IN THE SUPREME COURT OF IOWA

NO. 21-0723

JACQUELINE SUE UHLER,

Plaintiff-Appellant

vs.

THE GRAHAM GROUP, INC.,

Defendant-Appellee

AMENDED APPLICATION FOR FURTHER REVIEW

DECISION OF COURT OF APPEALS FILED ON JUNE 15, 2022

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QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERR WHEN IT IGNORED CONTROLLING PRECEDENT FROM THIS COURT WHICH DIRECTS THAT A JURY SHOULD HAVE BEEN ALLOWED TO DECIDE CAUSATION.

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STATEMENT SUPPORTING FURTHER REVIEW

In this personal injury case, the District Court granted summary judgment on causation. The Iowa Court of Appeals, by a 2 to 1 vote, affirmed that ruling. However, the decision of the Court of Appeals ignored a valid, and factually very applicable, decision of this Court. Specifically, the decision of the majority of the Court of Appeals, like the District Court, ignored Bloomquist v. Wapello County, 500 N.W.2d 1 (Iowa 1993) ("Bloomquist"). Given the Court of Appeals' disregard of Bloomquist, and for the reasons artfully stated in Judge Tabor's dissenting opinion, it is respectfully submitted that this Court should grant further review (and reverse the decision of the District Court).

BRIEF

STATEMENT OF FACTS

I. SUMMARY

On October 16, 2017, Jacqueline Uhler ("Ms. Uhler") went to work at 1212 Pleasant Street ("the building") in Des Moines. (App. 8-11, 82-94, 114-115). The Graham Group, Inc. ("Graham") was the majority owner of the building (App. 8-15, 121-122, 155-156, 189, 207-214). Graham was responsible for the operation, maintenance and safety of the building (Id.).

On the afternoon in question (shortly after a Graham employee used a product called "DRAYNAMITE" on the 1st level), multiple people (including Ms. Uhler) from three different offices complained about fumes in the building (App. 125-140, 159-160, 215-225, 228-232, 245-247, 254-256, 261-264). At least eleven of those people (including Ms. Uhler) reported fumes that made them sick and an entire clinic was closed due to the presence of fumes (Id.).

Fumes from DRAYNAMITE pose a danger of the exact injury claimed by Ms. Uhler as well as the symptoms voiced by numerous other people in the building (App. 117-118, 128, 164, 195, 215-225, 265-270). Furthermore, the only known use of a dangerous chemical in the building that day was Graham's use of DRAYNAMITE just before people began to complain about fumes that made them sick (App. 117-208). Beside Graham's use of DRAYNAMITE just before fumes

were noticed above where that use took place, there was no evidence suggesting any other possible source for fumes in the building (App. 8-390, 427-491).

In addition to admitting that it used DRAYNAMITE in the building on the day in question and that multiple people complained of being made sick by fumes after that usage, Graham actually admitted it was the use of DRAYNAMITE that caused there to be fumes in the building (App. 117-119, 125, 127, 138, 140, 142, 144, 159-161, 174, 176-179, 188-195, 199, 232-233, 254-256, 261). That is, Graham admitted the fact the District Court and the Court of Appeals said Ms. Uhler could not prove: that her injuries were caused by fumes resulting from the use of DRAYNAMITE (Id.). Furthermore, records and opinions from multiple doctors support the conclusion that Ms. Uhler was injured by DRAYNAMITE fumes in the building on the day in question (App. 271-323, 384-390, 427-450).

II. FACTS ABOUT MS. UHLER

Ms. Uhler is a 78 year old widow with two children including a special needs child for whom she is the primary caregiver (App. 8-11, 115-116). On the day in question Ms. Uhler was at work in the Children's Pediatric Clinic on the 4th level of the building (App. 8-11, 114-116, 125, 159-160, 169-170, 215-225, 262-264).

In the afternoon of the day in question, after the use of DRAYNAMITE by Graham on the 1st level, Ms. Uhler complained about and was made ill by fumes in her work area (App. 8-11, 114-119, 129-140, 160-170, 215-225, 289-323, 384-390,

427-450). Those fumes were noted by Ms. Uhler and other people at various places in the building all of which were above where DRAYNMITE had been used (App. 8-11, 114-119, 129-140, 160-170, 215-264). The fumes were described as "harsh", "chemically" and like "rotten eggs" all of which are common descriptions of the fumes generated by DRAYNAMITE and its chemical ingredient sulfuric acid (App. 115-119, 215-264, 349-358). Multiple people, in addition to Ms. Uhler, complained the fumes made them sick (App. 215-264).

As of the day in question Ms. Uhler had been diagnosed with asthma but that condition was well controlled and Ms. Uhler was an active person who walked recreationally on a regular basis and enjoyed things like "taking the stairs" at work and working out at the gym (App. 115-116, 289-323, 384-390, 427-450). According to her doctors, as a result of her exposure to fumes on the day in question, Ms. Uhler's asthma has markedly worsened and her ability to breath, speak and be active has been made much more difficult which will be true for the rest of her life (App. 271-323, 384-390, 427-450). The same doctors also noted that Ms. Uhler's pre-existing asthma made her more susceptible to injury from exposure to DRAYNAMITE fumes than someone without that condition (App. 289-323, 384-390, 427-450).

III. FACTS ABOUT GRAHAM AND THE BUILDING

Graham was the majority owner of the building and, as such, was responsible for its maintenance and operation (App. 8-15, 121-122, 155-156, 189, 191-192). The maintenance staff was manager Toby George and laborers Brad Grismore and Kevin Zimmerman (App. 65-66, 122-124, 155-158, 188-191). Graham executive Jeff Hatfield was Mr. George's supervisor (App. 155-156, 188-191). Only Messrs. George and Grismore were involved in the occurrences on the day in question (App. 65-66, 120-206). The above-named persons were all Graham employees (Id.).[1]

IV. FACTS ABOUT THE DAY IN QUESTION AND GRAHAM'S USE OF DRAYNAMITE IN THE BUILDING THAT DAY

Early in the afternoon on the day in question, after being told by Mr. George of a call from a tenant about a clogged sink on the 1st level, Mr. Grismore poured DRAYNAMITE, out of the bottle without measuring it, into standing water in that sink (App. 117-119, 129-140, 155-156, 160-170). Mr. Grismore did not identify the cause of the clog and Graham could never identify that cause or explain how it reacted with DRAYNAMITE such that, according to Mr. George, "fumes started to spread" through the building (App. 133, 195, 261).[2]

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[1] Messrs. George and Grismore were involved in the remediation efforts on the day in question while Mr. Hatfield was in charge of the later effort to identify the cause of those fumes (App. 129-140, 160-70, 188-195).

