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Court of Appeals
Division III
State of Washington
9/12/2019 3:13 PM

NO. 36754-1 III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FELIX W. SCHUCK, a single individual;

Appellant,

v.

TIM JACKSON and ROBERTA JACKSON, individually, as well as the
marital community thereof; IBEX CONSTRUCTION, INC., a Washington
corporation,

Respondents.

RESPONDENTS' OPENING BRIEF

Mark M. Myers, WSBA #15362
Ryan Vollans, WSBA # 45302
Williams Kastner, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Phone: 206.628.6600
Fax: 206.628.6611
Email: mmark@williamskastner.com
rvollans@williamskastner.com

*Counsel for Respondents Tim Jackson,
Roberta Jackson, and Ibex Construction,
Inc.*

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I. INTRODUCTION

This action arises out of a chlorine tank that was taken to Pacific Steel for recycle, which then ruptured during the recycling process, allegedly causing appellant Felix Schuck (“Schuck”) personal injuries. Schuck was an employee of Pacific Steel at the time of the incident. The tank was allegedly taken to Pacific Steel from the Jacksons’ property by Gordon Beck (“Beck”), who was hired by Thomas Reinland (“Reinland”) for the purpose of identifying recyclable scrap and arranging for its transportation to Pacific Steel. As a result of this incident, Schuck brought claims against respondents Tim and Roberta Jackson and Ibex Construction, Inc.¹ (collectively referred to as the “Jacksons”)² for negligence, for an alleged violation of Washington’s Hazardous Waste Management Act, and for strict liability. The trial court properly dismissed all claims brought by Schuck against the Jacksons.

The Jacksons agreed to sell various items to co-defendant Reinland, and also permitted Reinland to take items from the Jacksons’ property that *Reinland* determined to be recyclable and sell them as scrap metal (Reinland subsequently hired Beck to assist in recycling scrap, and they—not the Jacksons—were to share in the profits from this recycling venture). After consummation of the sale agreement, the Jacksons’ role and involvement in the matter ended. Reinland and Beck were not

¹ The Jacksons owned the property where the tank was seemingly removed from, and Ibex Construction, Inc. is the Jacksons’ company, which also operated on a portion of the subject property.

² Schuck also brought the same claims against Reinland and Beck.

thereafter carrying on any kind of service agreement for the Jacksons, nor were they acting as agents of the Jacksons. This distinction is crucial. The Jacksons did not stand to profit from Reinland's sale of scrap metal³; Reinland and Beck agreed to split the proceeds generated from their recycling of scrap 60/40; the Jacksons did not participate in any way regarding the selection of items from their property for recycle; Reinland/Beck was not required to take or remove any items from the Jacksons' property; Reinland/Beck could leave any items on the Jacksons' property that they did not want; the Jacksons did not make any arrangements for Reinland's/Beck's recycling venture; the Jacksons were unaware that a tank filled with chlorine gas had been left on their property⁴; the Jacksons never used chlorine gas for any purpose; and the Jacksons were not present when Reinland/Beck were selecting and removing items from the Jacksons' property. Based on the Jacksons' role relative to the other parties' roles (including that of non-party Pacific Steel), coupled with the undisputed facts, the trial court properly dismissed all of Schuck's claims against the Jacksons.

³ Schuck notes in his brief that the Jacksons profited from their sale of items to Reinland, which is correct. After the sale agreement between the Jacksons and Reinland was consummated, however, the Jacksons did not stand to gain anything further—they did not share in any of Reinland's or Beck's profits generated from their subsequent recycling venture.

⁴ As discussed below, the Jacksons leased various portions of the subject property to various individuals and companies over the years. At times, these individuals and businesses would leave items on the property after they left. Additionally, individuals have illegally dumped items on the Jacksons' property.

II. STATEMENT OF THE CASE

A. Background.

This lawsuit arises out of personal injuries related to exposure to chlorine gas that occurred on August 12, 2015, at Pacific Steel in Spokane, WA. *See generally* CP 47-64. Appellant Schuck was an employee of Pacific Steel at the time of the incident and alleges to have been injured by exposure to chlorine gas while he was working at the Pacific Steel facility in Spokane, WA. *Id.* at ¶ 3.11 – 3.14. The chlorine gas tank appears to have come from the Jacksons' property based on other parties' testimony.

The Jacksons' property consisted of approximately 5 acres. As noted by the satellite image of the property, there was a significant volume of items on the property, some of which were utilized for the Jacksons' business (Ibex), and some of which were utilized by various tenants that leased space on the property. CP 438. Below is a satellite image depicting the subject five acre property:



CP 438.

Various portions of the property were leased to a number of different individuals and companies throughout the years, with one such company being L&S Tire Recycling. Around the time when this incident occurred, the property had numerous large piles of old tires on it as a result of L&S Tire Recycling's operation, and the portions of the property that were not covered with tires were covered with old cars, old heavy equipment, railroad box cars, old parts, and various miscellaneous items. CP 444-445.

In addition to leasing portions of the property, the Jacksons also based their construction company, Ibex, on a portion of the property.⁵ CP 443. Ibex's primary business was highway construction. *Id.* Leading up to the incident at issue in this lawsuit, Ibex had begun winding down its operations. CP 461. As a result, the Jacksons entered into the agreement with Reinland whereby Reinland purchased certain, specific pieces of equipment from the Ibex property for \$32,500. *Id.*; *see also*, CP 470. In addition to the equipment that Reinland purchased, the agreement also allowed Reinland to take any items from the Ibex property that Reinland determined to have value as scrap metal and sell them. *Id.* However, Reinland was **not** required to clear the Ibex property or otherwise remove all items from the Ibex property. CP 477-478, 480-481. Reinland could leave on the Ibex property any items that he did not want to remove. *Id.* The Jacksons did not retain any financial interest in any of the items that

⁵ Although various portions of the 5 acre property are leased to various tenants, the property is often times referred to in this litigation as "the Ibex property."

Reinland removed from the Ibex property, including in any items removed by Reinland and sold as scrap.

Following the agreement between the Jacksons and Reinland, Reinland hired defendant Beck for the express purposes of identifying items on the Jacksons' property that had value as scrap metal and that met Pacific Steel's material acceptance policies, and to arrange for transportation of those items to a recycling facility. CP 474-475; CP 483-485. Reinland and Beck were to split the profits generated from the scrap metal 60/40, with Beck receiving 60% of the profits and Reinland receiving 40% of the profits. CP 473. Simply put, through the agreement between the Jacksons/Ibex and Reinland, Reinland was free to remove whatever items *he chose* from the property, but was not required to take anything.⁶

The Jacksons played absolutely no role in the determination of which items had scrap value. CP 478-479. Further, the Jacksons played no role in the determination of where to take any items that Beck determined to have scrap value. CP 462; CP 478-479.

B. The Incident.

Following the Jacksons' agreement with Reinland, Reinland and Beck came onto the property and began removing items. CP 488-493. Beck had been in the recycling business since he was 16 (he was 61 at the

⁶ This was subject to any items on the property that were owned by tenants of the Jacksons. Property belonging to the tenants that they did not want removed by Reinland/Beck were marked and/or designated by the tenants by spray painting them with a green "x." *Id.* at 72:13-18.

time of his deposition). CP 494. He selected the tank for recycling and loaded it into a Pacific Steel transport container. CP 498. Yet, Beck knew that pressurized tanks could not be recycled. CP 494-497. According to Beck, “red flags” indicating that a tank may not be safe for recycling would be if the tank has a placard on it indicating the tank’s contents, or if a tank has valves on it. CP 499. An image of the chlorine tank that Beck selected and transported to Pacific Steel is below:



CP 501. On one end of the tank there is a tag with the words “CHEMICALS CORPORATION.” CP 503. On the other end of the tank, there are valves, which are depicted in the photo below:



CP 509.

