

NO. 36220-1-II

FILED
BY *[Signature]*

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

JULIANE MORGAN; and RICHARD and CECILE SPEARS, husband and
wife,

Appellants,

v.

CHAUNCEY AND ELIZABETH LUFKIN, individually and the marital
community composed thereof; HYTEC, INC., a Washington corporation;
LASCO BATHWARE, INC., a foreign corporation; TOMKINS
INDUSTRIES, INC., a foreign corporation; TOMKINS PLC,
a foreign corporation,

Respondents.

APPEAL FROM THE THURSTON COUNTY
SUPERIOR COURT

Cause No. 04-2-01079-6

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellants Juliane Morgan and Richard and Cecile Spears addressed in their opening brief almost all the arguments raised in respondents' briefs and will try not to repeat those contentions here.

The parties agree that no published Washington opinion has directly addressed the issues raised in this appeal. Although respondents argue that the majority of other jurisdictions have rejected liability to subsequent landowners by prior owners and users who created conditions of toxic contamination on their land, the fact is that relatively few jurisdictions have addressed the issue and that many of those courts have recognized liability under some legal theories in some factual circumstances. For the reasons stated in appellants' opening brief and below, under the facts of this case, appellants should be able to hold both Hytec and Lufkin liable for their acts and omissions on the Littlerock property.

II. STATEMENT OF FACTS

Throughout their briefs, respondents rely heavily on the assertion that Hytec disposed only of solid fiberglass waste at the Littlerock site and did so in accordance with a permit issued by Thurston County. As explained in appellants' opening brief, this assertion is contradicted by the record.

In fact, Chauncey Lufkin, owner of the site and former president and owner of Hytec, admitted that in addition to fiberglass scraps, Hytec dumped a number of 55-gallon drums and liquid and chemical wastes at the site with his knowledge. *See* Opening Br. at 5-6; CP 95 (Lufkin Response to Interrogatories); CP 505-08 (Lufkin Dep.). Subsequent investigation of the site by the Department of Ecology and its consultants confirms the presence of such wastes. *E.g.*, CP 359-66 (Site Survey Results); *see also* CP 498 (email regarding excavations); CP 552-53, 569-70 (Morgan Dep.). This type of waste was not described in Lufkin's application for a solid waste permit and was not authorized by the permit. CP 76 (Application). In addition, there is evidence that Hytec illegally dumped outside the permit period. CP 80 (Letter from Thurston-Mason District Health Officer). To the extent that respondents base their arguments on the lawfulness of Hytec's dumping, therefore, those arguments must fail.

Respondents' claims that no hazardous wastes were dumped at the site also are belied by the Department of Ecology's inclusion of the area on the state Hazardous Sites List, CP 391 (Letter from Department of Ecology), and its assertion of jurisdiction under the Model Toxics Control Act to require that respondents clean up the site, CP 402 (Agreed Order). Ecology's intervention would not have occurred or even been possible in the absence of hazardous contamination at the site. Although appellants

acknowledge that contaminants in their well water have never exceeded MTCA clean-up levels, it is disingenuous for respondents to argue that no contamination exists. Chemical contamination from the waste has been found on the site and has been detected in appellants' well water. *See generally* Opening Br. at 10-12. The presence of this contamination has caused reasonable concern among appellants for their well-being and the health of their land and has interfered with their quiet possession, use, and enjoyment of their property.

III. ARGUMENT

A. Appellants Have Stated Valid Claims For Negligence.

1. Recognition of a duty to subsequent owners of land is consistent with and supported by Washington law.

Respondents accuse appellants of skipping the "duty" element of the cause of action in their discussion of their negligence claims. That is not the case. Appellants agree that the existence of a duty is a question of law. What appellants argue is that Washington law should recognize that owners and users of land have a duty to foreseeable subsequent owners of the property to protect them from the creation of latent hazardous conditions caused by the prior use of the land and to notify subsequent owners of the existence of such conditions.