[2] Mr. Grismore's use of DRAYNAMITE was, in a number of ways, contrary to the Material Safety Data Sheet for DRAYNAMITE. The following warnings/directions were ignored by Mr. Grismore: "use in a well-ventilated area", "wear protective

Shortly after Mr. Grismore's use of DRAYNAMITE, a tenant on the 3rd level called Mr. George and complained about "funny odors" (App. 117-119, 136-138, 160-170). Mr. George then got a call from another tenant (on the 4th level where Ms. Uhler worked) complaining of fumes that were making people sick (App. 8-11, 115-116, 160-70).

In response to those complaints, Mr. George called Mr. Grismore and, after finding out about his use of DRAYNAMITE, those men immediately went to the bathroom where that product had been used (App. 117-119, 128-140, 160-70). Initially, Graham's interrogatory answer said that, before getting to the 1st level to meet Mr. Grismore, Mr. George could smell "a funny odor" on the 2nd level by the elevator (App. 117-119). However, by the time of Mr. George's deposition, Graham changed that story and Mr. George said he first smelled DRAYNAMITE, through a closed door to a room where the ventilation was "working", in a hallway on the 1st level (App. 160-170).

After the odor complaints from tenants, and being able to smell DRAYNAMITE either through a closed door as he neared the room with the clogged

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gloves, protective clothing, eye protection and face protection", "wear respiratory protection", "wash face, hands and any exposed skin thoroughly after handling", "do not flush into surface water or sanitary sewer system", "avoid breathing vapors, mist or gas", "local ventilation is suggested to control exposure from operations that can generate significant levels of vapor, mist or fumes", "chemical googles and a face shield should be worn when handling" and "reacts violently with water" (App. 129-140, 265-270, 349-358).

sink or on the 2nd level by the elevator, Mr. George and Mr. Grismore sprang into action in an attempt to "air out" the building....something they had never done in their over forty combined years of working for Graham (App. 117-119, 125-140, 159-170). Mr. George, using a computer that controlled air flow in the building, altered that air flow thereby manipulating the "recirculation" of air that was already in the building (Id.). Mr. George and Mr. Grismore also went through the building opening doors and placing fans in various places in furtherance of their never before attempted effort to alter the "recirculation" of the air in the building (Id.).

During discovery Graham said "all remnants of any smell were out of the building within approximately 10 minutes of it being reported" (App. 117-119). However, in a communication with a tenant the next day, Mr. George said it took "about ½ hour" to air out the building (App. 261). Also, several people noted that odors were still detectable in the building the next day (App. 215-225, 262-263, 366-367). Finally, Graham admitted that it actually had no idea how long it took to rid the building of the illness causing fumes that were complained about by multiple persons on (and even after) the day in question (App. 117-119, 141, 175, 261).

During discovery Graham gave multiple answers as to "how much" DRAYNAMITE Mr. Grismore used on the day in question. Graham's Answer to Interrogatory No. 8 listed the amount as "about a cup" (App. 117-119). Mr. George testified Mr. Grismore told him he used "a cup" (App. 167). Mr. Grismore's

deposition testimony was that he used "half a bottle" (App. 133). Finally, in paragraph 19 of the Statement of Undisputed Facts offered in support of its summary judgment motion, Graham said Mr. Grismore "could" have used "up to two cups" (App. 30).

V. FACTS ABOUT DRAYNAMITE AND ITS CAUSATIVE ROLE IN MS. UHLER'S INJURIES

The chemical ingredient in DRAYNAMITE is sulfuric acid and an odor commonly used to describe sulfuric acid is "rotten eggs" (App. 265-270, 349-358). Mr. Grismore admitted he did not smell rotten eggs until after his use of DRAYNAMITE on the day in question (App. 135). Other people reported that same smell in the building only after Mr. Grismore's use of DRAYNAMTE and there was no evidence of any other explanation for that odor in the building that day (App. 115-116, 135, 170, 215-225, 228-230, 262-264). Furthermore, and as Graham admitted, exposure to DRAYNAMITE fumes can unquestionably cause serious injury including aggravation of conditions like asthma; which is exactly what happened to Ms. Uhler (according to her doctors) because of her exposure to fumes in the building on the day in question (App. 142-143, 177, 197-198, 265-270, 289-323, 349-358, 384-390, 427-450).

Daniel Dodge, D.O. ("Dr. Dodge") and Jacqueline Stoken, D.O. ("Dr. Stoken"), both of whom were designated as experts and whose reports were made available to Graham in a timely manner, opined that the permanent worsening of

Ms. Uhler's asthma was due to her being exposed to DRAYNAMITE fumes on the day in question (App. 16-18, 289-323). In addition to those opinions (from doctors the District Court said were qualified to opine on the cause of Ms. Uhler's injuries), Drs. Dodge and Stoken both also opined that, because of her underlying asthma, Ms. Uhler was more susceptible to permanent increased injury from exposure to DRAYNAMITE fumes than someone who did not have that condition (App. 289-323, 481-460).

In addition to the opinions of Drs. Dodge and Stoken, records of other doctors Ms. Uhler saw support the conclusion that she was injured by exposure to DRAYNAMITE fumes in the building (App. 271-288, 384-390, 427-450). Like Drs. Dodge and Stoken, the District Court had the records of those doctors before it when it granted summary judgment (Id.). However, unlike Drs. Dodge and Stoken, the District Court (and the Court of Appeals) simply ignored what the records of those other doctors said (App. 451-460).

Ms. Uhler saw Dr. Daphney Myrtil on October 18th and 26th, 2017 (App. 384-390). Dr. Myrtil's records provide support for the conclusion that Ms. Uhler was injured by exposure to chemical fumes at work on the day in question (Id.). The record from October 18, 2017 says "exposed to fumes in the building... presents...following exposure to what she describes as a cleaning agent...was just doing her job and she noticed a very nasty rotten egg smell..." (App. 384-387).

The first 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). Dr. Hicklin's records also support the conclusion that Ms. Uhler suffered injury due to exposure to chemical fumes in the building on the day in question (App. 271-288, 427-444). A record from November 29, 2017 states "in mid-October, she was exposed to a hydrogen sulfide episode due to a spill or accident in the basement below where she works. Many people were evacuated" (App. 427-432). A record from January 19, 2018 states "has a history of asthma but was doing well until she was exposed to fumes at the workplace. There was an incident where multiple people were exposed, and she has had problems since then" (App. 433-438).

