STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JILL POWELL-MURPHY et al,

Plaintiff(s),

Case No. 2018-168037-NO
Hon. JACOB J. CUNNINGHAM

-vs-

REVITALIZING AUTO COMMUNITIES ENVIRONMENTAL RESPONSE TRUST and RACER PROPERTIES, LLC,

Defendant(s).
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ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At said session of the Sixth Circuit Court held in the County of Oakland, City of Pontiac, State of Michigan, on this 24 day of April 2025.

The matter is before the Court on Defendants' motion for summary disposition based on MCR 2.116(C)(8) & (10). The Court heard oral argument on the motion on January 15, 2025, and took the matter under advisement.

By way of background, Plaintiffs brought the underlying putative class action on behalf of employees of the United States Postal Service (the "USPS") who, from August 2015 to the present or before, were allegedly exposed to toxic methane gas and other noxious chemicals or gases at the Metroplex Postal Complex (the "Metroplex") in Pontiac, Michigan.

The Metroplex is a processing and distribution facility for the USPS and built on property previously used by non-party General Motors Corporation as a foundry for manufacturing operations and for the storage of hazardous materials. Under a lease and "master agreement" between the USPS and General Motors, USPS leased the property

from General Motors and General Motors retained liability for cleaning up, investigating, monitoring, and remediating environmental conditions, including contamination, on the property. Subsequent bankruptcy proceedings resulted in Defendants Revitalizing Auto Communities Environmental Response Trust ("RACER Trust") and Racer Properties, LLC ("Racer Properties") becoming responsible for environmental conditions on the property during the time relevant to this dispute.[1]

Plaintiffs' underlying first amended Complaint, filed August 24, 2018, asserted Count I – Negligence and Count II – Nuisance against Defendants, alleging in part all Plaintiffs, and potential unnamed putative Plaintiffs, suffered from rapid breathing, rapid heart rate, clumsiness, emotional upsets and fatigue, nausea, vomiting, collapse, convulsions, coma, permanent damage to the organs, and death and "as a result of the release of methane gas into the air in the areas where they were working in the Metroplex complex between August 2015 to the present, as well as the outdoor parking lot and rooftop areas."[2] Defendant filed a motion for summary disposition in lieu of an answer on December 28, 2018. On April 11, 2019, this Court's predecessor granted Defendants' motion for summary disposition, finding Plaintiffs failed to "establish general or specific

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[1] The factual and procedural history of this issue was set forth more comprehensively in *Powell-Murphy et al v Revitalizing Auto Communities Envtl Response Tr.*, 333 Mich App 234 (2020). In pertinent part, the Court of Appeals determined "the Master Agreement places the responsibility on General Motors (and thus, by assignment, on [RACER Trust and Racer Properties]) for environmental conditions on the property." *Id. at* 244. To the extent Defendants' motion argues it owes no duty to Plaintiffs, this Court disagrees and adopts the reasoning of the appellate history as the law of this case. See *Id. at* 243-245; see also, *Grievance Admin v Lopatin*, 462 Mich 235 (2000).

[2] Complaint, paras 24-25. The Complaint also included class allegations. Complaint, paras 26-33. This Court granted class certification. See Order dated December 22, 2022. MCR 3.501(A)(1).

causation linking any particular constituent to any alleged injury." See Opinion and Order dated April 11, 2019.

On appeal, our Michigan Court of Appeals in *Powell-Murphy*, *supra*, held this Court acted prematurely in granting summary disposition on the issue of causation. Consistent with Michigan case law regarding motions under MCR 2.116(C)(10) brought before the end of discovery,[3] Plaintiffs had "at least asserted that a dispute does exist and supported that allegation by some independent evidence" sufficient to avoid summary disposition at the pre-discovery stage. *Id. at* 255, citing *Bellows v Delaware McDonalds Corp*, 206 Mich App 555, 561 (1994) (quotation marks omitted). See also *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292 (2009) ("Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete.").

