**CASE NO. 01-07-01052-CV**

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**IN THE COURT OF APPEALS**
**FIRST SUPREME JUDICIAL DISTRICT**
**HOUSTON, TEXAS**

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**EVELYN LOCKETT, et al.,**
*Appellants*,

*v.*

**AMOCO CORPORATION, et al.,**
*Appellees*.

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**On Appeal from the 149th Judicial District Court of Brazoria County, Texas**
**Cause No. 44732**

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# BRIEF OF APPELLEE ROHM AND HAAS COMPANY

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**ORAL ARGUMENT REQUESTED**

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**Trial Judge:**

The Honorable Robert E. May, 149th Judicial District Court of Brazoria County, Texas.

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# BRIEF OF APPELLEE ROHM AND HAAS COMPANY

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## TO THE HONORABLE COURT OF APPEALS:

Appellee Rohm and Haas Company ("Rohm and Haas") submits this brief in response to the brief previously filed by Appellants Evelyn Lockett, Individually and as personal representative of the heirs and estate of Clifford Lockett, deceased and Ashley Jackson and Timothy Carl Jackson II, Individually and as Executors of the Estate of Georgetta Jackson, Deceased, and Timothy Jackson ("Appellants" or "the Jackson plaintiffs"),[1] as follows:

[1] Appellants Evelyn Lockett, Individually and as personal representative of the heirs and estate of Clifford Lockett, deceased ("the Lockett plaintiffs") contend that Clifford Lockett died as a result of occupational exposure to benzene and to other carcinogenic chemicals (CR 581-604).

## STATEMENT OF THE CASE

The Jackson plaintiffs' statement of the case is generally correct.

## RECORD CITATIONS

Rohm and Haas's references to the clerk's record will be designated as "CR" followed by the page number.

## ISSUES PRESENTED

Reply Point To Appellants' Issue 9:

The trial court properly granted partial summary judgment for Rohm and Haas on the basis that Ms. Jackson was Rohm and Haas's borrowed servant.

Reply Point To Appellants' Issue 10:

The trial court properly granted partial summary judgment for Rohm and Haas on the Jackson plaintiffs' gross negligence claim.

## STATEMENT OF FACTS

Georgetta Jackson ("Ms. Jackson") was an employee of Certified Technical Services ("CTS") (CR 609, 611). From the fall of 1992 to June 1994, she worked as a laboratory chemist at Rohm and Haas's premises in Deer Park, Texas ("the Deer Park facility") (CR 607-08). In that capacity, she handled and oversaw the distribution of various chemicals (CR 1527-29). Ms. Jackson's supervisor at Rohm and Haas was Sam Whitley (CR 607, 1256).

The chemicals that Ms. Jackson handled at the Deer Park facility were sealed off (CR 1528). Ms. Jackson always worked under a ventilated hood when she handled and

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The Lockett plaintiffs assert no claims against Rohm and Haas, however (*Id.*). For the sake of clarity, Rohm and Haas will use the terms "the Jackson plaintiffs" or "Appellants."

manipulated chemicals (CR 1527-29). Further, Ms. Jackson was never exposed to any chemical spill or leak at the Deer Park facility (CR 1528). Ms. Jackson acknowledged that she could not think anything else Rohm and Haas could have done to make her work environment safer (CR 1508).

While Ms. Jackson worked at the Deer Park facility, she received training from Rohm and Haas (CR 607-08). She received gloves from Rohm and Haas (CR 609, 1256). All of her dealings were with Rohm and Haas (CR 610). Further, Ms. Jackson took all of her work orders from Rohm and Haas (*Id.*). Ms. Jackson testified during her deposition that if she had any questions, she would talk to Rohm and Haas's employees (CR 609).

Ms. Jackson subsequently developed acute mylogeneous leukemia and passed away (CR 582-604). The Jackson plaintiffs alleged that her death resulted from occupational exposure to benzene (CR 581-604). They filed a lawsuit in the 149th Judicial District Court of Brazoria County, Texas, contending that Rohm and Haas, among others, is liable for products liability, premises liability, negligence, and gross negligence (*Id.*).

Rohm and Haas filed a traditional motion for partial summary judgment on the basis that Ms. Jackson was Rohm and Haas's borrowed servant when she worked at the Deer Park facility (CR 574-624). Rohm and Haas then filed a first amended original answer, subject to its motion to transfer venue (CR 625-28).[2] The Jackson plaintiffs then

[2] In that answer, Rohm and Haas asserted that Ms. Jackson was an employee of Rohm and Haas (CR 627). Rohm and Haas also alleged that Ms. Jackson's causes of action "are barred by the

responded to Rohm and Haas's motion for partial summary judgment (CR 630-1166). The trial court granted Rohm and Haas's traditional motion for partial summary judgment based on the borrowed servant doctrine (CR 1209-10).