Despite the metal tag indicating that the tank came from a chemical company and despite the visible valves, Beck loaded the tank into a Pacific Steel transport container, which was then delivered to Pacific Steel. Once received by Pacific Steel, the tank was loaded into a metal shear for recycling, which is depicted below:



CP 506. When the shear began crushing the subject tank, it caused the tank to open, releasing choline gas. *See generally*, CP 47-64.

C. Pacific Steel's Policies and Training to Inspect For and Reject Tanks.

Plaintiff acknowledges that Pacific Steel's policies and procedures prohibit them from accepting materials such as the chlorine tank. CP 3.9. During its investigation of the incident, the Department of Labor and Industries obtained and retained Pacific Steel's relevant policies and procedures, confirming that Pacific Steel employees are prohibited from accepting (1) chemicals/hazardous waste, (2) pressurized gas

cylinders/sealed containers, and (3) tanks and drums that have not been certified empty. CP 517-523. In order to ensure that Pacific Steel is complying with its policies and procedures in this regard, its employees are to “keep an eye” on materials entering the facility. CP 522.

D. The Jacksons’ Lack of Knowledge Regarding the Subject Tank.

The Jacksons have been unequivocal that they had no knowledge prior to this incident of any chlorine gas tank left on their property. CP 447-448. Mr. Jackson, who owned and operated Ibex, confirmed that Ibex never used chlorine gas for any reason. CP 449. Mr. Jackson did not learn until sometime after the incident that the tank contained chlorine; he was completely unaware of any tanks on his property that contained chlorine gas. CP 441-442.

The origins of the tank remain unknown. Notably, over the years, tenants who rented space on the Jacksons’ property would, from time to time, leave various items on the property after the tenants left. CP 463-464. Additionally, people have also, on occasion, illegally entered the Jacksons’ property and dumped materials onto it⁷. CP 465-466.

⁷ It is interesting that Schuck argues that the Jacksons owned a de facto junk yard. First, there is no evidence that persons were paying the Jacksons money to dump items onto the Jacksons’ property. Second, Schuck provides no authority for the proposition that owners of junkyards/salvage yards owe a duty to inspect all items within the junkyard/salvage yard to ensure that every single item is safe for the use that it *could* be put to by a customer who purchases/removes items from the junkyard/salvage yard. The lack of authority in this regard is telling, and it illustrates the dubious nature of the claims against the Jacksons in this lawsuit.

E. Schuck's Reliance on Inadmissible Hearsay.

Plaintiff's counsel has previously relied on an inadmissible document in an effort to argue that Mr. Jackson was aware of the chlorine tank prior to the subject incident. A copy of the inadmissible record cited to by Schuck was attached to the declaration of the Jacksons' counsel, which noted that the record was inadmissible. CP 418. The day following the incident, on August 13, 2015, it appears from the inadmissible record that "K. Miller" of the Spokane Fire Department contacted Mr. Jackson, who was at his home in Montana when the incident occurred. *Id.*, CP 512. While the record is inadmissible hearsay, it also does not support Schuck's assertion that Mr. Jackson was aware of a chlorine gas tank prior to the incident. The record was generated one day following the incident, and it is clear from the document that it was not yet known what was in the tank. *Id.* This is evidenced by the lack of any reference to chlorine, and also by the author's statement that, "[a]ll information continued to relate the material to a product used in the purification or manufacture of acetylene." *Id.* Based on the initial belief communicated by "K. Miller" that the tank had something to do with the use of acetylene, the record indicates that Mr. Jackson engaged in a discussion of some tank that he thought could have been the tank but which was used for the process of improving acetylene. *Id.* There is no evidence that chlorine gas has any connection to improving acetylene, a commonly used fuel for cutting – torching – steel. Based on this record, Schuck argued that the record represents an admission that Mr. Jackson was aware of "the subject tank"

prior to the incident since the record references “the tank.” Quite clearly, the inadmissible record does not support Schuck’s contention in this regard.

The Jacksons noted the inadmissibility of the record in their motion for summary judgment, where it was also made clear that the record was being offered for illustrative purposes, not for the purpose of proving the truth of any matters asserted therein. CP 418. In opposing summary judgment, Schuck failed to offer any authority establishing that the record itself was admissible. *See* CP 537. Indeed, the only authority offered on the point came from the Jacksons, and it demonstrates that the record is inadmissible hearsay. CP 607; *See State v. Hines*, 87 Wn. App. 98, 102, 941 P.2d 9 (1997) (investigative reports prepared during the course of an investigation, containing narrative accounts and interpretations, do not qualify as non-hearsay nor do they meet any hearsay exceptions). A court cannot consider inadmissible evidence when ruling on a motion for summary judgment. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). The investigative report of K. Miller is inadmissible hearsay and could not be considered when ruling on summary judgment. Yet, as explained below, the report is of no consequence when analyzed under the Restatement (Second) of Torts § 388. The physical characteristics of the tank are agreed upon by the parties, and Schuck argues that all involved (any reasonable person), though even the most minimal of inspections, should have realized that the tank was a tank based on its physical characteristics and could not be

recycled as such. Indeed, Reinland, Beck, and Pacific Steel (through its policies and procedures and training) all confirm that they know this. These undisputed facts, including Schuck's own arguments regarding the facts, establish that the Jacksons were entitled to summary judgment irrespective of the inadmissible record.

F. Facts and Issues Undisputed at Summary Judgment.

- The physical characteristics of the tank (CP 538-540);
- That even the most minimal of investigations would have revealed that the tank was unfit for recycling (CP 538-540);
- That Reinland and Beck, not the Jacksons, would inspect materials on the property for determining whether they were recyclable (CP 478-479);
- Reinland knew that tanks could not be recycled, and he knew from reviewing a photo of the tank that it could not be recycled (not because he now understands that the tank had chlorine in it, but because he identified the tank as such and would not know what—if anything—was inside it) (CP 407-408);
- Beck knew that tanks could not be recycled (CP 494-497, 499);
- Pacific Steel prohibits its facility from recycling tanks and trains its employees on identifying tanks (CP 517-523);
- Plaintiff contends that Reinland and Beck, as part of their recycling venture, should have inspected the tank prior to recycling it, and were negligent for not so doing (*see generally* CP 47-64; CP 275-291);

- No Facts offered supporting a conclusion that the Jacksons produced chlorine gas (or tanks of it) as a result of their business operations;
- No facts offered to supporting a conclusion that the Jacksons first caused the tank of chlorine gas to become subject to regulation under the HWMA;
- Neither Reinland nor Beck was acting as agents of the Jacksons while Reinland and Beck carried out their recycling venture.

III. SUMMARY OF ARGUMENT

When viewing the Jacksons' role in this matter, the issues presented on summary judgment, and now on appeal, clearly demonstrate that the trial court's order dismissing Schuck's claims against the Jacksons should be affirmed. Regarding Schuck's common law claims, Schuck was not injured on the Jacksons' property (nor was anyone injured by a condition on the Jacksons property). Despite this, Schuck urged the trial court, and now this Court, to apply premises liability standards to his claims against the Jacksons. Schuck's efforts in this regard are both exhausting and troubling. A case out of this very Court makes clear that when claims relate to injuries resulting from the supply of a chattel, the applicable duty is that which is set forth in the Restatement (Second) of Torts § 388 (1965). See *Lunt v. Mount Spokane Skiing Corp.*, 62 Wn. App. 353, 814 P.2d 1189 (1991). Notably, the trial court expressly relied upon *Lunt* in rejecting Schuck's request that the applicable duty should be some

generalized concept of ordinary care. *See* CP 818. It is questionable that Schuck fails to even mention *Lunt* in his appeal, and instead makes the same tired arguments rejected by the trial court and by *Lunt*. Under controlling precedent, the duty applicable to Schuck's common law negligence claim is set forth in the Restatement (Second) of Torts § 388 (1965).

