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SUPREME COURT

**COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2005-SC-000242-DGE**

DEBBIE ELLEN REHM, *et al.*

APPELLANTS

v.

NAVISTAR INTERNATIONAL CORP., *et al.*

APPELLEES

Court of Appeals No. 2002-CA-001339-MR
On Appeal from Jefferson Circuit Court
Division Ten, Action No. 01-CI-01344
Before the Honorable Thomas B. Wine


**INDIVIDUAL BRIEF OF
APPELLEE ROHM AND HAAS COMPANY**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Appellee Brief of Rohm and Haas Company was served upon Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601-3488; George M. Geoghegan III, Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Thomas B. Wine, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202; and all counsel of record per attached Service List via regular U.S. mail, postage prepaid, this 17th day of January, 2006. It is further certified that the record on appeal was not withdrawn by Appellee Rohm and Haas Company.



One of Counsel for Rohm and Haas
Company

STATEMENT CONCERNING ORAL ARGUMENT

The Court has already set oral argument in this case.

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INTRODUCTION

The facts relating to Rehm's work at Rohm and Haas do not present a close case. Appellee, Rohm and Haas Company ("Rohm and Haas"), contracted with James Rehm's employer, Rapid Installation, periodically to perform maintenance work on pipes, pumps, motors and blowers at Rohm and Haas' Jefferson County plant. The work Rehm did was the same type of work Rohm and Haas' full-time maintenance crew also did on a daily basis. It was part of Rohm and Haas' regular or recurrent maintenance of its Louisville facility.

Kentucky's Workers' Compensation law provides immunity to employers who use other companies to perform regular or recurrent activities like the work performed by Rehm. Accordingly, Rohm and Haas was Rehm's statutory employer at the time he performed the services that his estate now claims caused him injury, and Appellants' exclusive remedy against Rohm and Haas for Rehm's injury is limited to up-the-ladder liability for workers' compensation benefits pursuant to KRS Chapter 342. The decisions of the courts below were faithful to the statute and settled Kentucky law on up-the-ladder immunity. This Court should affirm.

COUNTERSTATEMENT OF THE CASE

The Rehms' brief blatantly misrepresents the record regarding the work Rehm did at Rohm and Haas. Rehm's work at Rohm and Haas did not, as Appellants contend, "involve[] major demolition and new installation" [Appellants' Brief, i]. Rehm never "demolish[ed], remove[d] and install[ed] sophisticated conveyor systems and equipment" at Rohm and Haas, as the Rehms allege [*Id.*]. To the contrary, Mr. Rehm himself testified that he did not install any conveyor systems at Rohm and Haas [Rehm Depo. Vol. I, 212].

Rather, it is undisputed in the record that: (1) Rehm removed and installed pumps, pipes, motors and blowers at Rohm and Haas, and that (2) Rohm and Haas periodically contracted with Rapid for these types of routine maintenance tasks that Rohm and Haas' own full-time maintenance crew also performed.¹ That type of work unquestionably falls within the meaning of "regular or recurrent" in KRS 342.610(2)(b). This Court should reject Appellants' efforts to mischaracterize what there is no dispute about in the record -- the type of work Rehm performed at Rohm and Haas.

Rohm and Haas is a chemical manufacturer with a plant in Louisville. As a part of its manufacturing process, Rohm and Haas uses pumps, blowers and motor-driven or turbine-driven appliances to move various substances, including water, air and chemicals, throughout the plant [McCormick Affidavit ¶5, TR 1783, Appendix A]. Rohm and Haas employs a full-time maintenance crew responsible for the maintenance of its Louisville manufacturing plant, including removing and installing the pumps and motor-driven or turbine-driven appliances that assist in moving these substances [*Id.* ¶2]. The full-time maintenance crew performs these tasks daily [*Id.*]. In addition, Rohm and Haas periodically contracts with millwright subcontractors to do this type of work when the full-time crew needs to be supplemented, or when Rohm and Haas corrects a manufacturing problem or increases the output of the plant [*Id.* ¶3]. Rohm and Haas periodically contracted with Rapid to perform millwright and iron work, including installing and removing pumps and motor-driven or turbine-driven appliances -- the same type of work regularly performed by Rohm and Haas' own maintenance crew [*Id.* ¶4].

¹ Rehm Depo. Vol. I, 196, 202-04; Vol. II, 189-90; McCormick Aff. ¶¶ 2-3, TR 1783.

