

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

<b>JASON LONG,</b>	§				
		Plaintiff,	§	§	
v.	§			NO. 0:00-CV-000 ABC	§
					§
<b>THE CHABON GROUP, INC.,</b>	§				
		Defendant.	§		

**DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT AND BRIEF IN SUPPORT THEREOF**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW THE CHABON GROUP, INC. (“CHABON”), Defendant herein, who makes and files this, its Motion for Summary Judgment and Brief in Support Thereof (the “Motion”), on its negligence claim asserted against Greenburg Well Service (“Greenburg”), responsible third party herein, and in support whereof would respectfully show unto the Honorable Court as follows:

**I.  
Introduction**

This suit arises out of an accident on an oil rig in White County, Texas. Plaintiff Jason Long (“Plaintiff”) was seriously injured while working as a floor hand under the direction and control of his employer, Greenburg. Plaintiff alleges that he sustained serious personal injuries when the screw pin shackle connecting a “birdie” to the end of a

hoisting chain failed and allowed the load of three connected sections of steel sucker rods to fall on Plaintiff.

## **II.** **Statement of the Issues**

CHABON is entitled to summary judgment as a matter of law on its responsible third- party claim against Greenburg. Under Chapter 33 of the Texas Civil Practice and Remedies Code, sufficient evidence exists demonstrating Greenburg's negligence in the accident causing Plaintiff's injuries to submit Greenburg as a responsible third party and assign a percentage of responsibility to it. Although Greenburg should likely not receive the same apportionment as CHABON, Greenburg should receive a percentage of the responsibility which reflects its amount of negligence in its acts or omissions leading to the accident.

## **III.** **Evidence Relied upon for Summary Judgment**

In support of its Motion, CHABON relies on the attached evidence, on the arguments and authorities presented herein, and on the current pleadings on file in this case, of which CHABON asks the Court to take judicial notice.

The following exhibits are attached to this Motion as evidence and explicitly incorporated herein by reference, as if set forth at length:

Exhibit A Excerpts from the deposition of David R. Jones and exhibits attached thereto ["Ex. A"]; and

Exhibit B Occupational Safety and Health Administration (“OSHA”) report dated [CLIENT TO ADD DATE] [“Ex. B”].

#### **IV. Statement of Undisputed Facts**

This suit arises from damages sustained by Plaintiff as the result of an accident on an oil rig site while Plaintiff was employed by Greenburg. (Ex. A, 9:25-10:2; 13:9-15; 72:13-14, 17-19.) Plaintiff was injured on or about March 23, 2005 when using a screw pin shackle, in White County, Texas, and the use of said screw pin shackle resulted in Plaintiff’s damages. (See Pl.’s Second Am. Compl. (on file with the Court) ¶ 4.) Specifically, Plaintiff sustained serious injuries when the screw pin shackle connecting a “birdie” to the end of a hoisting chain failed and allowed the load of three connected sections of steel sucker rods to fall on Plaintiff. (*Id.* ¶ 5.)

There is no dispute that Greenburg was cited for OSHA violations as a result of the accident that caused Plaintiff’s injuries. (Ex. A, 63:23-25.) Specifically, Greenburg was cited for failing to properly inspect slings and fastenings each day or during use by a competent person. (Ex. B, [CLIENT TO INSERT PAGE AND PARAGRAPH OF OSHA REPORT].) Further, Greenburg was cited for not properly removing slings and fastenings were not properly removed from service when damaged or defective. (*Id.*)

#### **V. Summary Judgment Standard**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary

judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party is “entitled to a judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” *Id.* at 323.

Rule 56(e) of the Federal Rules of Civil Procedure provides, in pertinent part, that a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)).

## **VI.** **Argument and Authorities**

### **A. Chapter 33 of the Texas Civil Practice and Remedies Code Applies to This Case.**

In diversity actions, federal courts should apply state law on substantive issues and federal procedural law. *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965); *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 687 (5th Cir. 1991). Further, a state Rule that reflects a state substantive policy that is not in conflict with a federal Rule should be applied to the

