

STATE OF CALIFORNIA)
COUNTY OF MENDOCINO) SS: AFFIDAVIT OF
MARC LAPPE, Ph.D.

I, Marc A. Lappe, being first duly sworn according to law, depose and state as follows:

1. I am presently Professor of Health Policy and Ethics at the University of Illinois, College of Medicine, and beginning in September of 1994, I will serve as the Director for the Center for Ethics and Toxic Substances. Attached hereto as Exhibit A is a true and complete copy of my *Curriculum Vitae*.

2. I have reviewed summaries of the depositions of Jack H. Wolfsie, Walter D. Harris, Benton R. Leach, J. Dexter Forbes, William Emerson Fletcher, M.D., Richard Kogler, Lavern Landry, and Joseph P. Variani taken in the case of Burnheimer v. Uniroyal Chemical Company, Incorporated (Lake Cty. Common Pleas Ct. No. 91CV001653), as well as Uniroyal's answers to interrogatories in that action.

3. From my review of the above described material, I have found the following information of particular significance in forming my opinions in this matter:

a. Harry Burnheimer began to work for the U.S. Rubber Company, now known as Uniroyal, in 1949. He worked in the Painesville, Ohio plant, which converted the monomer, vinyl chloride, into a polymer, polyvinyl chloride. Mr. Burnheimer was an instrument repairman, and as such he repaired the equipment

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used to create polyvinyl chloride monomer. It was known in the mid 1960's that workers performing such activities were routinely exposed to high levels of vinyl chloride and could develop health problems as a result. His opportunity for exposure lasted from 1949 until 1974, when Uniroyal ceased to use vinyl chloride at that facility. In 1990, Mr. Burnheimer was diagnosed with angiosarcoma of the liver, a tumor causally linked to vinyl chloride. He died shortly thereafter.

b. Prior to 1974, Uniroyal never adequately monitored its employees exposure to vinyl chloride. The few samples which were taken in late 1972, 1973, and 1974 were insufficient to constitute a monitoring program to protect worker health. The company monitored airborne vinyl chloride concentrations only for explosion detection purposes. Explosion detection levels of the monomer are somewhere between sixty and two hundred and fifty thousand parts per million (60,000 - 250,000 ppm).

c. The engineering controls which were in place at the Painesville plant to minimize emission of airborne vinyl chloride were directed toward economical value, that is, they were principally an economic incentive to recapture the monomer. No protective breathing devices were required to be worn by workers who were potentially exposed to vinyl chloride. The only protective clothing

required of Uniroyal workers was hard hats, safety glasses, and gloves.

d. Uniroyal's knowledge of the toxic effects of vinyl chloride commenced in 1964, when Dr. Wolfsie became the Corporate Medical Director for Uniroyal's predecessor, U.S. Rubber Company. Dr. Wolfsie had an extensive library on vinyl chloride before joining the company, and thereafter he built an even larger reference library. He subscribed to scientific journals and joined organizations such as the American Academy of Chemical Toxicology. That same year, Walter Harris became Uniroyal's Corporate Industrial Toxicologist. He also collected literature regarding toxicology matters, which was sent to the library along with the information Dr. Wolfsie gathered.

e. Dr. Wolfsie professes to have limited memory regarding the contents of his library, but it is known that world literature existed as early as the late 1940's referencing the toxic effects of exposure to vinyl chloride and/or polyvinyl chloride. According to the sworn testimony of Walter Harris, Uniroyal's library contained a 1954 Chemical Safety Data Sheet (CSDS) for vinyl chloride, which provided that "the presently accepted upper limit of safety as a health hazard is 500 ppm." Although Dr. Harris was aware of that threshold limit value, Uniroyal did not undertake to engage

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in monitoring of vinyl chloride exposure levels of its employees at the Painesville plant to assure that this level was not exceeded.

f. In February, 1969, the University of Michigan released a study titled "Epidemiological Investigation of the Polyvinyl Chloride Industry in Reference to Occupational Acroosteolysis." Acroosteolysis was known at least as early as 1961 to be caused by vinyl chloride exposure. It is typically characterized by degeneration of the bones in the distal portion of the fingers. Uniroyal participated in the 1969 University of Michigan study, and both Wolfsie and Harris were aware of it. As a result of the Acroosteolysis threat, Uniroyal began to routinely x-ray the hands of its workers at the Painesville PVC plant, to screen them for the disease.

g. The University of Michigan report states "To assure that atmospheric concentrations are below this level," meaning 500 ppm, "air analysis instruments of adequate sensitivity should be used. The flammable vapor detectors at most of the plants gives a positive reading only down to 400 to 800 parts per million of vinyl chloride. A more sensitive instrument of this type is commercially available that reads to a tenth of these levels. Also, a portable chromatograph has recently become commercially available which has even greater sensitivity." Uniroyal did not

obtain such an instrument, and took no action to alter its protocol to reduce the risk of harm to its employees.

h. On May 22, 1970, an Italian research team headed by Dr. P.L. Viola, released a study which revealed that tumors had developed in rats exposed to vinyl chloride. This study was formally reported in the medical literature in 1971, but Dr. Harris was aware of Viola's study even before that date. In response thereto, Dr. Harris wrote to Benton Leach, "I feel that it is probably necessary for the industry to run a dosage series to determine whether levels in the range of practical working conditions have any effect... Thus one cannot say from present data that there will be no response at 1,000 or 100 parts per million." Despite this information, however, there was no immediate change in the protocol within the Painesville plant with respect to monitoring air levels or requiring protective clothing.