VI. FACTS PROVING GRAHAM HAS ADMITTED IT WAS THE USE OF DRAYNAMITE THAT CAUSED THERE TO BE INJURY CAUSING FUMES IN THE BUILDING ON THE DAY IN QUESTION

In the history of the building, and the experiences of the Graham employees who were involved in the matters at issue, there has never been a day, other than the day in question, when (a) multiple occupants of a building were made sick by fumes; (b) an entire office was closed due to illness causing fumes in a building; or (c) efforts were made to try to "air out" an entire building due to complaints of illness causing fumes (App. 125, 127, 138, 140, 142, 159-161, 174, 191, 261, 372-381). Furthermore, each Graham employee who had any involvement with the matters at

issue admitted that they had no explanation for the illness causing fumes in the building other than the admitted use of DRAYNAMITE therein.[3]

Graham listed Mr. George as an expert and said that, as such, he was qualified to testify about air movement in the building (App. 19-22). That is significant because Mr. George told several people that the fumes in the building on the day in question were caused by the use of DRAYNAMITE on the 1st level (App. 232-233, 254-256, 261). In other words, Graham identified as its expert on the topic of air flow in the building someone who literally told people that the fumes in the building on the day in question were caused by the use of DRAYNAMITE that day (the very fact the District Court and the Court of Appeals ruled Ms. Uhler could not prove).

More specifically, Unity Point employee Andrea Fetters (a supervisor who fielded complaints from persons who said that fumes made them sick) testified that (App. 232-233):

> "What…explanation…have you been given…about…there being fumes in the building that were making people feel unwell? What I recall is that there was something that was disposed of in the drain…they had poured something

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[3] App. 144 (Brad Grismore): "Can you give me one specific plausible explanation for the complaints [about illness causing odors in the building on the day in question] other than your use of… DRAYNAMITE…in the basement…that day… No."; App. 176-177 (Toby George): "Can you offer any explanation for the complaints of the people who say they got sick on the day in question besides the use of chemicals in the basement…No, I cannot." and App. 177-178: "Can you give me a single specific plausible explanation for the complaints…other than the use of DRAYNAMITE in the building that day? No, I can't."; and App. 199 (Jeff Hatfield): "Do you have a single plausible specific explanation for what happened that day that does not involve the use of DRAYNAMITE in the basement? I don't."

> down the drain…So in terms of what you recall being told by [Graham] about the cause of all this was they had poured something down the drain? Yes. Do you remember who told you that? Toby George. Did he tell that to you that day or afterward? That day…Have you been given any other explanation, either that day or since, by anyone…about why these fumes were in the building in question on the day in question? Not that I recall."

Scott Draper (another Unity Point employee who was in direct contact with Graham about the fumes) testified (App. 254-256):

> "What did you learn from Toby about what caused the incident…[T]hat there was a cup of drain cleaner poured into a basement sink drain, and it resulted in fumes. And the source of that information was Toby George? Yes."

Finally, the day after the incident Mr. Draper sent an email to other Unity Point employees which said (App. 261):

> "I spoke with Toby and he'll put together a synopsis of the timeline for the 1212 incident. It was just his staff that were involved. Poured about 1 cup of drain cleaner in a basement sink drain. Fumes started to spread…."

In addition to those examples of Mr. George admitting that the source of the fumes was DRAYNAMITE, Mr. Hatfield, Graham's Senior Vice President of Medical Properties who was involved in identifying the source of the fumes in the building, came to the same conclusion (App. 188-195). Specifically, Mr. Hatfield testified that, after talking to Mr. George, various tenants and the plumbing contractor used by Graham, his conclusion was that the fumes were caused by DRAYNAMITE (App. 193: "In my opinion, the chemical was part of what caused problems…"). After that, Graham stopped using DRAYNAMITE due to the conclusion that it was the source of the fumes on the day in question (App. 194-195:

"So the next logical thing is let's not use [DRAYNAMITE]. I don't ever want to have a second one of these.").

Finally, and very much consistent with the foregoing, in its answer to an interrogatory asking for an explanation of the events in question, Graham described Mr. Grismore's usage of DRAYNAMITE and the efforts of Messrs. George and Mr. Grismore to address the fumes they felt were caused by that usage (App. 117-119). In other words, it was Graham that identified Mr. Grismore's use of DRAYNAMITE as the source of the fumes in the building in question on the day in question. Only after realizing the importance of that admission did Graham (or, more accurately, its legal counsel) begin to dispute that the presence of fumes in the building on the day in question was caused by the use of DRAYNAMITE.

ARGUMENT

"Causation is a question for the jury save in very exceptional cases where the facts are so clear and undisputed, and the relation of cause and effect so apparent to every candid mind, that but one conclusion may be fairly drawn..." Thompson v. Kaczinski, 774 N.W.2d 829, 836 (Iowa 2009). Causation, like any other fact, can be proven by direct and circumstantial evidence and neither is more or less conclusive than the other. Walls v. Jacob N. Printing, 618 N.W.2d 282, 285 (Iowa 2000); see also Rauch v. Des Moines Elec. Co., 206 Iowa 309, 218 N.W. 340, 342 (1928) ("proof of 'causal connection' [between complained of behavior and alleged

damages] may be by...direct or circumstantial evidence"). Finally, "to determine whether the defendant...caused the plaintiff's harm...the defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred..." Garr v. City of Ottumwa, 846 N.W.2d 865, 869-70 (Iowa 2014).

I. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN IGNORING BLOOMQUIST AND THE SUPPORT IT PROVIDES FOR THE CONCLUSION THAT THERE WAS SUFFICIENT EVIDENCE TO GENERATE A JURY QUESITON ON CAUSATION

In 1993 this Court decided Bloomquist v. Wapello County, 500 N.W.2d 1 (Iowa 1993). Bloomquist has never been overturned and, on the contrary, it was cited with approval in the one Iowa case (Ranes v. Adams Laboratories, Inc., 778 N.W.2d 677 (Iowa 2010)) relied on by the District Court and the Court of Appeals in support of their decision to decide causation as a matter of law. Simply put, Bloomquist is controlling authority which, when properly applied to the facts of this case, demonstrates that a jury question existed on causation.

Very much like this case, Bloomquist involved injuries allegedly caused to workers in an office building by exposure to dangerous chemicals that had been used in the building. After a jury verdict in favor of the plaintiffs, the trial court in Bloomquist took that verdict away by deciding the issue of proximate cause as a

matter of law (because the plaintiffs did not present "epidemiological evidence" of causation). In overturning that decision, this Court noted:

> "....The plaintiffs' experts concurred in their opinions that medical problems experienced by the plaintiffs....were caused by [exposure to the chemicals in question which were used in the building and were known to be dangerous] ....the evidence presented by the plaintiffs in support of their proximate cause claim was properly admitted. The jury found that the evidence was sufficient on causation, and the court erred in deciding otherwise, as a matter of law...."

Bloomquist, 500 N.W.2d at 3-6.

Bloomquist rejected an argument that the Plaintiffs could not prevail (on causation) in the absence of evidence consisting of statistics or scientific studies proving a nexus between the chemical in question and the injuries claimed by the Plaintiffs. Id. at p. 5 ("....while epidemiological evidence is helpful, it should not be held to be an absolute requirement [to prove] causation"). Rather, this Court held that "traditional cause and effect" testimony from the Plaintiffs' physicians was enough to generate a jury question on causation. Id. at pp. 3-5.

