IN THE SUPREME COURT OF IOWA

NO. 21-0723

JACQUELINE SUE UHLER,

Plaintiff-Appellant

vs.

THE GRAHAM GROUP, INC.,

Defendant-Appellee

RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF COURT OF APPEAL'S DECISION FILED JUNE 15, 2022

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CERTIFICATE OF FILING AND SERVICE

I hereby certify:

That I filed Resistance to Application for Further Review with the Clerk of the Supreme Court of Iowa by EDMS on the 14th day of July. 2022, 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 5,104 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: July 14, 2022

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Question Presented for Review

Whether the Supreme Court should grant Further review in this matter?

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This Court should decline the Application for Further Review.

The case at bar is a toxic-tort, case clearly within the purview of the Court of Appeals to decide, and the Court's decision was based on existing precedent of the Iowa Supreme Court.

The Applicant suggests that the Court of Appeals ignored the 1993 Bloomquist case. That is not an accurate assertion. The Court of Appeals considered, but distinguished the Bloomquist decision

The majority of the Court of Appeals *explicitly noted* its consideration of the Bloomquist decision when it wrote;

> "… suggests that we have not adequately accounted for the Supreme Court ruling in Bloomquist….**We are mindful of Bloomquist, but we find it distinguishable on its facts**….The circumstances that exist here are sufficiently different from those presented in Bloomquist that we do not find Bloomquist controlling here, and Uhler's failure to present expert testimony to establish that she was exposed to levels of Draynamite sufficient to cause her injuries is fatal to her claim." (See; Court of Appeals decision, footnote 5, page 5 of the opinion), (Underlining and bolding added by this writer).

Toxic-torts are a sub-classification of Iowa tort law.

In 2015, this Iowa Supreme Court, in Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, (Iowa 2010), prescribed criteria to evaluate causation requirements in toxic-tort cases.

The Court of Appeals, as did the District Court below, properly and correctly followed the law as prescribed in Ranes.

The Court of Appeals decision affirming the District Court is grounded in fact and law and this Court should deny the Application for Further Review.

Factual Background

Graham Group manages a multi-story, 90,000 square foot, medical office building at 1212 Pleasant Street, Des Moines, Iowa, known as Methodist Medical Plaza One. (App. P. 155). Graham provides maintenance for the building. On October 16, 2017, Graham was notified that a sink in the restroom of a tenant in the basement level was clogged. (App. P. 158, Depo. P. 23, ln. 17-21). As has been done numerous times before within the building, a Graham maintenance attended to the clogged sink and poured "approximately a cup" of liquid drain opener into the restroom sink basin. (App. P. 133, Depo P. 55, ln. 10- P. 56. Ln. 9). The Graham maintenance worker stayed in the restroom for a few minutes to observe and then came back in about 10 minutes to see that the drain was unclogged and functioning. (App. P. 136, Depo. P. 66, ln. 13-16; App. P. 136, Depo P. 67. Ln. 1-4).

Graham maintenance staff has carried out such procedures between 36 to 78 times with this product, in this building. (App. P. 394, numbered 16 paragraphs 2-4; App. P. 65-66, Numbered Paragraphs 2-7; App. P. 134, Depo. P. 57, ln. 9-10).

The restrooms within the Plaza have dedicated exhaust vents which carry air from the restrooms to the outside through a vent to the roof of the building. (App. P. 396, Numbered Paragraphs 16-20) (See App. P. 408, 409, Exhibits E and F).

There has never been a prior complaint of any health problem concerning the use of this drain opener in the building. (App. P. 394, numbered 16 paragraphs 2-4, App. P. 65-66, Numbered Paragraphs 2-7; App. P. 134, Depo. P. 57, ln. 9-10). The maintenance worker who poured the product and unclogged the sink did not wear any protective gear and at no time felt ill effects from being around the product. (App. P. 391, numbered paragraph 3).