Recognition of such a duty would be consistent with Washington law, which already recognizes that owners of real property have duties to protect vendees from injuries caused by latent dangers on the property.

E.g. Pfeifer v. Bellingham, 112 Wn.2d 562, 772 P.2d 1018 (1989); *Porter v. Sadri*, 38 Wn. App. 174, 685 P.2d 612 (1984); *Seattle-First National Bank v. State*, 14 Wn. App. 166 (1975); *see also* Restatement (Second) of Torts § 353. Washington also recognizes that owners and occupiers of land may be liable to persons coming on to the land for injuries caused by latent defects and to adjacent property owners for damages caused by their unreasonable conduct of activities on their own property. If the scope of a landowner's or user's duty extends to *geographically* downstream owners of property, as it clearly does under Washington law, it should also extend to *temporally* downstream owners. There is no reason to exclude foreseeable future owners of property from this duty of care, particularly in circumstances such as these, where respondent Lufkin always intended to develop and market the property for residential use. CP 502 (Lufkin Dep.).

Lufkin's attempt to distinguish *Pfeifer* and *Porter* on the ground that those cases involved personal injury, while appellants here claim only economic loss is incorrect. Lufkin Br. at 17. Appellants Morgan and Spears seek damages for loss of enjoyment and mental distress caused by the contamination of their properties. These are not economic losses, but general damages akin to the types of personal harm suffered in *Pfeifer* and *Porter*.

The leading case relied on by respondents to argue against the existence of a duty is *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D.Mass. 1990). However, *Wellesley*, and subsequent cases from other jurisdictions that have relied on and followed *Wellesley*, involved a sophisticated business purchaser of commercial property who knew of the site's history as a gas station and the consequent possibility of contamination. Those facts pose a significantly different situation than this case, in which private individuals purchased unimproved forestland, adjacent to a state forest, for residential use with no reasons to suspect any history of toxic contamination. *Wellesley's* application of the doctrine of *caveat emptor* to bar a tort action in the commercial context is not warranted under these circumstances.

Respondents also argue that recognizing such a duty would upset the market's allocation of costs and risks between sellers and buyers of land. Lufkin Br. at 21; Hytec Br. at 28. However, this duty would actually correct the market imperfection that occurs when a prior landowner or occupier disposes of property knowing of the existence of latent hazards, like the presence of toxic wastes, that are not obvious or readily discoverable by subsequent owners. Recognizing this duty would not alter the negotiated balance in situations where the subsequent owners either knew or should have known about the hazards. Defenses of contributory negligence, assumption of risk, and lack of proximate cause

will be available to the prior owners in such situations. Failing to recognize a duty, however, will allow those responsible for creating a persistent, latent hazard to escape liability to those who are most directly, seriously, and foreseeably injured by their acts.

2. Van Dinter does not contradict the duty of a prior owner of vacant land to warn foreseeable future owners of latent, hazardous conditions.

Lufkin relies on the Supreme Court's opinion in *Van Dinter v. Clark*, 157 Wn.2d 329, 138 P.3d 608 (2006), to argue that a prior owner or vendor of unimproved land has no duty to subsequent owners to disclose the existence of latent defects, such as toxic contamination. However, *Van Dinter* does not support this proposition. Rather, the Court recognized in *Van Dinter* that a duty to disclose does exist, at least with respect to the immediate buyer, if any of a number of conditions are met. Referencing the Court's earlier decision in *Colonial Imports, Inc. v. Carlton NW, Inc.*, 121 Wn.2d 726, 853 P.2d 913 (1993), *Van Dinter* explained:

In *Colonial Imports* this court endorsed the notion that **the duty arises when the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other**; or where, by the lack of business experience of one of the parties, the other takes advantage of the situation by remaining silent. *Id.* at 732. And the court quoted with approval from a Court of Appeals decision suggesting that **the duty to disclose arises** where there is a quasi-fiduciary relationship, where a special relationship of confidence and trust had developed between the parties, where a party relies on the specialized and superior knowledge of the other party, where a party has a statutory duty to disclose, or **where a seller knows a**

material fact that is not easily discoverable by the buyer. *Id.*

157 Wn.2d at 334 (emphasis added). Although the Court concluded there was no duty or misrepresentation in *Van Dinter* because the defendants “could easily have discovered” the undisclosed information, the Court’s discussion demonstrates that a duty to disclose can arise in vacant land transactions and that the duty can arise even where there is no fiduciary relationship between the parties.

