

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

CONTROL NUMBER:
 080585
(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

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ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:
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Month APRIL Term, 2005
 No. 002860

Estate of Barry C. Lange, by the Administratrix,
 LINDA LANGE, and LINDA LANGE, Individually

Name of Filing Party:
ROHM & HAAS CO.
 (Check one) Plaintiff Defendant
 (Check one) Movant Respondent

vs.
ROHM & HAAS CO.

INDICATE NATURE OF DOCUMENT FILED:
 Petition (Attach Rule to Show Cause) Motion
 Answer to Petition Response to Motion

Has another petition/motion been decided in this case? Yes No
 Is another petition/motion pending? Yes No
 If the answer to either question is yes, you must identify the judge(s):

TYPE OF PETITION/MOTION (see list on reverse side) <u>Motion for Pre-Complaint Discovery</u>	PETITION/MOTION CODE (see list on reverse side) <u>MTPCD</u>
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I. CASE PROGRAM
 Is this case in the (answer all questions):
A. COMMERCE PROGRAM
 Name of Judicial Team Leader: _____
 Applicable Petition/Motion Deadline: _____
 Has deadline been previously extended by the Court?
 Yes No
B. DAY FORWARD/MAJOR JURY PROGRAM — Year _____
 Name of Judicial Team Leader: _____
 Applicable Petition/Motion Deadline: _____
 Has deadline been previously extended by the Court?
 Yes No
C. NON JURY PROGRAM
 Date Listed: _____
D. ARBITRATION PROGRAM
 Arbitration Date: _____
E. ARBITRATION APPEAL PROGRAM
 Date Listed: _____
F. OTHER PROGRAM: _____
 Date Listed: _____

II. PARTIES
 (Name, address and **telephone number** of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)

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By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

J. A. L. Battle August 29, 2005 Jennifer A. L. Battle (I.D.No. 86765
 (Attorney Signature/Unrepresented Party) (Date) (Print Name) (Attorney I.D. No.)

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date.
 No extension of the Answer/Response Date will be granted even if the parties so stipulate.

SCHNADER HARRISON SEGAL & LEWIS LLP

By: Dennis R. Suplee (I.D. No. 03336)
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Estate of Barry C. Lange, by the	:	
Administratrix, LINDA LANGE, and	:	COURT OF COMMON PLEAS
LINDA LANGE, Individually	:	OF PHILADELPHIA COUNTY
	:	
Plaintiffs,	:	
	:	
v.	:	APRIL TERM, 2005
	:	NO. 002860
ROHM & HAAS CO.	:	
	:	
Defendant.	:	MOTION CONTROL NO. 080585
	:	

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRE-COMPLAINT DISCOVERY**

Defendant Rohm and Haas Company ("Rohm and Haas"), by and through its counsel, hereby opposes the Motion for Pre-Complaint Discovery filed by Plaintiff Linda Lange and, in support thereof, states as follows:

1. Denied as stated. No complaint has yet been filed in this matter.
2. Admitted in part, denied in part. It is admitted that Dr. Lange worked for Rohm and Haas at its Spring House facility and that he contracted brain cancer. To the extent plaintiff

suggests a causal link between the two, the allegations in Paragraph 2 are denied. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Leave to Conduct Pre-Complaint Discovery ("Defendant's Memorandum").

3. Rohm and Haas is without information sufficient to form a belief as to what plaintiff seeks in this case. It is denied that Rohm and Haas was negligent, careless, reckless or fraudulent. *See* Defendant's Memorandum.

4. Admitted.

5. Admitted in part, denied in part. It is admitted that plaintiff's motion seeks pre-complaint discovery. All other allegations in Paragraph 5 are denied. *See* Defendant's Memorandum.

6. Denied. *See* Defendant's Memorandum.

7. Admitted.

8. Admitted upon information and belief.

9. Admitted.

10. Admitted.

11. Admitted upon information and belief.

12. Admitted upon information and belief.

13. Admitted.

14. Admitted.

15. Admitted upon information and belief.

16. Admitted upon information and belief.

17. It is admitted that Dr. Lange died on April 29, 2003. Rohm and Haas is without information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 17.

18. Admitted.

19. Admitted.

20. Admitted.

21. Denied as stated. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 21 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

22. It is admitted that Mr. Haag wrote to Dr. Lewis in 1996 about the BP Amoco study. Mr. Haag's letter is a document which speaks for itself. All remaining allegations in Paragraph 22 are denied as stated. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 22 are irrelevant to the issue of Plaintiff's entitlement to pre-complaint discovery.