The Plaintiff, Uhler, worked in the building three (3) floors above, but 50 to 60 feet east/west from the bathroom. (App. P. 196, Depo. P. 37, ln. 3-13). Plaintiff's workspace was located within what is known as the UnityPoint Pediatric Clinic. (App. P. 235). The Pediatric Clinic is on the third floor (fourth level) of the Medical Plaza. Plaintiff worked in the records department as a medical record (App. P. 115) and is not medical personnel. The Pediatric Clinic is the largest clinic within the Plaza, and it had forty plus (40+) people working within the clinic at the time of the alleged incident. (App. P. 235, Depo. P. 38, ln. 11-13).

Plaintiff claims she noticed a foul odor. She asked to leave work and immediately did. (App. P. 425). Plaintiff claims that even though she was separated

by three floors and a large part of the building, she had exposure to "fumes" from the "about a cup" of drain opener used in the basement. No medical personnel working within the Pediatric Clinic that day complained of any smell nor asked to go home, nor did any pediatric patients or their parents within the same clinic as the Plaintiff. (App. P. 235, Depo. P. 37, ln. 22 – P. 38, ln. 18, App. P. 235, Depo. P. 40, Ln. 4-11)

While Plaintiff claims she suffered lung damage, Plaintiff presented no evidence as to concentration levels of fumes from the liquid drain opener that would be required to cause injury. (Application for Further Review P. 34- Court of Appeals decision page 8). Plaintiff provided no evidence on what concentration level fumes might have had if fumes actually did reach the third floor (Application for Further Review P. 33- Court of Appeals decision page 7), nor did Plaintiff present any evidence by what method such fumes might have traveled to the third floor. Plaintiff did not even present evidence whether fumes from Draynamite were, in fact, lighter than air, so that they could rise to the third level.

Plaintiff presented no toxicological expert nor any chemist to support her claims that fumes from the drain opener could cause injury at such a long distance.

Both the District Court and the Court of Appeals ruled that Plaintiff had failed to present sufficient evidence as to causation in this toxic-tort case.

Procedural Background

The District Court sustained Defendant's Motion for Summary Judgment on the basis that Plaintiff did not satisfy the requirement of initial proof by expert testimony, as a matter of law, after applying the facts to the law. The Court of Appeals affirmed the lower court's ruling. Plaintiff had not presented evidence of the toxicity level of fumes necessary to cause injury to a human, nor whether the fumes (assuming they did reach the third floor) would have existed at a toxicity level able to cause injury to Plaintiff where she was located over three floors away from the "about a cup" of drain opener poured into the basement restroom sink.

ARGUMENT

BRIEF POINT 1

THE SUPREME COURT SHOULD NOT ACCEPT FURTHER REVIEW BECAUSE THE COURT OF APPEALS DID NOT ENTER A DECISION IN CONFLICT WITH AN EXISTING SUPREME COURT DECISION

Applicant alleges that the Court of Appeals erred by entering a decision in conflict with an existing decision of this Court. That is not the case.

Iowa R. App. P. 6.1103(1)(b)(1) notes that applications for further review will not be granted under normal circumstances. While not controlling the courts discretion to further review a case, Iowa R. App. P. 6.1103(1)(b)(1) notes that if a decision is in conflict with a prior decision on an important matter that such could

be of the character of the reason the court might review. However, that ground to consider granting further review does not exist.

Appellant suggests in her Application for Further Review that the Court of Appeals ignored Bloomquist v. Wapello County, 500 N.W. 2d 1,5 (Iowa 1993). That is not the situation. The Court of Appeals did not ignore the Bloomquist case. The Court gave appropriate consideration and correctly found that Bloomquist was distinguishable upon its facts.

The majority writing the Court of Appeals decision even noted this apparent contention and specifically discussed why the court found Bloomquist not to be controlling. The Court of Appeals noted,

> "The dissent suggests that we have not adequately accounted for the supreme court's ruling in Bloomquist v. Wapello County…"

The majority of the Court of Appeals then went on to discuss, in substantial detail, the distinguishing differences between Bloomquist and the case at bar. The majority noted that Bloomquist involved a situation where five workers sued Wapello County, claimed their illness was caused by a pesticide sprayed over and over in the building in which they worked in an effort to combat a flea problem (as well as by poor ventilation of sewer gas). The majority noted that in the Bloomquist case,

"The pesticide was sprayed throughout the building on a monthly basis into "cracks and crevices" and "when that didn't work, the pesticide was "broadcast sprayed" in the building in addition to being sprayed in cracks and crevices".