Under these principles, a duty to disclose should be recognized in this case because Lufkin knew material facts regarding the hazardous designation and past use of the land that were not easily discoverable or readily obtainable by either Lufkin’s immediate vendee, Joseph Monte, or the subsequent owners, Juliane Morgan and the Spears. This case is thus factually distinguishable from *Van Dinter*. The undisclosed fact in *Van Dinter* was the existence of a capital facilities rate as part of the sewer bill that would be charged by the County if the land were developed and connected to the newly constructed sewer main. The Court explained that the Van Dinters, who bought the property for commercial development, “knew the sewer system had been recently constructed.” 157 Wn.2d at 334. If they had asked the County about the costs of connecting a new commercial development to the new sewer system, a natural and reasonable inquiry given their knowledge and plans, they would easily have discovered the existence of the capital facilities rate. Moreover, the

existence of the rate, whether or not the sellers knew of it, was not due to any action by the sellers, but was solely the result of the County's extension of its sewer lines.

By contrast, the contamination of the Littlerock property and its hazardous site designation were due entirely to Lufkin's use of the land and were peculiarly within his scope of knowledge. Appellants, buying land in a remote and wooded area for purposes of building single-family homes, had no reason to suspect the history of the site and no reason to inquire of the Department of Ecology regarding the history or status of the land.

Lufkin's arguments also are directly rebutted by *Sorrell v. Young*, 6 Wn. App. 220, 491 P.2d 1312 (1971), in which the Court of Appeals recognized a duty to disclose and rejected the defense of *caveat emptor* in a buyer's action seeking rescission of a purchase of unimproved residential land. The court held that the seller could be held liable for failing to disclose the fact that the land had been filled, even in the absence of any inquiry by the plaintiff. The court set forth the elements of the cause of action as follows:

We conceive the essential "elements" in proof of constructive fraud by nondisclosure of the existence of a land fill to be: (1) a vendor, knowing that the land has been filled, fails to disclose that fact to a purchaser of the property, and (2) the purchaser is unaware of the existence of the fill because either he has had no opportunity to inspect the property, or the existence of the fill was not apparent or readily ascertainable, and (3) the value of the

property is materially affected by the existence of the fill. When these three elements have been proved, a vendor's duty imposed by *Obde*'s general standard of justice, equity, and fair dealing have been violated.

Id. at 225 (citing *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960)). Although the problem with the "fill" in this case differs from that in *Sorrell* – hazardous contamination versus foundational stability – that difference is immaterial.¹

In reaching its conclusion, *Sorrell* relied on the Supreme Court's decision in *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960), in which the Court affirmed the seller's liability in damages for failing to disclose termite infestation of an apartment building where the infestation was "not readily observable upon reasonable inspection." *Id.* at 453 (quoted in *Sorrell*, 6 Wn. App. at 224). As demonstrated by *Sorrell*, *Obde* has not been limited in its application to improved, as opposed to vacant, real properties. Moreover, the duty to disclose recognized in *Obde* has been applied in a wide variety of real property contexts. *E.g.*, *Atherton*

¹ The fact that the remedy sought in *Sorrell* was rescission rather than damages also is immaterial. *Obde*, on which *Sorrell* relied, was an action for damages, as were *Luxon v. Caviezel*, 42 Wn. App. 261, 710 P.2d 809 (1985) and *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990), two other cases recognizing a vendor's duty to disclose in a residential property transaction. Moreover, in *Mitchell v. Straith*, 40 Wn. App. 405, 410, 698 P.2d 609 (1985), the court indicated that the burden of establishing a right to rescission is greater than to sustain a claim for damages. "Proof of a material misrepresentation should be sufficient to allow recovery of damages, whether or not it would be sufficient to support rescission." *Id.* Thus, *Sorrell*'s holding is not limited to the remedy of rescission, and failure to disclose material, latent facts about the status and history of vacant land can give rise to a cause of action for damages.