That holding is, for all intents and purposes, on point with this case. In fact, the evidence here is more convincing than in Bloomquist in that, in Bloomquist (unlike here), there was a plausible explanation for the injury causing fumes other than the chemicals the Plaintiffs pointed to. That was not true here where, quite literally, the only explanation for fumes in the building on the day in question was Graham's admitted use of DRAYNAMITE.

Given all of that, it is respectfully submitted the Court of Appeals (like the District Court) erred in ignoring Bloomquist (along with the totality of the evidence) and reaching the conclusion that there was insufficient evidence to generate a jury question on causation. See Banwart v. 50th St. Sports, L.L.C., 910 N.W.2d 540, 548–49 (Iowa 2018) ("the issue is not whether a party uses circumstantial evidence, as opposed to direct evidence, to prove his or her claim because circumstantial evidence may raise a genuine issue of material fact. Rather, the issue is whether the party has proffered sufficient evidence. In regards to sufficiency of the evidence, evidence is substantial if a reasonable person would find it adequate to reach a conclusion.") and Peak v. Adams, 799 N.W.2d 535, 542–43 (Iowa 2011) ("The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. An inference is legitimate if it is rational, reasonable, and otherwise permissible under the governing substantive law …If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists…").

II. THE EVIDENCE, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO MS. UHLER AND RESOLVING ALL INFERENCES IN HER FAVOR, WAS CLEARLY SUFFICIENT TO GENERATE A JURY QUESTION ON CAUSATION

The above-noted realities of Iowa law cannot be questioned. However, both the District Court and the Court of Appeals issued rulings that ignored that law along with most of the evidence. Simply put, the fundamental error of those courts

was in failing to look at the totality of the evidence in a light most favorable to Ms. Uhler and in a way that decided all reasonable inferences in her favor. Instead, those courts looked myopically at only certain parts of the evidence and bought into the fallacy 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. That was reversible error. See Bitner v. Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295, 300 (Iowa 1996) ("a court deciding a motion for summary judgment must not weigh the evidence, but rather simply inquire whether a reasonable jury faced with the evidence presented could return a verdict for the nonmoving party.").

The reality, of course, is that it would be impossible for anyone 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 through the building. Graham itself has no idea what was in the water Mr. Grismore poured DRAYNAMITE into, how much DRAYNAMITE he used or how long it took to rid the building of the fumes. Given that, how would Ms. Uhler (or any expert she hired) be able to ascertain that information or recreate precisely what happened on the day in question? The answer, of course, is that Ms. Uhler was not required to do that.

Rather, based on the authority from in Bloomquist, what Ms. Uhler was required to do was present evidence (direct and circumstantial and expert and non-expert) from which a jury could reasonably conclude that the behavior of Graham caused the fumes that were noted by numerous people and, in turn, caused people, including Ms. Uhler, to report being injured (conclusions which Graham itself reached). See Becker v. D & E Distrib., 247 N.W.2d 727, 730 (Iowa 1976) ("evidence indicating a probability or likelihood of [causation]…may be inferred by combining an expert's…testimony with non-expert [evidence] that the described condition of which complaint is made did not exist before [the] occurrence of those facts alleged to be the cause thereof…"); Larson v. Johnson, 253 Iowa 1232, 1234, 115 N.W.2d 849, 850 (1962) ("…evidence must be such as to make plaintiff's theory of causation reasonably probable and more probable than any other theory based on such evidence. It is not necessary the testimony be so clear as to exclude every other possible theory…") and Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425, 430 (1940) (plaintiffs bear the burden "to show [a] causal connection between the negligence claimed and the injury…[that connection] need be established only by the preponderance or greater weight of the evidence… And this is true whether the testimony be direct or circumstantial. No different rule is applied in the establishment of these facts than is ordinarily applied in the

establishment of any other fact in a civil action."). It is, with all due respect, impossible to logically conclude Ms. Uhler did not clear that hurdle.

There is no dispute that the product Graham admitted using (just before people started to complain about fumes making them sick) is dangerous and generates the exact kind of fumes people reported. There is no dispute that multiple people did complain about fumes that made them sick and that they were all above where DRAYNAMITE was used. There is no dispute that the descriptions of the fumes matched common descriptions of the chemical in DRAYNAMITE and there is no evidence those fumes were present before the use of DRAYNAMITE. There is no dispute that the fumes were bad enough to close an entire office in the building and that, in response to complaints about fumes, Graham employees took steps to manipulate the "recirculation" of air throughout the building (in a way never attempted before or since). Other than the use of DRAYNAMITE, there is no other explanation for the fumes and Graham itself concluded the fumes were caused by the use of DRAYNAMITE. Finally, based on the foregoing facts, two doctors opined that Ms. Uhler was injured by exposure to DRAYNAMITE fumes in the building on the day in question and the records of several other doctors support that same conclusion.

With all of that in mind, and again recognizing that the evidence must be viewed in a light most favorable to Ms. Uhler and all logical inferences that can be

deduced from the same have to be decided in her favor, it is impossible to logically conclude that a jury could not reasonably find Ms. Uhler was injured by fumes from DRAYNAMITE. Put another way, it is logically impossible to conclude that a reasonable jury could not reach the same conclusion Graham did (i.e. that the source of the injury causing fumes on the day in question was Graham's use of DRAYNAMITE in the building). See Oak Leaf Country Club v. Wilson, 257 N.W.2d 739, 746–47 (Iowa 1977) ("Proof of the necessary causal connection [between a defendant's behavior and a plaintiff's damages] may be by either direct or circumstantial evidence…[and] it is generally for the trier of fact to say whether circumstantial evidence [makes the plaintiff's theory of causation reasonably probable]…[Furthermore,] the probability of [such a] causal connection necessary to generate a jury question need not come solely from one witness. 'Probability' may be inferred by combining an expert's 'possibility' testimony with nonexpert testimony that the described condition of which complaint is made did not exist before occurrence of those facts.").

III. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN FAILING TO REALIZE THAT THE FACTS OF THIS CASE ARE UNDENIABLY DIFFERENT THAN THE RANES CASE

This case is not remotely similar to the lone Iowa case relied on by the District Court and the Court of Appeals. Ranes v. Adams Lab'ys, Inc., 778 N.W.2d 677, 682–85 (Iowa 2010), dealt with a drug about which there was very little

evidence of the same causing even the general type of injury (stroke) alleged by the plaintiff (an adult man) and about which there was zero evidence of the same causing stroke in adult men. Also, Mr. Ranes, who had mental issues, saw thirteen doctors all of whom felt he did not suffer a stroke (let alone one caused by the drug in question). Against that backdrop, the trial court in Ranes excluded testimony from one doctor (a pediatrician) who was willing to say ingestion of the drug did cause Mr. Ranes' claimed stroke. That decision was upheld on appeal.

