa Court in *Ranes* noted that, although generally, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility…" if an expert's opinion is "so fundamentally unsupported… it can offer no assistance to the jury…", it must be excluded. *Ranes* at p. 693; other citation. The *Ranes* Court quoted 7 *Iowa Practice Evidence* §5.703:1 at p. 625 (2009) authored by Laurie Kratky Doré, which stated, "without reference to some facts pertinent to the matter in issue (such as how far from the source a party is when allegedly exposed and how long the party was exposed), an expert cannot state an opinion that will be of assistance to the trier of fact."

Dr. Stoken and Dr. Daniel's, as well as the late Dr. Hicklin's medical office notes, failed to reliably "rule in" Draynamite.

Another item in Plaintiff's Brief that seems misleading is Plaintiff's description of Dr. Dodge who Plaintiff-Appellant designated as an expert. On page 22 of its Brief Plaintiff stated: "the first pulmonary specialist Ms. Uhler saw after the day in question was Dr. Gregory Hicklin (who died in 2018 after which Dr. Dodge took over as Ms. Uhler's pulmonologist). In actuality, Dr. Dodge only saw Ms. Uhler one time before his "opinion" and that was on October 29, 2020, some two years after Dr. Hicklin's death. There is no record of Ms. Uhler seeing any pulmonologist from September 28, 2018 until October 29, 2020. Dr. Dodge may have "taken over" Plaintiff's care, but it was after a void in care by a pulmonologist for some two years.

As the trial court noted, the Appellant only designated one expert, Dr. Hicklin, to be an expert on "causation". Dr. Gregory Hicklin died in 2018, before being designated as expert, and never gave a deposition or wrote up an expert opinion.

The other two medical experts Plaintiff designated were not listed as "causation" experts in Plaintiff's disclosure of expert witnesses.

Dr. Stoken only saw the Plaintiff one time on February 11, 2021 for a scheduled independent medical exam, three years and four months after the alleged exposure.

While not designated as a causation expert, her expert report never notes that "Draynamite" was a liquid drain cleaner or that it had been used at a distance of four floors below where Plaintiff was working.

Dr. Stoken was not able to "Rule In" the liquid drain cleaner as a source of alleged injury four floors above the use of the liquid drain opener because Dr. Stoken did not know the concentration level of any fumes. She had no scientific basis of what distance the liquid drain cleaner's fumes could cause harm to humans.

Conclusion of Argument

Neither Dr. Stoken, Dr. Daniels, nor the deceased Dr. Hicklin, having not delved into the specific factual issues od distance and toxicology, were able or are thus qualified to render causation opinions as to whether the Draynamite can cause injury at the distance Plaintiff was from the product, nor are they able to render a reliable scientific expert opinion on whether the Draynamite could and did cause bodily injury to the Plaintiff as is mandated by the Iowa Supreme Court in *Ranes v. Adams Laboratories, Inc.* 778 NW 2nd 667 (Iowa 2010).

Because Plaintiff was unable, or chose not to, present necessary expert

testimony, Plaintiff simply failed in putting forth a prima facia case.

Thus, Summary Judgment was proper.

APPELLEE'S RESPONSE TO LATER ARGUMENTS RAISED IN APPELLANT'S BRIEF

1. Response to Burden Shifting

Plaintiff's Brief noted that Graham had not proved an alternative theory for fumes. Defendant Graham does not have the burden to prove alternative theories to Plaintiff's contentions.

Plaintiff spends significant space in its brief arguing that Graham has not come up with an explanation for their contention that "fumes" allegedly existed on the fourth level where Uhler was working. The burden of proof for any of Plaintiff's contentions lies with the Plaintiff to prove and not on Graham to prove otherwise.

This concept is so basic it does not require citation.

2. Response to Appellant's Argument Point III

Plaintiff's Argument Point III arguing that the evidence, when viewed in the light most favorable to Ms. Uhler, and resolving all inferences in her favor, misses the fact that this is a toxic-tort case, and that Plaintiff must provide reliable expert testimony of causation to survive summary judgment.

In a rather rash attack on the District Court, Plaintiff states the Court simply "ignored" the principles of summary judgment (Appellant's Brief p. 30, Ln. 3)) as well as ignored "most of the evidence." (Appellant's Brief p.30, Ln. 3-4). Plaintiff

also stated that the Court "bought into the fallacy" (Appellant's Brief p.30, Ln. 12) that a Plaintiff, in Ms. Uhler's position, has to offer expert testimony on things like "concentration levels and/or duration of exposure" and if they cannot, there can be no jury question on causation.

Unfortunately for the Plaintiff, the district court did not "buy into a fallacy," as the district court was correct as to what is required of a Plaintiff in a toxic-tort case.