Applying the Restatement (Second) of Torts § 388 (1965), it is clear that there are no disputed questions of fact regarding Schuck's common law negligence claim against the Jacksons, and that summary judgment dismissal of the claim was proper. Schuck tacitly concedes as much through his repeated efforts to have premises liability law applied to a case where the injury did not occur on the Jacksons' property and does not even relate to a condition on land⁸. Notably, the purpose for which the items on the Jacksons' property were made available to Reinland was so to allow Reinland to inspect items on the Jacksons' property and determine whether they were recyclable scrap, and then sell them if they were (for Reinland's financial gain, which he would split with Beck). Reinland paid

⁸ Schuck also places reliance on various iterations of the Restatement (Second) of Torts § 302. As explained in more detail below, Schuck's efforts in this regard fail for multiple reasons. First, these restatements do not establish what the duty is, they set forth when a duty may arise. Assuming a duty arose under the Restatement (Second) of Torts § 302, the Restatement (Second) of Torts § 388 (1965) would still define what the duty is. Second, the claims against the Jacksons relate to alleged omissions, rendering the Restatement (Second) of Torts § 302 inapplicable.

the Jacksons for the ability to do this. Schuck failed to offer any evidence showing that the Jacksons should have known that the items on their property were unfit for this purpose—the purpose of allowing Reinland to determine whether the items could be recycled as scrap.

Further yet, Reinland, Beck, and Pacific Steel all knew that tanks could not be recycled. Additionally, the physical characteristics of the tank are not disputed. Schuck points to the physical characteristics of the tank in support of his argument that “any reasonable person, through even the most minimal investigation,” should have realized that the tank was a tank and could not be recycled as such. Schuck’s contentions in this regard extinguish the ability to satisfy the requirements of the Restatement (Second) of Torts § 388 (1965), and the trial court correctly dismissed Schuck’s common law negligence claim accordingly.

The dismissal of Schuck’s HWMA claim against the Jacksons is even more straightforward. Schuck explicitly identified that his sole theory against the Jacksons under the HWMA was based on the Jacksons’ alleged status as “generators” under the act. A generator is one whose act or process produces dangerous waste **or** whose act first causes a dangerous waste to become subject to regulation. WAC 173-303-040. Schuck failed to present any evidence that the Jacksons’ acts or processes produced chlorine (or tanks of it) **or** that an act of the Jacksons’ first

caused the tank of chlorine gas to become subject to regulation under the HWMA. It is that simple, and the trial court correctly dismissed Schuck's statutory claim.

Lastly, the trial court properly ruled that, as a matter of law, the Jacksons did not engage in an inherently dangerous activity by making items on their property available for Reinland to inspect and remove at his Reinland's discretion.

In summary, the trial court properly dismissed all claims against the Jacksons.

IV. THE TRIAL COURT'S ORDER DISMISSING ALL CLAIMS AGAINST THE JACKSONS SHOULD BE AFFIRMED

A. Summary Judgment and Standard of Review.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

At summary judgment, the non-moving party may not rest upon mere allegations, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990).

If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to the party's case,

and on which the party will bear the burden at trial,” then the trial court should grant the motion.

Young v. Key Pharmaceuticals, Inc., 112 Wn. 2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 US 317, 322 (1986)). Failure of proof on any essential element of a plaintiff’s claim necessarily renders all other facts immaterial and requires entry of summary judgment for defendant. *Robinson v. Avis Rent A Car Sys.*, 106 Wn. App. 104, 110-11, 22 P.3d 818 (2001).

Whether a case goes to the jury or the judge dismisses the claim for a failure to establish a question of fact may depend on the actors and the circumstances involved. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985). When reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law on summary judgment. *Id.* Lastly, a proper function of summary judgment is avoiding useless trials where the facts are not in dispute, or when reasonable minds could reach but one conclusion on relevant facts. *Id.* at 773.

B. Common Law Claims Properly Dismissed.

The existence of a duty owed is a question of law for the court. *See Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). Liability in tort for negligence may lie only where the defendant owes the plaintiff a duty of care. *HBH v. State*, 197 Wn. App. 77, 86, 387 P.3d 1093 (2016), *as amended on denial of reconsideration* (Apr. 18, 2017), *review granted*, 189 Wn.2d 1002, 404 P.3d 1162 (2017). The plaintiff has

the burden of establishing the existence of a duty. *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 804, 43 P.3d 526 (2002). In general, a duty to use reasonable care will be imposed if one of two conditions applies: (1) where the defendant engages in conduct that poses a risk of injury to the plaintiff, or (2) where the defendant's conduct did not itself pose a risk of harm to the plaintiff, but the defendant is found to have a duty to prevent the injury to the plaintiff. 16 Wash. Prac., Tort Law And Practice § 2:2 (4th ed.). In general, if injury is caused by the *acts* of the defendants (misfeasance), a duty to use reasonable care to avoid injury will be assumed. *Id.* (emphasis added). By contrast, if the injury results from the defendant's *omission*—the failure to act, or nonfeasance—there will be no liability in the absence of the defendant having assumed the duty of care to protect the plaintiff from harm, or such a duty being imposed by statute. *Id.*

1. The Restatement (Second) of Torts § 388 Establishes the Duty With Regard to Supplying Chattels.

Schuck's claim that the Jacksons' sale of various items to **Reinland** created a duty between the **Jacksons** and **Schuck** is baseless. Nonetheless, Washington follows the Restatement (Second) of Torts § 388 for duties owed with respect to the supply of a chattel in this context (*i.e.*, when the supplier is a non-manufacture and when the chattel is not supplied for use in the supplier's business). See *Lunt v. Mount Spokane Skiing Corp.*, 62 Wn. App. 353, 358, 814 P.2d 1189 (1991). Thus, § 388

would outline the duty owed with respect to the chattel at issue in this case, the tank. Under this restatement, a supplier of a chattel can be liable for injuries caused by the chattel only if he/she:

- a. knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- b. has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- c. fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Simonetta v. Viad Corp., 165 Wn.2d 341, fn. 3, 349, 197 P.3d 127 (2008) (citing Restatement (Second) of Torts § 388 (1965)). No claim is viable under §388 unless the plaintiff proves all three elements. *Id.*

Despite *Lunt* making clear that § 388 would establish the duty applicable to the common law negligence claim against the Jacksons in this case, Schuck continues to argue that some generalized notion of a duty should be applied. A determination of duty must be assessed in the context of the standard of care imposed on a person charged with negligence. See *Schinkelshoek v. Empire Seed Co.*, 60 Wn. App. 733, 736-37, 806 P.2d 1263 (1991). In *Schinkelshoek*, the plaintiff was injured by a golf cart while on the defendant's property. The plaintiff tried to frame the duty owed to him by the defendant under premises liability standards. The court rejected plaintiff's efforts in this regard and noted that the

applicable duty was defined by § 388 since the injury was caused by a chattel, not land. *Id.* at 736.

Significantly, this Court has squarely rejected the same contentions advanced by Schuck's in this regard (*i.e.*, that the common law duty with respect to a chattel is established by something other than § 388). *See Lunt v. Mount Spokane Skiing Corp.*, 62 Wn. App. 353, 814 P.2d 1189 (1991). In *Lunt*, the plaintiff was injured as a result of ski bindings that she rented from defendant Mount Spokane Skiing Corporation; the plaintiff was injured on Mt. Spokane's property. *Id.* at 355. The plaintiff brought a negligence claim against Mt. Spokane with respect to the bindings. *Id.* at 354-355. Specifically, the plaintiff alleged in her lawsuit that she was an invitee of Mt. Spokane and that Mt. Spokane failed to **protect** or **warn** her with respect to the ski bindings that Mt. Spokane provided. *Id.* at 356.