Rohm and Haas then sought traditional summary judgment on the Jackson plaintiffs' claim for gross negligence (CR 1226-35). The Jackson plaintiffs responded to and Rohm and Haas filed a reply brief in support of that motion (CR 1476-1711, 1719-27). The trial court granted Rohm and Haas's traditional motion for summary judgment on the Jackson plaintiffs' gross negligence claim and dismissed the Jackson plaintiffs' claims against Rohm and Haas with prejudice (CR 1750-51). The Court later denied the Jackson plaintiffs' motions for reconsideration (CR 1211, 1213). The Jackson plaintiffs' motions for new trial were overruled as a matter of law.

Pharmacia, H.B. Zachry, and Union Carbide obtained summary judgment on Appellants' claims (CR 1728, 1738, 1744-45, 1750). All defendants subsequently filed a motion to sever, which the trial court granted (CR 1773-77). This appeal followed.

## SUMMARY OF THE ARGUMENT

Ms. Jackson worked at the Deer Park facility from the fall of 1992 to June 1994. She developed acute mylogeneous leukemia and passed away. The Jackson plaintiffs sued Rohm and Haas, among others, for premises liability, products liability, negligence, and gross negligence. Each of these claims, however, is unavailing under Texas law.

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exclusive remedy provision of the Workers' Compensation Act of the State of Texas . . . because Defendant was a subscriber to worker's compensation insurance at all relevant times" (CR 627-28).

The trial court correctly granted Rohm and Haas's traditional motions for partial summary judgment.

While Ms. Jackson worked at the Deer Park facility, she took all of her orders from Rohm and Haas, received training and equipment from Rohm and Haas, and dealt exclusively with Rohm and Haas. The summary judgment evidence shows that Rohm and Haas controlled the details and methodology of Ms. Jackson's work. Thus Ms. Jackson qualifies as Rohm and Haas's borrowed servant.

Rohm and Haas subscribed to workers' compensation insurance in Texas at all relevant times. Further, Rohm and Haas established that it was covered by workers' compensation insurance when Ms. Jackson worked at the Deer Park facility. The exclusive remedy provision established by section 408.001 of the Texas Labor Code therefore precludes all claims except gross negligence. The trial court properly granted Rohm and Haas's traditional motion for partial summary judgment based on the borrowed servant doctrine.

The trial court also properly granted Rohm and Haas's traditional motion for partial summary judgment on the Jackson plaintiffs' gross negligence claim. To prevail on this claim, the Jackson plaintiffs must show that Rohm and Haas committed an action that involved an extreme degree of risk and exhibited conscious indifference to the rights, safety, or welfare of Ms. Jackson. The Jackson plaintiffs cannot satisfy either requirement.

If anything, the transcript of Ms. Jackson's deposition demonstrates that Rohm and Haas provided Ms. Jackson with a safe working environment. Further, the evidence

on which the Jackson plaintiffs rely to establish gross negligence does not meet the exacting standard set forth in Chapter 41 of the Texas Civil Practice and Remedies Code ("Chapter 41"). Thus, the trial court correctly granted Rohm and Haas's traditional motion for partial summary judgment on the Jackson plaintiffs' gross negligence claim. This Court should affirm the judgment of the trial court.

## ARGUMENT

### Reply Point to Appellants' Issue 9

**The trial court properly granted partial summary judgment for Rohm and Haas on the basis that Ms. Jackson was Rohm and Haas's borrowed servant.**

#### A. The appropriate standard of review for a traditional summary judgment is *de novo*.

A movant for summary judgment must show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The Court must take all evidence favorable to the non-movant as true and indulge every reasonable inference in the non-movant's favor. *Id.* Summary judgment for a defendant is proper when the proof shows that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's causes of action. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990); *White v. Wah*, 789 S.W.2d 312, 315 (Tex. App.—Houston [1st Dist.] 1990, no writ). In other words, a defendant must disprove—as a matter of law—at least one of the essential elements of a plaintiff's cause of action. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

When a defendant moves for summary judgment and bases that motion on an affirmative defense, the defendant must prove all of the elements of that defense as a matter of law. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). Once the movant establishes a right to summary judgment, the non-movant must expressly present any reasons seeking to avoid the movant's entitlement and must support the reasons with summary judgment proof to establish a fact issue. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Servs. of Tex.*, 799 S.W.2d 403, 405 (Tex. App.—Houston [14th Dist.] 1990, no writ).

Where, as here, the Court's order granting summary judgment does not specify the grounds on which the Court granted summary judgment, the Court of Appeals should affirm the summary judgment if any theory advanced in the motion supports the granting of summary judgment. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

**B. Ms. Jackson was a borrowed servant of Rohm and Haas.**

Texas courts consistently recognize that the general employee of one company can become the borrowed servant of another company. *E.g.*, *Gibson v. Grocers Supply Co., Inc.*, 866 S.W.2d 757, 760 (Tex. App.—Houston [14th Dist.] 1993, no writ).[3] "Whether this has in fact occurred hinges on whether the other employer or its agents had the right to direct and control the employee with respect to the details of the particular work at issue." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 517 (Tex. 2002); *see also Marshall v.*

[3] Texas courts have used the terms borrowed servant and borrowed employee interchangeably. *Id.*

*Toys-R-Us Nytex, Inc.*, 825 S.W.2d 193, 195-96 (Tex. App.—Houston [14th Dist.] 1992, writ denied). The right to control is "necessarily determined from the facts and circumstances of the project." *Gibson*, 866 S.W.2d at 760 (citing *Marshall*, 825 S.W.2d at 196). The company who retains the right of control is exempt from common law liability. *E.g.*, *Esquivel v. Mapelli Meat Packing Co.*, 932 S.W.2d 612, 614 (Tex. App.—San Antonio 1996, writ denied).