Rehm testified that he worked at Rohm and Haas' chemical manufacturing plant "all through my career" as a millwright [Rehm Depo. Vol. I, 195]. Specifically, Rehm removed and installed pumps, pipes, motors and blowers at Rohm and Haas' Louisville plant while employed with Rapid [Rehm Depo. Vol. I, 196, 202-04; Vol. II, 189-90]. Rohm and Haas contracted with Rapid to perform work that that was part of the regular or recurrent maintenance of its facility [McCormick Aff., TR 1783-84]. Rohm and Haas is thus protected from tort liability by the Workers' Compensation Act, KRS 342. Because Rehm was Rohm and Haas' statutory employee during the time he performed maintenance work at the Rohm and Haas facility, the Rehms' sole remedy for his alleged injuries is through workers' compensation benefits. This Court should affirm the rulings of the courts below.

ARGUMENT

I. THE COURTS BELOW CORRECTLY DETERMINED THAT THE WORK REHM PERFORMED WAS A REGULAR OR RECURRENT PART OF ROHM AND HAAS' BUSINESS.

Under Kentucky's Workers Compensation Act, a "contractor" is, by operation of law, the statutory employer of the subcontractor's employees when they perform work that is a "regular or recurrent" part of the contractor's business. In such a case, a contractor has no tort liability for work-related injuries sustained by those statutory employees, but will be liable for workers compensation benefits if the subcontractor fails to pay. KRS 342.610(2). See Appellees' Joint Brief at Section I.

The undisputed facts of record make clear that the work Rehm did was a regular and recurrent part of Rohm and Haas' business. His work replacing pumps, blowers and other parts on Rohm and Haas' chemical process lines -- which he did "throughout his

career" -- is a textbook case of the type of activity that would qualify for "contractor" status under the plain meaning of KRS 342.690 and 342.610 and the well-established law of this Commonwealth.

The undisputed evidence of record shows that Rohm and Haas routinely contracted with outside vendors, such as Rapid, to perform millwright and iron work [McCormick Aff. ¶3, TR 1782; McCormick Depo. 25, 35-36]. Rohm and Haas used these subcontractors to: (1) supplement the daily tasks of the full-time maintenance crew, and (2) participate in engineering projects to increase output or correct manufacturing problems [McCormick Aff. ¶3, TR 1783; McCormick Depo. 53]. So common was this practice that Rohm and Haas hired outside contractors to remove and install pumps, blowers and motor- or turbine-driven appliances *more than 100 times between 1975 and 1982* [McCormick Depo. 60-61].

As part of the services Rapid performed for Rohm and Haas, Rehm testified that he installed and removed pumps, pump motor assemblies and blowers [Rehm Depo. Vol. I ,196, 202-04]. The pumps and motors Rehm worked on were on the "process lines" at Rohm and Haas -- the pipes that move the ingredients for Rohm and Haas' products throughout the plant [*Id.* 189]. Rehm admitted that he performed these tasks at Rohm and Haas "*all through my career*" [*Id.* 195]. As the Court of Appeals recognized, this testimony by Rehm "is in effect an admission that the work performed there [at Rohm and Haas] by Rapid Installation was regular and recurrent" [Court of Appeals Opinion at 56-57].

There is no dispute that a full-time Rohm and Haas maintenance crew did the same type of work on a daily basis [McCormick Aff. ¶2, TR 1783]. During the time

Rehm performed work at Rohm and Haas, Rohm and Haas employed *forty-five to sixty-five full-time maintenance mechanics* who were responsible for maintenance at the plant [McCormick Depo. 21-22]. Like Rehm, they removed and installed manufacturing equipment, including piping, pumps, motors, blowers and motor- or turbine-driven appliances [McCormick Aff. ¶2, TR 1783]. As the Court of Appeals correctly acknowledged, the fact that Rohm and Haas used its own full-time maintenance crew to do the same type of work Rehm did underscores the inevitable conclusion that the work was a “regular or recurrent” part of Rohm and Haas’ business within the meaning of the workers compensation law. *See* Court of Appeals Opinion at 57 (“Rohm and Haas employed its own full-time maintenance crew to do the same type work performed by Rapid Installation which, again indicates that the work performed by Rapid Installation was regular and recurrent.”).

Kentucky case law is clear that many activities at a manufacturing plant qualify as “part of the work of the trade, business, occupation or profession of the contractor,” even though those activities do not directly involve making the product. For example, cases construing this standard have determined that maintenance of a manufacturer’s physical plant, though not the manufacturer’s primary business objective, is nevertheless “part of the business of” a manufacturing company. *See Thompson v. The Budd Co.*, 199 F.3d 799, 804-805 (6th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000) (changing air conditioner filters is part of the business of manufacturer); *Sublett v. Tennessee Valley Authority*, 726 F. Supp. 1077 (W.D. Ky. 1989) (repairs on a damaged conveyor belt were regular or recurrent part of TVA’s business).