Condo. Ass'n, 115 Wn.2d at 524-25 (concealment of use of substandard materials for exterior wall coverings in condominium development); *Luxon*, 42 Wn. App. at 264-65 (allowing claim for damages for failure to disclose inadequacy of septic system for residential home); *Perkins v. Marsh*, 179 Wash. 362, 364-65, 37 P.2d 689 (1934) (fraudulent concealment from lessee of flooding problems in commercial building).

Applying *Sorrell's* three elements to this case, there is at least a question of fact with respect to each element. First, Lufkin knew that the Littlerock property had been used as a dump for chemical wastes by his former company and that the whole property had been designated as a hazardous site by the Department of Ecology. Second, appellants and Joseph Monte were unaware of these facts at the time they purchased their lots and, due to the fact that the waste had been buried in depressions, covered with dirt, and revegetated over the course of twenty years, the historic use of the site was not apparent or reasonably ascertainable by the type of inspection that a residential purchaser would ordinarily and reasonably conduct on vacant forested land. Third, the presence of the contamination and designation of the lots as part of a hazardous site have materially impaired their value.

The one difference between *Sorrell* and this case is that the appellants were not in direct contractual privity with Lufkin. However, the Washington courts have recognized that manufacturers of dangerous

products have a continuing duty to warn end users of the risks even in the absence of contractual privity. *Lockheed v. AC&S, Inc.*, 109 Wn.2d 235, 261, 744 P.2d 605 (1987). The burden of a similar duty on landowners would be less than on manufacturers because of the more limited universe of future consumers and the availability of established mechanisms for providing disclosure. For example, the existence of toxic contamination on a property or uses that may have resulted in such conditions can be recorded in the county title records. In addition, this duty need not be open-ended, but can be discharged through recording or disclosure to the owner's immediate vendee. *Cf.* Restatement (Second) of Torts § 353 (prior owner of real property is liable to vendee, subvendees, and others for physical harm caused by latent conditions on land only until vendee knows or has reason to know of the condition or risks involved). For these reasons and the reasons explained in appellants' opening brief, the court should conclude that a prior property owner who creates a latent, hazardous condition on his land has a duty to disclose that is consistent with Washington law, appropriately places the burden of care on those in the best position to act, and does not create an unmanageable or open-ended duty on the prior property owner.

B. Appellants State Valid Claims For Nuisance.

Appellants should be allowed to assert claims for both private and public nuisance against Lufkin and Hytec for the reasons explained in

their opening brief. Appellants briefly respond to three arguments raised by respondents' briefs below.

1. The courts have recognized a difference between public and private nuisance actions.

Lufkin and Hytec both argue that there is no difference between a public and private nuisance claim in the context of subsequent landowners suing prior owners or users of land. Lufkin Br. at 22; Hytec Br. at 28. As explained in appellants' opening brief, this assertion is incorrect. Several jurisdictions that have declined to recognize a cause of action for private nuisance on behalf of subsequent landowners have held that such owners can maintain a claim for public nuisance. Opening Br. at 27-28. Although appellants contend both their private and public nuisance claims should be allowed, the distinction between public and private nuisance causes of action is real and valid. In particular, when the actions of prior owners and users of land have caused a public nuisance affecting the rights of an entire community, there is no lawful or rational justification for preventing only subsequent owners, as members of the affected community, from asserting those rights.

2. Appellants may assert both nuisance and negligence claims in this case.

Lufkin relies on *Kaech v. Lewis County PUD No. 1*, 106 Wn. App. 260, 281, 23 P.3d 529 (2001), to argue that plaintiffs may not pursue both negligence and nuisance claims. *Kaech* is distinguishable in several

respects and does not support dismissal of appellants' nuisance claims at this stage of the proceedings.