Answering the question of whether an employee of one company is the borrowed employee of another company requires an examination of all relevant facts. *E.g.*, *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630-31 (Tex. 1992) (per curiam). "A contract between two employers providing that one shall have the right of control over certain employees is a factor to be considered, *but it is not controlling*." *Id.* at 630 (emphasis added). Where, as here, there is no written contract, Texas courts examine "the facts and circumstances of the project." *Gibson*, 866 S.W.2d at 760 (citation omitted). Texas courts also focus on "traditional indicia, such as the exercise of actual control over the details of the work . . . ." *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 477 (Tex. 2005).

An employee can have more than one employer under the Texas Workers' Compensation Act. *Wingfoot Enters. d/b/a Tandem Staffing v. Alvarado*, 111 S.W.3d 134, 135 (Tex. 2003). Thus, a company that carries workers' compensation insurance may rely on section 408.001 of the Texas Labor Code, which provides as follows:

> Recovery of workers' compensation benefits is the *exclusive remedy* of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

TEX. LAB. CODE ANN. § 408.001(a) (Vernon Supp. 2005) (emphasis added).

In order to become a subscriber under the Texas Workers' Compensation Act, a company must pay "the premiums on the workers' compensation insurance. The manner in which the insurance is paid is immaterial, *so long as there is a compensation policy in force*." *Gibson*, 866 S.W.2d at 759 (emphasis added) (citing *Marshall*, 825 S.W.2d at 197). The company must, however, establish that it was "covered by workers' compensation insurance coverage" when the worker was injured *Garza*, 161 S.W.3d at 474; *see also Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 123-24 (Tex. 2006).

The Texas Labor Code does not prohibit "the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence." TEX. LAB. CODE ANN. § 408.001(b). Thus, a defendant who establishes the right of control under the borrowed servant doctrine could only face liability for gross negligence. *Id.*; *cf. Gibson*, 866 S.W.2d at 760.

*Gibson* is quite instructive. In *Gibson*, the plaintiff "was hired by Link Personnel Services. He was assigned by Link to work at Grocers Supply." 866 S.W.2d at 759. Mr. Gibson sued Grocers Supply for negligence. *Id.* at 758-59. In response, Grocers Supply moved for summary judgment based on the borrowed servant doctrine. *Id.* at 759-60. The trial court granted summary judgment for Grocers Supply and Mr. Gibson subsequently appealed. The Fourteenth Court of Appeals affirmed the judgment of the trial court. *Id.* at 760.

The Court relied heavily on the transcript of Mr. Gibson's deposition in determining that he was a borrowed servant of Grocers Supply on the day of the accident. *Id*. Indeed, during his deposition, Mr. Gibson admitted that he reported to Grocers Supply, that Grocers Supply checked his time cards and directed him, and that Grocers Supply "set the hours that he worked." *Id*. Aggregating these facts, the Court held that "Grocers Supply had the right of control over the details and manner in which [Mr. Gibson] performed his job." *Id.*

**1. There is Overwhelming Evidence That Rohm and Haas Controlled the Details and Methodology of Ms. Jackson's Work.**

This case parallels *Gibson*. Ms. Jackson worked at Rohm and Haas's premises from the fall of 1992 to June 1994 (CR 607, 1526). Her supervisor at Rohm and Haas was Sam Whitley (CR 607-08). As the following exchange from Ms. Jackson's deposition illustrates, Rohm and Haas directed Ms. Jackson's activities and work:

> Q. (BY MS. HENRY) But, again, you took *all your work orders from Rohm & Haas*. Is that correct?
> A. *Yes, I did*.

(CR 610) (emphasis added). Indeed, Ms. Jackson made the following statements during her deposition:

> Q. You didn't report back -- if you had a question, you didn't call Certified Technical Services?
> A. Oh, no. I didn't work for Certified.
> Q. And so--
> A. *I worked for Rohm & Haas.*

(CR 609) (emphasis added). It would be difficult to find a more explicit admission than this one.