Adopting Chief Justice Markman's concurrence in *Lowery v Enbridge Energy Limited Partnership*, 500 Mich 1034 (2017), the *Powell-Murphy* court provided a framework for applying general and specific causation elements in a toxic tort case. Specific to the instant case, the *Powell-Murphy* Court provided,

> [O]n remand, the causation analysis (after sufficient discovery) should focus on whether plaintiffs can provide specific information regarding the level of methane gas and other toxins potentially present at the Metroplex facility to which plaintiffs (and other members of the prospective class) were exposed and whether exposure at that level could cause plaintiffs' symptoms.

[3] Defendants' first motion for summary disposition was brought on March 20, 2019, prior to the close of discovery on August 31, 2020.

Powell-Murphy, *supra at* 252-253. The *Powell-Murphy* court provided "plaintiffs acknowledge that they have not presented evidence of the level of the toxic emissions to which they were exposed in the Metroplex facility, and whether that level was sufficient to cause the alleged health effects. In our view, this omission would render plaintiffs' proffered evidence insufficient to survive a motion for summary disposition brought at the appropriate time." *Powell-Murphy*, *supra*, at 255.

Following remand, the parties engaged in discovery related to both class-certification and other matters. According to this Court's January 19, 2024, scheduling order, Discovery closed on November 1, 2024, and the deadline for filing a dispositive motion was December 4, 2024.[4] On December 3, 2024, Plaintiffs filed a motion for leave to file a second amended complaint (the "motion for leave"), and Defendants filed a second motion for summary disposition on December 4, 2024. This opinion and order addresses both motions.

Defendants now move for summary disposition based on MCR 2.116(C)(10) and MCR 2.116(C)(8). Defendants argue Plaintiffs "cannot meet their burden of proof on either general or specific causation" as they have failed to conduct any testing to prove the presence or level of any chemical at the Metroplex. Defendants cite Plaintiffs' proffered expert reports by Bert Schiller, industrial hygienist, Steven Campeau, M.D., and David Sole, chemist, and the experts' depositions. Specifically, Defendants argue Mr. Schiller, who opined it is likely Metroplex employees were exposed to vapors of volatile organic compounds ("VOCs"), including benzene and methylene chloride, admitted he was

[4] By stipulated order dated September 9, 2024, the parties extended the deadline for expert depositions, only, to November 30, 2024.

unaware of any air sampling data inside the building and had not done any testing in the Metroplex. Motion, p 13. Defendants aver Dr. Campeau, who opined Plaintiffs "suffered manifestation of volatile organic vapor injury such as headache, nausea, nose irritation, shortness of breath, or confusion during their employment at [the Metroplex]" as a result of exposure to VOCs, see Motion, Exhibits S-T, admitted in his deposition he had not taken any hair or bodily fluid samples, had not performed any radiographs or imaging studies of the Plaintiffs, and did not know the VOC levels to which Plaintiffs were exposed. Motion, p 15-18. Finally, Defendants aver Mr. Sole, who opined the six chemicals found to be present underground at the Metroplex prior to the construction of the building had potential negative health effects, denied he obtained or otherwise had evidence any Metroplex worker was actually exposed to the chemicals, or any evidence of the listed chemicals being present in the air at the Metroplex. Motion, p 18. Defendants request the Court grant summary disposition of Plaintiffs' negligence claim under MCR 2.116(C)(10) because Plaintiffs failed to provide evidence of the level of the toxic emissions to which they were exposed in the Metroplex facility or evidence regarding whether that level was sufficient to cause the alleged health effects,[5] arguing both of which the *Powell-Murphy* court opined would be required to survive a motion for summary disposition under (C)(10). See *Powell-Murphy*, *supra*.