In *Kaech*, the court dismissed plaintiff's nuisance claim only at the end of plaintiff's case at trial. *Id.* at 267. At that point, it was clear that plaintiff's nuisance claim was based on identical allegations to its negligence claim, specifically that the stray voltage creating the nuisance was due to "faulty insulators," not merely the presence of the transformer pole on the property. *Id.* at 282.

Here, by contrast, a jury could conclude that, even if Hytec and Lufkin did not act negligently in dumping chemical wastes on the Littlerock property, the presence of those wastes still create "an obstruction to the [appellants'] free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010. Thus, appellants' nuisance claims are not inextricably linked to an allegation or a finding of negligence.

This point was recognized in *Martins v. Interstate Power Co.*, 652 N.W.2d 657 (Iowa 2002), a stray voltage case in which plaintiffs did not claim negligence on the part of the defendant:

Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. In contrast, nuisance is a liability-producing condition. Negligence *may or may not* accompany a nuisance; negligence, however, is not an essential element of nuisance. If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages

to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance.

Id. at 660 (quoting *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998)). “In other words, nuisance simply refers to the results, negligence *might* be the cause.” *Id.* at 661.

As the Court explained, nuisance without negligence can occur when there is a sufficient “degree of danger (likely to result in damage) *inherent* in the thing itself, beyond that arising from mere failure to exercise ordinary care in its use.” *Id.* (quoting *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7, 11 (Iowa 1992)). That standard is met by the dumping of hazardous wastes on bare land intended for future residential use.

In addition, although the record is not entirely clear, *Kaech* likely involved only a claim for private nuisance, not for public nuisance as well. Public nuisances include the depositing of “noisome substances” to the prejudice of others, whether the disposal was negligent or not. RCW 7.48.140(1).

Finally, as noted above, the nuisance claim was not dismissed in *Kaech* until after submission of plaintiff’s case at trial. Here, the theory of the nuisance claims do not necessarily rely on a finding of negligence, and may not be presented that way at trial. In addition, respondents argue that appellants’ negligence claims should be dismissed for lack of a duty, which is not an element of nuisance. At a minimum, therefore, dismissal

of appellants' nuisance claims on the basis that they are identical to the negligence cause of action would be premature at this point.

3. Lufkin's consent to the dumping does not bar appellants' claims against Hytec.

Hytec relies principally on the California case of *Mangini v. Aerojet General Corp.*, 230 Cal. App.3d 1125, 1138-40 (1991), to argue that Lufkin's consent to its dumping relieves Hytec of any liability. There are several flaws in this argument.²

First, the *Mangini* court premised its discussion on the assumption that the lessee's use of the land was "lawful" as well as undertaken with consent. *Id.* at 1138. As explained above, Hytec's dumping exceeded lawful bounds in this case by including liquid substances and hazardous chemicals not contemplated in the county solid waste permit and by occurring outside the temporal limits of that permit. Indeed, in *Mangini*, the court rejected the defendant's dispositive motion on its consent defense on the basis that the lease did not clearly contemplate disposal of the types of hazardous wastes in the amounts alleged. *Id.* at 1140.

Second, the discussion of consent in *Mangini* is not actually supported by the sources the court cites. *Mangini* cites Restatement (Second) of Torts § 839 for the proposition that consent is a defense to a

² Hytec asserts a consent defense to all of appellants' causes of action, but the legal authorities it cites relate only to nuisance and trespass claims. Because Hytec provides no support for a consent defense to negligence or strict liability, appellants address the defense in this section of their brief.

claim for nuisance. However, that section merely recognizes that a possessor of land is liable for failing to abate a nuisance only if he knows or should know that the condition creating the nuisance exists without the consent of those affected by it. It does not address the situation presented by the current case, where the subsequent landowners clearly never consented to the contamination caused by the prior user of the land.