Ms. Jackson also acknowledged that she received job training from a supervisor at Rohm and Haas during the fall of 1992 (CR 608).[4] When she had a question or concern, she talked to Rohm and Haas's employees—not CTS's employees (CR 609). Moreover, Ms. Jackson unambiguously stated that all of her dealings were with Rohm and Haas (CR 609, 1526). Notably, Ms. Jackson received gloves that Rohm and Haas provided to her (CR 611). This evidence, taken together, shows that Rohm and Haas directed Ms. Jackson's activities (CR 606-11, 1526).[5]

Ms. Jackson would best know who controlled the details and methodology of her work. Her deposition testimony shows that she was a borrowed employee of Rohm and Haas when she worked at the Deer Park facility (CR 608-10). And because she was, the Jackson plaintiffs' remedy is under the Texas Workers' Compensation Act. *Gibson*, 866 S.W.2d at 760; *see also Denison v. Haeber Roofing Co.*, 767 S.W.2d 862, 864-66 (Tex. App.—Corpus Christi 1989, no writ); *Carr v. Carroll Co.*, 646 S.W.2d 561, 563 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).[6]

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[4] By contrast, Ms. Jackson did not receive any training from CTS (CR 607).

[5] Ms. Jackson did testify that when she worked at Rohm and Haas's premises, her employer was CTS (CR 1509). This testimony, however, only shows that CTS was her general employer. *Gibson*, 866 S.W.2d at 760. There is nothing that precludes Ms. Jackson from also being the borrowed employee of Rohm and Haas under the Texas Workers' Compensation Act. *Alvarado*, 111 S.W.3d at 135; *Gibson*, 866 S.W.2d at 760; *Denison*, 767 S.W.2d at 864-66.

[6] The Jackson plaintiffs proclaim that the question of whether an employee of one company is the borrowed servant of another is "a fact issue that is clearly within the purview of a jury . . . ." Appellants' Brief at 38. This assertion, however, is mistaken. Texas courts have routinely granted motions for summary judgment where, as here, there is no dispute regarding the application of the borrowed employee doctrine. *E.g.*, *Gibson*, 866 S.W.2d at 760; *Denison*, 767 S.W.2d at 864-66.

The summary judgment evidence proves that Rohm and Haas subscribed to workers' compensation insurance in Texas (CR 614-22). Rohm and Haas attached copies of the declaration pages to its workers' compensation insurance policies from 1991 to 1995, from 2002 to 2004, and from 2005 to 2006 (CR 616-22). The declaration pages specifically name Rohm and Haas as an insured (*Id.*).

The declaration pages also note that the policies apply to "the Workers Compensation Law" of the State of Texas (CR 617, 618). Consequently, the record shows that Rohm and Haas was covered by workers' compensation insurance coverage when Ms. Jackson worked at the Deer Park facility. *See Garza*, 161 S.W.3d at 474. Rohm and Haas therefore receives the protections of section 408.001 of the Texas Labor Code. *Gibson*, 866 S.W.2d at 759.

**2. The Jackson Plaintiffs' Objections to Rohm and Haas's Summary Judgment Evidence Are Unavailing.**

**a. The Jackson Plaintiffs Waived Their Objections to Rohm and Haas's Summary Judgment Evidence By Failing To Obtain A Ruling On Those Objections.**

The Jackson plaintiffs contend that they objected to Rohm and Haas's summary judgment evidence. The Jackson plaintiffs, however, failed to obtain a ruling on these objections. Further, there is nothing either explicit or implicit in the record that demonstrates that the trial court ruled on these objections. Accordingly, the Jackson plaintiffs waived these objections. TEX. R. APP. P. 33.1(a); *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 436 (Tex. App.—Houston [14th Dist.] 2000, pet denied.).

Texas courts hold that it "remains the responsibility of the party asserting the objections to obtain a ruling at or before the time the trial court rules on the motion for summary judgment." *Chapman Children's Trust*, 32 S.W.3d at 436 n.4 (citation omitted).[7] The Jackson plaintiffs did not meet this responsibility. Accordingly, the Jackson plaintiffs waived their objections. *Id*. Even assuming, *arguendo*, that the Jackson plaintiffs preserved their objections, Rohm and Haas's summary judgment evidence is entirely proper.

**b. Alternatively, Rohm and Haas's Summary Judgment Evidence Was Properly Before The Trial Court.**

Exhibit A to Rohm and Haas's motion for partial summary judgment is a copy of Plaintiffs' Fifth Amended Petition (CR 581-604). The Jackson plaintiffs objected to this exhibit (CR 632). A copy of a petition on file with the Court, however, is appropriate summary judgment evidence. TEX. R. CIV. P. 166a(c). Accordingly, this objection lacks merit.

Exhibit B to Rohm and Haas's motion for partial summary judgment is a copy of excerpts from the transcript of Ms. Jackson's deposition (CR 605-11). The Jackson plaintiffs contended that this exhibit was not properly authenticated (CR 632). The Court should not agonize over this objection.

[7] *See also Hogan v. J. Higgins Trucking Co.*, 197 S.W.3d 879, 883 (Tex. App.—Dallas 2006, no pet.); *Strunk v. Belt Line Rd. Realty Co.*, 225 S.W.3d 91, 99 (Tex. App.—El Paso 2005, pet. denied); *Allen v. Albin*, 97 S.W.3d 655, 663 (Tex. App.—Waco 2002, no pet.); *Eads v. Am. Bank, N.A.*, 843 S.W.2d 208, 211 (Tex. App.—Waco 1992, no writ).