23. Denied as stated. *See* Paragraph 22.

24. Admitted. Rohm and Haas notes, however, that Mr. Haag is not an epidemiologist.

25. Dr. Lewis's letter is a document which speaks for itself.

26. Dr. Lewis's letter is a document which speaks for itself.

27. Dr. Lewis's letter is a document which speaks for itself.

28. Admitted.

29. Admitted in part, denied in part. It is admitted that Rohm and Haas looked into the brain cancer rate at its Spring House facility in 1996. To the extent plaintiff suggests there was something to report as a result of that inquiry, or that Rohm and Haas had any obligation to make such a report, the allegations in Paragraph 29 are denied. *See* Defendant's Memorandum.

30. Admitted.

31. Denied as stated. *See* Defendant's Memorandum.

32. The May 2002 letter is a document which speaks for itself.

33. The May 2002 letter is a document which speaks for itself.

34. The May 2002 letter is a document which speaks for itself.

35. Admitted.

36. Admitted.

37. The October 2003 letter is a document which speaks for itself.

38. Rohm and Haas is without information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 38.

39. Admitted.

40. Denied as stated. Drs. Greenley and Carpenter went to Texas to give Dr. Hsu and his wife an update on the ongoing study. During the meeting of about two hours, the Hsus asked about coverage for Dr. Hsu's medical treatment in Texas. Dr. Greenley said that, while he did not know the details of Dr. Hsu's insurance plan, coverage can be affected if one goes to a doctor outside of one's home area for treatment. Dr. Greenley also explained that studies were still in progress and, at that point, there was no indication that his illness was caused by anything in the workplace. By way of further response, Rohm and Haas states that the allegations in Paragraph 40 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

41. Denied as stated. *See* Paragraph 40. By way of further response, Rohm and Haas states that the allegations in Paragraph 41 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

42. Admitted.

43. The January 8, 2004 letter is a document which speaks for itself.

44. The January 8, 2004 letter is a document which speaks for itself.

45. Admitted.

46. Denied. *See* Paragraph 40, *supra*; Plaintiff's Motion, ¶¶ 39-41 (describing meeting among Dr. Hsu, Dr. Carpenter and Dr. Greenley). By way of further response, Rohm and Haas states that the allegations in Paragraph 46 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

47. Admitted.

48. Denied as stated. The January 8, 2004 letter is a document which speaks for itself.

49. Denied as stated. The January 8, 2004 letter is a document which speaks for itself.

50. Denied. *See* Defendant's Memorandum.

51. Denied as stated. It is admitted that Mr. Haag wrote to Dr. Carpenter on January 20, 2004. The characterization of the contents of the letter is denied.

52. Denied as stated. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 52 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

53. Denied. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 53 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

54. Denied as stated. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 54 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

55. Denied as stated. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 55 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

56. Denied as stated. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 56 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

57. The June 2, 2004 letter is a document which speaks for itself.

58. Admitted. The study is now being prepared for publication.

59. Denied. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 59 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

60. Denied. *See* Defendant's Memorandum. By way of further response, Rohm and Haas states that the allegations in Paragraph 60 are irrelevant to the issue of plaintiff's entitlement to pre-complaint discovery.

61. Denied as stated. *See* Defendant's Memorandum.

62. Denied as stated. *See* Defendant's Memorandum.

63. Rohm and Haas is without information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 63. *See* Defendant's Memorandum.

64. Rohm and Haas is without information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 64. *See* Defendant's Memorandum.

65. Admitted.

66. Denied. *See* Defendant's Memorandum.

67. Denied as a conclusion of law.

68. Denied as a conclusion of law.

69. Paragraph 69 states a legal proposition to which no response is required.

70. It is denied that discovery would aid plaintiff in preparing a Complaint. *See* Defendant's Memorandum. Rohm and Haas is without information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 70.

71. Rohm and Haas is without information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 71.

WHEREFORE, defendant Rohm and Haas Company requests that Plaintiff's Motion for Leave to Conduct Pre-Complaint Discovery be denied in its entirety.



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Dated: August 29, 2005

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Estate of Barry C. Lange, by the
Administratrix, LINDA LANGE, and
LINDA LANGE, Individually

Plaintiffs,

v.

ROHM & HAAS CO.

Defendant.