Additionally, the Plaintiff all but admitted she was unable to prove her case when Plaintiff stated, "The reality, of course, is that it would be impossible for anyone to be able to know precisely how the Draynamite Graham admittedly used on the day in question reacted with whatever was in the clogged sink so as to be able to know why those things resulted in fumes spreading throughout the building." (Appellant's Brief p.30, Ln. 19 – P. 31, Ln. 3).

Right there, Plaintiff is claiming, without any proof whatsoever, that perhaps the liquid drain cleaner used on the lower level "reacted" to an unknown material to cause the "fumes" which allegedly injured Ms. Uhler. That is pure conjecture which will not support survival of summary judgment.

Plaintiff uses the majority of her legal argument in Argument III arguing causation requirements for general tort actions. However, Plaintiff's action is not a general tort action but a toxic-tort case.

The cases cited by Plaintiff in Argument III, concerning "sufficient facts" are not toxic-tort cases, but are simple negligence cases.

Johnson v. Junkmann 395 NW2d 862 (Iowa 1986) involves a traffic accident, negligence, and the concept of sudden emergency. That is a far cry from whether Plaintiff-Appellant, in the case at bar, produced evidence whether the liquid drain opener poured into a sink could have even inflicted injury at a distance of four floors plus 50 to 60 feet.

Clinkscales v Nelson Securities, Inc. 697 NW2d 836 (Iowa 2005) involved a case where a bar patron was injured when attempting to put out a fire in an outdoor grill that started when a bar employee was cooking hamburgers on the grill. The Court's summary judgment was overturned as there were issues as to whether the patron's actions were the normal and natural result of the bar's actions and that there was a genuine issue as to whether the bar was negligent. Again, this simple negligence case is a far cry from Plaintiff-Appellant's burden in this toxic-tort case to prove by expert testimony that the drain cleaner was even capable of causing lung damage at a distance of four floors plus 50 t0 60 feet.

Plaintiff's failure to recognize this was fatal to her case. Plaintiff needed causation experts that could opine given the specifics of Plaintiff's factual situation, but none could be found. Plaintiff's case was built upon false assumptions and speculation. That will not survive summary judgment in a toxic-tort case.

3. Response to Appellant's Argument Point IV

> Plaintiff incorrectly argues in section IV that part of the district court's error was failing to realize that the facts of the case at bar are different than the *Ranes* case.

It is not the "facts", but the type of case, that sets the required proof which Plaintiff failed to produce. Plaintiff attempts to distinguish the controlling *Ranes* case by arguing individual factual differences in the cases. Graham appoligizes for its seeming repetition of its theme, but Plaintiff fails to recognize or acknowledge that the *Ranes* case sets the proof standards for toxic-tort cases in Iowa.

Quoting again from the *Ranes* decision, the Iowa Supreme Court wrote:

> "This bifurcated analysis has not been explicitly used as the standard in Iowa. However, due to its general acceptance among scholars and courts of other jurisdictions, as well as the relative ease of application the analysis offers to courts examining complex issues of causation, we believe it is appropriate for courts to use the bifurcated causation language in toxic-tort cases. In the toxic-tort case before us, both types of causation must be proven, and expert medical and toxicological testimony is unquestionably required to assist the jury."

4. Response to Appellant's Argument Points VII and VIII

Plaintiff argues in VII and VIII that the District Court failed to consider certain irrelevant arguments.

In argument point VII, Plaintiff argued the district court failed "to consider the logical conclusion that, by manipulating the "recirculation" of air in the building on the day in question, Graham forced fumes from Draynamite into parts of the building they might not have otherwise reached."

This contention by Plaintiff is irrelevant and meritless. Even if that were a "logical conclusion", which Graham denies, it does not save Plaintiff from summary judgment when Plaintiff could not prove causation between any liquid drain cleaner fumes far away from the source and injury to Plaintiff.

Likewise, Plaintiff argues in Argument VIII that the Court erred in failing to consider the "logical inference" that she may have been more likely to be injured by fumes. The fact that Plaintiff "might be" more susceptible to injury does not satisfy the required causation proof for a toxic-tort. Speculation does not save summary judgment.

Again Plaintiff-Appellant did not prove the caused elements to proceed in a toxic-tort case. *See Ranes.*

The two arguments by Plaintiff-Appellant really require no argument and Defendant-Appellee will not further use up the Court's time.

5. Response to Appellant's Argument Point V

Plaintiff's citation to *Bloomquist* that there was sufficient evidence to generate a jury question on causation is misguided.

Plaintiff claims at argument point V. that *Bloomquist v. Wappello County*, 500 N.W.2d 1 (Iowa 1993) supports their argument that the District Court erred. Plaintiff is wrong. The *Ranes* case, not the *Bloomquist* case, controls. *Bloomquist* was decided in 1993. *Ranes* was decided 17 years after *Bloomquist* in 2010. *Bloomquist* was even cited in *Ranes*. It was cited as the earlier *Bloomquist* case had noted that epidemiological evidence need not be presented in toxic-tort cases.