The majority further distinguished the facts of Bloomquist,

"The pesticide was sprayed over the carpet while workers were still in the building, in violation of established standards of care; it was sprayed on the papers on workers desks; and workers who were gone when the spraying occurred were allowed to return to the building while the carpet was still wet with pesticide."

In fact, the majority noted that with regard to testing,

"Bloomquist had the benefit of tests done on the carpet several months after it was sprayed, which revealed remaining residue of the pesticide, even after the carpet was shampooed."

The Court of Appeals opinion noted, that in the instant, Uhler, case,

"…we have a much different situation with a one-time use of a small but unknown quantity of a chemical a long distance away from where Uhler is alleged to have ingested the fumes and been injured," (Underlining added by this writer).

This writer would further factually note that the record, in the case at bar, shows at Exhibit 25, (App. P. 366), an email from Tim Neal to Scott Draper (Neil being the former safety coordinator at UnityPoint Des Moines, who reported to Scott Draper, the environmental risk manager and safety officer at UnityPoint Health Des Moines (App. p. 253)), dated October 17, 2017, that states,

> "Kolleen Dahl, Emergency Preparedness Coordinator and I just went to the Pulmonary Clinic on the second floor as well as the Peds Clinic on third floor. Andrea Fetters, Manager, joined us. Jay Bisset was also made aware of our findings.
>
> The atmospheric oxygen in all exam rooms, offices, restrooms and other areas, of both clinics, maintained at 20.9%. "Normal" is 21%.
>
> The air monitor did not alarm on anything including hydrogen sulfide, CO, LEL or oxygen deficiency. All is good. At Andreas request I circulated through and talked with employees and showed the air monitor at 20.9 and emphasized all was ok. I suspected the odor people are smelling is residual from the deodorizing spray Graham used on some of the carpeted areas." Exhibit 25, (App. P. 366)

The "Peds Clinic on the third floor", where the report on the testing found that "all is good", is right where Uhler worked.

That prompt testing that found no indication of hydrogen sulfide additionally distinguishes the Bloomquist case. While obviously not conclusive, this evidence illustrates why expert toxicological evidence would be required in the case at bar.

The evidentiary requirements for causation in toxic tort cases was clarified by this Court in the later, Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, (Iowa 2010), which was written 16 years after Bloomquist. Both the District Court and Court of Appeals properly relied upon and followed Ranes.

The Court of Appeals correctly noted, "We do not read Bloomquist to say that requiring expert testimony to establish that a plaintiff has been exposed to levels sufficient to cause the claimed injuries is never required."

Seemingly putting Applicant's contention of ignoring Bloomquist to rest, the Court of Appeals wrote,

> "The circumstances that exist here are sufficiently different from those presented in Bloomquist that we do not find Bloomquist controlling here, and Uhler's failure to present expert testimony to establish that she was exposed to levels of Draynamite sufficient to cause her injuries is fatal to her claim."
>
> There should be no question that the contentions that the Court of Appeals ignored Bloomquist is without merit.

What Plaintiff would have this court do is to ignore Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, (Iowa 2010).

BRIEF POINT 2

TO CLAIM RANES CITED BLOOMQUIST WITH APPROVAL IS TO MISCONSTRUE THE ISSUE THAT PRESENTS ITSELF IN THE CASE AT BAR.

The Applicant (as well as the dissent below) states Ranes cited Bloomquist with approval. The "citation" was only for a narrow proposition, not relevant to the resolution of this case. The following quotation is the only language from Ranes referencing Bloomquist in its 2010 decision,

> "While there is no requirement that a medical expert cite published epidemiological studies on general causation to make a reliable conclusion, the methodology used by the expert becomes suspect when it is only supported by case reports of limited use to the medical field. See Bloomquist v. Wapello County, 500 N.W. 2d 1,5 (Iowa 1993).