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

APRIL TERM, 2005
NO. 002860

MOTION CONTROL NO. 080585

**DEFENDANT'S MEMORANDUM
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO CONDUCT
PRE-COMPLAINT DISCOVERY**

INTRODUCTION

Under the controlling authority of *McNeil v. Jordan*, 814 A.2d 234 (Pa. Super. Ct. 2002) (attached hereto as Exhibit A), plaintiffs' motion for pre-complaint discovery should be denied.

* * * *

Plaintiffs commenced this action four months ago in tandem with another individual action, *Hsu v. Rohm and Haas Co.*, No. 2861 (April Term 2005), by writ of summons only. They seek pre-complaint discovery from defendant Rohm and Haas Company (in the form of documents and depositions) on the ground that such discovery is necessary so plaintiffs in both cases can plead their claims of fraud and misrepresentation with particularity. See Plaintiffs' Motion for Pre-Complaint Discovery ("Plaintiffs' Motion"), ¶¶ 65-68.¹

Plaintiffs' claims are barred by the Workmen's Compensation and Occupational Disease Acts, except for a narrow exception permitting claims of "fraudulent misrepresentation." *Martin v. Lancaster Battery Co.*, 530 Pa. 11, 606 A.2d 444 (1992).

Plaintiffs are entitled to pre-complaint discovery only upon a showing that "one, the plaintiff has set forth a *prima facie* case, and, two, the plaintiff cannot prepare and file a complaint otherwise." *McNeil*, 814 A.2d at 246. Where such discovery "would amount to authorizing the proverbial 'fishing expedition,'" it will not be allowed. *Id.* Though *McNeil* is the leading case on pre-complaint discovery, plaintiffs do not even cite it, much less attempt to show that they meet its criteria.

Here, plaintiffs have not come close to stating a *prima facie* case of fraudulent misrepresentation. The only statements they allege Rohm and Haas made were that:

- Rohm and Haas was unable, despite conducting an in-depth epidemiological study, to identify any possible work-related association between chemical exposure and brain cancer at its Spring House facility, and

¹ Since both sets of plaintiffs make the same contentions in support of their respective motions, Rohm and Haas's response as to each is identical except for factual details relating to the individual plaintiffs.

- based on the available information, Rohm and Haas believes that the Spring House facility is a safe place to work.

See Plaintiffs' Motion, ¶¶ 47-48, 64. Plaintiffs do not – and cannot – allege that either statement was false.

Although plaintiffs also take issue with the details of the methodology used by Rohm and Haas in conducting its epidemiological study, *see* Plaintiffs' Motion, ¶¶ 51-56, it is undisputed that Rohm and Haas followed the generally accepted, standard epidemiological protocol in conducting its study, which was independently reviewed by three experts in public health and epidemiology. We have attached the declaration of Dr. Carpenter to show that these unverified lay speculations do not in any way suggest a fraudulent misrepresentation. *See* Declaration of Arvind V. Carpenter ("Carpenter Decl."), ¶¶ 25-26 (attached hereto as Exhibit B). Plaintiffs' criticisms and questions about the study, set forth in their unverified Motion, come from a lay person's perspective, with no support from an epidemiologist. Such criticisms, regardless of their merits, do not come close to making out a *prima facie* case of fraudulent misrepresentation.

Since plaintiffs do not and cannot allege that any fraudulent statement was made by Rohm and Haas with the intent of misleading them, they cannot allege a *prima facie* case of fraudulent misrepresentation, and so cannot satisfy that prerequisite for pre-complaint discovery. The discovery they seek amounts to nothing more than a "fishing expedition," to use the *McNeil* Court's term, and should not be permitted.

ISSUE PRESENTED

Should plaintiffs be permitted to discover unspecified Rohm and Haas documents and depose three Rohm and Haas witnesses when plaintiffs have not stated a *prima facie* case for fraudulent misrepresentation?

Defendant submits that pre-complaint discovery is not authorized under these circumstances. *McNeil, supra*, 814 A.2d at 246.

FACTUAL BACKGROUND

Founded in 1909, Rohm and Haas is a specialty chemicals company headquartered in Philadelphia. Since 1963, Rohm and Haas has operated a research laboratory in Spring House, Montgomery County, Pennsylvania. Plaintiff's decedent, Dr. Barry C. Lange, worked as a research chemist for Rohm and Haas beginning in approximately 1980, spending most of his time working at the Spring House facility. In August 2001, Dr. Lange was diagnosed with brain cancer.