In response, Plaintiffs argue they have proven both the general and specific elements of the causation analysis despite not having presented evidence of the specific

[5] *Powell-Murphy*, *supra* at 255, opining "plaintiffs acknowledge that they have not presented evidence of the level of the toxic emissions to which they were exposed in the Metroplex facility, and whether that level was sufficient to cause the alleged health effects. In our view, this omission would render plaintiffs' proffered evidence insufficient to survive a motion for summary disposition brought at the appropriate time."

levels of toxins present in the air of the Metroplex facility. Plaintiffs aver "it has been the law in Michigan for decades that a Plaintiff may establish causation by circumstantial evidence[,]" Response, p 20 (emphasis omitted). Plaintiffs argue the Court may do so here where "reasonable inferences can be drawn concerning the plaintiff's exposure level." *Id. at* 20-21, quoting *Powell-Murphy*, *supra* at 250. Plaintiffs also request this Court follow the persuasive authority of *In Re Flint Water Cases*, 579 F.Supp 3d 971 (ED Mich 2022), which held a material question of fact existed regarding but-for causation even where plaintiffs were unable to present direct evidence of the level of toxin to which the plaintiffs had been exposed. Response, p 21-22.

Regarding the presence of harmful chemicals at the Metroplex, Plaintiffs cite a report produced by Defendants' environmental testing contractor, Arcadis, (the "Arcadis report") and noted chemical presence in the groundwater and soil of the Metroplex property, including benzene, methylene chloride, dioxins, and PCBs. Plaintiffs' Response, Exhibit 5. Plaintiffs cite the affidavit and report of David Sole, chemist, who reviewed the Arcadis report and found several chemicals listed as present in the soil (including Benzene, Carbon Tetrachloride, Chloroform, Methylene Chloride, Toluene, and Hydrogen Sulfide) were cancer-causing or could cause serious harm to human health. See Response p 4, 23-24. Plaintiffs cite the deposition of Bert Schiller, industrial hygiene expert, who testified the listed chemicals, when present in soil, can vaporize, move vertically and horizontally, and move through cracks in concrete, and opined it is "likely" Metroplex employees were exposed to vapors of volatile organic solvents, including benzene and methylene chloride. Response, Exhibit 22B.

Plaintiffs do not present any evidence regarding the actual *quantity* or *identity* of chemicals to which Plaintiffs were allegedly exposed. In sum, Plaintiffs argue there is sufficient circumstantial evidence to conclude there were *some* toxic chemicals present at the Metroplex during the timeframe proffered in the first amended Complaint, but the distinct level is irrelevant for summary disposition purposes because, according to Plaintiffs, any amount can be harmful.[6]

Regarding harm, Plaintiffs cite to depositions where Metroplex class member employees describe symptoms they experienced while employed at the Metroplex, including but not limited to: headaches, nausea, blurred vision, shortness of breath, and anxiety. *Id. at* 5-9. They also report seeing cracks in the walls, floors, and parking lot of the Metroplex facility along with a "foul, rotten egg and sewerage type smell." *Id. at* 5. Plaintiffs cite surveys by Metroplex employees alleging 90.4% of respondents experienced some symptoms including "headaches, nausea, nose irritation, shortness of breath, skin irritation, and confusion."[7] *Id. at* 25. Plaintiffs also argue there were "approximately 200 calls for emergency ambulance services" from the Metroplex facility from 2015 to 2023. *Id.* Plaintiffs again cite Dr. Campeau's expert report, which found Plaintiffs displayed "physical and mental symptoms that were consistent with exposure to

[6] At oral argument, Plaintiffs' counsel argued ingesting "a single molecule" of a harmful toxin can be carcinogenic and harmful and therefore summary disposition should be denied as causation concerns have been satisfied.

[7] Four thousand (4,000) surveys were distributed to Metroplex employees, three hundred and fifty-eight (358) were returned completed, and three-hundred twenty-four (324) of those returned surveys revealed "positive physical and psychological symptoms that were consistent with symptoms in a peer reviewed study by Plaintiffs' expert medical physician, Dr. Steven Campeau." *Id.* It is unclear based on the evidence presented to the Court how many or what combination of symptoms were reported by each survey respondent.