i. In 1971, the American College of Government and Industrial Hygienists suggested "a time-weighted average threshold limit value of 200 parts per million... to prevent adverse systemic effects from long-continued daily exposure." Uniroyal did not adopt this standard or take any action to reduce its employees' exposure.

j. In 1971, Benton Leach became the Factory Manager of the Painesville Uniroyal plant. Leach and Harris both received the

1972 Manufacturing Chemists Association (MCA) Chemical Safety Data Sheet (CSDS), which states that "[t]he primary hazard of vinyl chloride is associated with excessive respiratory exposure. Exposure to high levels may produce liver injury." Prior to reading the 1972 CSDS, both Leach and Harris were aware that chlorinated chemicals, such a vinyl chloride, could produce liver damage, and in fact Harris admits that it was well known at the time.

k. On November 14, 1972, Harris drafted a confidential company memo regarding a meeting of the Technical Task Groups which he had attended that day. Therein, he wrote, "The work in Europe indicates that we have a problem which cannot be ignored." He was referring to the studies of another Italian scientist, Dr. Cesan Maltoni, who found vinyl chloride toxicity at levels as low as 250 ppm.

4. Based upon my review of the above described material, my experience, training, and education, I have formed opinions regarding the matters at issue in this case.

5. It is my opinion that Harry Burnheimer died as a result of his occupational exposure to vinyl chloride.

6. It is my opinion that in causing its unprotected employees to be chronically exposed to vinyl chloride at unmonitored levels, Uniroyal

exposed its employees to a risk sufficiently great that serious harm to one or more of its employees was substantially certain to result. This is particularly true for workers whose job description maximized the potential for overexposure to the monomer, such as Harry Burnheimer.

7. It is my opinion that Uniroyal was aware that its conduct was substantially certain to result in serious harm to its employees, in light of the fact that Uniroyal was aware of the known serious toxic effects of vinyl chloride, including degeneration of bone structure, yet took no action whatsoever to reduce the level of exposure of its employees who would be continuously over-exposed for periods spanning decades. Despite a recommended exposure level of not more than 500 parts per million, Uniroyal monitored its plant only for airborne concentrations of 60,000 parts per million. Uniroyal continued to fail to take any action to protect its employees from harm, even after learning that vinyl chloride had known oncological effects. In fact, Uniroyal continued to fail to take any preventive measures whatsoever until forced to do so by the Occupational Safety and Health Administration of the United States Government.

8. It is my opinion that if Uniroyal had utilized available precautionary measures to protect its employees from the known serious toxic effects of vinyl chloride, it is more likely than not that Harry Burnheimer would not have contracted angiosarcoma of the liver, and would not have died.

9. The contents of this Affidavit are based on my personal

knowledge as to which I am competent to testify.

FURTHER AFFIANT SAYETH NAUGHT.

Marc A. Lappe

MARC A. LAPPE

Sworn to before me and subscribed in my presence this 12th day
of August, 1994.

NOTARY PUBLIC

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of CALIFORNIA

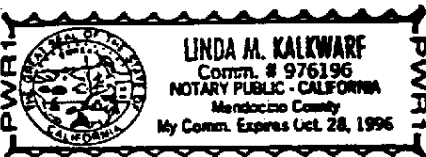
County of MENDOCINO

On 8-12-94
DATE

before me, LINDA H. KALKWARF, Notary Public
NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared MARC LAPPE
NAME(S) OF SIGNER(S)

☒ personally known to me - OR - ☐ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



WITNESS my hand and official seal.

Linda M. Kalkwarf
SIGNATURE OF NOTARY

OPTIONAL SECTION

CAPACITY CLAIMED BY SIGNER

Though statute does not require the Notary to fill in the data below, doing so may prove invaluable to persons relying on the document.

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Though the data requested here is not required by law, it could prevent fraudulent reattachment of this form.

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SIGNER(S) OTHER THAN NAMED ABOVE _____

CURRICULUM VITAE

July 1994

NAME: Marc Alan Lappé
ADDRESS: 47910 Signal Port Road, Gualala, CA 95445
DATE OF BIRTH: January 14, 1943
PLACE OF BIRTH: Irvington, New Jersey
PHONE: (707) 884-1846
SOC: SEC: NUMBER: 140-34-7851

EDUCATION

B.A.	Biology	Wesleyan University	1964
Ph.D.	Experimental Pathology	University of Pennsylvania.	1968

HONORS AND AWARDS:

1960-1964	Warner-Chilcott Scholar.
1964-1966	NIH Trainee.
1968-1970	Anna Fuller Fund Fellow.
1968-1970	Honorary Postdoctoral Fellow University of California.
1975-Present	Member, Bioethics Advisory Committee, National Foundation, March of Dimes
1979-Present	Fellow, Hastings Institute of Society, Ethics and Life Sciences
1980-Present	Invited Member, New York Academy of Sciences.
1981-1985	Sustained Development Award, National Science Foundation.
1983-Present	Board of Directors, Committee for Genetic Responsibility.
1988-1991	Board of Directors, Health & Medicine Policy Group, Chicago.