By contrast, Restatement (Second) of Torts § 834 clearly contemplates that a user, as well as an owner, of land can be held liable for creating a condition that continues to cause harm even after the activity that created the condition has ceased.

[I]f the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm.... This is true even though he is no longer in a position to abate the condition and to stop the harm.

Restatement § 834, comment e. Under this provision, Hytec would not be able to interpose a consent defense against adjacent landowners affected by the migration of its toxic wastes who themselves did not consent to creation of the condition. Subsequent landowners should be placed in no worse position than these adjacent property holders.

Mangini also relies on a law review Note regarding the defense of “coming to the nuisance,” which argued that consent is a valid defense against subsequent landowners because the original landowner cannot pass

on a right to sue that he has lost through his own consent to the activity. *Id.* at 1139 (quoting Note, *Torts: Nuisance: Defenses: "Coming to the Nuisance" as a Defense*, 41 Cal.L.Rev. 148, 149 (1953)). However, the doctrine of coming to the nuisance does not provide an absolute defense under Washington law, but is merely a factor that the court can take into account in determining liability under the statute. *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 887-88, 969 P.2d 10 (1998) (Talmadge, J. concurring). More important, the Note's conceptualization of the nuisance cause of action as a right that passes with the land is inaccurate and misses the point. For example, a landowner's acquiescence to a physical invasion that has not risen to the level of adverse possession or a prescriptive easement would not bar a subsequent owner from requiring removal of the offending encroachments. The problem with considering the prior owner's acquiescence as a fixture that gets conveyed with the land is even clearer where the landowner was an active participant in the unreasonable or unlawful activity giving rise to the nuisance or trespass.

The factual example used in *Mangini* to support that court's discussion also is readily distinguishable. A lessee who digs a quarry pursuant to the terms of the lease creates a "substantial and inevitable hole in the ground" that not only is anticipated by the prior owner, but is perfectly lawful and obvious to any subsequent owners. *Mangini*, 230 Cal. App.3d at 1138. Unlawful dumping of hazardous waste followed by

landscaping and revegetation, by contrast, creates a hidden hazard for which the disposing party should remain responsible.

Finally, as noted in appellants' opening brief, courts in other jurisdictions have rejected consent as a defense by disposers of toxic materials against tort claims by subsequent landowners. *See Redevelopment Agency v. Burlington N. & Santa Fe R. Corp.*, 2007 U.S. Dist. LEXIS 44287 (E.D. Cal. 2007); *Donald v. Amoco Production Co.*, 735 So.2d 161 (Miss. 1999). And Hytec has not cited any case where consent has been recognized as a defense to negligence or strict liability, as opposed to nuisance or trespass claims. Where, as here, the predecessor owner was a co-tortfeasor with the user of the land, it makes no sense legally or factually to excuse the user from liability based on its co-tortfeasor's consent.

C. Appellants State A Valid Claim For Trespass.

Hytec's attempts to distinguish the cases cited by appellants in support of their trespass claim are misplaced. *See Hytec Br.* at 34-35.

In *Newhall Land and Farming Co. v. Mobile Oil Corp.*, 19 Cal. App.4th 334, 345-47 (1993), the court held that prior owners who unlawfully deposited hazardous waste could be liable to subsequent owners based on their failure to remove the waste and the continued presence of the toxic materials on the property. In this case, the evidence also could support the conclusion that Hytec unlawfully and tortiously

deposited chemical wastes on the Littlerock property and can be held liable in trespass for the continued presence of the waste on the land.

It is immaterial under *Newhall*'s analysis that Hytec did not own the property. *Newhall* relied on Restatement (Second) of Torts § 161(1), which refers to the continuing liability of an "actor" who tortiously placed the offending thing on the property. Liability under this principle is predicated not on ownership of the property, but on the act of depositing the noxious substance.