To say that Ranes is factually similar to this case, or required the dismissal of this case as a matter of law, is wrong. The evidence here was uncontroverted that the chemical in DRAYNAMITE causes fumes exposure to which can and does lead to the exact type of injury sustained by Ms. Uhler. That alone makes this case different then Ranes. Beyond that, in this case there was evidence proving fumes were caused in the building on the day in question by the use of DRAYNAMITE. Again, that fact makes this case different than Ranes. Finally, unless one literally ignores the opinions of Drs. Dodge and Stoken and the records of Drs. Myrtil and Hicklin, it is beyond reasonable dispute that there was medical evidence (from doctors that the District Court identified as qualified to speak to the cause of Ms. Uhler's lung damage) that would support a jury finding that Ms. Uhler's damages were caused by exposure to fumes from Draynamite on the day in question.

The foregoing realities make this case clearly different (factually) from Ranes. Those realities also demonstrate that the result in this case is properly controlled not by Ranes but by Bloomquist and numerous other cases finding that, in all but the most unusual of circumstances, juries should decide the issue of causation. See Benson v. 13 Assocs., L.L.C., 2015 WL 582053, (Iowa Ct. App. 2015) (case involving a person who was injured at work and a reversal of a summary judgment in favor of the building owner based on appellate court's recognition that said owner, who retained control of the building, owed a duty of reasonable care to entrants with regard to conduct in the building "that creates risks to entrants" and "artificial conditions" in the building "that pose risks to entrants") and Randol v. Roe Enterprises, Inc., 524 N.W.2d 414, 417 (Iowa 1994) (in reversing a grant summary judgment on the issue of causation, Supreme Court held "we think the district court erroneously discounted the probative value of the circumstantial evidence…This court has routinely observed that circumstantial evidence often may be equal or superior to direct evidence… Affording [the plaintiff] every legitimate inference reasonably deducible from the evidence, a reasonable mind could conclude that the [complained of condition on the property led to the injury causing incident and, as such, generated] a genuine issue of material fact on proximate cause.").

IN THE COURT OF APPEALS OF IOWA

No. 21-0723
Filed June 15, 2022

JACQUELINE SUE UHLER,
Plaintiff-Appellant,

vs.

THE GRAHAM GROUP, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Samantha Gronewald, Judge.

Jacqueline Uhler appeals the grant of summary judgment in favor of The Graham Group, Inc. **AFFIRMED.**

Jason D. Walke of Walke Law, LLC, West Des Moines, for appellant.

James S. Blackburn of Finley Law Firm, P.C., Des Moines, for appellee.

Heard by Tabor, P.J., and Greer and Ahlers, JJ.

AHLERS, Judge.

Jacqueline Uhler appeals from the grant of summary judgment dismissing her personal-injury claim against The Graham Group, Inc. (Graham). Uhler argues the district court erred in finding she failed to generate a fact question on whether Graham's use of a chemical in Uhler's office building resulted in permanent damage to her lungs and other injuries. We agree that Uhler's failure to produce expert testimony or other evidence resulted in a failure to generate a fact question as to whether Graham's use of the chemical was the proximate cause of Uhler's injuries. Therefore, we affirm.

I. Background Facts and Proceedings

On October 16, 2017, Uhler was working in an office building in Des Moines. The building has five floors, including a lower level, and is approximately 90,000 square feet. Graham was responsible for the operation and maintenance of the building. That afternoon, a maintenance worker for Graham received a call about a clogged sink in a bathroom on the lower level of the building, one floor below the first level. The worker poured "about a cup" of Draynamite, a chemical drain cleaner, into the clogged sink. The worker noted the Draynamite smelled like rotten eggs. The worker stayed in the bathroom for a "couple minutes" to observe the sink, left the bathroom, and returned about ten minutes later to find the drain appeared to be clear and in good working order. The maintenance manager soon received a call from a second-floor office about a "funny odor" in the area. The manager went to the lower-level bathroom to inspect the drain and noticed a rotten egg smell right outside the bathroom. In response to the odor, the manager and the worker opened doors in the building and on the roof to draw air up and out of

the building, and the manager altered the building's ventilation settings to draw fresh air into the building.

At some point during that afternoon, Uhler noticed a harsh, chemical smell like rotten eggs in her third-floor cubicle. Uhler developed a headache, sore throat, burning in her eyes and nose, and difficulty breathing. Uhler left the office early due to her symptoms. Uhler noticed the same odor in other areas as she left the building, but the odor disappeared as soon as she was outside. At least eleven people working in the building that day, including Uhler, filed incident reports with their employers complaining of the odor and reporting symptoms such as headache, nausea, and difficulty breathing. Despite the odor, only a few left the building for the day. The safety data sheet for Draynamite cautions against exposure to Draynamite:

> Risk of serious damage to the lungs (by inhalation). Causes burns to the respiratory tract, nose, mouth, and throat with discomfort, nasal discharge, sneezing, coughing, rapid heartbeat, and chest pain. Inhalation of mist or vapors may cause chemical pneumonia which can cause damage and may be fatal.

In October 2019, Uhler filed her petition alleging Graham's negligence was "the direct and proximate cause of the chemical accident" (in other words, the use of Draynamite) that caused her to seek medical treatment and sustain permanent damage to her lungs and acute injuries. Uhler designated a series of experts, including Drs. Jacqueline Stoken and Daniel Dodge. Dr. Stoken provided a report, after examining Uhler in February 2021 and reviewing her medical records, in which she concluded, "Uhler has sustained a chemical fume injury with Draynamite which has caused permanent lung damage. This has resulted in a material aggravation of her underlying asthma and permanent lung damage." Similarly, Dr.

Dodge provided an affidavit, after examining Uhler and reviewing her medical records, in which he agreed with the statement, "Uhler, as a result of her exposure to fumes in her place of employment on October 16, 2017, suffered a significant and permanent worsening of her pre-existing asthma." Graham moved for summary judgment, which the district court granted, finding Uhler failed to provide expert opinion establishing causation. Uhler appeals.

II. Standard of Review

We review a grant of summary judgment for correction of errors at law. *Ranes v. Adams Lab'ys, Inc.*, 778 N.W.2d 677, 685 (Iowa 2010). "Summary judgment is appropriate only when the record shows no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Hedlund v. State*, 930 N.W.2d 707, 715 (Iowa 2019). "We view the summary judgment record in a light most favorable to the nonmoving party." *Id.* "Summary judgment is proper when the plaintiff's claim lacks evidence to support a jury question on an essential element of the claim." *Ranes*, 778 N.W.2d at 685.

III. Analysis

Causation is an essential element of a negligence claim. *Garr v. City of Ottumwa*, 846 N.W.2d 865, 869 (Iowa 2014). "Causation is ordinarily a jury question." *Id.* at 870. "In some cases, however, causation may be decided as a matter of law." *Id.* "[W]hen the connection between the defendant's negligence and the plaintiff's harm is not within the layperson's common knowledge and experience, 'the plaintiff needs expert testimony to create a jury question on causation.'" *Id.* at 872 (quoting *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 793 (Iowa 2009)).