VOCs: headaches, nausea, vomiting, impaired thinking, confusion and depression." *Id.* at 26.

However, Plaintiffs do not present evidence of the specific category or level of toxic emissions in the air of the Metroplex facility. Regarding general and specific causation, Plaintiffs argue "any exposure at all to [any] mutagen may increase the risk of cancer" and "there is no known minimum level that human exposure to a volatile organic (cancer causing) chemical can cause cancer." *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *Maiden v. Rozwood,* 461 Mich. 109, 120, 597 N.W.2d 817 (1999). In evaluating a (C)(10) motion, a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362 (1996); MCR 2.116(G)(5). If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Quinto*, *supra* at 362–363. Under MCR 2.116(G)(4), "[w]hen a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against [them]."

To establish a prima facie case of negligence, a plaintiff must show: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3)

the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Powell-Murphy*, *supra* at 243, citing *Hill v Sears, Roebuck & Co.*, 492 Mich. 651 (2012). "The causation element of a negligence claim encompasses both factual cause (cause in fact) and proximate, or legal, cause." *Id. at* 245, citing *Skinner v Square D Co.*, 445 Mich 153, 162-163 (1994). "A plaintiff must necessarily establish factual cause in order to establish proximate cause. While factual causation may be established with circumstantial evidence, the evidence must support reasonable inferences of causation, not mere speculation." *Id*, quotation marks and citations omitted. If relying on circumstantial evidence to prove factual causation, the evidence must be such that a jury may conclude, more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Id*. "The mere possibility of causation is insufficient to survive summary disposition." *Id*.

In a toxic tort case, plaintiffs must show both general causation (i.e. "whether a toxin is capable of causing the harm alleged") and specific causation (i.e. "that exposure to the toxin more likely than not caused the plaintiff's injury.") *Lowery*, *supra* at 914, see also *Powell-Murphy*, *supra* at 249. A necessary predicate to proving whether a toxin is capable of causing the harm alleged is identifying the asserted exposure level of the toxin. *Id. at* 249. "Knowledge of the exposure level is *crucial* to determining whether the toxin can cause the harm because many substances are harmful in certain quantities but are safer at lower levels." *Id. at* 250 (emphasis supplied).

When proving specific causation, it is a plaintiff's burden of "presenting evidence that excludes other reasonably relevant potential causes of a plaintiff's symptoms" and "putting forth evidence [they were], in fact, exposed to the toxin at issue including the

estimated amount and duration of exposure. *Id.*, citing *Lowery*, *supra* at 1045-1046 (quotation marks omitted). While circumstantial evidence may be used to establish specific causation, "the evidence must be such that reasonable inferences can be drawn concerning the plaintiff's exposure level." *Id.*

As an initial matter, the Court finds it inappropriate to dismiss Plaintiffs' claims under MCR 2.116(C)(8), as a contemplation of the pleadings reveals, in the Court's view, Plaintiff has stated a claim upon which relief can be granted. Therefore the motion is denied on these grounds.

As previously discussed, the *Powell-Murphy* court concluded Defendants in this case owed a duty of care to Plaintiffs. *Id. at* 245, see footnote 1. To the extent Defendants' instant motion for summary disposition argues it owes no duty, this Court disagrees and adopts the reasoning of *Powell-Murphy* court. See *Id. at* 243-245.[8] The Court does not find Defendants are entitled to relief on that basis.

Regarding Defendant's motion under MCR 2.116(C)(10), the Court finds Plaintiff has failed to present rebutting evidence setting forth specific facts showing that there is a genuine issue for trial. Without evidence of "specific information regarding the level of methane gas and other toxins potentially present at the Metroplex facility to which plaintiffs (and other members of the prospective class) were exposed" "it is not possible to determine whether the alleged exposure could have harmed plaintiffs and caused their alleged injuries." *Powell-Murphy*, *supra* at 252-253. Further, in toxic tort cases, "evidence of general causation should be tailored to the estimated amount and duration of exposure

[8] The decision of the Court of Appeals is the law of this case. See *Grievance Admin*, *supra*.

at issue to enable the fact-finder to reasonably conclude that exposure to the defendant's toxin in the amount and duration alleged is capable of causing the alleged injury." *Id.*, citing *Lowery*, *supra* at 1043 (2017).