The plaintiff contended—as Schuck does here—that Mt. Spokane owed her the general duty, based on premises liability law, to exercise ordinary care to protect against the danger posed by the bindings. *Id.* at 357 (the plaintiff relied on, *inter alia*, § 343 of the Restatement (Second) of Torts, as does Schuck, for the duty she advocated for). The *Lunt* court rejected the plaintiff's reliance on § 343 and general notions of a duty to exercise ordinary care to protect and/or warn against dangerous conditions. *Id.* at 358. The *Lunt* court recognized that Washington has adopted Restatement (Second) of Torts § 388 for outlining “the duty” owed by those who supply a chattel that causes an injury. *Id.* Here, Schuck was not injured on the Jacksons' property, and Schuck's claims

against the Jacksons' relates to the chattel being made available to Reinland. Accordingly, § 388 outlines the applicable duty. This very Court has confirmed as much. Schuck's failure to even mention *Lunt*, despite the trial court's express reliance on it, is telling. *See* CP 818.

Next, Schuck—for the very first time on appeal—relies on the Restatements (Second) of Torts §§ 390, 392 and 402A⁹. These restatements outline specific duties owed under specific circumstances, and they were not presented to the trial court for consideration on summary judgment. *See generally*, CP 534-558 (Schuck's Opposition to Summary Judgment). Because these restatements and the specific contexts in which they apply for the creation of a specific duty were not presented to the trial court (and thus not considered by the trial court), Schuck cannot now raise them on appeal to argue that the trial court erred. *See*

⁹ Notwithstanding, the aforementioned restatements are unhelpful to Schuck's claims. The Restatement (Second) of Torts § 402A sets forth a product liability theory (i.e., defective product), and relates to sellers who are engaged in the business of selling such a product. Schuck did not raise any product liability claims in this lawsuit. CP 47-64. Further, the undisputed evidence establishes that the Jacksons were not sellers who were engaged in selling products of this kind (tanks of chlorine gas). Next, the Restatement (Second) of Torts § 390 applies when a chattel is provided to someone known to be incompetent for use of the chattel. While not previously raised at the trial court level, the restatement is readily dispensed of given (1) the Jacksons' lack of knowledge regarding the tank, and (2) Reinland's knowledge that tanks cannot be recycled and his ability to identify the subject tank as a tank, as well as Beck's and Pacific Steel's knowledge regarding tanks and that they cannot be recycled. Lastly, the Restatement (Second) of Torts § 392 applies only when a chattel is supplied to another for use in the **supplier's own business**. Again, this restatement was not considered by the trial court, but the undisputed evidence also makes clear the restatement's inapplicability to our facts. The restatement applies in situations where, for example, a company that manages/maintains a shipping dock provides a worker with a pressure washer to clean the dock, and the worker is injured by a dangerous condition of the pressure washing. In that scenario, the company providing a chattel for use in its business has a duty to inspect the chattel to ensure that it is safe for the intended use.

Martin v. Johnson, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (refusing to review issue that trial court did not have opportunity to rule on first); *Re v. Tenney*, 56 Wn. App. 394, 400, 783 P.2d 632 (1989) (same); *see also McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) (party may not “sandbag” his case by presenting one theory to the trial court and then arguing additional theories on appeal).

The Restatement (Second) of Torts § 388 (1965) establishes the duty applicable to Schuck’s common law negligence claim.

2. No Disputed Questions of Fact Warranting a Trial Under § 388.

No claim is viable under the Restatement (Second) of Torts § 388 unless the plaintiff proves all three elements. *Simonetta v. Viad Corp.*, 165 Wn.2d 341, fn. 3, 349, 197 P.3d 127 (2008). Subsections (a) and (b) cannot be supported based on the undisputed facts. The comments to this restatement are particularly informative when evaluating Schuck’s claims.

First, the Jacksons’ duty would be limited to disclose only information actually known to them:

When warning of defects unnecessary. One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care **to inform them of its dangerous character in so far as it is known to him, or of facts which to his knowledge** make it likely to be dangerous, if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved.

Mele v. Turner, 106 Wn.2d 73, 79, 720 P.2d 787 (1986) (quoting comment k to §388).

Second, the Jacksons had no duty to inspect the cylinder:

[T]he mere fact a chattel is supplied for the use of others does not of itself impose upon the supplier a duty to make an inspection of the chattel, no matter how cursory, in order to discover where it is fit for the use for which it is supplied.

Olson v. U.S. Industries, Inc., 649 F. Supp. 1511, 1518 (1986), (citing §388 comments l, m); *see also Mele v. Turner*, 106 Wn.2d 73.

Third, the Jacksons had no duty to warn about conditions a casual glance would reveal:

It is not necessary for the supplier to inform those for whose use the chattel is supplied of a condition which a mere casual looking over will disclose, unless the circumstances under which the chattel is supplied are such as to make it likely that even so casual an inspection will not be made.

Mele, at 79 (quoting comment k to §388).

Under §388 and the standards applicable to it, the trial court properly dismissed Schuck's common law claim because there were not disputed questions of fact for each of the three required elements under the restatement.

a. No Disputed Questions of Fact Under Subsection (a) to § 388.

In order to satisfy subsection (a) of §388, the defendant must know or have reason to know that the chattel is or is likely to be dangerous for the **use for which it is supplied**. The Jacksons had no knowledge regarding the chlorine tank¹⁰, and, importantly, the Jacksons did not supply the chlorine tank for the purpose of recycling it. The Jacksons' property was made available to Reinland for the purpose of allowing Reinland to evaluate items and determine whether they were appropriate for recycling, so that Reinland could then recycle items if he so chose. Put differently, the "purpose" for which the items on the Jacksons' property were made available to Reinland was for the purpose of allowing Reinland to determine whether said items were appropriate for recycling. There is no basis to support the contention that the items on the Jacksons' property were not safe for this purpose, especially when Reinland, Beck, and Pacific Steel all knew that tanks could not be recycled. Based on the Jacksons' lack of knowledge regarding the tank (lack of actual knowledge of a tank filled with chlorine gas), coupled with the "purpose" for which the items on the Jacksons' property were supplied (so that others could determine whether they were appropriate for recycling), Plaintiff cannot establish subsection (a) of § 388. Certainly not when Reinland testified that, based on a picture he reviewed of the tank, he would not have

¹⁰ Any duty to warn/disclose in this context is restricted to what the Jacksons actually knew. *See Mele v. Turner*, 106 Wn.2d 73, 79, 720 P.2d 787 (1986).

recycled since it was unknown what was, or was not, inside the tank. CP 407-408. This conclusively demonstrates that subsection (a) cannot be satisfied as to the Jacksons.

Further yet, Schuck failed to offer any evidence demonstrating that the Jacksons should have known that Reinland was unable to determine whether a tank was a tank and whether it could be recycled. The only evidence in this regard is that Reinland wanted to remove recyclable items from the Jacksons' property, and that he knew tanks could not be recycled. No evidence was offered at the trial court level indicating that the Jacksons should have known Reinland was unable to safely do the very task that he set out to do. There is a dearth of evidence that the Jacksons either knew or should have known that making their property available to Reinland for the purpose of Reinland identifying recyclable scrap was likely to be dangerous, which extinguishes Schuck's ability to create a question of fact under § 388. For instance, Schuck did not offer evidence that (1) the Jacksons had more knowledge regarding safe recycling practices than Reinland, (2) that the Jacksons' were aware that Reinland would not, or could not, determine whether a tank was a tank and whether it could safely be recycled, or (3) that the Jacksons knew items from their property would be taken to a recycling facility that either did not have material acceptance policies or to a facility that would flunk its own material acceptance policies. Schuck failed to put any evidence in the record that would suggest the Jacksons knew or should have known that

Reinland, Beck, or Pacific would fail to identify a tank as a tank and recycle it.