Deposition transcripts used in the same proceeding are not hearsay. TEX. R. EVID. 801(e)(3); *In re J.A.M.*, 945 S.W.2d 320, 323 (Tex. App.—San Antonio 1997, no pet).[8] Moreover, a party need not authenticate excerpts from a deposition transcript in order to include them as summary judgment evidence. *E.g.*, *McConathy v. McConathy*, 869 S.W.2d 341, 341 (Tex. 1994) (per curiam). Because "authentication is not necessary and is not required," excerpts from the transcript of Ms. Jackson's deposition are proper summary judgment evidence. *Id*. at 342.

Exhibits C and D to Rohm and Haas's motion for partial summary judgment contain the business records affidavit of Marcia Paulsen, a Custodian of Records for Rohm and Haas (CR 612-22). The Jackson plaintiffs claimed that this affidavit constitutes improper summary judgment evidence (CR 632). Ms. Paulsen's affidavit, however, is plainly admissible.

Ms. Paulsen's affidavit establishes that she is a custodian of records for Rohm and Haas (CR 613-14). In that capacity, Ms. Paulsen reviews and compiles Rohm and Haas's business records (CR 614). She therefore has personal knowledge concerning the facts stated in her affidavit (CR 613).

Ms. Paulsen's affidavit proves that the records attached to her affidavit are kept by Rohm and Haas in the regular course of business (CR 614). She unequivocally states that the records attached to her affidavit were made "at or near the time recorded or reasonably soon thereafter" (*Id*.). Accordingly, Ms. Paulsen's affidavit qualifies as a

[8] If anything, the statements Ms. Jackson made during her deposition qualify as admissions by a party-opponent. *See* TEX. R. EVID. 801(e)(2)(A).

business records affidavit under Texas Rule of Evidence 803(6). *See* TEX. R. EVID. 803(6). Thus, this affidavit is legitimate summary judgment evidence. *See id*.

### 3. There Are No Admissions or Concessions That Preclude Summary Judgment for Rohm and Haas.

The Jackson plaintiffs claim that "Rohm and Haas admitted that no contract existed between CTS and Rohm and Haas that determined the right of control." Appellants' Brief at 38. To support this assertion, the Jackson plaintiffs point the Court to page 637 of the Clerk's Record. *Id*. Page 637 of the clerk's record, however, is part of the Jackson plaintiffs' response to Rohm and Haas's motion for summary judgment (CR 637). Consequently, this argument is unfounded.

The Jackson plaintiffs also contend that Rohm and Haas made inconsistent admissions in its traditional motion for summary judgment on the Jackson plaintiffs' gross negligence claim. Appellants' Brief at 39. The Jackson plaintiffs point to the following statements made in that motion:

- Ms. Jackson was employed as a laboratory chemist at the Deer Park facility (CR 1226);
- Ms. Jackson was diagnosed with acute mylogeneous leukemia in 2003 (*Id*.);
- Ms. Jackson passed away on September 3, 2005 (*Id*.);
- Ms. Jackson came into contact with "certain hazardous chemicals" when she worked as a laboratory chemist at the Deer Park facility (CR 1227).

The Jackson plaintiffs believe that these admissions raise factual issues that preclude summary judgment. Appellants' Brief at 39 (citing *Mendoza v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980)). This belief is mistaken.

None of the preceding statements pertain in any way to the central question regarding the borrowed employee doctrine: whether Rohm and Haas controlled the details and methodology of Ms. Jackson's work. Indeed, each of the foregoing statements concerns collateral issues. Further, the case on which the Jackson plaintiffs rely—*Mendoza*—does not apply here.

In *Mendoza*, the plaintiff sued Fidelity & Guaranty Insurance Underwriters, Inc. and sought an increase in his workers' compensation benefits. 606 S.W.2d at 692-93. The case proceeded to trial. *Id.* at 693. The jury found that Mendoza's physical condition had "substantially deteriorated after his back injury . . . ." *Id.* The Third Court of Appeals reversed and rendered a take-nothing judgment, "holding that Mendoza's testimony that he was totally unable to work prior to the award of November 30th, 1976 was a judicial admission that he was totally disabled at that time so that there could not have been a further change in his work capacity." *Id.* (footnote omitted). On appeal, the Texas Supreme Court reversed the judgment of the Third Court of Appeals. *Id.* at 695.

The Texas Supreme Court acknowledged that "testimonial declarations which are contrary to his position are quasi-admissions." *Id.* at 694. The Court, however, chose not to hold Mendoza to the statements that he made during his deposition. *Id.* at 695. The Court found that issues concerning a plaintiff's physical condition are factual questions

for the jury to answer. *Id*. Any lay testimony on these issues could easily be unreliable. *Id*. Thus, the Court held that Mendoza's deposition testimony "was not deliberate, clear and unequivocal, so as to preclude his recovery by a judicial admission." *Id.*

*Mendoza* differs markedly from this lawsuit. Appellants have failed to cite any inconsistent statements, admissions, or testimony concerning the borrowed employee doctrine. Further, *Mendoza* undercuts the Jackson plaintiffs' contentions because the Court in Mendoza held there was no judicial admission or quasi-admission. *Id*. Consequently, the Court should reject this argument.