While Plaintiffs have presented evidence regarding toxins in the ground and opinions of experts regarding Plaintiffs' alleged health conditions and the likelihood those conditions are linked to poisoning by methane, Plaintiff has not provided the Court with evidence of the *specific level* of methane or other suspected chemical in the "air in the areas where they were working in the Metroplex between August 2015 to the present, as well as the outdoor parking lot and rooftop areas." First Amended Complaint, paras 24-25. The Court notes Plaintiffs have not produced evidence showing the presence of any specific chemicals or amounts of chemicals in the air in or outside the facility at the time of the alleged injuries. Again, "[w]ithout such evidence, it is not possible to determine whether the alleged exposure could have harmed plaintiffs and caused their alleged injuries." *Powell-Murphy*, *supra* at 252. This Court does not find Plaintiffs' argument a "single molecule" of any number of chemicals which may possibly have been in the air of the metroplex to be sufficient for surviving summary disposition under MCR 2.116(C)(10), as that argument is, simply put, too speculative. For all these reasons, Defendants' motion for summary disposition is GRANTED.

The Court also notes Plaintiffs filed a motion for leave to file a second amended complaint and noticed the motion for a hearing concurrent with the instant motion for summary disposition.[9] Plaintiffs' motion for leave cites MCR 2.118(A)(2) and MCR

[9] The Court observed some confusion as to Plaintiffs' exhibits. Plaintiffs originally filed this motion on December 3, 2024. The motion was heard on December 18, 2024, before visiting Judge, the Honorable Wendy Potts (Ret). Plaintiffs' motion for leave was denied

2.118(C)(1), arguing leave to amend is appropriately granted freely and at any time, even after a judgment is made. Motion for Leave, p 7. Plaintiffs argue the amendment is necessary in order for Plaintiffs to "cure deficiencies" and "conform to the evidence gleaned from discovery." Motion for Leave, p 2.

Plaintiffs' proposed second amended complaint removes Count II – Nuisance, and adds Count II – Premises Liability. The proposed second amended complaint alleges Defendants had "a duty to notify and warn Plaintiffs that approximately seventy-six (76) hazardous chemicals were in the soil underneath and around the building and parking lot where they work, some of which were carcinogens." Proposed Second Amended Complaint, para 51. The proposed second amended complaint alleges "Defendants...knew, or should have known, that the hazardous chemicals identified herein and above were located in and on the land that it owned and these hazardous chemicals, including cancer causing chemicals, posed an unreasonable risk of harm to Plaintiffs[.]" *Id. at* para 54.

The proposed second amended complaint relies on the same or a substantially similar factual basis asserted in the currently operative Complaint, including the allegation the Plaintiffs suffered injury due to chemicals present on the Metroplex property. See

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without prejudice at that time. See Order dated December 19, 2024. Plaintiffs then "re-filed" the motion on December 23, 2024. Exhibit 1 to the re-filed motion consisted of a "cover sheet" which provided the proposed second amended Complaint was "filed separately due to volume." Defendants filed a timely response on January 3, 2025, noting the "missing" attachment. Plaintiffs filed a separate proposed complaint with the Court on January 6, 2025, two days before oral argument. The Court notes Plaintiffs' original motion, dated December 3, 2024, *did* include a copy of a proposed second amended complaint, which included Count III – Nuisance. However, Plaintiffs included a *different* proposed second amended complaint in its motion filed December 23, 2024, though it was incorrectly located after "Exhibit 3" and was substantially altered, in the Court's mind, as it removed the nuisance claim entirely.