Notably, subsection (a) to § 388 will seemingly always be established in lawsuits involving the supply of a chattel because the chattel at issue was specifically provided or negotiated for. *See Olson v. U.S. Industries, Inc.*, 649 F.Supp. 1511; *see also Mele v. Turner*, 106 Wn.2d 73, 720 P.2d 787 (1986). That is not so here. The Jacksons, per the sale agreement, allowed Reinland to take or leave whatever items Reinland wanted from the Jacksons' five acre property based on the determinations of Reinland. The evidence presented on summary judgment established that the Jacksons did not provide any instruction on what items should be recycled (and which could not), nor were they even present at the Ibez property when Reinland/Beck were recycling scrap iron, and Reinland and Beck both knew tanks could not be recycled. As such, there is no evidence to support subsection (a), whereby the supplier must know or have reason to know that the chattel is or is likely to be dangerous for the **purpose** which it is supplied.

Additionally, this same analysis demonstrates that, on the face of § 388, it does not extend to create a duty between the Jacksons and Schuck in this case. Prior to even getting to subparts (a) – (c) of § 388, the rules states as follows:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable

use, for physical harm caused by the **use of the chattel in the manner for which and by a person for whose use it is supplied**, if the supplier:

The Restatement (Second) of Torts § 388 (emphasis added).

Again, Reinland purchased the right to inspect items from the Jacksons' property that he determined to have recyclable value, and then he was permitted to remove and sell the items that he determined to have recyclable value (with Reinland and Beck sharing the proceedings from any sales). The Jacksons did **not** hire or pay for Reinland to come onto their property and recycle items from it so that they could split the proceeds from said sales; **Reinland** paid the Jacksons' for the ability to carry on his recycling venture. Here, no one—including Schuck—was injured on the Jacksons' property by a chattel during the course of attempting to determine whether or not it was recyclable. If that occurred, then perhaps the calculi as to the Jacksons' would be different under § 388. For example, if Reinland (or perhaps Beck or someone else hired by Reinland to identify recyclable scrap on the Jacksons' property) was injured by a chattel on the Jacksons' property during that process, then § 388 would outline the applicable duty. Here, § 388 does not even create a duty on the part of the Jacksons as to Schuck. Nonetheless, for the reasons discussed within this section and *infra*, Schuck failed to create a triable issue of fact under either subsection (a) or (b) to § 388.

b. No Disputed Questions of Fact Under Subsection (b) to § 388.

Under subsection (b) to § 388, the plaintiff also needs to establish that the supplier “has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition.” The Restatement (Second) of Torts § 388. Under this section, particularly clause (b), “a supplier is under no duty to inform the user or consumer of a condition readily observable upon casual inspection.” *Olson v. U.S. Industries, Inc.*, 649 F.Supp. 1511, 1518 (1986) (citing § 388 comment *k*)¹¹. There are no disputed facts regarding the physical characteristics of the tank and what a causal inspection would have led to.

The determination as to whether scrap is recyclable necessarily means that items would need to be casually inspected or, at the very least, it dictates that the Jacksons would not have “no reason to be believe” that a casual inspection would not be made and the condition not discovered (for recycling purposes). Schuck himself maintains that the tank was a tank and it was readily observable as such. CP 538-540. Schuck also acknowledges that the tank had a label with the word “chemical” on it and that the tank had valves on one end. *Id.* When the facts are undisputed and the inferences therefrom are plain and incapable of reasonable dispute,

¹¹ Further, the supplier of a chattel is under no duty to inspect the chattel. *Olson*, 649 F.Supp. at 1518 (“although the supplier’s duty is to exercise reasonable care to inform those for whose use the article is supplied of dangers which are *peculiarly* within the supplier’s knowledge, the mere fact a chattel is supplied for the use of others does not of itself impose upon the supplier a duty to make an inspection of the chattel, no matter how cursory, in order to discover whether it is fit for the use for which it is supplied.”) (citing § 388 comments *l, m*).

the issue is one of law for the court. *See e.g., Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008). There are no disputes regarding the physical characteristics of the tank and what was readily determinable based on its characteristics, as argued by Schuck himself. The trial court correctly observed this and determined that Schuck's contentions in this regard were dispositive of his § 388 claim. CP 696.

The following evidence was submitted on summary judgment and is not in dispute:

- Reinland's knowledge that tanks are not recyclable, and he knew from looking at a photo of the tank at issue that it was not recyclable. CP 407-408;
- Beck's knowledge that tanks cannot be recycled and that valves on the end of a tank is a telltale sign that the tank is pressurized. CP 494-497, 499;
- Pacific Steel's knowledge that tanks and pressurized canisters cannot be recycled and its training of employees that they need to keep an eye out for prohibited items. CP 517-523;
- Reinland's agreement with the Jacksons meant that he (not the Jacksons) would be selecting items from the Jacksons' property for recycling. CP 478-479;
- Beck was hired for the purpose of selecting marketable scrap from the Jacksons' property and scrap that was acceptable to Pacific Steel. CP 483-485;
- The Jacksons were not involved in the determination of what items could be recycled from their property. CP 478-479;
- The physical characteristics of the tank. CP 538-540;

- That even the most minimal of investigations would have revealed that the tank was unfit for recycling. CP 538-540.

Again, Schuck and his expert argue that, “A reasonable person would have taken notice of this potential hazard.” CP 538-540. Schuck maintains that “[...] a reasonable person should have known, **through even a minimal investigation**, that there was potentially hazardous material in the cylinder.” *Id.* (emphasis added). The undisputed facts – Schuck’s own contentions, no less – demonstrates there no questions of fact and that the Jacksons are entitled to summary judgment on subsection (b) of § 388, which eliminates Schuck’s ability to establish liability under the restatement.

Schuck has made efforts to argue—in contradiction to other arguments he offers in this same litigation—that the circumstances were such that it should have been unlikely to the Jacksons that even a casual inspection would be made by Reinland, Beck, or Pacific Steel. Schuck’s *arguments* in this regard are unsupported by facts and undermined by the nature of the agreement that the Jacksons entered into. Again, not every item on the Jacksons’ property was recyclable. Reinland testified that he (and subsequently Beck) would make the determination of whether scrap was recyclable, not the Jacksons. This in and of itself debunks Schuck’s baseless contention that the Jacksons should not have expected that even the most casual of inspections to be performed. What’s more is that we are not talking about a needle in a haystack here; we are not talking about

a dime that went unnoticed. The chattel at issue was very substantial and had to be moved by an excavator. CP 575. The standard here is not whether an inspection was in fact made, as Schuck attempts to argue backwards from. The standard is whether the circumstances were such that it was unlikely an inspection would be made. On that point, Schuck himself argues that Reinland and Beck were both negligent for not inspecting the chattel prior to delivering it to Pacific Steel. CP 47-64; 275-279; Appendix. As noted in the Appendix—and in Schuck’s other filings referenced herein—Schuck has filed in at the trial court level arguments—supported by expert testimony—that Reinland would be *expected* to inspect and identify items such as the tank. Schuck’s efforts to turn around and then argue that the Jacksons had no reason to believe that Reinland would inspect items prior to recycling them are disingenuous and unsupported by evidence¹². Moreover, Pacific Steel has policies and procedures requiring them to identify and reject tanks. Schuck’s contention that it was unlikely Pacific Steel would inspect the chattel due to the fact that Pacific Steel receives large amounts of scrap material is perplexing. Of course Pacific Steel receives large amounts of scrap materials— that is its business, and that is the very reason its employees are trained to identify and reject prohibited items, including tanks.

¹² Judicial estoppel precludes Schuck’s efforts to submit argue that Beck and Reinland should have inspected the tank given their roles in this scenario, but then take contradictory positions when it is advantageous for him to do so with regard to a different defendant. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and then seeking an advantage by taking a clearly inconsistent position).