Other tasks that go beyond a business's primary objective also may qualify as regular or recurrent. In *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 462 (Ky. 1986), for example, this Court held that rough framing work is a regular or recurrent part of the work of the building construction business, even when the project is large and specialized. See also *Granus v. North American Phillips Lighting Corp.*, 821 F.2d 1253, 1255-1257 (6th Cir. 1987) (refurbishing glass melting tank at glass factory was regular or recurrent part of the glass factory's business, where evidence showed that glass factory furnaces are re-bricked periodically as a matter of routine maintenance); *Daniels v. Louisville Gas & Elec. Co.*, 993 S.W.2d 821, 824 (Ky. App. 1996) (emissions testing required by the EPA was a regular or recurring part of a coal, fire and electric plant's business); *Franke v. Ford Motor Co.*, 398 F. Supp. 2d 833 (W.D. Ky. 2005) (installing lift tables was regular or recurrent part of Ford's business, even though lift table in question was "unique").

The *Gesler* case cited by the Rehms bears no resemblance to the facts at issue here. *Gesler v. Ford Motor Co.*, 185 F. Supp. 2d 724 (W.D. Ky. 2001). The *Gesler* court denied summary judgment because the work there was a one-time project to demolish and remove an entire manufacturing system. Those facts stand in stark contrast to the routine maintenance and repair work that Rehm did at Rohm and Haas removing and installing pumps, gaskets, piping, pump motor assemblies and blowers [Rehm Depo. Vol. I. 196, 202-04]. The undisputed evidence of record shows that the work he performed was also done by Rohm and Haas personnel as part of their regular duties [McCormick Aff. ¶2, TR 1783]. The cases construing KRS 342.690 and 342.610 overwhelmingly support the decisions by the trial court and Court of Appeals that

Rehm's work was a regular or recurrent part of Rohm and Haas' business, making Rohm and Haas immune from the Rehms' claims against it.

The affidavit and deposition testimony of Dennis McCormick, former Maintenance Manager at Rohm and Haas, verify that the work Rehm did was a regular or recurrent part of Rohm and Haas' business. The Rehms criticize McCormick's affidavit because he used the term "periodic" instead of the legal conclusion "regular or recurrent" in describing Rapid's work at Rohm and Haas [Appellants' Brief at 18]. It is not necessary for an affidavit to utilize legal terminology to have the same operative legal effect. The McCormick affidavit explains that Rohm and Haas had a full-time maintenance crew, which performed the same type of work Rehm did on a daily basis, and that Rohm and Haas periodically subcontracted with Rapid for similar work [McCormick Aff. ¶¶1-3, TR 1783]. In his deposition, McCormick added that Rohm and Haas had 45-65 full-time maintenance mechanics and that Rohm and Haas used outside contractors for work like Rehm did more than 100 times between 1975 and 1982 [McCormick Depo. 21-22, 60-61]. McCormick's testimony leaves no question that the work Rehm and Rapid performed at Rohm and Haas was a regular or recurrent part of Rohm and Haas' business.

Furthermore, contrary to the Rehms' argument at p.18 of their brief, Rohm and Haas was right to instruct McCormick not to answer the question whether "replacing a whole conveyor line" would be regular or recurrent because Rehm himself testified that he never replaced any conveyors at Rohm and Haas [Rehm Depo. Vol. I, 212]. Therefore, the question was not relevant to the issue of whether the work Rehm did at Rohm and Haas was regular or recurrent. When the Rehms made a motion objecting to

the instruction not to answer this question, the trial court agreed that this and two similar hypothetical questions were not appropriate and denied the motion as to those questions [see TR 3016-3029, 3054-3059, Appx. C-E]. The Rehms have not appealed that ruling and have not even attempted to show how the trial court abused its discretion. They have failed to refute the solid and undisputed evidence in the record that the work Rehm did was a regular or recurrent part of Rohm and Haas' business.