Similarly, Hytec errs in asserting that *Newhall* confirmed an unlimited consent defense for prior lessees. In fact, *Newhall* only recognized that "the absence of a consent defense for a lessee *in certain situations* would lead to absurd results." *Id.* at 345 (emphasis added) (discussing the quarry hypothetical raised in *Mangini*). There is no suggestion in *Newhall* that a consent defense would be proper where dumping of hazardous materials in excess of permitted authority creates a latent hazard on the land. To the contrary, *Newhall* refused to recognize a "consent" defense for such activities interposed by the prior landowners themselves. Just as the prior owners could not escape liability by "consenting" to their own tortious conduct, they cannot foreclose the rights of future owners by consenting to the tortious conduct of others.

Hytec's misreading of *Newhall* is demonstrated by *Redevelopment Agency*, 2007 U.S. Dist. LEXIS 44287 (E.D. Cal. 2007). In that case, the

court relied on *Newhall* to hold the railroad companies liable for trespass even though they were occupiers, not owners, of the property for most of the time during which the contamination occurred. *Id.* at *30-31. The court premised the liability of the rail companies on their participation in the design and maintenance of the drainage system leading to the contamination, not on their ownership of the property. *Id.*

Hytec tries to distinguish *Redevelopment Agency* by arguing that, unlike the rail companies, it cannot be held liable for nuisance under Washington law. However, this contention assumes the correctness of Hytec's argument regarding appellants' nuisance claims. More important, the prerequisite for trespass liability in *Newhall* and *Redevelopment Agency* was not the *viability* of a concurrent nuisance claim, but the defendant's *act* of creating a public nuisance. Thus, even if the Court agrees – which it should not – that Hytec is immune from liability to appellants in nuisance because, for example, nuisance liability arises only between adjacent property owners, that does not change the fact that Hytec created a public nuisance by disposing of toxic chemicals that have migrated through the soil and reached the public groundwater.

Hytec's further attempt to distinguish *Redevelopment Agency* on the basis that there was no consent in that case also is unavailing. On the one hand, *Redevelopment Agency* does not discuss a consent defense at all. On the other, it is clear that the railroads did have permission to use and

maintain the drainage system that caused the conveyance of contamination to the property.

Finally, Hytec argues that *Donald*, 735 So.2d 161 (Miss. 1999), is distinguishable because the Court in that case based the trespass liability of the oil companies on their negligent entrustment of wastes to an incompetent contractor – the prior owner of the property – for disposal. This distinction does not help Hytec. If anything, Hytec is more clearly subject to liability, having itself been directly responsible for the improper disposal of its waste on the Littlerock property.

For these reasons, *Newhall*, *Redevelopment Agency*, and *Donald*, along with the other cases and authorities cited in appellants' opening brief, support the viability of appellants' trespass claims against both Lufkin and Hytec in this case.

D. Appellants Are Not Pursuing A Claim For Continuing Trespass And Nuisance Based On Migration From Lufkin's Property.

Respondents evince some confusion regarding whether appellants are still pursuing claims for continuing nuisance and trespass based on the migration of chemicals from property still owned by Lufkin on to the Morgan and Spears property. Although appellants did assert such claims in the trial court, they are not continuing to pursue those theories on appeal.

Investigation since the filing of the suit has revealed that the Morgan and Spears properties are being affected principally or entirely by waste that was dumped directly on those lots. Appellants' reference to evidence of the continuing migration of hazardous chemicals into and through the groundwater at the site, Opening Br. at 38-39, was not intended to signal a claim that chemicals were migrating from the parcels still owned by Lufkin to appellants' land. Rather, this evidence supports two conclusions.