generally, First Amended Complaint, paras 69-72, Proposed Second Amended Complaint, para 72. While the first amended Complaint alleges injuries based on the "release and discharge of extremely hazardous toxic chemicals," the proposed second amended complaint alleges injuries based on the chemicals present in the soil and groundwater. First Amended Complaint, para 71, compare Proposed Complaint, paras 49-70. The proposed second amended complaint also alleges Plaintiffs have suffered "fear and anxiety" at being placed at an increased risk of developing cancer and/or development of some other catastrophic disease, Proposed Second Amended Complaint, para 72, and alleges Defendants had a duty to warn Plaintiffs about the hazardous chemicals in the soil and groundwater.[10] Proposed Complaint, para 67.

The proposed complaint also adds a claim of premises liability based on the toxicity in the soil under and around the Metroplex facility, Defendants' duty to warn and protect Plaintiffs, Defendants' breach of that duty, and Plaintiffs' injuries, including a present manifestation of a physical injury, fear and anxiety of future disease, economic and financial loss, mental emotional injuries, fright, shock, embarrassment, pain and suffering, and loss and enjoyment of life, which were allegedly caused by Defendants breach. Proposed Complaint, paras 65, 72. The proposed complaint changes Plaintiffs' negligence claim by relying on the existence of "hazardous chemicals, including volatile organic compounds" deposited in the land and groundwater, and, generally, removing allegations directly related to methane gas and other toxic chemicals being released into

[10] The Court notes assertion of this duty is separate from the duty asserted in the currently operative Complaint.

the air. See Proposed Complaint, paras 63-70, compare First Amended Complaint, paras 70-72.

Defendants argue the amendment would be futile, untimely, and prejudicial to Defendants.[11] Defendants argue Plaintiffs' amendment would be futile because Plaintiffs have failed to provide evidence of general or specific causation, both of which are necessary elements of the proposed second amended complaint's premises liability and negligence claims. Defendants further argue Plaintiffs' dilatory motive in seeking leave to amend is evident based on the Plaintiffs' decision to file the motion on December 3, 2024, "six years after they originally amended their Complaint, three years after Defendants' experts first rendered opinions on Plaintiffs' claims, two years after this Court certified a class of Plaintiffs based on Plaintiffs' First Amended Complaint, thirty-two days after discovery closed, and...on the eve of Defendants' MSD filing deadline." Motion for Leave Response, p 6.

Defendants also aver Plaintiffs did not seek concurrence on the motion, contrary to local court rule, see LCR 2.119(B)(2), and Defendants had no advance notice of Plaintiffs' intention to file yet another amended complaint. *Id.* Finally, Defendants argue they will be severely prejudiced by the amendment, because Defendants have spent the last four years, since *Powell-Murphy*, *supra*, preparing the case based on the Court of

[11] Defendants filed a response on January 3, 2025, prior to the date Plaintiffs filed their proposed amended Complaint as "Exhibit 1," on January 6, 2025. Defendants argued they did not have a copy of the proposed amended complaint at the time of their response, but were afforded the opportunity to respond during oral argument on the motion on January 8, 2025. Defendants' written response also included arguments based on a "previously filed" proposed amended complaint.

Appeals' directives, which were based on Plaintiffs' first amended Complaint, filed on October 16, 2018. *Id.* For the reasons stated below, this Court agrees with Defendants.[12]