GRANTS

1972-1975	Principal Investigator, "Ethical Issues of Genetic Knowledge" National Institutes of Health
1986	GTE Lecture Series Grant
1989	March of Dimes Grant, "Parental Exposure to Toxic Substances and Birth Outcomes"
1991-1992	Principal Investigator, "Justice and the Human Genome" U.S. Department of Energy

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EDUCATIONAL POSITIONS

1966	Graduate Supervisor of Pre-college Training, The Jackson Laboratory
1965-1967	Teacher, Free University at University of Pennsylvania.
1968-1969	Teacher, Free University at Berkeley.
1968	Lecturer, University of California, Berkeley.
1969-1970, 1980-1981	Staff Instructor, University of California Extension, Berkeley.
1969-1970	Consultant in Biology to Worth Publishers, New York.
1971-1974	Adjunct Assistant Professor, State University of New York at Purchase.
1971-1976	Associate for the Biological Sciences, Institute of Society, Ethics and the Life Sciences, Hastings-on-the Hudson, New York.
1972-1975	Principal Investigator, NIH Grant to study Social and Legal Aspects of Human Genetic Research.
1975	Guest Instructor, Sarah Lawrence College Program in Human Genetics.
1976-1978	Chief, Office of Health, Law and Values, Department of Health, California.
1978-1979	Chief, Office of Planning and Evaluation, Department of Health Services, California.
1979-1981	Chief and Staff Toxicologist, Hazard Evaluation System and information Service Department of Health Services and Department of Industrial Relations.
1981-1985	Adjunct Associate Professor of Health Policy, University of California, Berkeley.
1982-1983	Special Consultant, Department of Consumer Affairs.
1985-1986	Sciences Editor, Callaghan & Co., Toxic Monograph Series.
1986-1988	Director, Humanistic Studies Program, Professor, University of Illinois, at Chicago, Affiliate College of Pharmacy
1988-Present	Appointed Member: Appeals Board of the Love Canal Medical Fund.
1990-Present	Consultant to Medical Devices and Radiation Panel, FDA
1988- 1994 •	Professor of Health Policy & Ethics, Univ. of Illinois, College of Medicine.
1991-1994	National Consultant: The Human Genome Project and Women
1993-1994	Visiting Scholar, University of Washington
1994-Present	Director, Center for Ethics and Toxic Substances

• Adjunct Professor 1994-1995

HOUSE AND SENATE TESTIMONY (Washington, D.C.)

- 1977 September 7 Testimony before House Subcommittee on Science and Technology, Recombinant DNA Research and Public Health.
- November 2 Testimony on Freedom and Responsibility in Science before Senate Commerce Committee .
- 1982 November 18 Testimony (submitted by invitation) to House Subcommittee on Science and Technology on Ethics of Developing Treatment for Human Genetic Disease.
- 1985 December 18 Testimony on Biotechnology and Government Policy, Subcommittee on Oversight & Investigations, Senate Commerce and Energy Committee,
- 1988 November 22 Testimony on Disclosure and Informed Consent, before the Panel on Medical Devices, Food and Drug Administration.
- 1991 June 11 Testimony on adequacy of safety testing of injectable silicone, Human Resources & Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives
- 1992 June 4 Testimony on health policy issues surrounding the development of dental prosthetic devices, Human Resources & Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives

ORGANIZATIONS

American Association for the Advancement of Science
American Public Health Association
American Chemical Society
Hastings Center
National Environmental Health Association
New York Academy of Science
Scientific Advisory Committee to Mothers and Others
Society of Environmental Toxicology and Chemistry
Editorial Board, International Journal of Occupational Medicine and Toxicology

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1. Lappé, M.A. "Evidence for the antigenicity of papillomas arising on isografts of initiated skin," Proc. Am. Assoc. Cancer Res. 7:40, 1966 (abstract).
2. Lappé, M.A. "Immune elimination of pre-malignant papillomas in isografts of initiated skin," Proc. Am. Assoc. Cancer Res. (9:39, 1968, (abstract of paper presented at 9th annual meeting at AACR).
3. Lappé, M.A. "Evidence for the antigenicity of papillomas induced by 3-methylcholanthrene." J. Nat. Cancer Inst. 40:823-840, 1968.
4. Lappé, M.A. "The role of immunologic surveillance during skin carcino-genesis in the mouse," Ph.D. Dissertation, University of Pennsylvania, Philadelphia. (LC card. no. Mic. 69-15, 079). Ann Arbor, Michigan, University Microfilms, Inc., p. 84, 1968.
5. Lappé, M.A., Graff, R.J. and Snell, G.D. "The importance of target size in destruction of skin grafts with weak incompatibility," Transplantation 7:372-377, 1969.
6. Graft, R.J., Lappé, M.A. and Snell, G.D. "The influence of the gonads and the adrenal glands on the immune response to skin grafts," Transplantation 7:105-111, 1969.
7. Lappé, M.A. "Tumor specific antigens: Possible origin in premalignant lesions," Nature 223:82-84, 1969.
8. Lappé M.A. and Prehn, R.T. "Immunologic surveillance at the macroscopic level: Non-selective elimination of premalignant skin papillomas," Cancer Research 29:2374-2378, 1969.
9. Lappé M.A. and Blair, P.B. "Interference with mammary tumorigenesis by antilymphocyte serum," Proc. Am. Assoc. Cancer Res. 11:47, 1969. (abstract of paper presented at 11th Annual Meeting of AACR).
10. Lappé M.A. and Steinmuller, D.S. "Depression of weak allograft immunity in the mouse by neonatal or adult exposure to urethan," Cancer Research 30:674-680, 1970.
11. Lappé, M.A. "Chemical and Biological Warfare," In: The Social Responsibility of the Scientist, Martin Brown (ed.), The Free Press, Berkeley.
12. Lappé M.A. and Prehn, R.T. "Predictive value of skin allograft survival during the development of urethan induced lung adenomas in BALB/c mice," Cancer Research 30:1357-1361, 1970.