That is hardly a statement claiming future courts should rely upon Bloomquist as setting the standard for causation; all the Supreme Court was saying in that sentence was that "epidemiological" evidence, while helpful, was not required. In fact, Bloomquist has not been cited in an Iowa toxic tort case since Ranes.

Defendant never claims that "epidemiological" evidence is required. Neither did either of the lower courts who have ruled in this case.

What Uhler, however, was required to do is to show that the fumes emitted from the use of "about a cup" of the drain opener poured into a clogged sink in the basement would have been at a concentration level able to cause injury to her where Uhler was when she claims to have noticed an odor.

BRIEF POINT 3

THE COURT OF APPEALS PROPERLY FOUND THAT THE REQUIREMENTS ANNOUNCED IN RANES V. ADAMS LABORATORIES, AS WELL AS WRIGHT V. WILLIAMETTE, BONNER V. ISP TECHS AND BLAND V. VERIZON WIRELESS CONTROLLED THIS TOXIC TORT CASE

Both the District Court and the Court of Appeals correctly applied the developed bifurcated standard adopted by the Iowa Supreme Court in Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677, (Iowa 2010) when considering requirements of proof of causation in toxic tort cases.

The Court of Appeals did a deep dive into the existing law and requirements for causation proof in toxic tort case such as that brought by the Plaintiff.

The court of Appeals citation and explanation of the relevant toxic tort cases of Wright v. Willamette Indust., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996), as well as Bonner v. ISP Techs., Inc., 259F3d 924, 928 (8th Cir. 2001), and Bland v. Verizon Wireless, (VAW) L.L.C., 538 F3d 893,897 (8th Cir. 2008) leave little doubt of the scholarly treatment of the Court's ruling. Additionally, the Court of Appeals noted, in its analysis, the law review article; David E. Bernstein, Getting to Causation in Toxic Tort Cases, 74 Brook. L. Rev. 51, 52-53 (2008).

This ability of the toxin to cause injury at that distance was the situation this court contemplated when considering the required causation analysis for toxic-tort actions. This Iowa Supreme Court considered these causation proof requirements in Iowa when, in 2010, it 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. Ranes, at 688. (Underlining added by this writer)."

The District Court and Court of Appeals followed this bifurcated causation language as specified in Ranes. The Court of Appeals noted at page 5, footnote 1, of the opinion, in the case at bar that, "the law of causation in toxic torts explained in Ranes applies to Uhler's toxic tort case".

Both the District Court and Court of Appeals correctly applied the facts to the law when they ruled Plaintiff's proof was deficient as a matter of law.

Whether fumes from "about a cup" of the liquid drain opener could cause injury to a human at a distance of over three floors in the building is crucial to the case.

Consider two analogies that involve common sense. It is easily understood that a spoonful of ammonia inhaled through one's nose, placed directly under one's nose, is a much different experience from the experience one might have walking into a room where a spoonful of ammonia lies on a table.

Consider also, this example. Assume one was sitting in the home team side at a large college football stadium. Assume further that, by some chance, someone sitting across the field in the stadium, on the visitor's side, spilled about a cup Draynamite liquid drain opener. The fumes emitted from such a spill of about a cup of the drain opener would clearly dissipate and not be harmful by the time fumes

drifted across the football field. No rational person would conclude otherwise. For heavens sakes, Draynamite is a product made and sold to be used to unclog drains.

The Court of Appeals correctly noted that "Uhler must show the use of Draynamite, at the levels, used by Graham, is capable of causing her injuries." (See Ruling, p. 6.) The Court wrote,

> "To generate a fact question on specific causation, Uhler must produce evidence to allow a jury to find Graham's use of Draynamite in the lower-level bathroom caused Uhler in her third-floor cubicle to be exposed to unsafe levels of Draynamite known to cause the kind of injuries she now claims. *See Wright*, 91 F.3d at 1107." (Ruling p. 7.)