The central dispute in this case is whether Graham's use of Draynamite caused Uhler's injuries. The district court characterized Uhler's claim as a toxic tort claim. Generally, a plaintiff in a toxic tort case must establish both general and specific causation. *Ranes*, 778 N.W.2d at 687.[1] "General causation is a showing that the drug or chemical is capable of causing the type of harm from which the plaintiff suffers." *Id.* at 688. "Specific causation is evidence that the drug or chemical in fact caused the harm from which the plaintiff suffers." *Id.* "There must be evidence that would permit a reasonable person to conclude the [substance] probably caused the injury claimed." *Id.* Expert testimony is often necessary to establish causation in a toxic tort case. *Id.* at 688–89 ("In the toxic-tort case before us, . . . expert medical and toxicological testimony is unquestionably required to assist the jury."). The Eighth Circuit summarized the plaintiff's burden in establishing causation in a toxic tort case:

> Actions in tort for damages focus on the question of whether to transfer money from one individual to another, and under common-law principles . . . that transfer can take place only if one individual proves, among other things, that it is more likely than not that another individual has caused him or her harm. It is therefore not enough for a plaintiff to show that a certain chemical agent sometimes causes the kind of harm that he or she is complaining of. At a minimum, we think that there must be evidence from which the factfinder can conclude that the plaintiff was exposed to levels of that agent that are known to cause the kind of harm that the plaintiff claims to have suffered. We do not require a mathematically precise table equating levels of exposure with levels of harm, but there must be evidence from which a reasonable person could conclude that a defendant's emission has probably caused a particular plaintiff the kind of harm of which he or she complains before there can be a recovery.

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[1] Uhler asserts *Ranes* has limited applicability to her case. She notes her claim of workplace exposure is factually different from the plaintiff in *Ranes* who claimed injuries from consuming pharmaceuticals. *See* 778 N.W.2d at 682–84. While Uhler's facts are undeniably different, the law of causation in toxic torts explained in *Ranes* applies to Uhler's toxic tort case.

Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996) (internal citation omitted).

To establish general causation, Uhler must show the use of Draynamite, at the levels used by Graham, is capable of causing her injuries. *See Ranes*, 778 N.W.2d at 688. Uhler submitted the data sheet and other documentation showing inhalation of Draynamite can cause lung damage and other bodily injuries. Both parties agreed that Draynamite can cause lung damage at some level of exposure. This evidence might be sufficient to generate a fact question on general causation regarding Uhler's acute and permanent injuries if there was expert testimony Draynamite "is capable of causing injuries like that suffered by the plaintiff in human beings subjected to the same level of exposure as [Uhler]." *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 928 (8th Cir. 2001). Because no expert identified at what levels or length of exposure Draynamite could cause an injury, the district court found Uhler failed to show general causation. To assure a complete analysis despite this finding, the district court turned to the specific causation proof. "Because proof of general causation cannot satisfy a plaintiff's burden without proof of specific causation, and proof of specific causation implicitly requires proof of general causation, the focus of inquiry in toxic tort cases typically is on the existence of specific causation." David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 52–53 (2008). At a minimum, both questions about causation come down to the question of dose. The dose-response relationship refers to an epidemiological principle "that exposure to a substance must exceed a certain level before it manifests a risk of adverse health effects." *In*

re Prempro Prods. Liab. Litig., 738 F. Supp. 2d 887, 895 (E.D. Ark. 2010) (citing Fed. Jud. Ctr., Reference Manual on Scientific Evidence 475 (2d ed. 2000)). Likewise, proof of mere possibility of exposure to a chemical is not enough. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 861–62 (Iowa 1994).

To establish specific causation, Uhler must show Graham's use of Draynamite actually caused her injuries. *See Ranes*, 778 N.W.2d at 688. The undisputed evidence shows Graham used Draynamite in the office building while Uhler was present. However, the fact that a dangerous chemical was used in Uhler's workplace is not enough by itself to establish specific causation. *See Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986) (rejecting "a rule that if the plaintiff can present any evidence that a company's asbestos-containing product was at the workplace while the plaintiff was at the workplace, a jury question has been established as to whether that product contributed as a proximate cause to the plaintiff's disease"). 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.

Identifying how Draynamite moves through a building and causes injury is far beyond a layperson's understanding and requires expert testimony. *See id.* While Uhler need not need measure her chemical exposure with mathematical precision, *see id.*, 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. Dr. Stoken opined inhalation of even "small

amounts" of Draynamite may cause permanent injury.[2] However, Dr. Stoken does not quantify a harmful level of Draynamite, and no expert even attempts to quantify any level of Uhler's Draynamite exposure. Uhler's experts offered no insight into the principles and methodology supporting their conclusions.[3] Thus, Uhler's experts do not support finding Graham's actions caused her to be exposed to levels of Draynamite sufficient to cause her injuries.[4]

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[2] *See* Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. at 68 ("Still other experts decline to estimate the plaintiff's exposure. They rely instead on terms such as "substantial," "significant," or "high"—terms that have no objective scientific meaning in the absence of a defined baseline.")

[3] *See Ranes*, 778 N.W.2d at 691 (noting the court's obligation to assess reliability of the expert opinion by examining the principles and methodology, rather than the conclusions the expert might offer).

[4] The dissent suggests that we have not adequately accounted for the supreme court's ruling in *Bloomquist v. Wapello County*, which noted that "while epidemiological evidence is helpful, it should not be held to be an absolute requirement in establishing causation." 500 N.W.2d 1, 5 (Iowa 1993). We are mindful of *Bloomquist*, but we find it distinguishable on its facts. In *Bloomquist*, five workers sued the county and others after they became ill after working in an old government building. *Id.* at 2. They claimed their illness was caused by pesticide sprayed in the building in an effort to combat a flea problem and by poor ventilation of sewer gas. *Id.* at 2–3. The pesticide was sprayed throughout the building on a monthly basis into "crack[s] and crevice[s]." *Id.* at 2. When that didn't work, the pesticide was "broadcast spray[ed]" in the building in addition to being sprayed in the cracks and crevices. *Id.* 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. *Id.* As part of the evidence connecting the exposure to the pesticide with the claimed injury, 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. *Id.* at 3. It was under these facts that the supreme court noted that epidemiological evidence is not "an absolute requirement in establishing causation." *Id.* at 5. Here, 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. There was no repeat use, no prolonged or repeated exposure, and no violation of any established standards. 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.