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13. Lappé, M.A. "The ecology of cancer," Contact Point 48:140-146, 1970.
14. Lappé, M.A. "Failure of long-term immunologic control 3-methylcholanthrene-induced skin tumors in the autochthonous host," (Presented at the 7th Annual Meeting of the Reticuloendothelial Society, December 1970). J. Reticuloendothelial Soc. 10:120-130., 1971.
15. Lappé, M.A. "Evidence for immunological surveillance during skin carcinogenesis: Inflammatory foci in immunologically competent mice," Israel J. Med. Sci. 7:52-65, 1970.
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18. Lappé M.A. and Schalk, J. "Necessity of the spleen for balanced secondary sex ratios following maternal immunization with male antigen," Transplantation 11:491-495, 1971.
19. Lappé, M.A. "The genetic counselor: Responsible to Whom?" The Hastings Center Report 2:2, 1971.
20. Prehn R.T. and Lappé, M.A. "An Immunostimulation theory of tumor development." Transplantation Review 7:26-54, 1971.
21. Lappé, M.A. "Risk-taking for the Unborn," The Hastings Center Report 1:2-4 1972.
22. Lappé, M.A., Gustafson, J.M., Roblin, R. et al., "Ethical and social issues in screening for genetic disease," N. Eng. J. Med. 286:1129-1132, 1972.
23. Lappé, M.A. "Moral obligations and the fallacies of genetic control," Theological Studies 33:411-427, 1972.
24. Lappé, M.A. "The possible significance of immunological recognition of Preneoplastic and Neoplastic cell surfaces," National Cancer Institute Monographs 35:49-55, 1972.

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25. Lappé, M.A. "Mass genetic screening programs and human values: Another view," Med. Dimensions 2:2, 1973.
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27. Lappé, M.A. "Human Genetics," In: Public policy toward the environment: A review and appraisal. Ann. N. Y. Acad. of Sci. 216:152, 1973.
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29. Lappé, M.A. "Genetic and biochemical screening: Beyond testing for disability," Lab. Management Vol. 11, No. 11, November 1973.
30. Lappé, M.A. and Brody, J.A. "Genetic counselling: A psychotherapeutic approach to autonomy in decision-making," Birth Defects Original Article Series (published as No. 46).
31. Lappé M.A. and Steinfeld, P. "Choosing the sex of our children," Hastings Center Report 4, pp. 3-7, February 1974.
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33. Ehrman L. and Lappé, M. "Screening for polygenic disorders." Birth Defects Original Article Series. Ethical, Social and Legal Dimensions of Screening for Human Genetic Disease 10:102-122, 1974.
34. Brower, D., Lappé, M.A. and McCurdy, J.C. Of All Things Most Yielding. McGraw-Hill, Inc. (New York, 1974)
35. Lappé, M.A. "Censoring the Hereditarians," Commonweal 50:183-185, 1974.
36. Lappé, M.A. "What counts in deciding to withhold treatment from the defective new born?" Tufts Medical Alumni Bulletin 33, 1974.