The Court correctly followed the law. There is no need for the Supreme Court to invoke further review. Two courts have reviewed the matter, and both are in agreement.

BRIEF POINT 4

PLAINTIFF'S EXPERTS DID NOT ESTABLISH THAT FUMES FROM THE DRAIN OPENER CAUSED INJURY TO PLAINTIFF.

There were numerous ways that Plaintiff failed to present expert testimony sufficient to avoid summary judgment.

As a starting point, the two doctors that Plaintiff seeks to elicit testimony from were not even listed as causation experts by the Plaintiff. The only witness listed by the Plaintiff as a causation expert was Dr. Hicklin, who offered no testimony. Dr.

Hicklin was designated as, "…his opinions will address causation…". (App. P. 16). Regarding Drs. Dodge and Stoken Plaintiff designated, "will express opinions relative to the treatment of Jacqueline…" (App. P. 16-17)

Neither Dr. Stocken, nor Dr. Dodge, even assuming the court would let them testify at trial on issues relating to causation, provided any evidence as to any quantity of the concentration level a fume from Draynamite would have to contain to cause injury to a human.

It is not enough for a witness to simply read a generic warning label that a product can cause injury and to use in a well-ventilated space and then to claim knowledge about the product's specific qualities. Neither doctor did any specific research into the toxicity qualities or the concept of dissipation of strength of the fumes in open air.

A causation expert must be able to testify as to how or why a toxin can cause injury. These are beyond the ability of common knowledge.

Not all exposure to fumes will cause injury. An expert in a case involving claims of injury from exposure to a toxin must be able to tell the court or jury that for a human it would take an exposure of X before injury can occur. Without that knowledge there is no way to ascertain whether a certain toxin is even capable of causing injury to a human.

Does a person need to be within an enclosed area before a person can be injured? How much of a toxin must be in the air before a toxin in air can cause injury? Is there a difference between the smell of a substance and the ability of a substance to cause injury? Can a toxin be smelled at a very low concentration level below the concentration level required of a substance to do harm? Neither Dr. Stocken, nor Dr. Dodge provided information on these matters.

Plaintiff was unable to even establish at what levels hydrogen sulfide within the air can cause injury to a human. Beyond that base consideration neither doctor was able to opine on what level of toxicity a fume originating at the basement level might retain if it traveled up to the third floor. Would such a toxin even be potentially harmful to humans at such range? How much toxin would about a cup of Draynamite poured into water in a sink be able to put into the air? In what size area of air could such an amount retain the ability to harm humans?

None of these fundamental topics were even noted by Plaintiff's witnesses.

Without such basic testimony and guidance, the court has no way to determine whether an airborne toxin could cause injury.

Plaintiff's Response to Summary Judgment was void of such information. Even these threshold questions were left with no answer.

Dr Stoken was hired to perform an IME upon the Plaintiff and only saw Uhler one time. Plaintiff filled out a number of questionnaires for Stoken. Plaintiff's report discusses Uhler's functionality, but gives no information on how much toxin is required for injury.

Likewise, Dr Dodge was a latecomer. Dr Dodge did not see Plaintiff until 3 years after incident (October 29, 2020) (App. P. 292 [from Stoken]) Dr Dodge actually only ever saw the plaintiff one time before the summary judgment. Plaintiff last saw Dr. Hicklin in June 2018. (App P. 270). Plaintiff did not even see Dr Dodge until October 29, 2020, more than 2 years later. It is a stretch to claim that Dr. Dodge "took over as Ms. Uhler's pulmonologist", as though to suggest a continuation of care. (Appellant's Amended Final Brief P. 22)

The question of causation is begged when Dr. Mytril, who saw the Plaintiff the closest after the alleged incident notes in her records on October 27, 2017, the following; "While she associates her symptoms to her recent hydrogen sulfide exposure, I believe that the likelihood of her symptoms being a result of a recent brief exposure to hydrogen sulfide are low". Interestingly this comment from Uhler's physician did not find it's way into Dr. Stoken's IME report. (App. P. 295).