With Uhler's pre-existing history of asthma and lung issues, her proof to support a permanent injury suffers from that found in *Bland v. Verizon Wireless, (VAW) L.L.C.*, 538 F.3d 893, 897 (8th Cir. 2008), in which expert testimony was excluded because the expert:

> (1) failed scientifically to eliminate other possible causes as part of her differential diagnosis; (2) did not know what amount of exposure to the diflu[o]roethane-containing Freon causes, or involves an appreciable risk of causing, asthma; (3) had no good grounds for determining whether Bland was exposed to a sufficient dose of difluoroethane-containing Freon to have caused her asthma, because [the expert] could not determine or estimate the amount of difluoroethane or Freon Bland was actually or probably exposed to when she smelled the water in her water bottle; (4) could not extrapolate from the existing data because the gap between the data identified and [the expert's] proffered opinion was simply too great an analytical gap to support admissibility; (5) did not offer as evidence any personal experience with treating other patients following a similar exposure to difluoroethane, Freon, or Freon with difluoroethane; and (6) reliance on temporal proximity, without more, is insufficient to establish causation.

(Cleaned up.) Thus, the requirement that some showing of exposure to dangerous levels of Draynamite that could cause Uhler's claimed injury is even more compelling. *See Bland*, 538 F.3d at 898 (noting a general causation expert must identify (1) what amount of exposure was capable of causing the alleged injury and (2) the amount to which the plaintiff was actually or probably exposed).

When taking the record in the light most favorable to Uhler, she also provided considerable temporal evidence of a connection between her acute injuries and Graham's use of Draynamite. Eleven employees, including Uhler, filed

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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.

incident reports for the day in question complaining of fumes. These other employees reported a variety of symptoms, at least some of which are similar to Uhler's acute symptoms, including headache, nausea, shortness of breath, ringing in the ears, dizziness, difficultly remembering, congestion, fatigue, chest tightness, cough, and other flu-like symptoms. Even Uhler's supervisor, who did not file an incident report, testified she had a headache on the day in question. An area on the second floor, which was open to the public, closed that day due to the fumes. Graham's maintenance staff took unprecedented steps to ventilate the building that day and quickly clear the fumes. Uhler preserved the value of this temporal evidence by promptly seeking medical attention, including a doctor's appointment two days after exposure to the fumes. *See Bland*, 538 F.3d at 899 (finding the plaintiff could not produce temporal evidence to support causation after waiting five weeks to visit a doctor).

"Under some circumstances, a strong temporal connection is powerful evidence of causation." *Bonner*, 259 F.3d at 931. However, even with strong temporal evidence, Uhler must still "prove that she was exposed to a quantity of the toxin that 'exceeded safe levels.'" *Id.* (citation omitted). In *Bonner*, the court affirmed judgment in favor of the plaintiff on her toxic tort claim after she "presented witnesses who testified that her exposure to [the chemical] was of a duration and of a volume sufficient to support a conclusion that she inhaled and/or absorbed through her skin at least a quarter of a teaspoon of [the chemical] when she was sprayed with it." *Id.* A showing that others reacted to the odor of a chemical with a headache or dizziness is a far cry from confirming the chemical caused someone permanent lung damage. *See Ranes,* 778 N.W.2d at 693 (noting that generally a

bare analogy to case reports to the injuries alleged in a particular case is "unreliable"). Even considering Uhler's temporal evidence of Graham using Draynamite immediately before her injuries, Uhler failed to present the type of evidence admitted in *Bonner*, that Graham's use of Draynamite exposed her to an unsafe level of toxic chemical sufficient to cause her injuries. *See* 259 F.3d at 931. Therefore, we find Uhler failed to generate a fact question regarding the causation of her injuries immediately following Graham's use of Draynamite.

IV. Conclusion

Uhler did not provide expert testimony or other evidence to generate a fact question on whether Graham's use of Draynamite caused her to be exposed to levels of toxins sufficient to cause her injuries. We affirm the grant of summary judgment in favor of Graham.

AFFIRMED.

Greer, J., concurs; Tabor, P.J., dissents.

TABOR, Judge (dissenting)

"We have long been committed to the principle that issues of proximate cause are only rarely decided as a matter of law." *Bloomquist v. Wapello Cnty.*, 500 N.W.2d 1, 5 (Iowa 1993). Because the majority wrongly abandons that commitment today by finding that Jacqueline Uhler needed more precise expert testimony to generate a jury question on causation, I respectfully dissent.

Here's what we know from the summary judgment record. An employee poured one to two cups of the drain opener Draynamite into a clogged sink in a lower level bathroom of the Methodist Medical Plaza, a building owned and managed by the Graham Group. Within an hour, tenants on the third and fourth floors complained about the smell of "rotten eggs" and reported that some occupants of the building were feeling sick. Building staff tried to "recirculate" the air. A pediatric pulmonary clinic on the third floor closed after one of its doctors expressed concerned that the exposure could "trigger some breathing issues." Indeed, Uhler and ten other people in the building that day reported illness, including difficulty breathing. Uhler went home sick.

Two days later Uhler saw her doctor, complaining of "inhalation exposure to hydrogen sulfide." The doctor's notes confirmed "mild inhalation exposure symptoms" and a history of asthma. Uhler returned to that doctor eight days later, complaining about shortness of breath. The doctor believed that the likelihood of Uhler's symptoms relating to the fume exposure was "low" but referred her to "pulmonary for further evaluation." Then, after an "acute worsening of her asthma" including continued shortness of breath, Uhler saw pulmonologist Gregory Hicklin

who noted that her lung condition had been stable until her exposure to fumes at work.

Uhler also was evaluated by Dr. Jacqueline Stoken, who was board certified in physical medicine and rehabilitation. Dr. Stoken believed that Uhler "sustained a chemical fume injury with Draynamite" which caused "a material aggravation of her underlying asthma and permanent lung damage." The doctor observed that before the accident Uhler was not on medication for her asthma, but after exposure she had "significant obstruction, symptoms of wheezing, cough and shortness of breath and markedly diminished exercise capacity." Dr. Stoken also stated that during her extensive work in pulmonary care, she had seen "injury from the inhalation of fumes (even in small amounts) from dangerous chemicals, including sulfuric acid."

Finally, as part of the summary judgment record, Uhler offered an affidavit from pulmonologist Daniel Dodge. Dr. Dodge agreed that Uhler's exposure to fumes generated by the use of Draynamite in her workplace led to a "significant and permanent worsening of her pre-existing asthma."

Applying *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677 (Iowa 2010) to these facts, the majority finds that Uhler generated a fact question on general causation (that Draynamite could cause the type of harm she suffered).[5] But not on specific causation (that the use of Draynamite by the Graham Group in fact caused the lung damage Uhler alleged). The majority is right that Uhler offered enough proof for a reasonable jury to find that inhaling Draynamite, in the abstract,

[5] By contrast, the district court determined that Uhler did not generate a jury question on general causation.

could cause lung damage. But the majority is mistaken in requiring more or different evidence to generate a jury question that the exposure to Draynamite was the cause of Uhler's lung damage.