II. THE AFFIDAVITS PRESENTED BY THE REHMS FAIL TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO ROHM AND HAAS.

The trial court and Court of Appeals correctly determined that the affidavits the Rehms submitted are irrelevant and do not create a genuine issue of material fact [Trial Ct. Op. 11-17, TR 5385-5391; Ct. App. Op. 17-25]. The testimony of the five Rapid employees reveal that these individuals either have no specific recollection of working at Rohm and Haas at all, or do not recall working there with Rehm:

- **Don Boaz** - Boaz testified that he has no recollection of working with Rehm at Rohm and Haas [Boaz Depo. 137]. Boaz testified that he assumed Rohm and Haas' employees performed the same type of work as Rapid [*Id.* 143-144]. He stated that Rapid "**normally ke[pt] a crew of men [at Rohm and Haas] all the time,**" and agreed that the type of jobs he performed at Rohm and Haas were done "**over and over again**" [*Id.* 138, 142]. He had no personal knowledge regarding what Rohm and Haas considered to be regular or recurrent maintenance work [*Id.* at 144].
- **Richard Sweazy** - Sweazy worked at Rohm and Haas a total of less than ten weeks between 1977 and 1985 [Sweazy Depo. 180]. Sweazy stated that although he recalled working at Rohm and Haas, it is possible he did not work with Rehm there [*Id.* 309]. He did not recall installing or removing pumps, pipes, motors or blowers at Rohm and Haas [*Id.* 180]. Sweazy clarified that his reference to "special jobs" in his affidavit meant **special as to Rapid Installation, not Rohm and Haas** [*Id.* 188-90, 309]. Sweazy confessed that he does not know what the maintenance department at Rohm and Haas did on a daily basis and admitted

that Rohm and Haas personnel could have been doing the same type of work that Rapid did [*Id.* 182-83].

- **Mark Draper, Richard Williams, Kenneth Sheets** - Mark Draper and Kenneth Sheets had no information about Rohm and Haas [Draper Depo. 97-100; Sheets Depo. 176-77]. The Appellants stipulated that Richard Williams would offer no evidence as to Rohm and Haas [Williams Depo. 151-52].

The Rehms' lay witnesses presented no evidence that contradicted the evidence showing that Rehm and Rapid's work at Rohm and Haas was regular and recurrent.

Nor did the Rehms' expert witnesses provide any testimony that would disturb the summary judgment granted to Rohm and Haas. Their accounting witness, James King, had no information about the type of work Rehm performed at Rohm and Haas, and he offered no opinion as to Rohm and Haas [King Depo. 65-66].² The distinction King makes between projects that are capitalized and those that are expensed has no relevance to the legal issue of what is regular or recurrent [*See* Appellees' Joint Brief at Section IIC(2)]. As the trial court held, "whether a business engaged in a 'capital expenditure' has no bearing on whether the work to perform the capital expenditure was the type of work that was a regular or recurrent part of the business" [Trial Ct. Op. at 16, TR 5390]. The Rehms' other expert witness, Dr. Alexander, had no knowledge about Rohm and Haas, and even admitted that maintaining the pumps and pipes at Rohm and Haas "would be a regular part of what the company [Rohm and Haas] would do" [Alexander Depo. 160, 165].

² Excerpts from the depositions of James King and Suraj Alexander in which they discuss Rohm and Haas appear as Appendices F and G respectively.

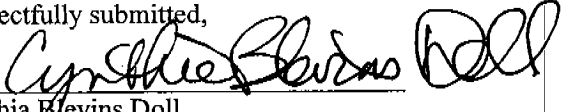
III. ROHM AND HAAS MAINTAINED WORKERS' COMPENSATION COVERAGE DURING THE RELEVANT TIME.

It is undisputed that Rohm and Haas maintained Kentucky workers compensation coverage for the time period at issue in this case with Liberty Mutual Insurance Company [Certification Ched Jennings, TR 4874, Appendix H]. There is no requirement, statutory or otherwise, that Rohm and Haas secure coverage that specifies that it applies to subcontractors on the property. That coverage arises by operation of law. See Appellees' Joint Brief at Section III.

CONCLUSION

Rohm and Haas respectfully asks this Court to affirm the determination of the trial court and Court of Appeals. The Workers' Compensation Act is Kentucky's comprehensive remedy for workplace injuries. It establishes the sole method of recovery by an employee against his or her employer for work-related injuries. An "employer" includes a "contractor" like Rohm and Haas. Rohm and Haas contracted with Rapid Installation to perform tasks that were a regular or recurrent part of its business, entitling it to immunity under the plain language of the Act. Accordingly, Appellants' sole method of recovery against Rohm and Haas for Rehm's alleged injuries is under Kentucky's workers' compensation law, not in tort. This Court should affirm the decision that the Rehms' tort claim against Rohm and Haas is barred under Kentucky's workers' compensation law and uphold the summary judgment.

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