**4. The Cases On Which the Jackson Plaintiffs Rely Are Quite Distinguishable.**

The Jackson plaintiffs point to *Ortiz v. Furr's Supermarkets*, 26 S.W.3d 646 (Tex. App.—El Paso 2000, pet. denied). In that case, the Eighth Court of Appeals held that there was "no evidence for the jury to conclude that Ortiz was a borrowed employee of Furr's on the occasion in question." *Id*. at 652. Notably, however, the Court in *Ortiz* had no occasion to answer the question now before this Court: whether a defendant is exempt from liability based on the borrowed servant doctrine. *Id*. Consequently, *Ortiz* is distinguishable.

The Jackson plaintiffs cite *Alaniz v. Galena Park Independent School District*, 833 S.W.2d 204 (Tex. App.—Houston [14th Dist.] 1992, no writ). *Alaniz*, however, does not resemble this case. In *Alaniz*, the plaintiff contended on appeal that he was the defendant's borrowed servant. *Id*. at 206-07. Thus, the plaintiff sought to impose liability on the defendant based on the borrowed servant doctrine. *Id*.

Here, however, a diametrically opposite situation exists. Rohm and Haas has demonstrated that Ms. Jackson was its borrowed servant because Rohm and Haas controlled the details and methodology of Ms. Jackson's work. Thus, Rohm and Haas seeks to evade liability based on this doctrine. Because *Alaniz* concerns a plaintiff's attempt to impose liability under the borrowed servant doctrine, *Alaniz* is inapplicable.

The Jackson plaintiffs rely on *Lara v. Lile*, 828 S.W.2d 536 (Tex. App.—Corpus Christi 1992, writ denied). In *Lara*, the plaintiffs sued for wrongful death in connection with an automobile accident. *Id*. at 537. The trial court granted summary judgment for the defendant. *Id*. On appeal, the plaintiffs contended that factual issues regarding whether the decedent was the defendant's borrowed servant precluded summary judgment. *Id*. at 540-41. Agreeing with the plaintiffs, the Thirteenth Court of Appeals reversed and remanded. *Id*.

As in *Alaniz*, the plaintiffs in *Lara* sought to impose liability on the defendant under the borrowed servant doctrine. *Id*. at 541 ("Lile had to establish as a matter of law that Hernandez was Heldenfels' borrowed servant when he rolled over Lara with his truck, killing him."). The Court, however, held that the defendant had not established its entitlement to summary judgment. *Id*. ("There is no undisputed evidence of the surrender of the right of control of the driver to the degree that he became Heldenfels' employee as a matter of law."). Overall, the plaintiffs in *Lara* utilized the borrowed servant doctrine in order to impose liability.

Here, however, a contrary situation exists. Rohm and Haas moved for summary judgment on the basis of the borrowed employee doctrine and asserted that as a matter of

law it was an employer of Ms. Jackson. Because this lawsuit does not involve the imposition of liability under the borrowed servant doctrine, *Lara* does not apply.

The Jackson plaintiffs refer to *Producers Chemical Co. v. T.H. McKay*, 366 S.W.2d 220 (Tex. 1963). In *McKay*, the Texas Supreme Court held that mere directions to an employee regarding how to shut down and hook up a compressor did not establish the right to control. *Id*. at 226. Thus, the Texas Supreme Court affirmed the trial court's refusal to submit that issue to the jury. *Id*.

Here, by contrast, the record shows that Rohm and Haas controlled the details of Ms. Jackson's work when she worked at the Deer Park facility. Ms. Jackson admitted during her deposition that she took all of her work orders from Rohm and Haas (CR 610). She also stated during her deposition that all of her dealing were with Rohm and Haas and that if she had a problem, she would go to Rohm and Haas, not CTS (CR 609). Consequently, *McKay* does not control.

The summary judgment evidence proves that Ms. Jackson was a borrowed employee of Rohm and Haas when she worked at the Deer Park facility (CR 605-11). In accordance with Texas law, Rohm and Haas receives the protection of the Texas Workers' Compensation Act. Thus, the Court should affirm the judgment of the trial court. *Gibson*, 866 S.W.2d at 760; *Denison*, 767 S.W.2d at 864-66.

## Reply Point to Appellants' Issue 10

**The trial court properly granted partial summary judgment for Rohm and Haas on the Jackson plaintiffs' gross negligence claim.**

### A. The appropriate standard of review for a traditional summary judgment is *de novo*.

A movant for summary judgment must show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). The Court must take all evidence favorable to the non-movant as true and indulge every reasonable inference in the non-movant's favor. *Id.* Summary judgment for a defendant is proper when the proof shows that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's causes of action. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990); *White v. Wah*, 789 S.W.2d 312, 315 (Tex. App.—Houston [1st Dist.] 1990, no writ). In other words, a defendant must disprove—as a matter of law—at least one of the essential elements of a plaintiff's cause of action. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

When a defendant moves for summary judgment and bases that motion on an affirmative defense, the defendant must prove all of the elements of that defense as a matter of law. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). Once the movant establishes a right to summary judgment, the non-movant must expressly present any reasons seeking to avoid the movant's entitlement and must support the reasons with summary judgment proof to establish a fact issue. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Servs. of Tex.*, 799 S.W.2d 403, 405 (Tex. App.—Houston [14th Dist.] 1990, no writ).