Schuck failed to offer evidence that should have led the Jacksons to have known that a casual inspection of items from their property would be unlikely, either prior to removing them for recycling, or prior to a recycling facility actually recycling them. The only evidence in this regard demonstrates that the Jacksons would have no reason to believe that an inspection would not be made. And as Schuck himself adamantly maintains, even the most minimal of an investigation would have led to the determination that the tank should not be recycled. CP 539-540.

3. Restatement (Second) of Torts § 302 is Inapplicable.

The **only** authority Schuck raised at the trial court level addressing the Restatement (Second) of Torts § 302 was *Parrilla v. King County*, 138 Wn. App. 427, 157 P.3d 879 (2007)¹³. Notably, *Parrilla* only addresses the Restatement (Second) of Torts § **302B**. Now, on appeal, Schuck contends the trial court committed error for failing to consider sections of Restatement (Second) of Torts § 302 other than section B, sections never raised or addressed by Schuck at the trial court level. Once again, Schuck's efforts to allege that the trial court committed error for failing to consider authority and theories not raised by Schuck at the trial court level should be rejected. *See Johnson*, 141 Wn. App. 611.

¹³ Schuck did not cite to this case in his Opposition to Summary Judgment, nor did Schuck even cite to or mention the Restatement (Second) of Torts § 302 in his Opposition. *See* CP 534-558. Instead, Schuck cited to *Parrilla* for the first time in a filing titled "Plaintiff's Statement of Additional Authorities." CP 626-628. The trial court expressly stated that it would not consider "Plaintiff's Statement of Additional Authorities." CP 646. Notwithstanding, Schuck still cited to *Parrilla* at oral arguments on the Jacksons' motion for summary judgment. RP 57.

As an important threshold matter, even if the Restatement (Second) of Torts § 302 were relied upon for the proposition that acts or omissions could create a duty, the Restatement (Second) of Torts § 388 would still establish what that duty would be in the context of Schuck's claims against the Jacksons. Schuck's tireless efforts to maintain that some vague notion of a generalized duty to the public at large should apply to his claims against the Jacksons in this case ring hollow, and *Lunt* squarely rejects Schuck's contentions in this regard. As such, Schuck's arguments regarding the Restatement (Second) of Torts § 302 is a futile enterprise; it could only lead back to the application of § 388 and, as discussed *supra*, the trial court correctly dismissed Schuck's common law claim against the Jacksons due to the lack of disputed questions of fact under § 388.

Nonetheless, the Restatement (Second) of Torts § 302, regardless of the subsection, does not apply to Schuck's claims against the Jacksons. Any allegations as to the Jacksons rest on alleged omissions. The Jacksons did not take **actions** that placed Schuck in immediate peril. Everything Schuck cites to as constituting "actions" on the part of the Jacksons are inactions— *i.e.*, the Jacksons did not inspect; the Jacksons did not warn; the Jacksons *allowed* others to leave items on their property; the Jacksons *allowed* items to be taken from their property. These are all failures to act. The Restatement (Second) of Torts § 302B is only implicated by **affirmative actions** that place a plaintiff in peril. *Robb v. City of Seattle*, 176 Wn.2d 427, 439, 295 P.3d 212 (2013) (discussing § 302B). Schuck maintains that § 302B applies to the Jacksons because

they created an unreasonably dangerous situation by **allowing** the subject tank to be removed from their property and/or by allowing it to arrive and/or remain on their property. Schuck's position in this regard belies the application of § 302B. Washington's Supreme Court squarely rejected the application of § 302B to instances even where the conduct at issue is, albeit in a remote sense, affirmative. *See Robb*, 176 Wn.2d at 439 (the officer *affirmatively* apprehended the suspect and left munitions at the scene of the arrest, but this conduct was not affirmative in the sense envisioned by § 302B). § 302B is inapplicable to the Jacksons.

Similarly, the Restatement (Second) of Torts § 302 and § 302A are also unhelpful to Shuck's claims against the Jacksons. The restatement is nothing more than circular statement that, "A **negligent** act or omission may be one which involves an unreasonable risk of harm to another through either:

- (a) the continuous operation of a force started or continued by the act or omission, or
- (b) the foreseeable action of the other, a third person, an animal, or a force of nature.

Restatement (Second) of Torts § 302¹⁴. This is merely a statement that negligent acts and negligent omissions can occur in certain contexts. It is difficult to understand how this statement is helpful in anyway. This

¹⁴ It should be noted that the language of the Restatement (Second) of Torts § 302 is particularly vague and unhelpful, which likely explains that lack of Washington authority interpreting and applying the restatement.

restatement is not informative as to what the underlying duty would be that would form the basis to a negligence claim—it presupposes a duty without identifying it or describing the scope of said duty. Significantly, *comment a* to this restatement concedes just that: “If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, **but it does not subject him to liability, because of the absence of duty.**” Restatement (Second) of Torts § 302, *comment a*. The same is true with respect to Restatement (Second) of Torts § 302A, which contains the same comment: “If the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, **but it does not subject him to liability, because of the absence of duty.**” Restatement (Second) of Torts § 302A, *comment a*. Accordingly, the Restatement (Second) of Torts § 302 and § 302A do not create a duty to act towards another person or to protect them.

Lastly, Schuck’s reliance on *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532 (2011) in support of his Restatement (Second) of Torts § 302 argument is also unhelpful to his claims and is clearly distinguishable. In *CH2M Hill*, the defendant was an engineering firm that undertook the **affirmative** acts of designing and consulting on features of a sewage treatment plant. After CH2M Hill provided certain design consultations on components of the sewage treatment facility, the components they allegedly designed and/or consulted on failed and resulted in death and personal injuries to several workers at the facility.

The main takeaways from *CH2M Hill* are simple: (1) the defendant owed a duty, when performing its services, to “exercise the degree of skill, care, and learning possessed by members of their profession in the community,” and (2) that the duty extends to those working on the property at the time the defendant’s designs were being implemented. *Id.* at 609. It is unclear why Schuck believes *CH2M Hill* is helpful to his claims in this case. The case stands for a proposition not in dispute: when one acts towards another, they owe a duty to exercise ordinary care in their actions. This proposition is neither novel nor in dispute. Additionally, it is not controversial that the duty owed by an entity designing a building would extend to occupants of that building.

In short, the trial court correctly held that the Restatement (Second) of Torts § 302B did not apply to Schuck’s claims in this case, and Schuck’s reliance on the Restatement (Second) of Torts § 302 and § 302A is unhelpful— they do not set forth an underlying duty, and the comments to those restatements explicitly confirm this.

4. Claim of Abnormally Dangerous Activity Properly Dismissed.

Schuck alleges in his Complaint that the Jacksons were engaged in an abnormally dangerous activity. This claim does not warrant serious consideration. Washington courts have adopted the test for abnormally dangerous activities set forth in the Restatement (Second) of Torts § 520. *See Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 332 P.3d

469 (2014). The Restatement sets forth six factors that are to be considered in deciding whether an activity is abnormally dangerous:

(a) Existence of a high degree of risk of some harm to the person, land, or chattels of others;

(b) Likelihood that the harm that results from it will be great;

(c) Inability to eliminate the risk by the exercise of reasonable care;

(d) Extent to which the activity is not a matter of common usage;

(e) Inappropriateness of the activity to the place where it is carried on; and

(f) Extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520.

Nonetheless, “[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.” *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 7, 810 P.2d 917 (1991), *opinion amended on other grounds*, 117 Wn.2d 1, 817 P.2d 1359 (1991). The question of whether to impose strict liability under this theory is for the court. *Id.* at 6.

