

STATE OF MICHIGAN  
SUPREME COURT

**DENNIS G. SIMPSON**  
Plaintiff-Appellee,

Supreme Court no. 133274

v

Court of Appeals no. 264106

**BORBOLLA CONSTRUCTION & CONCRETE SUPPLY, INC**  
**CINCINNATI INSURANCE COMPANY**  
Defendants-Appellants,

Lower Court no. 04-000017

and

**FLUOR CONSTRUCTORS INTERNATIONAL, INC**  
**TRAVELERS CASUALTY & SURETY COMPANY**  
Defendants-Appellees,

and

**SILICOSIS, DUST DISEASE & LOGGING INDUSTRY**  
**COMPENSATION FUND**  
Defendant.

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133274  
Supel

**SUPPLEMENTAL BRIEF AMICUS CURIAE**  
**MICHIGAN HEALTH AND HOSPITAL ASSOCIATION**

PROOF OF SERVICE

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**FILED**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ..... ii

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT ..... iii

STATEMENT OF QUESTION PRESENTED ..... iv

STATEMENT OF FACTS ..... 1

ARGUMENT

**I     RAKESTRAW v GEN DYNAMICS LAND SYS, INC,**  
    **APPLIES WHERE THE PREEXISTING CONDITION IS WORK-**  
    **RELATED ..... 1**

RELIEF ..... 3

**INDEX OF AUTHORITIES**

**STATUTES**

MCL 418.301(1) ..... 2

**CASES**

*Carter v Gen Motors Corp,*  
361 Mich 577; 106 NW2d 105 (1960) ..... 2

*Karaczewski v Farbman/Stein & Co,*  
- Mich - ; - NW2d - (2007) ..... 2

*Mattison v Pontiac Osteopathic Hosp,*  
242 Mich App 664; 620 NW2d 313 (2000) ..... 2

*Rakestraw v Gen Dynamics Land Sys, Inc,*  
469 Mich 220; 666 NW2d 199 (2003) ..... 2

*Rowland v Washtenaw Co Rd Comm,*  
477 Mich 197; - NW2d - (2007) ..... 2

**STATEMENT OF THE BASIS FOR THE  
JURISDICTION OF THE COURT<sup>1</sup>**

The second sentence of MCL 418.861a(14) gives the Court jurisdiction to review *Simpson v Borbolla Constr & Concrete Supply Co*, 274 Mich App 40; - NW2d - (2007).

The application for leave to appeal was filed and the entry fee paid to the Court less than forty-two days after *Simpson* was entered.

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<sup>1</sup> This is the same description of the authority for the Court to hear this case that was given in the brief amicus curiae.

STATEMENT OF QUESTION PRESENTED<sup>2</sup>

I

**DOES *RAKESTRAW v GEN DYNAMICS LAND SYS, INC*, APPLY WHERE THE PREEXISTING CONDITION IS WORK-RELATED?**

Plaintiff-appellee Simpson answers "No."

Defendants-appellants Borbolla - Cincinnati Ins answer "Yes."

Defendants-appellees Fluor Constr - Travelers answer "Yes."

Amici curiae MSIA and MMA answer "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

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<sup>2</sup> The Court directed answering this particular question. *Simpson v Borbolla Constr & Concrete Supply, Inc*, - Mich - ; - NW2d - (2007).

## STATEMENT OF FACTS

The wrist that Dennis G. Simpson had fractured at work for Babcock and Wilcox Company proved bothersome while working for Borbolla Construction & Concrete Supply, Incorporated.<sup>3</sup>

Simpson then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation saying that he had sustained a personal injury at Borbolla that Borbolla denied. And the Bureau remitted the case to the Board of Magistrates for hearing and disposition.

The Board allowed Simpson compensation from Borbolla because "that was the last time he was subjected to the conditions which generated and exacerbated his wrist disease."<sup>4</sup> The Workers' Compensation Appellate Commission affirmed.<sup>5</sup> The Court of Appeals granted leave to appeal<sup>6</sup> and affirmed.<sup>7</sup> The Court ordered argument of the application for leave to appeal that Borbolla had filed to address the question of whether "the Court of Appeals erred in holding that *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003) does not apply where the preexisting condition is work related."<sup>8</sup>

## ARGUMENT

### I

#### ***RAKESTRAW v GEN DYNAMICS LAND SYS, INC, APPLIES WHERE THE PREEXISTING CONDITION IS WORK-RELATED.***

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<sup>3</sup> *Simpson v Borbolla Constr & Concrete Supply, Inc*, 274 Mich App 40, 41-42; - NW2d - (2007).

<sup>4</sup> *Simpson*, p 42-43.

<sup>5</sup> *Simpson*, p 43-44.

<sup>6</sup> *Simpson*, p 44.

<sup>7</sup> *Simpson*, p 46-48.

<sup>8</sup> *Simpson v Borbolla Constr & Concrete Supply, Inc*, - Mich - ; - NW2d - (2007).

*Rakestraw v Gen Dynamics Land Sys, Inc.*<sup>9</sup> overruled *Carter v Gen Motors Corp*<sup>10</sup> and held that "MCL 418.301(1) means that . . . where a claimant claims to have suffered an injury whose symptoms are consistent with a preexisting condition, he or she must establish the existence of a work-related injury that extends beyond the manifestation of symptoms of the underlying preexisting condition." *Rowland v Washtenaw Co Rd Comm.*<sup>11</sup>

This was entirely accurate.<sup>12</sup> And without reservation. When the statute — the first sentence of MCL 418.301(1)<sup>13</sup> — applies, *Rakestraw* applies — not *Carter* or its progeny. And when the statute does not apply, neither *Rakestraw* nor *Carter* can possibly apply.

The Court of Appeals was certainly wrong in failing to recognize that the fact that engages *Rakestraw* is a claim for compensation by the terms of the first sentence of § 301(1), not that an employee had or had no prior, work-related condition. The only way to distinguish *Rakestraw* is that a case is not subject to the first sentence of § 301(1). And that is not claimed here. It could not be claimed. The first sentence of § 301(1) applies to every claim for compensation.

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<sup>9</sup> 469 Mich 220; 666 NW2d 199 (2003).

<sup>10</sup> 361 Mich 577; 106 NW2d 105 (1960).

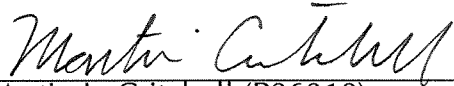
<sup>11</sup> 477 Mich 197, 236; - NW2d - (2007) (MARKMAN, J., concurring). This was recognized in *Karaczewski v Farbman/Stein & Co*, - Mich - ; - NW2d - (2007), slip op., 17.

<sup>12</sup> *Rakestraw* overruled *Carter* first by saying in plain English that "*Carter* should not be read to support the holding that mere symptom aggravation, without a change in pathology, constitutes a 'personal injury' under §301(1)" and then by flatly overruling all of its progeny that culminated in *Mattison v Pontiac Osteopathic Hosp*, 242 Mich App 664; 620 NW2d 313 (2000). *Rakestraw*, p 229, 230.

<sup>13</sup> "An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act."

**RELIEF**

Amicus curiae Michigan Health and Hospital Association asks the Court to reverse *Simpson v Borbolla Constr & Concrete Supply Co*, 274 Mich App 40; - NW2d - (2007).



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