Where, as here, the Court's order granting summary judgment does not specify the grounds on which the Court granted summary judgment, the Court of Appeals should affirm the summary judgment if any theory advanced in the motion supports the granting

of summary judgment. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

### B. Rohm and Haas Conclusively Established That Summary Judgment Is Appropriate On The Jackson Plaintiffs' Gross Negligence Claim.

#### 1. To Prevail On Their Gross Negligence Claim, The Jackson Plaintiffs Must Establish that Rohm and Haas Committed An Action Involving An Extreme Degree Of Risk and Acted With Conscious Indifference To Ms. Jackson's Rights, Safety, or Welfare.

Chapter 41 governs claims for exemplary damages. A plaintiff may recover exemplary damages only if he or she "proves *by clear and convincing evidence* that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence." TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (Vernon Supp. 2005) (emphasis added). "Clear and convincing" means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2). Gross negligence, in turn, means an act

> (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

*Id.* § 41.001(11)(A)-(B). To prevail on a gross negligence claim, the plaintiff must establish both the "objective" and "subjective" components of section 41.001(11). *Id.*

Under Texas law, "evidence of simple negligence alone is not sufficient to establish gross negligence." *Diamond Shamrock Ref. Co., L.P. v. Hall*, 168 S.W.3d 164,

171-72 (Tex. 2005) (quotation & footnote omitted). Indeed, "[w]hat separates ordinary negligence from gross negligence is the defendant's state of mind . . . ." *Id*. at 173. The plaintiff must show that "the defendant knew about the peril, but his acts or omissions demonstrate that he did not care." *Id*. (footnote omitted); *see also Louisiana-Pacific Corp*. *v*. *Andrade*, 19 S.W.3d 245, 247 (Tex. 1999). Where, as here, there is no evidence of conscious indifference to the risk of harm or an action involving an extreme degree of risk, summary judgment is warranted. *Graham v*. *Adesa Tex*., *Inc*., 145 S.W.3d 769, 772-73 (Tex. App.—Dallas 2004, pet. denied); *see also Hall*, 168 S.W.3d at 171-72.

*Diamond Shamrock* is quite pertinent. In that case, "Charles Hall died of burns he suffered in a refinery explosion." 168 S.W.3d at 165. Mr. Hall's wife sued Diamond Shamrock Refining Co., L.P. ("Diamond Shamrock"), a subscriber under the Texas Workers' Compensation Act, for gross negligence. *Id*. The jury found that Diamond Shamrock "was grossly negligent and assessed exemplary damages of $42.5 million." *Id*. at 169. The defendants moved to limit and the trial court agreed to limit the amount of punitive damages to $200,000.00, in accordance with section 41.008 of the Texas Civil Practice and Remedies Code. *Id*. Both parties appealed. *Id.*

The Third Court of Appeals subsequently held, among other things, that evidence of gross negligence was legally and factually significant. *Id*. Both parties then filed petitions for review, which the Texas Supreme Court granted. *Id*. Choosing not to address the parties' other arguments, the Texas Supreme Court held "that there is no clear and convincing evidence of gross negligence." *Id*.

Writing for the Court, Justice Hecht observed that Diamond Shamrock's failure to make various modifications to its refinery "may have been negligent." *Id*. at 172. Crucially, however, the Court held that evidence of simple negligence alone "is not sufficient to establish gross negligence." *Id*. at 171-72 (quotation & footnote omitted).

The Court further observed that there was no evidence that Diamond Shamrock knew that the compressor in its refinery was "unsafe as designed and operated." *Id*. at 172. Similarly, there was no evidence that Diamond Shamrock intentionally did nothing to protect the decedent from the risk of explosion. *Id*. Accordingly, the Court reversed and rendered a take-nothing judgment. *Id*. at 173. *Diamond Shamrock* controls this lawsuit.

**2. There Is No Evidence That Rohm and Haas Either Committed An Action Involving An Extreme Degree Of Risk Or Acted With Conscious Indifference To Ms. Jackson's Rights, Safety, or Welfare.**

Here, there is no evidence that Rohm and Haas intentionally did nothing to protect Ms. Jackson from the dangers of hazardous chemicals. There is not a scintilla of evidence that Rohm and Haas acted with conscious indifference to Ms. Jackson's rights, safety, or welfare. Nor is there any evidence that Rohm and Haas committed an action that involved an extreme degree of risk concerning Ms. Jackson. Consequently, the trial court correctly entered summary judgment for Rohm and Haas on the Jackson plaintiffs' gross negligence claim. *Id*. at 173; *Graham*, 145 S.W.3d at 772-73.