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37. Lappé, M.A. "Can Eugenic policy be just?" In: The Prevention of Genetic Disease and Mental Retardation. A. Mulinsky, Ed., W.B. Saunders, Phila., pp 456-476, 1975.
38. Gaylin W. and Lappé, M.A. "Fetal Politics," Atlantic 235:66-71, 1975.
39. Lappé, M.A. "Moral Claims of the Wanted Fetus," Hastings Center Report 5:11-13, 1975.
40. Lappé, M.A. "Realities of 'Genetic Engineering'," Medical Research Engineering 12:25-29, 1976.
41. Lappé, M.A. "Human Uses of Molecular Genetics," Federation Proceedings 34, 1975.
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43. Lappé, M.A. "Abortion and Fetal Research: A Reconsideration," In: Encyclopaedia Britannica Year Book, 1975.
44. Lappé, M.A. "Reflections on the Non-Neutrality of Hypothesis Formulation," Clinical Research 24:56-63, 1976.
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46. Lappé, M.A. "What's in the Genes Anyway?" Man and Medicine 5:268-272, 1976
47. Lappé M.A. and Brody, J.A. "Genetic counselling: A psychotherapeutic approach to autonomy in decision-making," Psychiatry and Genetics, M.A. Sperber and L.F. Jarvik, eds. (Basic Books, New York), 1976.
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49. Lappé M.A. and Morrison R. (eds.) Annals of the New York Academy of Sciences Volume 265. "Ethical and Scientific Issues Posed by Human Uses of Molecular Genetics," 1976.
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53. Lappé, M.A. "Genetic Screening." In: Principles of Counseling, T. Hsia, ed., (Alan R. Liss, Inc. New York, 1978).
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58. Lappé, M.A. "Ethical Issues in Eugenics." Encyclopedia of Bioethics W. T. Reich ed., MacMillan: The Free Press (New York, 1978).
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62. Lappé, M.A. "HLA homozygosity and neural tube defects," Lancet 1:1342, 1979 (letter).
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63. Lappé M.A. and Myers, Beverlee "California's New Birth Certificate Law: Some Lessons to be Learned," American Journal of Public Health 69:706, 1979.
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65. Lappé, M.A. "Holistic Health: A Valuable Approach to Medical Care," Western Journal of Medicine, 131:475-477, 1979.
66. Lappé, M.A. "Breaking Scientific Dogmatism." Op-Ed Page, Oakland Tribune (editorial). Commentary Page for January 7, 1980.
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70. Lappé, M.A. "Blaming the Victim," Hard Choices, pp. 25-26, Regents of the University of Washington, (Seattle, 1981).
71. Lappé, M.A. "Justice and Prenatal Life," In: Justice and Health Care, Earl E. Sheip ed., D. Reidel Pub. Co., 1981, (New York).
72. Lappé, M.A. et al., "Carcinogens and Regulation," Science, 211:332-334, 1981. (letter).
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74. Lappé, M.A., Germes That Will Not Die: The Medical Consequences of The Misuse of Antibiotics. Doubleday/Anchor Press, (New York, 1982).
75. Lappé, M.A. "Ethical Issues Generated by Testing for Genetic Susceptibility to Occupational Hazards or Monitoring for their Mutagenic Effects." Invited Background Review Article, Office of Technology Assessment, 1983.

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76. Lappé, M.A. "Genetic Disease: Diagnosis and Treatment", In: Proceedings of the Fifth Arnold O. Beckman Conference in Clinical Chemistry, A.A. Dietz, Ed., Washington, D.C., 1983, pages 282-296.
77. Lappé, M.A. (editor and co-author), Published Reports from The Hazard Evaluation System and Information System, California Department of Health Services, 1979-1982.
78. Lappé, M.A. (editor and co-author), Trichloroethylene (TCE): Evaluation of the Human Health Effects, California Department of Health Services and Department of Industrial Relations, April 18, 1980.
79. Lappé, M.A. (editor and co-author), 2, 4-Dichlorophenoxyacetic Acid (2, 4-D): Evaluation of the Human Health Effects, California Department of Health Services and Department of Industrial Relations, June 16, 1980.
80. Lappé, M.A. (editor and co-author), Potential Health Hazards Associated with the Use of Plastic Pipe in Potable Water Systems, California Department of Health Services and Department of Industrial Relations, October 17, 1980.
81. Lappé, M.A. (editor and co-author), The Toxicology of PCB's: An Overview with Emphasis on Human Health Effects and Occupational Exposure, California Department of Health and Department of Industrial Relations, January, 1981.
82. Lappé, M.A. "Potential Reproductive Risks Posed by Maternal Exposure to Photographic Chemicals," Journal Birth: Issues in Perinatal Care and Education, 10:173-177, 1983.
83. Lappé, M.A. "Values and Public Health: Value Considerations in Setting Health Policy," Theoretical Medicine, 4:1-10, 1983.
84. Lappé, M.A. "Ethical Issues in Testing for Differential Sensitivity to Occupational Hazards," Journal of Occupational Medicine, 25:797-801, 1983.
85. Lappé, M.A. "Ethics at the Genetic Frontier: A Critique of the Use of Genetic Knowledge," In: John Bradford Pracyk, Editor, Science, Technology, Ethics and Policy, Duke University Symposium Committee, pp. 22-37, 1983.
86. Lappé, M.A. "The Relationship Between Rational Medicine and Public Policy: Antibiotics As a Case Study," In: John Bradford Pracyk, Editor, Science, Technology, Ethics and Policy, Duke University Symposium Committee, pp. 38-55, 1983.

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87. Lappé, M.A. "The Tyranny of The Bell-Shaped Curve: Who Should be Protected From Risk-Generating Activities?" Politics and The Life Sciences, Vol. 3, No 1, 53-55, Aug. 1984.
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Ohio Unrep. App. Cases 1989-94
1990 WL 40229, Stillo v. Rubbermaid Inc., (Ohio App. 1990)
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NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS
IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Carol STILLO, et al., Plaintiff-Appellants,
v.
RUBBERMAID INCORPORATED, Defendant-Appellee.

No. 56612.
Court of Appeals of Ohio, Cuyahoga County.
April 5, 1990.

Civil Appeal from Common Pleas Court, Case No. 143225.

Michael T. Honchan, Mary L. Nunnala, Steven L. Wasserman, Cleveland, for
plaintiff-appellants.

Thomas Schick, Cleveland, for defendant-appellee.

JOURNAL ENTRY and OPINION

DYKE, Judge.

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Plaintiffs-appellants, the estate of Grace I. Berry and Carol Stillo,
alleged that defendant acted intentionally in causing their respective
resulting illnesses and, in the case of Grace I. Berry, death.