The Court's below correctly decided this matter.

BRIEF POINT 5

DESPITE TWO ADVERSE RULINGS APPLICANT FAILS TO UNDERSTAND THAT THE CASE IS A TOXIC TORT CASE

The District Court and the Court of Appeals both described Applicant's lawsuit as a toxic tort case.

The Court of Appeals wrote, "The district court characterized Uhler's claim as a toxic tort claim. Generally, a plaintiff in a toxic tort claim must establish both general and specific causation." (Application for Further Review P. 31- Court of Appeals decision page 5). Not once in the entirety of Applicant's Application do the words "toxic tort" appear.

Ranes adopted the bifurcated analysis in toxic tort cases that applies to this case.

One should remember that the plaintiff did not even understand that this was a toxic tort case and tried to claim it was just a premises liability claim in arguing why the expert requirement was not necessary. (Appellant's Amended Final Brief P. 10). That contention was so weak that the Court of Appeals failed to even mention it. The attempt to escape the requirements of a toxic tort claim by claiming to be a premises liability claim was an effort by Uhler to disguise that Plaintiff had no expert who would say what dosage level or toxicity level of fumes would be necessary to cause injury to a human's lungs and whether that dosage level could have been present on the third floor of the medical building.

For whatever reason (most likely because Plaintiff did not have the supportive evidence) Plaintiff has failed to acknowledge that the Iowa Supreme Court tightened the analysis of toxic tort causation. The District Court understood the significance of Ranes. Then, on appeal, the Court of Appeals further recognized the standard discussed in Ranes and the many other toxic tort cases considered by the Court of Appeals.

Plaintiff continues to argue as though the case at bar is not a toxic tort case.

Appellant seeks to bolster her argument through the use of colorful language rather than scholarly analysis. Applicant claims the District Court and Court of Appeals "looked myopically" (Application for Further Review P. 21) and "bought into the fallacy" (Application for Further Review P. 21) of what an expert must offer. Applicant further claims it is "impossible to logically conclude Ms. Uhler did not clear her hurdle" (Application for Further Review P. 23) and that it is "impossible to legally conclude that a reasonable jury could not find Ms. Uhler was injured by Draynamite fumes" (Application for Further Review P. 24). Grandiose statements in a brief or argument do not make a case.

BRIEF POINT 6

APPLICANT SEEMS UNABLE TO GRASP THAT GENERALLY SPEAKING A TOXIC TORT CASE HAS A HIGHER CAUSATION STANDARD THAN A SIMPLE NEGLIGENCE CASE

Despite the Supreme Court articulating a standard in Ranes, Applicant does not understand that her case involves different proof than simple negligence cases.

Of the cases cited by Applicant in Applicant's Request for Further Review; only the 2015 Ranes case, and the earlier 1994 Bloomquist case, are toxic tort cases. The other cases cited by Applicant in her Application are listed below. Following the citations of the cases this writer notes the basic subject matters of the cases. As the Court can read, none of these cases deal with toxic torts.

Thompson v. Kaczinski, 774 NW2d 829 (Iowa 2009) [Auto accident]

Walls v. Jacob N. Printing, 618 NW2d 282 (Iowa 2000) [Fall from ladder]

Rauch v Des Moines Elec. Co., 218 NW 340 (Iowa 1928) [Light pole falling]

Garr v City of Ottumwa, 846 NW2d 865 (Iowa 2014) [Water Damage]

Banwart v. 50th St. Sports, L.L.C., 910 NW2d 540 (Iowa 2018) [Intoxicated driver]

Peak v. Adams, 799 NW2d 535 (Iowa 2011) [Written release, car accident]

Bitner v. Ottumwa Cmty. Sch. Dist., 549 NW2d 295 (Iowa 1996) [Defamation]

Clinkscales v. Nelson Sec., Inc., 697 NW2d 836 (Iowa 2005) [Negligent fire-burn]

Becker v. D & E Distrib., 247 NW2d 727 (Iowa 1976) [Truck collision]

Larson v. Johnson, 115 NW 2d 849 (Iowa 1962) [Car accident]