**a. Rohm and Haas Provided Ms. Jackson With A Safe Working Environment.**

If anything, the record shows that Rohm and Haas acted with high regard for Ms. Jackson's safety. During her deposition, Ms. Jackson acknowledged that she always wore gloves when she worked at Rohm and Haas's premises (CR 1508, 1529). Further, Ms. Jackson stated that she always worked under a ventilated hood when she was working with chemicals (CR 1527, 1529). There was no chemical leak or spill to which Ms. Jackson was exposed (CR 1528). Nor could there have been—Ms. Jackson testified during her deposition that all of the chemicals were sealed off (*Id.*). Even when her counsel asked Ms. Jackson what she thought Rohm and Haas could have done to make her work environment safer, Ms. Jackson could not point to any additional procedures (CR 1508).[9]

**b. The Evidence On Which The Jackson Plaintiffs Rely Does Not Even Approach the Standard Required To Establish Gross Negligence Under Texas Law.**

According to the Jackson plaintiffs, the summary judgment evidence shows that "Rohm & Haas failed to warn the decedent of the seriousness of the chemicals she worked with . . . ." Appellants' Brief at 40. To support this assertion, the Jackson plaintiffs cite pages 1478-80 of the clerk's record and Tab T to their Appendix. *Id.* Pages 1478-80 of the clerk's record, however, is a part of the Jackson plaintiffs' response to Rohm and Haas's motion for partial summary judgment on the gross negligence claim

[9] The Jackson plaintiffs remark that Rohm and Haas attached "selected excerpts" from the transcript of Ms. Jackson's deposition." Appellants' Brief at 40. Yet this practice is entirely permissible under Texas Rule of Civil Procedure 166a(c). *See* TEX. R. CIV. P. 166a(c). Moreover, the Jackson plaintiffs attached the entire transcript of Ms. Jackson's deposition in their summary judgment response (CR 1495-1540). It is therefore difficult to ascertain the cause of the Jackson plaintiffs' vexation.

(CR 1478-80). The Jackson plaintiffs cannot establish a fact issue concerning gross negligence simply by citing the text of their summary judgment response.

Tab T to the Jackson plaintiffs' appendix is their response to Union Carbide's motion for summary judgment (CR 1324-48). Whatever the merits of this response, it has no bearing on whether Rohm and Haas is potentially liable for gross negligence. Thus, these citations are unpersuasive.

The Jackson plaintiffs contend that Rohm and Haas produces and processes benzene. Appellants' Brief at 40-41. This assertion, even if taken as true, has nothing to do with whether Rohm and Haas exhibited conscious indifference to Ms. Jackson's rights, safety, or welfare or committed actions that involve an extreme degree of risk. Accordingly, there is no evidence of gross negligence.

In response to Rohm and Haas's traditional motion for partial summary judgment, the Jackson plaintiffs attached a report from Frank H. Gardner, M.D. (CR 1546-49). This report, however, neither explicitly nor implicitly mentions Rohm and Haas (*Id.*). Nor does this report identify any alleged acts or omissions by Rohm and Haas (*Id.*). Thus, this report is irrelevant.

The Jackson plaintiffs also relied on various documents concerning toxicological reviews of butadiene, benzol, and benzene (CR 1550-1698). Even taking these documents at face value, there is no evidence regarding concerning conscious indifference to the risk of harm or an action involving an extreme degree of risk. Consequently, these documents do not concern the merits of the Jackson plaintiffs' gross negligence claim.

Finally, the Jackson plaintiffs relied upon a document entitled "Mortality Patterns Among Petroleum Refinery and Chemical Plant Workers" (CR 1699-1710). Like the Jackson plaintiffs' other summary judgment evidence, this report is irrelevant because it does not address Rohm and Haas's alleged conduct. This report neither creates a genuine issue of material fact nor holds any relevance to the Court's evaluation of the Jackson plaintiffs' gross negligence claim.

Under Texas law, the plaintiff faces a rather steep burden to prevail on a gross negligence claim. *Diamond Shamrock*, 168 S.W.3d at 173. "The plaintiff must show that the defendant knew about the peril, *but his acts or omissions demonstrate that he did not car*e." *Id.* (emphasis added) (quotation & footnote omitted). Viewing the record in the light most favorable to the Jackson plaintiffs, there is absolutely no evidence that Rohm and Haas knew of any risk to Ms. Jackson "and yet did not care." *Id.* Accordingly, the Court should affirm the judgment of the trial court. *Id.*; *Graham*, 145 S.W.3d at 772-73.

## PRAYER

For these reasons, Appellee Rohm and Haas Company respectfully prays that the trial court's judgment be in all things affirmed, with costs taxed against Appellants.

Respectfully submitted,

**HAYS, McCONN, RICE & PICKERING**

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## CERTIFICATE OF SERVICE

As required by Texas Rules of Appellate Procedure 6.3 and 9.5(b), (d), (e), I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded by certified mail, return receipt requested on this the_____day of May, 2008, to all counsel of record, as follows:

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