Defendant-appellee Rubbermaid, Inc., filed a motion for summary judgment
arguing that no material issues of fact exist in regard to plaintiffs' ability
to meet the requisites for establishing an employer intentional tort as set
forth in Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St. 3d 100.

Plaintiffs opposed defendant's motion for summary judgment. On October 3,
1988, the trial court, without written opinion, granted summary judgment in
favor of defendant. Plaintiffs filed a timely appeal of the trial court's
ruling.

Plaintiffs Carol Stillo and Grace Berry were employees at defendant's plant
from 1966 and 1973, respectively, until 1982. By January of 1982, both women
had been diagnosed by their physicians as having scleroderma-type illnesses
including Raynaud's phenomenon which, according to their treating physicians,
resulted from their prolonged exposure to polyvinyl chloride degradation
products.

During the time of plaintiffs' employment, defendant was involved in the
manufacturing of plastic products, and used a substance known as polyvinyl
chloride (hereinafter PVC) in the production of its products.

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PVC is a substance that is formed when vinyl chloride monomers (a gas) undergo polymerization. (FN1) PVC can exist in powder, pellet and liquid form. The vinyl chloride monomer, the chemical compound that undergoes polymerization, is a highly toxic, dangerous substance. Residue of vinyl chloride can be precipitated from PVC in the manufacturing process. (FN2) In this case, the pleadings, briefs, and evidentiary materials submitted by defendant show that it used PVC in powder, pellet and liquid form in the manufacturing of some of its products, including processes consisting of molding, injecting and coating.

No later than 1974 through reports and notices from the Occupational Safety and Health Administration, Department of Labor (hereinafter OSHA) defendant was made aware that the use of polyvinyl chloride resin (FN3) in its manufacturing process was shown to be a danger to its employees engaged in those manufacturing processes. It was determined that the toxic vinyl chloride monomer was a degradation product of PVC and was present in manufacturing conditions. Defendant was further informed by OSHA that the standard for exposure to vinyl chloride was being drastically reduced. From the OSHA hearings, industrial users of PVC, including defendant, were directed to monitor their equipment and manufacturing processes to make sure that they fell within the newly-established part per million standard, and were directed to immediately institute feasible engineering, work practice and personal protective controls to reduce employee exposure to at or below the new permissible exposure limit.

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Defendant instituted a program to monitor exposure levels of vinyl chloride monomer at the plant where plaintiffs were employed. PVC was used at defendant's plant until 1977 at which time its use was discontinued except in the wire coating division where it was used until 1982.

I

WHERE A MATERIAL ISSUE OF FACT EXISTS WITH RESPECT TO WHETHER AN EMPLOYER KNOWINGLY AND INTENTIONALLY EXPOSED ITS EMPLOYEES TO A HARMFUL, TOXIC SUBSTANCE, IT IS ERROR FOR THE TRIAL COURT TO CONCLUDE, AS A MATTER OF LAW, THAT NO MATERIAL ISSUES OF FACT ARE IN DISPUTE, THEREBY GRANTING SUMMARY JUDGMENT TO THE EMPLOYER.

Plaintiffs argue in their sole assignment of error that the trial court erred by granting summary judgment in favor of defendant since there was a genuine issue of material fact as to whether defendant committed an intentional tort as defined by law.

In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100 the Ohio Supreme Court set forth the standard for determining whether an employer has committed an intentional tort against an employee:

Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts (5 Ed. 1984), in order to establish "intent" for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition

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within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty and not just a high risk; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.

* * *

To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. Where the risk is great and the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk - something short of substantial certainty - is not intent. (*Blankenship v. Cincinnati Milacron Chemicals, Inc.* [1982], 69 Ohio St. 2d 608, 23 O.O. 3d 504, 433 N.E. 2d 572; and *Jones v. VIP Development Co.* [1984], 15 Ohio St. 3d 90, 15 OER 246, 472, N.E. 2d 1046, explained.) (Emphasis added.)

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Van Fossen *supra*, paragraphs five and six of the syllabus.

In *Bostic v. Connor* (1988), 37 Ohio St. 3d 144, 146, the court stated as follows:

Summary judgment is appropriate when the following factors have been established:

*** (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66 8 O.O. 3d 73, 74, 375 N.E. 2d 46, 47. See, also, *Civ. R. 56(C)*; and *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 327, 4 O.O. 3d 466, 472, 364 N.E. 2d 267, 274.

The standard for granting summary judgment is high; in an employer intentional tort case, it is no less high. In *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St. 3d 135, at 138 the court, in deciding an intentional tort claim, stated:

In deciding whether the trial court correctly granted summary judgment to Goodyear, we must follow *Civ. R. 56* and view the record in the light most favorable to the party opposing the motion. *** Further, the inferences to be drawn from the underlying facts contained in depositions, affidavits, and exhibits must be construed in the opposing party's favor. When so construed, the motion must be overruled if reasonable minds could find for the party

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opposing the motion. ***.