First, evidence of migration into the groundwater demonstrates that the waste is not harmless and inert, as respondents imply, but is mobile and poses a threat not just to appellants but to other downgradient property owners. This supports appellants' claims of public and private nuisance and trespass from the continuing presence of the hazardous conditions created by respondents on the lots. Moreover, because Morgan's property is downgradient from the Spears' property, Lufkin and Hytec can be held liable for dumping waste on the Spears' property and creating hazardous conditions that are now migrating on to the Morgan property. *See* Restatement (Second) of Torts §§ 160-61, 834.³

³ Hytec also consciously misinterprets appellants' statement of facts to argue that appellants are alleging that the contamination is flowing up-hill. Hytec Br. at 45. As Hytec knows, borehole B02 is located either on the Spears property or on Lufkin's property immediately adjacent to Spears property and upgradient from Morgan's property and the Morgan and Pavlicek wells. Investigation has shown that dumping of drums and other materials occurred in the location of borehole B02. No such dumping occurred in the location of the Morgan or Pavlicek wells. Identification of

Second, the migration of chemicals from the dumpsites undermines appellants' consent and permitting defenses. To the extent that the dumping was permitted and consented to, it was limited to disposal of solid wastes in existing depressions on the land, not to deposition of chemicals into the groundwater.

Thus, continued mobilization of the pollution on the site is relevant to the validity of appellants' claims even if the chemicals are not migrating on to their properties from the land still owned by Lufkin.

E. Appellants Have Stated A Valid Claim For Strict Liability.

Appellants explained in their opening brief why disposal of hazardous wastes on vacant, unprepared land qualifies as an abnormally dangerous activity giving rise to strict liability. Hytec and Lufkin's response to this claim is based principally on the incorrect factual assertion that only solid waste was deposited at the Littlerock site in accordance with a county solid waste disposal permit. Respondents' repetition of this assumption throughout their briefs does not make it true. The evidence, construed in favor of appellants, is sufficient to support a finding that Hytec and Lufkin knowingly disposed of liquid chemical wastes at the site in excess of the solid waste permit and applicable county regulations. Dumping of toxic wastes on bare land was not authorized by

the same contaminants in borehole B02 and the wells provides evidence that migration of wastes has occurred, not *upgradient* from the Morgan and Pavlicek wells where no dumping occurred, but *downgradient* from the location of borehole B02 or other dumpsites.

the permit or applicable regulations, was not a common or appropriate usage of such land, and carried with it a high risk of significant harm to the natural resources and health of the community. For these reasons, respondents may be held strictly liable for their actions in polluting the Littlerock site.

F. The Court Should Not Allow Respondents To Displace Their Liability for Their Actions.

Finally, respondents suggest that appellants should look for their remedy to Joseph Monte, who bought their lots from respondent Lufkin before reselling to appellants. Appellants explained in their opening brief that Monte did not participate in and had no knowledge of the history of the site as a hazardous waste dump. Opening Br. at 8. Rather, he was only told that some fiberglass scraps had been deposited on the site. CP 511 (Lufkin Dep.); CP 528-29 (Monte Dep.). Monte also did not engage in any activities at the site that contributed to or exacerbated the contamination. Moreover, Lufkin's suggestion that Monte never suffered any impairment of his use and enjoyment of the site as a result of the dumping is a red herring, because Monte never attempted to live at the site or to build a structure or a well prior to selling the property to appellants. The Court should reject respondents' attempt to displace their liability for their own actions on to Mr. Monte.

IV. CONCLUSION

For the reasons stated in appellants' opening brief and above, the Court should reverse the trial court's entry of summary judgment in favor of the respondents, reinstate appellants' claims for negligence, nuisance, trespass, and strict liability, and remand to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 7th day of December, 2007.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

JULIANE MORGAN; and RICHARD
and CECILE SPEARS, husband and
wife,

Appellants,

v.

CHAUNCEY and ELIZABETH
LUFKIN, individually and the marital
community composed thereof; HYTEC,
INC., a Washington corporation;
LASCO BATHWARE, INC., a foreign
corporation; TOMKINS INDUSTRIES,
INC., a foreign corporation; TOMKINS
PLC, a foreign corporation,

Respondents.

NO. 36220-1-II

CERTIFICATE OF
SERVICE

THIS IS TO CERTIFY that on **December 7, 2007** the following
document:

- Appellants' Reply Brief

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