The *Ranes* Court was obviously aware of Bloomquist, as *Bloomquist* is noted in the opinion. The *Ranes* court considered the earlier opinions such as the cited *Bloomquist* case when *Ranes* described the state of the law in 2010 and moving forward.

After citation in the *Ranes* case, *Bloomquist* has only been cited by the Iowa Supreme Court three more times; in *Sugura v. State* 888 NW2d 215,222 (Iowa 2017) which involved the issue of a state claim, and in *Matter of Estate of Vos,* 553 NW2d

878, 880 (Iowa 1996) which involved administrative remedies, and in *Christie v. Miulli,* 692 NW2d 694,705 (Iowa 2005) which involved consortium claims.

Ranes is the primary case in Iowa on proof of causation in toxic-tort cases.

The District Court got it right.

6. Response to Appellant's Argument Point VI

In Argument Point VI Plaintiff argues Graham has admitted that the drain opener caused there to be injury causing fumes in the building on the day in question.

Defendants did not admit that fumes from the liquid drain opener injured Plaintiff. The statements are generalized at most. (App. P. 127, Depo. P. 32, Ln. 3-19).

None of the employees that Plaintiff cites, Toby George, Brad Grismore or Jeff Hatfield are experts in the area of toxicology, none are scientists or medical personnel. They are not qualified to opine as to whether the drain opener could cause injury from the lower level to the first floor as is required in this toxic-tort case.

Jeff Hatfield is not qualified to render an opinion on causation as to whether the liquid drain cleaner could cause lung damage at a distance of four floors away.

Jeff Hatfield is Senior Vice President of Medical Properties for The Graham Group. (App. P. 188, Depo. P. 8, ln. 12-13). He does not have firsthand knowledge

about what happened or what was done regarding odor or fumes in the building on the day in question. (App. P. 189, Depo. P. 9, ln 22 – P. 10, ln 1). Hatfield's office is about a mile from Plaza 1 (App. P. 189, Depo P. 10, ln 2–6). Hatfield's job is described as asset management in that he does "a lot of leasing for a portfolio". He prepares leases and has an overall supervision of maintenance staff in medical buildings, but not on a micromanagement level. (App. P. 190, Depo. P. 13. Ln. 1-22). Hatfield stated leasing would probably be the most important part to his boss. (App. P. 190, Depo. P. 13. Ln. 21-22).

Mr. Hatfield testified he did not have enough knowledge to give a specific plausible explanation (App. P. 192, Depo. P. 23, Ln. 10-23), that The Graham Group doesn't know what could have happened (App. P. 192. Depo. P. 24, Ln. 21-25), that he had never read the material safety data sheet for the product used that day, that he does not know the labeling instructions (App. P. 195, Depo, P. 36, ln. 16-19), that he is not a chemist (App. P. 198, Depo. P. 48, Ln. 20-22), that is "a mystery what happened" (App. P. 199, Depo. P. 49, Ln. 20- P. 50, ln 2), and that I don't know what happened that day." (App. P. 199, Depo. P. 50, ln. 3-19).

Any supposed admission by Jeff Hatfield as to the connection between the liquid drain opener and Plaintiff's alleged injuries is inadmissible. Iowa Rule of Evidence 5.701 Opinion testimony by lay witnesses states;

> "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is, … c. Not based on scientific, technical, or other specialized knowledge within the scope of rule 5.702".

Any lay opinion from Jeff Hatfield would not be admissible to save Plaintiff from Summary Judgement for this reason. The rule excludes Hatfield's opinion on the very issue Plaintiff needed expert testimony.

Plaintiff cannot escape Summary Judgment through the attempted use of vague lay opinions of Graham employees unqualified to render opinions.

The fact that Graham designated maintenance manager, Toby George, as an expert on the HVAC does not in any way make him an expert on whether Dryanamite could cause injury to a person at a distance of four floors plus 50 to 60 feet.

CONCLUSION

What Plaintiff faces in this Summary Judgment matter is similar to the old New Yorker Magazine cartoon that shows two mathematicians at a blackboard. At the left is step one. A complicated mathematical formula. Then at the right is step three, the solution to the complicated formula. In the middle, under step two states, "Then a miracle occurs." At the bottom of the cartoon, the second mathematician is pointing to step 2 and states, "I think you should be a little more explicit here in step two."

Plaintiff, Uhler, in this toxic tort case at bar has failed to prove step two, that the drain opener was even capable of causing injury at the distances involved in the cas, through qualifying expert testimony as required under Iowa law and expressly enumerated in *Ranes v. Adams Laboratories, Inc.*

For all the reasons noted above this Court should affirm the District Court's granting of Summary Judgment.

REQUEST FOR ORAL ARGUMENT

Appellee Graham Group requests to be heard orally on this matter.

Respectfully Submitted.