Leave to amend a pleading "shall be freely given when justice so requires," MCR 2.118(A)(2), and is "generally a matter of right rather than of grace." *In re Kostin Estate*, 278 Mich App 47, 52 (2008), citing *Ben P. Fyke & Sons v. Gunter Co.,* 390 Mich. 649, 659 (1973). Leave to amend should ordinarily only be denied for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments, or futility." *In re Kostin Estate*, *supra* at 52. "[I]n the absence of a showing of either bad faith or actual prejudice, mere delay does not warrant denial of a motion to amend." *Ben P. Fyke & Sons, Inc. v. Gunter Co.*, 390 Mich. 649, 663-664 (1973) (quotation marks and citation omitted). Intentional delay may constitute evidence of a dilatory motive. See *Davis v Chrysler Corp*, 151 Mich App 463, 474 (1986) ("[I]t is apparent from the record that the court meant merely that plaintiffs were late in filing their nuisance claim, not that plaintiffs possessed a dilatory motive, *i.e.,* intentionally delayed filing their claim.") A court may also consider whether the moving party provides a reasonable explanation for the delay. See *Mich Head & Spine Institute, PC v Mich Assigned Claims Plan*, 331 Mich App 262, 278 (2019) (finding no dilatory motive or bad faith where moving party provided a "reasonable explanation" for the delayed amendment). Finally, "[a]n amendment is futile

[12] Though the Court appreciates the notion that amendments can be brought to conform to the evidence, the Court also appreciates Defendants have spent four years defending against allegations at the trial and appellate levels of litigation. This is the second round of summary disposition with appellate proceedings and class certification litigation in between. There comes a practical consideration, in the Court's mind, where Defendants get to rely firmly on what they are responding to instead of years of litigation where the sands continuously shift underneath them while Plaintiff builds a case ongoing.

if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Yudashkin v. Holden*, 247 Mich App. 642, 651 (2001).

First, the Court finds Plaintiffs' second amended complaint in this case would be futile, as Plaintiffs' proposed amendment substantially restates the allegations of the original Complaint without curing concerns noted by the Court of Appeals. As noted, the *Powell-Murphy* court delineated a (binding) specific burden of proof for general and specific causation related to Plaintiffs' toxic tort claims. By amending the Complaint, Plaintiffs have simply presented an additional claim based on injuries allegedly caused by vaporized chemicals in the soil and groundwater. Plaintiffs would still be required to prove the elements of general and specific causation as to those injuries. Stated differently, the proposed complaint makes substantially similar factual allegations which would inevitably require the factfinder reach the same conclusion as that required by the original Complaint and the first amended Complaint, to wit: that toxic chemicals present in the ground and soil on the Metroplex property caused respiratory and other injuries to Plaintiffs. Again, "[a]n amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Yudashkin*, *supra* at 651. Here, the Court finds the proposed amended complaint substantially restates the allegations previously made, such that the requested amendment would be futile.

Following the *Powell-Murphy* decision in 2020, the parties engaged in extended discovery. By stipulated order dated March 10, 2021, the parties set the deadline for discovery related to class certification for December 7, 2021, and the deadline for remaining discovery for November 1, 2024. On September 23, 2024, a scheduling order issued setting a hearing on Defendants' motion for summary disposition on January 8,

2025, and setting a filing deadline of December 4, 2025. On December 3, 2025, Plaintiffs filed a motion titled "Plaintiffs' Motion for an Order to File a Second Amended Complaint Pursuant to MCR 2.118(A)(2) and MCR 2.118(C)(1) to Conform to the Evidence." A proposed complaint was attached as "Exhibit 1" and included a third count, for premises liability, based on Defendants failure to "use ordinary care to protect [Plaintiffs] from the hazardous chemicals" on the Metroplex property." December 3, 2024, Motion for Leave, Exhibit 1, p 19. Defendants filed a timely response on December 13, 2024.

Plaintiffs' December 3, 2025, motion for leave was denied without prejudice at the hearing on December 18, 2025, the Court noting Defendants' pending motion for summary disposition may be dispositive of some of Plaintiffs' claims. Plaintiffs then "re-filed" the motion on December 23, 2025, noticed it for a hearing on January 8, 2025, and attached *different* copy of the second amended complaint, which had again been significantly changed by comparison to the December 3, 2024, request by abandoning Count III – Nuisance. Plaintiffs "re-filed" motion provided no explanation for the delay in filing *either* version of the proposed second amended complaint(s), other than restating "discovery in the present case recently ended on November 1, 2025" and indicating the versions of the proposed complaint cured deficiencies and conformed to "evidence gleaned during discovery." Motion for Leave, p 2; see also, footnote 9. Again, the Court notes this occurred, and this request came, after discovery closed.[13]

[13] Discovery closing and a new complaint become operative either poses a disadvantage to Defendants without allowing further discovery or puts the case yet again in the procedural position of starting at square one on the new allegations. The Court notes again this case was filed in 2018.

