

112-3

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

Ruth N. Burnheimer, etc.,	)	Case No. 93 CV 001758
Plaintiff,	)	Judge Martin O. Parks
v.	)	NOTICE OF SUPPLEMENTAL
Uniroyal Chemical Company,	)	AUTHORITY OF DEFENDANT
Inc., et al.,	)	UNIROYAL CHEMICAL
Defendants.	)	<u>COMPANY, INC.</u>
	)	Robert A. Bunda (0019775)
	)	Anne Y. Koester (0040609)
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	)	Trial Counsel for Defendant
	)	Uniroyal Chemical Company, Inc.
	)	

URL 23231

In further support of defendant Uniroyal Chemical Company, Inc.'s Motion for Summary Judgment, Uniroyal hereby gives notice of the recent decision of the Court of Appeals of Ohio, Summit County in Lucas v. R.C.A. Rubber Co. (1994), 93 Ohio App. 3d 389, attached hereto as Exhibit A.

Of significance in the Lucas court's opinion is the court of appeals' recognition that the plaintiff who is claiming his employer is liable for an intentional tort must demonstrate that the employer had ""actual knowledge of the exact dangers which ultimately caused injury."" Id. at 391, citing Ortiz v. Elyria Foundry Co. (Oct. 21, 1992), Lorain App. No. 5302, unreported, at 5, 1992 WL 308556, quoting Sanek v. Duracote Corp. (1989), 43 Ohio St. 3d 169, 172.

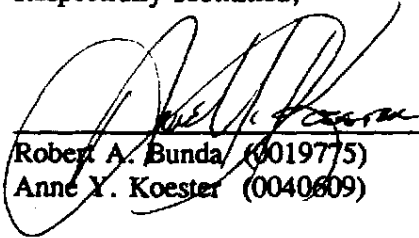
In Lucas, the trial court granted the defendant employer's motion for summary judgment, which was affirmed by the court of appeals.

Uniroyal requests that the court's decision in Lucas be considered by this Court in ruling on Uniroyal's pending motion for summary judgment.

Respectfully submitted,

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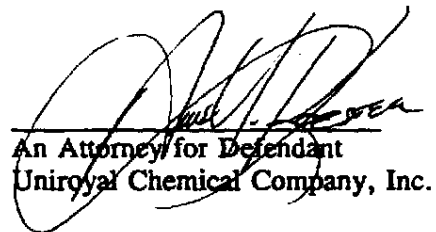
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CERTIFICATE OF SERVICE

This is to certify that a copy of the Notice of Supplemental Authority of Defendant Uniroyal Chemical Company, Inc. was mailed this 28th day of September, 1994, to Peter J. Brodhead, Esq., attorney for plaintiff, at his office located at Spangenberg, Shibley, Traci, Lancione & Liber, 2400 National City Bank Building, Cleveland, Ohio 44114, and Victoria L. Vance, Esq., attorney for defendants, Borden, Inc. and Monochem, Inc., at her office located at Arter & Hadden, 1100 Huntington Building, Cleveland, Ohio 44115-1475.


An Attorney for Defendant
Uniroyal Chemical Company, Inc.

URL 23233

Administration (OSHA) citation following accident; employer had used procedure in past without incident, fact that procedure was not safest or even correct procedure did not negate fact that employer was not on notice of any problems with procedure prior to accident, and employee did not use procedure as instructed in that he used one pipe instead of two to support elevator.

3. Workers' Compensation §2093

In order to show that employer had knowledge that procedure used by employee was substantially certain to cause harm to employee, as required to prove that employer committed intentional tort against employee, employee is required to demonstrate that employer had actual knowledge of exact dangers which ultimately caused injury.

Walter Vogel and Daniel Wilson, for appellant.
John Solomon, for appellee.

BAIRD, Judge.

This cause was heard upon the appeal of Maria I. Lucas, executor of the estate of John Lucas, from a judgment in the Summit County Court of Common Pleas granting summary judgment to R.C.A. Rubber Company ("R.C.A."). We affirm.

On November 4, 1989, John Lucas was killed when the elevator which he was repairing fell and crushed him. At the time, Lucas was employed by R.C.A. His supervisor, John Spinks, instructed Lucas and another employee, Warner Shears, to repair the chevron packing on a hydraulic elevator which operated between the first two floors of the plant. Spinks told the two men that, in order to repair the elevator, it would have to be supported with two steel pipes. This procedure had been used in the past to support the elevator for repair. Despite this fact, when Lucas went to retrieve the pipes, he took only one, insisting to his co-worker that one pipe would provide sufficient support.

The elevator was lowered onto the one pipe, and the power to the elevator was turned off. Lucas entered the elevator pit and began the repair. The supporting pipe began to bend, and the elevator came down on Lucas.

Lucas' estate filed suit against R.C.A., alleging that R.C.A. had committed an intentional tort against Lucas. R.C.A. moved for summary judgment, which was granted by the trial court.

It is from this judgment that the executor of Lucas' estate appeals, asserting a single assignment of error:

"The trial court erred and abused its discretion in granting defendant-appellee's motion for summary judgment because:

"1. Reasonable minds could come to different conclusions based on the parties' affidavits.

"2. It weighed the evidence in reaching its decision.

"3. It totally disallowed the potential probative effect of circumstantial evidence.

"4. It determined the credibility of competing affidavits attached to the parties' summary judgment pleadings."

Appellant argues that a material issue of fact existed as to whether R.C.A. committed an intentional tort against Lucas, and that summary judgment was, therefore, inappropriate.

[1, 2] In order to prove that an intentional tort was committed against an employee, the employee must prove:

" * * * (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition 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 (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus.

The Supreme Court of Ohio has explained that the burden is upon the plaintiff to establish these elements by proof beyond that required to prove negligence and beyond that necessary to prove recklessness. *Id.* at paragraph two of the syllabus; *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 631, 576 N.E.2d 722, 727. Appellant has not shown that R.C.A. had the requisite knowledge that harm to its employee was substantially certain to occur in using the procedure which it instructed Lucas to use in fixing the elevator.

[3] In order to show that R.C.A. had knowledge that the procedure used by Lucas was substantially certain to cause harm to its employee, Lucas would be required to demonstrate that R.C.A. had "actual knowledge of the exact dangers which ultimately caused injury." *Ortiz v. Elyria Foundry Co.* (Oct. 21, 1992), Lorain App. No. 5302, unreported, at 5, 1992 WL 308556, quoting *Sanek v. Duracole Corp.* (1989), 43 Ohio St.3d 169, 172, 539 N.E.2d 1114, 1116. The evidence set forth in opposition to the motion for summary judgment does not show this actual knowledge by R.C.A. R.C.A. had used the procedure which