Courts have readily dismissed similarly alleged claims against manufactures of firearms on the basis that simply selling a firearm is not an inherently dangerous activity merely because firearms are readily

capable of causing serious injury. *See e.g., Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wn. App. 267, 275, 748 P.2d 661, 665 (1988). The same rationale applies to the present facts. The Jacksons simply sold equipment to Reinland and permitted him to take from their property other items that Reinland/Beck determined had scrap value. There is nothing inherently dangerous in the agreement reached by the Jacksons, irrespective of whether an item that was removed from their property subsequently caused an injury to someone. The operative analysis does not work backwards based on whether an injury occurred on a given occasion. If that were the case, any conduct that resulted in an injury would be deemed to be an inherently dangerous activity. For example, if driver A inadvertently hit another car which resulted in personal injuries to driver B, then the driver A would be deemed to have engaged in an unreasonably dangerous activity because hitting another vehicle with your car is inherently dangerous—under Schuck’s reasoning. Rather, the inquiry is whether the general activity that is initially engaged in (such as driving a car) is an inherently dangerous activity.

Here, the trial court correctly ruled that, as a matter of law, the Jacksons did not engage in an inherently dangerous activity when they entered into a sales agreement with Reinland. CP 649.¹⁵ Notably, one

¹⁵ Although the trial court reached the correct conclusion in this regard, its analysis was flawed to the extent it reasoned the Jacksons were engaged in the disposal of a single tank. As noted, the Jacksons did not arrange for the disposal of even a single tank—they did not arrange for the disposal of anything. The evidence is that the Jacksons entered into a sales agreement, not any kind of service agreement. The evidence is also that the Jacksons were not involved in any way regarding the selection of recyclable materials or the transport of recyclable materials. Attributing Beck’s and Reinland’s subsequent

court has expressly held the manufacture and storage of chlorine gas are not unreasonably dangerous activities that warrant strict liability because they can safely be accomplished through the exercise of reasonable care. *Erbrich Products Co., Inc. v. Wills*, 509 N.E. 2d 850 (Ind. Ct. App. 1987). So too with respect to the proper disposal of chlorine gas; Schuck failed to present any authority or evidence indicating that chlorine gas cannot be safely disposed of when reasonable care is exercised. But more to the point, the Jacksons did not even engage in the disposal of a chlorine gas tank. As referenced above and discussed below, Reinland and Beck were not agents of the Jacksons when Reinland or Beck selected the tank for recycling and transported it to Pacific Steel. Arguing that the Jacksons engaged in the disposal of the tank is a factually and legally unsupportable position.

C. Schuck’s Statutory Claim Under the HWMA Was Properly Dismissed.

Washington’s Hazardous Waste Management Act (HWMA), RCW 70.105, does not create any duties with respect to the Jacksons in this case. The application and obligations of HWMA are promulgated under WAC 173-303 et seq. The Act applies to owners and operators of dangerous waste facilities—facilities that either store or dispose of hazardous waste. *See* WAC 173-303-630(1).¹⁶

actions to the Jacksons absent the establishment of an agency relationship is a legally unsupportable leap.

¹⁶ Hazardous waste is regulated at both the federal and state levels. The Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901–6992k, was enacted in 1976 in response to the environmental and public health risks associated with the

Notably, other jurisdictions have confirmed that the HWMA only applies to facilities, owners/operators of facilities, transporters, or generators that are **purposefully** and knowingly handling hazardous waste. See *State ex rel. Iowa Dep't of Water, Air & Waste Mgmt. v. Presto-X Co.*, 417 N.W.2d 199 (1987)¹⁷. In *Presto-X*, the Supreme Court of Iowa considered civil claims filed against a defendant for alleged violations of Iowa's hazardous waste management statutes which, like Washington's HWMA, were modeled after the Federal Resource Conservation and Recovery Act of 1976 (RCRA). *Id.* at 201.

The defendant in *Presto-X Co.* owned and operated an exterminating and fumigating business. *Id.* at 200. For a particular job, the defendant selected a commercial fumigant known as Detia Gas EX-B Phosphine; the active ingredient in the fumigant is aluminum phosphide which releases phosphine gas when exposed to heat and humidity. *Id.* The

mismanagement of hazardous waste, created a permit scheme for the treatment, disposal, or storage of hazardous waste. See *id.* § 6925(a). The same year, Washington enacted the HWMA to serve as Washington's corresponding regulations to the RCRA. See *United States v. Manning*, 527 F.3d 828, 832 (9th Cir. 2008).

¹⁷ When a Washington statute is substantially similar to a corresponding Federal Statute, Washington courts look to Federal authority interpreting the Federal statute for persuasive authority. See *e.g.*, *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 127, 144 P.3d 1185 (2006) (court observed that Washington's Model Toxins and Control Act was heavily patterned after its federal counterpart, so federal cases interpreting similar "owner or operator" language in the federal Act are persuasive authority in determining operator liability); See also, *Goodman v. Boeing Co.*, 75 Wn. App. 60, 77, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995), *amended* (Sept. 26, 1995). Similarly, Washington courts will look to other states' authority interpreting analogous statutes. See *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 618, 319 P.3d 847 (2014) (looking to other states' workers' compensation statutes for guidance in interpretation). Specifically, Washington courts looks to other jurisdictions analyzing the RCRA for purposes of interpreting the HMCA. See *Louisiana-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1578 (9th Cir. 1994), *as amended* (Aug. 30, 1994).

fumigant came in the form of blankets that would be laid out. *Id.* After the completion of the job, the defendant's employees gathered up the fumigant blankets, put them into garbage bags, and then placed the bags into a truck which was driven to and parked at the home of one of the defendant's employee's. *Id.* Gases released by the fumigant blankets continued to build up in the bags and ultimately "exploded," popping open the door to the vehicle the bags were placed in. *Id.* The following day, the defendant employee drove the drums to a landfill, but they were refused by the landfill due to the drums' potential hazardous nature, and the employee took the drums back to his home. *Id.* After returning the drums back to the employee's home, one of the barrels exploded. *Id.* at 201.

Following these incidents, claims were filed against Presto-X Co. for violations of Iowa's hazardous waste regulations relating to: (1) operations of a hazardous waste facility (plaintiff claimed that the employee's home and the company's business were "facilities" since the hazardous materials were stored there), (2) knowingly transporting hazardous waste to a storage or treatment facility that did not possess a required permit for the handling of such hazardous waste, and (3) knowingly treating, storing, or disposing of a hazardous waste without a proper permit. *Id.* at 201-204. With respect to the latter two claims, the Iowa Supreme Court reasoned that the trial court applied an incorrect standard of "knowingly," which required the plaintiff to prove that the defendant knew that it was handling a material that was listed as a

hazardous material in Iowa's hazardous waste management regulations. *Id.* The court concluded that the level of knowledge required in order to establish these claims was simply that the defendant have **knowledge** that they were transporting a dangerous material. *Id.* Thus, defendants must at least have knowledge they are handling a dangerous waste; they just do not need to know specifically that the waste they are handling is listed as a hazardous material in the regulations.

In regard to the claim that Presto-X was operating a hazardous waste "facility," the Iowa Supreme Court affirmed the dismissal of the claim against Presto-X Co. *Id.* at 201-202. Under Iowa's hazardous waste management regulations, "facility" comprises "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." *Id.* at 201. The Iowa Supreme Court in *Presto-X Co.* observed that the plaintiff urged for this definition to be interpreted broadly, such that "a facility is any 'physical location where hazardous waste is stored, treated or disposed of.'" *Id.* The Court rejected this interpretation as too broad. *Id.* In so doing, the Iowa Supreme Court relied on the trial court's conclusion that the "mere presence of hazardous waste does not a facility make." *Id.* Instead, the court concluded, "facility" refers to an area **deliberately** designated for handling hazardous waste where such waste is located on an on-going basis and does not include any place where hazardous waste happens to be fortuitously located. *Id.* at 201-202. Notably, a federal court interpreting the corresponding regulation under the RCRA reached the same

conclusion, reasoning that § 6925 is aimed at controlling persons who own and operate facilities in a permanent sense. *Id.* at 202 (citing *U.S. v. Johnson & Towers, Inc.*, 741 F.2d 662, 667 (3d Cir.1984)). Thus, the Iowa Supreme Court affirmed the trial court's conclusion that simply because hazardous materials were located at the defendant's business and/or the defendant's employee's home did not make those locations "facilities" within the meaning of RCRA or Iowa's hazardous waste regulations. So too here. The Ibox property is not a "facility" within the meaning of HWMA merely because a chlorine tank fortuitously appears to have ended up on the property unbeknownst to its owners, the Jacksons.