In late 2001, as a result of recent developments in the scientific literature and the diagnosis of Dr. Lange with brain cancer, Rohm and Haas undertook to make a thorough review of causes of deaths among its past and present Spring House employees. Carpenter Decl., ¶¶ 8-10. The data showed 9 cases of brain cancer (in addition to Dr. Lange) among the approximately 6,000 people who had ever worked at Spring House, a number that appeared to be higher than one would expect when compared to the rate of brain cancer in the general United States population. *Id.*, ¶¶ 12-14, 18.

Rohm and Haas therefore publicly announced that it had decided to investigate the brain cancer cases further by conducting a detailed epidemiological study to determine whether

there was any link between exposure to chemicals at the Spring House facility and the apparent excess number of brain cancer cases among past and present Rohm and Haas employees. *Id.*, ¶¶ 23-24.

The study undertaken by Rohm and Haas, a “case-control study,” focused on attempting to identify expeditiously any association between chemical exposure at the Spring House facility and brain cancers or benign brain tumors. *Id.*, ¶ 23. Rohm and Haas decided to conduct this case-control study even before determining whether brain cancer rates at Spring House were actually elevated in comparison to the general population (which would ordinarily be the first step in evaluating incidences of a disease) because it wanted to identify and correct right away any hazardous condition that might be affecting its employees, rather than waiting several years for completion of a detailed study analyzing whether, given the specific characteristics of the Spring House employees, the brain cancer rate was in fact high. *Id.*, ¶¶ 21-23.

The case-control study, led by Dr. Arvind Carpenter, Director of Epidemiology and Health, Safety and Reporting at Rohm and Haas, was designed and conducted in accordance with generally accepted standards for such epidemiological studies. *Id.*, ¶¶ 25-32 (describing details of how the study was conducted) and Exhibit 3 thereto. The study’s methodology and results were reviewed by three independent epidemiology and industrial hygiene experts from the American Cancer Society, Johns Hopkins University School of Public Health, and Emory University School of Public Health. *Id.* The case-control study was conducted over an 18-month period by a team led by Dr. Carpenter that included an industrial hygienist, a toxicologist, two medical doctors, a statistician, a computer database manager, and several chemists, and considered over 100 potential

risk factors. *Id.* ¶ 27.² To identify as many cases of brain cancer among Spring House employees as possible, Rohm and Haas searched both national epidemiological databases, such as the National Death Registry, as well as internal medical databases, such as Rohm and Haas's Corporate Cancer Registry and personnel records, and asked past and present Spring House employees to help by reporting any cases of which they knew. *Id.*, ¶ 31. Taking a conservative approach, Rohm and Haas erred on the side of inclusiveness in deciding which cases to consider in the study, even including one employee who had worked at Spring House for only a month. *Id.*, ¶ 32.

In January 2004, Rohm and Haas announced the results of its epidemiological case-control study. In a series of meetings with current and former Spring House employees, including a separate presentation for the families of those with brain cancer, Dr. Carpenter and Dr. David E. Greenley, the director of technical operations and the Spring House facility manager, summarized the study's methodology and conclusions. *Id.* ¶¶ 33-35. As explained to the Spring House employees:

- The study had found no statistically significant risk factor linked to the occurrence of brain cancer or benign brain tumors at Spring House;
- The results of the study supported Rohm and Haas's belief that the Spring House facility was a safe place to work; and
- Further research was needed to better understand whether the rates were actually elevated in comparison to the general population.

See January 8, 2004 Letter from A. Carpenter and D. Greenley to Current and Former Spring House Employees (attached to Carpenter Decl. as Exhibit 4); Plaintiffs' Motion, ¶¶ 47-48.

² In fact, in order to identify the chemicals to which the study employees may have been exposed while working at Rohm and Haas, the research team thoroughly reviewed and analyzed the daily laboratory notebooks of each scientist included in the study, some of whom had worked at Spring House for over twenty years -- an undertaking involving review and analysis of literally hundreds of thousands of pages. Carpenter Decl., ¶ 30.

When it reported the results of its case-control study, Rohm and Haas announced that it would begin an in-depth cohort mortality study, which would examine the cause of death of anyone who had ever worked at Spring House and would help to determine whether the number of brain cancer cases at Spring House was elevated in comparison to the number of brain cancer cases in the general population. Carpenter Decl., ¶ 36. Although such a study will not be able to identify any association between chemical exposure at Spring House and brain cancer – the case-control study would have done so had any such link been scientifically identifiable – it will shed further light on the brain cancer cases at Spring House. The study is scheduled to be completed in 2006. *Id.* ¶ 37.