Moreover,

[u]pon motion for summary judgment pursuant to Civ. R. 56, the burden of establishing that the material facts are not in dispute, and that no genuine issue of fact exists, is on the party moving for summary judgment. Harless v. Willis Day Warehousing Co. (1978), 4 Ohio St. 2d 64, 8 O.O. 3d 73, 375 N.E. 2d 46. However, in that Civ. R. 56(E) requires that a party set forth specific facts showing that there is a genuine issue for trial, such party must so perform if he is to avoid summary judgment. Accordingly, in an action by an employee against his employer alleging an intentional tort, upon motion for summary judgment by the defendant employer, the plaintiff employee must set forth specific facts which show that there is a genuine issue of whether the employer had committed an intentional tort against his employee. (Emphasis added.)

Van Fossen, supra, paragraph seven of the syllabus.

The issue therefore in the present case is twofold: whether the movant, in this instance defendant, established that no material issue of fact existed as to its knowledge of a dangerous procedure or condition within its business operation which was substantially certain to harm the plaintiff and nonetheless continued to expose its employees to such harm, and secondly if the former is true whether plaintiff set forth specific facts which would show that there was a genuine issue of fact as to whether defendant had knowledge of a dangerous procedure or condition within its operation which it knew was substantially certain to harm plaintiffs and required plaintiffs to continue to perform the dangerous task.

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Defendant concedes its obligation to be in compliance with the OSHA regulations. Defendant's evidence attached to its motion for summary judgment indicated that it instituted a program within its plant to monitor exposure levels of vinyl chloride and that it was consistently within the OSHA limits. Defendant apparently concludes that because it was in compliance with OSHA, it did not know that a dangerous process existed within its work environment. Defendant's evidence also indicated that plaintiffs' illnesses were not necessarily attributed to the workplace.

Based on defendant's evidence, which indicated it was in compliance with OSHA and thus did not know a dangerous process existed, it became plaintiffs' burden to set forth specific facts which showed that there was a genuine issue as to whether defendant had knowledge that a dangerous process existed within their work environment.

I. Plaintiffs produced evidence which created an issue of fact as to whether the first prong of the Van Fossen test was satisfied.

In order to raise an issue of fact under the first prong of the Van Fossen test, plaintiffs must produce some evidence which shows defendant had knowledge that a dangerous process existed within its business operation.

Plaintiffs submitted the OSHA regulations which included the record of the

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hearings held by OSHA in 1974. The OSHA regulations and hearings make it clear that defendant was aware of the health hazards and dangerous propensities of PVC in early 1974. OSHA's drastic reduction of the allowable permissible levels of PVC prior to 1974 of 500 parts per million to an emergency temporary standard of 50 parts-per million, to a proposed permanent standard of 1 part per million, clearly put the plastics industry, which included defendant, on notice that PVC was a hazardous substance.

OSHA clearly rejected the plastics industry's argument that their pre-1974 levels of vinyl chloride did not induce cancer and were safe. OSHA stated that the significance of a lower dose could not be accurately assessed. In fact, OSHA concluded that research didn't indicate whether a safe level of exposure existed at all. The regulations further indicated that testimony of most experts concluded that a quantification of a safe exposure concentration was not possible given the present state of scientific knowledge. OSHA noted that the plastics industry's proposal to change the exposure level later, when improved technology would permit such reduction, would seem to indicate that the plastics industry, to which defendant belonged, had doubts about the safety of the new exposure limit about to be adopted.

It is clear from the OSHA regulations that the new exposure limits for work with PVC substances were not deemed safe levels but rather permissible levels based upon evidence then available, which OSHA practically conceded could prove harmful in the future. NIOSH, also a part of the 1974 hearings, in fact concluded that vinyl chloride monomers are carcinogenic and that a safe exposure level to a carcinogen cannot be determined.

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Given the rapidity with which OSHA changed its permissible levels of vinyl chloride monomers in the workplace and the caution and hesitation by OSHA in arriving at the new levels, it is evident that defendant knew that working with PVC substances presented a health hazard. Further, the OSHA regulations make clear that in the absence of the institution of feasible engineering, work practice and personal protective controls to reduce employee exposure to at or below the new permissible exposure limit, a dangerous process would exist within the work environment. In other words, the OSHA regulations made it evident that a violation of the new permissible levels, i.e., noncompliance, would result in exposure of employees to substantial certainty of harm.

Viewing the evidence presented in a light most favorable to plaintiffs, we conclude that plaintiffs successfully rebutted defendant's contention that they were unaware of a dangerous process. An issue of fact exists as to whether the first prong of the Van Fossen test was satisfied.

II. Plaintiffs produced evidence which created an issue of fact as to whether the second and third prongs of the Van Fossen test were satisfied.

In order to raise an issue of fact under the second and third prongs of the Van Fossen test, plaintiffs must produce some evidence which shows defendant had knowledge that if the employee is subjected to the dangerous process then harm will be a substantial certainty, and, further, that the employer knowingly required the employee to continue performing the dangerous task.

As earlier stated, the defendant's evidence showed that a monitoring program

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was established within its plant and that the levels of vinyl chloride were consistently at or below the new standards set by OSHA. Defendant argues that given its compliance with what the industry thought at the time to be reasonable exposure levels, there exists no evidence of a specific intent to injure the plaintiffs.