Whetstine v. Moravek, 291 NW2d 425 (Iowa 1940) [Dental Malpractice]

Oak Leaf Country Club v. Wilson, 257 NW2d 739 (Iowa 1977) [Water damage]

Benson v. 13 Assocs., L.L.C., 2015 WL 582053 (Iowa Ct. App. 2015) [Light fixture]

Randol v. Roe Enterprises, Inc., 524 NW2d 414 (Iowa 1994) [slip and fall]

Thirty more citations to simple negligence principles will not change the law in Iowa as it relates to causation in toxic tort cases.

BRIEF POINT 7

THE COURT OF APPEALS WAS CORRECT IN FINDING THAT CAUSATION IN TOXIC TORT CASES CAN NOT SIMPLY BE LEFT TO CONJECTURE BY THE JURY.

An interesting illustration of unscientific conjectures that Plaintiff urges in this case is contained within Plaintiff's Application for Further Review itself. At page 23 of her Application, the Applicant makes the statement, "There is no dispute that multiple people did complain about fumes … and that they were all above where Draynamite was used." (Underlining added by this writer.)

Applicant clearly speculates that the people being "above" the use of the drain opener is significant. However, Plaintiff put forth no evidence to indicate whether fumes from Draynamite would be heavier or lighter than air.

If one reviews the Safety Data Sheet, rather than relying upon speculation, one sees that the Vapor Density is listed at 3.4 (air = 1). (App. P. 268). (For Sulfuric

acid [Material Safety Data Sheet – Sulfuric acid 90-98%; some other product] the Vapor Density is noted at 3.38 (air = 1). (App. P. 355).

This is an example of Plaintiff simply invoking speculation because it sounds good rather than providing scientific proof that is required. These chemical and toxicological matters are not within the understanding of laypeople and require expert testimony. Wright v. Willamette Indust., Inc. 91 F.3d 1105, (8th Cir. 1996).

The Court of Appeals correctly noted,

> "Identifying how Draynamite moved through a building and causes injury is far beyond a layperson's understanding and requires expert testimony. (citation) While Uhler need not measure her chemical exposure with mathematical precision, (citation) she has not produced any evidence to show the amount of Draynamite used is capable of traversing great distances in an office building and causing permanent or acute injury."

BRIEF POINT 8

PLAINTIFF MISREPRESENTS THAT GRAHAM ADMITTED THAT FUMES FROM THE DRAIN OPENER CAUSED INJURIES TO THE PLAINTIFF

It is frustrating for Defendant to read Plaintiff's wrongful statements that claim that Defendant admits that fumes from the drain opener caused Plaintiff's alleged injuries. That is an obvious misrepresentation of the record.

Defendant has never admitted that Uhler was injured as a result of fumes from the cup of drain opener. The Applicant recklessly claims, "Graham actually

admitted it was the use of Draynamite that caused there to be fumes in the building that made people sick"…", "That is, Graham admitted the very fact that the District Court and the Court of Appeals said Ms. Uhler could not prove, namely her injuries were caused by fumes resulting from the use of Draynamite in the building" and "In other words, it was Graham that identified Mr. Grismore's use of Draynamite as the source of the illness causing fumes in the building in question on the day in question."(Application for Further Review Pages 7 and 19).

Defendant has always stated it poured about a cup of drain opener in the basement restroom sink, as that is simply a fact. Defendant has even acknowledged the obvious, that the drain opener has an odor. But Defendant has never admitted that the Plaintiff was injured as a result of that smell or fumes.

If Defendant had admitted it caused injuries to the Plaintiff, Defendant would not have filed for Summary judgment, nor would the District Court have sustained such.

Plaintiff attempts to mislead listeners by the sleight of hand of inaccurate wordsmithing. Both lower courts held Plaintiff to the required proof.

CONCLUSION

Both the District Court and the Iowa Court of Appeals gave reasoned, thoughtful, and proper rulings in this case below. For all the reasons noted above this Court should not grant Plaintiff's Application for Further Review.