During the course of the case-control study, and continuing after the study results were announced, Rohm and Haas responded to the concerns of Spring House employees, including former employee Thomas Haag, by inviting them to meet with Dr. Carpenter and other Rohm and Haas representatives in an effort to clarify the methodology and goals of the case-control epidemiological study and to enlist their help in identifying any additional brain cancer cases. Many, including Mr. Haag, accepted that invitation. *Id.*, ¶ 38.

The results of the 2004 case-control study are in the process of being prepared for publication in a peer-reviewed journal. *Id.*, ¶ 39.

ARGUMENT

Plaintiffs seek leave to request production of Rohm and Haas documents and to depose three Rohm and Haas employees, Dr. Carpenter, Dr. Greenley and Dr. Phillip Lewis.³ Plaintiffs contend such discovery is necessary in order to plead their claims of fraudulent misrepresentation with particularity. *See* Plaintiffs' Motion, ¶¶ 65-68. Because, as discussed below, such discovery would amount to the type of "fishing expedition" disapproved by the Superior Court in *McNeil, supra*, the motion should be denied.

Pre-complaint discovery "for preparation of pleadings" under Pennsylvania Rule of Civil Procedure 4001(c) will not be permitted unless a plaintiff can, at a minimum, allege a *prima facie* case against the defendant. *McNeil*, 814 A.2d at 246. Since plaintiffs here cannot do so, their Motion should be denied.

In the *McNeil* case, the Superior Court reviewed the variety of approaches taken by the Courts of Common Pleas to pre-complaint discovery and concluded that pre-complaint discovery is permissible only if "it is shown that, one, the plaintiff has set forth a *prima facie* case, and, two, the plaintiff cannot prepare and file a complaint otherwise." *Id.* at 246. *See also Wable v. Watkins*, 47 Pa. D. & C.3d 485, 489 (Ct. Com. Pl. Somerset Co. 1986) (deposition of party sought to be joined "not proper" if purpose was "to determine whether or not a cause of action, in fact, existed"). The *McNeil* Court therefore affirmed the trial court's denial of pre-complaint discovery because the plaintiff was not able to "reasonably allege the existence of . . . intent," a necessary element of his cause of action for intentional interference with a testamentary interest. Accordingly, the Court found that allowing plaintiff to examine estate records in the hope of being able to better

³ Dr. Lewis is Director of Environmental Health and Safety and Sustainable Development at Rohm and Haas.

allege the intent element “would amount to authorizing the proverbial ‘fishing expedition.’”

McNeil, supra, 814 A.2d at 246.

Here, plaintiffs state that they plan to allege a claim for “fraud and misrepresentation.” Plaintiffs’ Motion, ¶ 64. However, like the plaintiff in *McNeil*, these plaintiffs cannot now state a *prima facie* case for fraudulent misrepresentation against Rohm and Haas. The discovery they seek is not merely to “assist them in obtaining particular facts, such as ‘the identity and whereabouts of witnesses.’” *Evans Estate*, 15 Pa. D. & C. 2d 619, 628 (Ct. Com. Pl. Luzerne Co. 1958) (cited with approval by *McNeil, supra*, 814 A.2d at 245-46). Rather, the requested discovery would serve only the impermissible purpose of determining “whether pleadings shall be prepared in the first instance.” *Id.*

To state a cause of action for fraudulent misrepresentation, the plaintiffs must allege “(1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result.” *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285, 285 A.2d 451, 454 (1971). Here, plaintiffs cannot allege any fraudulent statement was made by Rohm and Haas with the intent of misleading them, nor can they allege any damage as a proximate result.

A. Plaintiffs Cannot Allege That Rohm and Haas Made a Fraudulent Statement.

First and most fundamentally, plaintiffs cannot allege that Rohm and Haas made any false statement. Plaintiffs allege that Rohm and Haas said two things: (a) that the rate of brain cancer at the Spring House facility appeared to be higher than expected, and (b) that based upon its

research to date, Rohm & Haas believes that Spring House is a safe place to work. Plaintiffs have made no *prima facie* showing that either statement was false.⁴

The fact that plaintiffs or Mr. Haag may have questions about the way the study was conducted, or may not understand Dr. Carpenter's methodology, does not make out a case of fraudulent misrepresentation against Rohm and Haas. *See, e.g., Moser v. DeSetta*, 527 Pa. 157, 589 A.2d 679 (1991) (fact that plaintiff may not have fully understood transaction does not mean she was defrauded). Plaintiffs' belief that Rohm and Haas's statements were false is insufficient to satisfy the first two elements of a fraudulent misrepresentation claim. *See, e.g., Gruenwald v. Advanced Computer Applications, Inc.*, 730 A.2d 1004, 1014 (Pa. Super. Ct. 1999) (holding plaintiff's "belief," in and of itself, is simply insufficient to prove a claim of fraud").