In most tort cases the plaintiff can prove general and specific causation with the same evidence. *Ranes*, 778 N.W.2d at 688. For instance, "when a plaintiff is injured in an automobile accident . . . potential causal explanations other than the collision are easily ruled out [i.e., specific causation]; common experience reveals that the forces generated in a serious automobile collision are capable of causing a fracture [i.e., general causation]." *Id.* (quoting Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 28 cmt. c, at 405 (2010)). The bifurcated analysis adopted in *Ranes* is just a means to examine the connection between a toxic substance and the development of illness. *Id.* It does not add new elements to the tort. *Id.* Put another way, general causation involves "ruling in" a potential cause. *Id.* at 690. And specific causation involves both ruling in that potential cause and ruling out other possible causes. *Id.* at 695. If an expert cannot rule out other possible causes of an injury, or at least minimize the probability of their contribution, then a plaintiff may not meet the "more likely than not" threshold for proving causation.

The majority recognizes that the manufacturer's own safety data sheet "ruled in" the inhalation of Draynamite mist or vapors as a potential cause of serious damage to the lungs. Thus, a jury question exists on general causation.[6]

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[6] This finding is telling. As a federal court recently noted,

> The requirement that a general causation expert identify the level of exposure differs from specific causation . . . . In order for a general causation expert to opine that a toxin is capable of causing injury in

So why not specific causation? In its analysis, the majority faults Uhler for not producing "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." But we know the fumes *did* traverse great distances—four floors of the medical building. The Graham Group admits as much in its response to Uhler's resistance to summary judgment. And we know that the fumes *did* cause acute injuries from the contemporaneous reporting of symptoms by Uhler and ten other building occupants. *See Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 931 (8th Cir. 2001) ("Under some circumstances, a strong temporal connection is powerful evidence of causation."); *see Cavallo v. Star Enter.*, 892 F. Supp. 756, 774 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 100 F.3d 1150 (4th Cir. 1996) ("[I]f a known chemical is accidentally introduced into a company's ventilation system, and all of the workers exposed immediately develop the same adverse reaction, then the episode itself may be sufficiently indicative of causation.").

But when considering Uhler's allegation of permanent lung injury, the majority contends that she does not meet the standard set by the Eighth Circuit in *Bonner*. As the majority acknowledges, *Bonner* did not require experts to quantify the amount of chemical exposure to prove causation. *See* 259 F.3d at 931. Instead, *Bonner* held it was "sufficient for a plaintiff to prove that she was exposed

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> the general population, he or she must identify the level to which the plaintiff was exposed in order to evaluate whether that level is capable of causing harm. . . . Thus, an expert cannot opine as to general causation in a toxic tort case without information as to the relevant exposure and the standard by which to assess its harmfulness.

Thiele v. DSM Food Specialties, USA, Inc., No. C18-4081-LTS, 2022 WL 94938, at *9 n.8 (N.D. Iowa Jan. 10, 2022) (citations omitted).

to a quantity of the toxin that 'exceeded safe levels.'" *Id.* (citation omitted). Assuming that federal standard applies here, Dr. Stoken's expert opinion supplied the proof that Uhler's exposure exceeded safe levels. She affirmed: "During the course of my career I have treated many patients who have experienced injuries and adverse effects from the inhalation of fumes from dangerous chemicals such as sulfuric acid (the active ingredient in Draynamite)." From that experience, Dr. Stoken discovered that inhalation of sulfuric acid fumes "even in small amounts" could cause pulmonary injuries. The expert's "personal experience with treating other patients following a similar exposure" buttressed her opinion on causation. *See Bland v. Verizon Wireless, (VAW) L.L.C.*, 538 F.3d 893, 898 (8th Cir. 2008).

Finally, the majority does not reckon with Iowa case law rejecting the necessity for epidemiological evidence. *See Bloomquist*, 500 N.W.2d at 3–6. To show pesticide sprayed on the carpet caused permanent neurological injuries to workers in the building, Bloomquist relied on "traditional cause-and-effect" testimony from treating doctors. *Id.* at 3. Building owners (the county) urged that Bloomquist could not meet his burden without statistics or scientific studies to prove a causal relationship between exposure to the flea spray and the incidence of disease. *Id.* at 4. The court rejected that argument, holding "while epidemiological evidence is helpful, it should not be held to be an absolute requirement in establishing causation." *Id.* at 5. It was enough for Bloomquist's doctors to testify that his medical problems were caused by the conditions in his workplace. *Id.* at 6. Similarly, Uhler lined up expert opinions from Dr. Stoken and Dr. Dodge that her worsened asthma could be traced to the Draynamite exposure at work. Under *Bloomquist*, summary judgment was improper.

The Graham Group claims that Uhler's reliance on *Bloomquist* is "misguided" because that case was decided seventeen years before *Ranes*. Yet *Ranes* did not overrule *Bloomquist*. In fact, *Ranes* cites *Bloomquist* with approval. *Ranes*, 778 N.W.2d at 693. So the majority should not cast it by the wayside. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."); *see also Chambers v. Trettco, Inc.*, 614 N.W.2d 910, 914 n.3 (Mich. 2000) ("[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by the authority." (citations omitted)). Because *Bloomquist* remains viable precedent, Uhler may rely on that standard in defending against summary judgment.

Because Uhler produced a submissible case on causation, the district court should not have granted summary judgment. Whether she can prevail on the merits remains to be seen, the Graham Group may be able to persuade the trier of fact of its position. But we must refrain from weighing the evidence and afford her every legitimate inference that can be deduced from the record. *See Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005). "Mere skepticism of a plaintiff's claim is not a sufficient reason to prevent a jury from hearing the merits of a case." *Id.*

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
21-0723	Uhler v. The Graham Group Inc.

Electronically signed on 2022-06-15 08:45:03

CERTIFICATE OF FILING

The undersigned hereby certifies that I, or someone acting on my behalf, filed the foregoing Amended Application For Further Review via the Iowa Judicial Branch EDMS system on July 7, 2022.

/s/ Nicolle Phifer
Nicolle Phifer

CERTIFCATE OF SERVICE

The undersigned hereby certifies that on the 7th day of July, 2022, a copy of the foregoing Amended Application for Further Review was served via the Iowa Judicial Branch EDMS system to the attorneys listed below:

James S. Blackburn
699 Walnut Street, Suite 1700
Des Moines, IA 50309

/s/ Nicolle Phifer
Nicolle Phifer

CERTIFICATE OF COMPLIANCE

The undersigned certifies that:

This Amended Application For Further Review complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

This Amended Application For Further Review has been prepared in a proportionally spaced typeface using Times New Roman in font size 14, and contains 5,466 words, excluding the parts of the Amended Application For Further Review exempted by Iowa R. App. P. 6.1103(4)(a).

Dated: July 7, 2022

/s/ Nicolle Phifer
Nicolle Phifer