To contradict defendant's argument and evidence, plaintiffs submitted a statement by Dr. Randall S. Krakauer, the plaintiffs' treating physician and Director of The Rheumatic and Immunologic Disease Section at St. Michael's Medical Center in Newark New Jersey. Dr. Krakauer stated:

I find that there clearly were vinyl chloride monomer levels in the plant, and that the measurements were taken in such a way that the levels at the work stations of these two women could not be determined.

The final standard adopted by OSHA had a permissible level of 1 part per million of vinyl chloride monomer in the work environment. The OSHA regulations submitted by plaintiffs reveal that PVC users were instructed under its methods of compliance section that:

Employee exposure to vinyl chloride shall be controlled to or at below the permissible exposure level. ... by engineering, work practice and personal protective controls. (Emphasis added.)

Dr. Krakauer further stated that:

It is also clear that protective measures were not taken to protect workers against the known dangers of aerosolized vinyl chloride monomers. *** The random chance of two employees coming down with this disease in one year is extraordinarily small. *** I believe both Mrs. Stillo and Mrs. Berry had vinyl chloride induced scleroderma-like syndrome due to their exposure during employment at Rubbermaid since there is no history to suggest any other place of exposure. (Emphasis added.)

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Plaintiffs' evidence showed 1) that the monitoring was done in a way that was unreliable and undeterminative; and 2) that defendant was not in compliance with the OSHA regulation which called for the introduction of personal protective controls in the work environment. The defendant's record is devoid of any evidence of any personal protective measures instituted to protect workers from the degraded PVC fumes and powders.

Plaintiff Carol Stillo submitted her own affidavit which supports her rebuttal that, despite the known dangers presented by the use of PVC, nothing changed in her work environment. Stillo's affidavit indicated that she worked at defendant's plant from 1966 to 1982. Plaintiff worked in the plastics division at injection molding, compression molding, plastic shelving and also worked in filling orders. Plaintiffs' evidence showed that in the injection molding process, PVC in pellet form was put into a barrel in the injection machine and was heated to 380 degrees Fahrenheit. The pellets then were turned into a liquid and injected into a mold. The finished product would drop out of the machine. The evidence indicated 5 ppm of vinyl chloride in powder form was retained.

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Stillo, in her affidavit, testified that if she wasn't busy at her machine, she would use hot wire to seal packages with plastic wrap. Stillo testified that if she was not working on heated PVC, she was working next to machines and processes that used PVC. Stillo stated that no barriers existed in her work environment to separate or isolate her from the processes where PVC was being used. Further she stated that no containers existed for the containment of airborne gases and particles. Stillo attested that at one spot, workers would gather PVC scraps, grind them back into a powder, and put them into a box. When the box got full, Stillo stated, it would be picked up by one of the workers and dumped back into the machine. Stillo related that PVC powder would fly all over and that dust would be on her hands and arms. Stillo stated that when the machines which used PVC were purged, gas and steam would surround her for 2 to 3 minutes. At the hot wire station, Stillo stated that every time heat hit the plastic, gas would come up in her face. She testified that in her 15 years at the plant there was no ventilation. Stillo testified that she was not given a respirator or any kind of protective gear, and was never warned of the dangers presented in working with these substances.

Plaintiffs' evidence further indicated that defendant did not change any of its manufacturing processes as it related to them. Stillo testified that the same procedures employed in the early 1970's were the same ones employed in the late 1970's. Plaintiffs' evidence also indicated that every machine involved in the production of PVC products was not tested, but rather the monitoring was done on a random, as opposed to an inclusive, basis.

To contradict defendant's claim that its compliance with the OSHA regulations entitles it to summary judgment because compliance shows that no evidence of a specific intent to injure existed, we have plaintiffs' evidence which shows: 1) the monitoring required by OSHA was random and undeterminative as it related to plaintiffs; 2) defendant never initiated personal protective measures as required by OSHA; and 3) defendant did not change any of its processes as they related to plaintiffs, and the same procedures employed in the early 1970's were the same ones employed in the late 1970's.

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The record demonstrates that noncompliance with the OSHA regulations would cause a dangerous condition in the work environment to exist resulting in harm that was substantially certain to occur to workers. Keeping in mind that the inferences to be drawn from the underlying facts contained in depositions, affidavits and exhibits must be construed in the opposing party's favor when ruling on summary judgment, we find that plaintiffs set forth specific facts which showed that a genuine issue existed as to whether defendant was in compliance with the OSHA regulations, and further plaintiffs created a genuine issue of fact as to whether defendant knew that harm was substantially certain to occur and whether defendant continued to allow plaintiffs to be exposed to such harm.

The plaintiffs' assignment of error is well taken. The trial court's grant of defendant's summary judgment is reversed and the matter is remanded to the trial court for further proceedings.

PATTON, C.J., and SWEENEY, J., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio

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Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

FN1 Polymerization is a chemical reaction in which two or more small molecules combine to form larger molecules which repeat structural units of larger molecules. Webster's New Collegiate Dictionary (1973- 1976) 892.

FN2 Plaintiffs were not involved in the manufacturing of vinyl chloride. Rather, they were involved in manufacturing products made with PVC. We recognize that PVC and vinyl chloride are not synonymous.

FN3 A resin is defined as any of a large class of synthetic products that have some of the physical properties of natural resins but are different chemically and are used chiefly as plastics. Webster's New Collegiate Dictionary (1973-1976) 985.

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