B. Plaintiffs Cannot Allege the Requisite Intent.

Plaintiffs have not adequately alleged any intent by Rohm and Haas to mislead its employees. To the contrary, even plaintiffs' allegations show that Rohm and Haas erred on the side of full investigation and full disclosure by undertaking a thorough epidemiological study of chemical exposure before even knowing whether the cancer rates at Spring House were actually elevated. *See* Plaintiffs' Motion, ¶¶ 47-48 (quoting Rohm and Haas letter explaining study conclusions, need for additional research, and acknowledging "concern and frustration" in not being able to better understand causes of brain cancer). In short, Rohm and Haas went beyond its legal and ethical obligations by conducting a full case-control study after learning that there might be an

⁴ As to its 1996 inquiry, *see* Plaintiffs' Motion, ¶ 29, Rohm and Haas had no duty to publicize the details of its internal analysis of the brain cancer rates at Spring House or its conclusion that the rates in 1996 were not a cause for concern because they appeared to be in line with national averages. The fact that Rohm and Haas did not volunteer such details falls far short of a fraudulent misrepresentation.

elevated rate of brain cancer at Spring House, and fully disclosed its thinking to its employees, including Dr. Lange, both before and after conducting the study.

This case is a far cry from the sole, and very narrow, exception to the Workmen's Compensation and Occupational Disease Acts bar on employee suits against employers articulated in *Martin, supra*. There, the Supreme Court permitted an employee to assert a fraudulent misrepresentation claim against his former employer which had monitored lead levels in his blood, but intentionally withheld and altered the plaintiff's blood test results, causing plaintiff to delay in seeking timely medical treatment for lead poisoning. In permitting the case to proceed, the Court drew a distinction between (a) "employers who tolerate workplace conditions that will result in a certain number of injuries or illnesses," against whom suit is barred, and (b) employers who "*actively* mislead employees already suffering as the victims of workplace hazards, thereby precluding such employees from limiting their contact with the hazard and from receiving prompt medical attention and care." *Id.* at 18, 606 A.2d at 448 (emphasis in original).

Thus, in order to state a cause of action that is not barred by the Workmen's Compensation and Occupational Disease Acts, plaintiffs here must be able to allege that Rohm and Haas *actively* misled them as to some known workplace hazard. Since plaintiffs are unable even to identify any known hazard at Spring House, and certainly cannot allege that Rohm and Haas willfully hid any such hazard from its employees, they cannot assert the "intent" requirement for a *prima facie* case of fraudulent misrepresentation.

C. Plaintiffs Cannot Allege Harm Resulting from any Rohm and Haas Statement.


Plaintiffs have not and cannot allege that they suffered any harm as a proximate result of Rohm and Haas's statements. Plaintiffs can point to no causal connection between Rohm

and Haas's statements and Dr. Lange's diagnosis of brain cancer. At most, plaintiffs allege that other people who worked at Spring House over its forty-year history also developed brain cancer. But that is insufficient to establish proximate causation. To conclude that Rohm and Haas's allegedly fraudulent statements caused Dr. Lange's brain cancer, plaintiffs would have to allege that as a result of Rohm and Haas's statement on workplace safety, Dr. Lange was exposed to chemicals at Spring House that caused his cancer. *See Walter v. Magee Womens Hosp.*, 876 A.2d 400 (Pa. Super. Ct. 2005). Plaintiffs cannot allege this critical fact. Indeed, plaintiffs have not even alleged that the medical course of Dr. Lange's illness would have been different were it not for Rohm and Haas's allegedly fraudulent statement.

RELIEF REQUESTED

Plaintiffs have no basis for stating a claim of fraudulent misrepresentation. Absent a statement of a *prima facie* case, plaintiffs should not be permitted to dig through Rohm and Haas's files and depose its employees to determine if they have a cause of action. Such a fishing expedition is not a legitimate purpose for pre-complaint discovery. Under the standard set by the Superior Court in *McNeil*, plaintiffs are not entitled to pre-complaint discovery here. For these reasons, plaintiffs' motion for pre-complaint discovery should be denied.

Respectfully submitted,



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