Based on the foregoing, the Court does not find *conclusive* evidence of dilatory motive by Plaintiffs. However, it remains curious to the Court Plaintiffs made little effort to discover the specific levels of methane and other toxic chemicals to which Plaintiffs were exposed in the four-year period between the Court of Appeals' decision in *Powell-Murphy*, *supra*, and the date of Plaintiffs' motion for leave, especially after the Court of Appeals directed Plaintiffs to do so.[14] Notably, despite the fact the first amended complaint, on which both parties relied throughout discovery, focused heavily on the intrusion of methane gas and other chemicals as alleged causes of Plaintiffs' injuries, and despite the specific suggestion by the Court of Appeals that parties focus on "the level of methane gas and other toxins potentially present at the Metroplex facility to which Plaintiffs (and other members of the prospective class) were exposed and whether exposure at that level could cause plaintiffs' symptoms," Plaintiffs did not conduct testing of the air in or around the Metroplex facility or otherwise seek evidence of the specific levels of methane gas or other toxins potentially present during the time period at issue.

Instead, Plaintiffs relied on the assertion that Plaintiffs' symptoms indicated, potentially, some exposure to some chemicals possibly present at the Metroplex, based

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[14] As previously indicated, the *Powell-Murphy* Court provided specific guidance that future discovery should focus on "the level of methane gas and other toxins potentially present at the Metroplex facility to which plaintiffs (and other members of the prospective class) were exposed and whether exposure at that level could cause plaintiffs' symptoms." *Powell-Murphy*, *supra* at 252-253. The *Powell-Murphy* Court held evidence of general causation should be "tailored to the estimated amount and duration of exposure at issue to enable the fact-finder to reasonably conclude that exposure to the defendant's toxin in the amount and duration alleged is capable of causing the alleged injury[.]" *Id.* at 252. At oral argument and in the instant briefing, the Court was only presented with the assertion "a single molecule present" could cause the harm Plaintiffs allege, which the Court finds is not consistent with the directive of this case's appellate history to plead with specific scientific articulation causation in fact beyond "mere speculation." *Id.*

on chemicals found in the *soil and ground water*, and argued any amount of exposure *could* cause Plaintiffs' symptoms and *could* possibly be dangerous. As noted, the proposed second amended Complaint removes references to vapor intrusion, but relies on the presence of chemicals in the soil and groundwater and suggests likelihood the chemicals may percolate into the air. See e.g., Proposed Second Amended Complaint, para 3. Additionally, Plaintiffs waited until *one day* prior to Defendants' motion for summary disposition filing deadline to move for leave to file an amended Complaint, and significantly changed the Proposed Second Amended Complaint shortly before the hearing on the motion.

Again, while the Court does not find this is conclusive evidence of dilatory motive, and the Court casts no dispersions on counsel, the Court does note a substantial delay exists for which Plaintiffs have not provided an explanation. See *Yudashkin*, *supra*; *Mich Head & Spine Institute*, *PC, supra.*

For all these reasons, Plaintiffs motion for leave to file an amended complaint is respectfully DENIED. Defendants' motion for summary disposition is GRANTED.

This order resolves the last pending claim and closes this case. MCR 2.602(A)(3).[15]

IT IS SO ORDERED.

Dated: 4/24/2025

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge

[15] Finding this matter appropriately dismissed, the Court finds ruling on Plaintiffs' motion to strike Defendants' notice of non-party at fault moot.