case as the rule of law. *Exxon Corp. v. Burglin*, 42 F.3d 948, 949 (5th Cir. 1995). Chapter 33 of the Texas Civil Practice and Remedies Code was enacted to determine the percentage of responsibility in tort actions between the parties and each responsible third party who has been designated under Section 33.004. Tex. Civ. Prac. & Rem. Code Ann. § 33.003. Several federal courts in Texas have found that Section 33.004 of the Texas Civil Practice and Remedies Code does not conflict with any federal Rules. *See, e.g., Kelly v. Pac. Cycle, Inc.*, 2007 WL 4226922, at \*1 (N.D. Tex. Nov. 29, 2007); *Becker v. Wabash Nat'l Corp.*, 2007 WL 2220961, at \*2 n.2 (S.D. Tex. July 31, 2007); *Cortez v. Frank's Casing Crew & Rental Tools*, 2007 WL 419371, at \*3 (S.D. Tex. Feb. 2, 2007). Thus, Chapter 33 and the Texas case law interpreting Chapter 33 apply to this diversity case.

**B. Persons Who May Be Assigned a Percentage of Responsibility Under Chapter 33 of the Texas Civil Practice and Remedies Code.**

Under Section 33.003 of the Texas Civil Practice and Remedies Code, the trier of fact may compare a defendant's responsibility with the responsibility of the claimant, other defendants, and any responsible third parties joined by the defendant. The claimant is any person seeking recovery of damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.011(1). A defendant is any person from whom a claimant seeks recovery of damages. *Id.* § 33.011(2). A responsible third party is any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought. *Id.* § 33.011(6). The definition of a responsible third party was broadened in 2003 to include parties that may otherwise be immune from suit by the claimant. Act of June 2, 2003,

78th Leg., R.S., ch. 204, § 4.05, 2003 Tex. Gen. Laws 847, 857; *see also In re Unitec Elevator Serv. Co.*, 178 S.W.3d 53, 58 n.5 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). This includes employers that subscribe to the workers compensation system. *Unitec Elevator*, 178 S.W.3d at 58 n.5. As long as there is sufficient evidence to support the submission, each of these parties should be included for the determination of responsibility. Tex. Civ. Prac. & Rem. Code Ann. § 33.003(b).

In this case, the three parties for which liability must be determined are Plaintiff, CHABON, and the employer, Greenburg. Although Greenburg is a subscriber to workers' compensation insurance and, under the predecessor statute, may not have been considered for responsibility, the broadened definition of "responsible third party" now allows an employer such as Greenburg to be designated as a responsible third party and submitted for a determination of a percentage of its responsibility for damages.

### **C. Sufficient Evidence Exists to Support a Finding of Negligence Against Greenburg.**

The three elements of a negligence claim include (1) a legal duty; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998). There is no dispute that Plaintiff was employed by Greenburg at the time of the accident, and he was injured while doing his job out in the oil field. (Ex. A, 9:25-10:2; 13:9-15; 72:13-14, 17-19.) Greenburg breached its duty of providing a safe place to work as required by OSHA. There is no dispute that Greenburg was cited for OSHA violations as a result of this accident. (*Id.*, 63:23-25; Ex. B.) Specifically, Greenburg was cited for failing to properly inspect slings and fastenings

each day or during use by a competent person. (Ex. B, [CLIENT TO INSERT PAGE AND PARAGRAPH OF OSHA REPORT].) Further, the slings and fastenings were not properly removed from service when damaged or defective. (*Id.*)

Based on the foregoing, Greenburg was negligent and responsible in part for Plaintiff's injuries suffered as a result of this accident. Although CHABON does not argue that Greenburg is 100% responsible for Plaintiff's injuries, a determination of 35% would be proper. Thus, a finding that CHABON was 65% responsible and Greenburg 35% responsible for Plaintiff's injuries would be a proper determination.

## **VII.** **Prayer**

WHEREFORE, PREMISES CONSIDERED, CHABON prays that Defendant's Motion be in all respects GRANTED, for the reasons set forth herein. Strictly in the alternative, CHABON prays that if the Court finds the Defendant's Motion meritorious in part, then it be GRANTED with respect to those issues on which the Court finds CHABON has proven itself entitled to judgment as a matter of law. CHABON prays for such other and

further relief, general or special, in law or in equity, to which it may prove itself to be justly entitled.

Respectfully submitted,

SMITH, JONES & LEMON, L.L.P.

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Motion and Brief has been sent to the following counsel of record according to the Federal Rules of Civil Procedure, on the \_\_\_\_ day of June 2008.

Don Pardo  
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Lucy Lemon