Here, the evidence establishes that the Jacksons were not operating their property as a hazardous waste "facility" within the meaning of the HWMA. Further, the evidence is that the Jacksons were not knowingly handling, in any regard, tanks filled with chlorine gas. At most, a tank of chlorine gas appears to have fortuitously ended up on the Jacksons' five acre property as a result of a third-party's actions (and the tank could have even existed there prior to the Jacksons purchasing the property, as it was in a similar condition as it is now). The HWMA does not apply to the facts of this case. *See Presto-X Co.*, 417 N.W.2d 199; *Johnson & Towers, Inc.*, 741 F.2d 662.

Notwithstanding, Schuck has taken the position that his claim against the Jacksons under the HWMA is based on the allegation that the

Jacksons are “generators” under the HWMA. CP 543 (fn. 1)¹⁸. A generator is one **whose act or process produces dangerous waste** or whose act **first causes a dangerous waste to become subject to regulation**. WAC 173-303-040. There is no evidence demonstrating that the Jacksons’ acts or processes produced chlorine gas (or tanks of it). Indeed, the evidence is to the contrary; the Jacksons did not use or generate chlorine gas for any purpose. Further, there is no evidence that the Jacksons’ acts or processes first caused the chlorine gas tank to become subject to regulation. Schuck advances an *argument*, unsupported by any authority, that the tank only became subject to the HWMA when it was removed from the Jacksons’ property. Schuck’s unfounded contention that the tank first became subject to regulation under the HWMA when it was removed from the Jacksons’ property flunks for multiple reasons.

First, the HWMA expressly covers hazardous waste that is being stored on a property—*i.e.*, at a facility. *See* WAC 173-303-630. Second, in *Hickle v. Whitney Farms, Inc.*, 148 Wn.2d 911, 64 P.3d 1244 (2003), the hazardous waste at issue in that case was located on the defendant’s property, and it was covered by the HWMA. Third, Schuck acknowledges that the manner in which the tank ended up on the property was quite likely the result of someone else discarding it on the property. RP 54-56.

¹⁸ To the extent that Schuck attempts on appeal to change or expand his claims against the Jacksons under the HWMA, any such theories and claims should not be considered. In his opposition to the Jacksons’ motion for summary judgment, Schuck explicitly limited his claim against the Jacksons under the HWMA as a claim based on their alleged status as “generators.” CP 543. *See McPhail*, 598 F.2d at 607 (1st Cir. 1979) (party may not “sandbag” his case by presenting one theory to the trial court and then arguing additional theories on appeal).

Under Schuck’s reasoning, that act—the act of some third-party discarding the tank onto the Jacksons’ property (whether prior to the Jacksons’ ownership of the property or during their ownership)—would constitute the first act that resulted in the tank being subject to HWMA regulation. Simply put, Schuck failed to offer any evidence that the Jacksons act first resulted in the tank being subject to the HWMA, and his *arguments* on the issue are nonsensical.

Moreover, the manner in which Schuck alleges the Jacksons violated the HWMA is by **failing to properly dispose of the chlorine tank**. CP 546. That is the sole claim raised by Schuck regarding the Jacksons allegedly violated the HWMA. *Id.* The facts are undisputed that the Jacksons did not arrange for the disposal of the tank. The Jacksons did not enter into a service agreement with Reinland, or otherwise pay Reinland, whereby Reinland was to remove and clear items from the Jacksons’ property and dispose of them at Pacific Steel. Put differently, Reinland was not carrying on an enterprise for the Jacksons when Reinland was engaging in his recycling venture, nor was Reinland serving as an agent for the Jacksons while he and Beck were carrying on their (Reinland’s and Beck’s) recycling venture. *See Moss v. Vadman*, 77 Wn.2d 396, 402–03, 463 P.2d 159, 164 (1969) (an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control). It is undisputed that Reinland and/or Beck selected the

tank for recycling, and that they made arrangements to have it transported to Pacific Steel for recycling. It is also undisputed that the Jacksons played no role in this process. Accordingly, there is no evidence supporting Schuck's contention that the Jacksons improperly disposed of the tank by taking it to a facility that was not permitted to receive such a tank. The evidence is undisputed that Beck facilitated having the tank taken to Pacific Steel. Thus, because Beck was not acting as an agent of the Jacksons during this process, Beck's disposal of the tank at Pacific Steel cannot be imputed to the Jacksons. *See Barker v. Skagit Speedway, Inc.*, 119 Wn. App. 807, 815, 82 P.3d 244, 248 (2003) (absent an agency relationship, the acts of one party cannot be imputed to another).

In summary, Schuck's claims against the Jacksons are not covered by the HWMA. The Jacksons were not purposefully or knowingly handling hazardous waste. Further, Schuck failed to offer evidence that the Jacksons generated the tank of chlorine gas through their acts or processes, or that the Jacksons first caused the tank to be subject to the HWMA. Lastly, the undisputed facts are that the Jacksons did not dispose of the chlorine tank, which is how Schuck alleges the Jacksons violated the HWMA (improper disposal).

V. CONCLUSION

For the foregoing reasons, the trial court's order dismissing Schuck's claims against the Jacksons and Ibex Construction should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of September, 2019.

/s/Ryan W. Vollans

Mark M. Myers, WSBA #15362

Ryan W. Vollans, WSBA # 45302

WILLIAMS KASTNER, PLLC

601 Union Street, Suite 4100

Seattle, WA 98101-2380

Phone: 206.628.6600

Fax: 206.628.6611

Email: mmyers@williamskastner.com

rvollans@williamskastner.com

Attorneys for Respondents Tim Jackson,
Roberta Jackson, and Ibex Construction,
Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on 12th day of September, 2019, I caused a true and correct copy of the foregoing document, “RESPONDENTS' OPENING BRIEF,” to be delivered in the manner indicated below to the following:

<p><u>COUNSEL FOR APPELLENT:</u> Janelle M. Carney, WSBA #41028 Sara Maleki, WSBA #42465 GLP ATTORNEYS, P.S., INC. ATTORNEYS AT LAW 601 W. Main Avenue, Suite 305 Spokane, WA 99201 Phone: (509) 455-3636 Fax: (509) 321-7459 Email: jcarney@glpattorneys.com; smaleki@glpattorneys.com</p> <p>Philip A. Talmadge, WSBA 6973 Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126 Phone: (206) 574-6661 phil@tal-fitzlaw.com Aaron@tal-fitzlaw.com matt@tal-fitzlaw.com</p>	<p><input checked="" type="checkbox"/> ECF/Email</p>
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Signed at Seattle, Washington this 12th day of September, 2019.

s/Catherine Berry

Catherine Berry
Legal Assistant to Ryan Vollans
cberry@williamskastner.com

APPENDIX

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

FELIX W. SCHUCK, a single individual,)	
)	
Plaintiff,	)	No. 17-2-02508-3
v.)	
	)	PLAINTIFF'S AMENDED
GORDON BECK and JANE DOE BECK,	)	RESPONSE IN OPPOSITION TO
individually, as well as the marital	)	DEFENDANTS REINLAND'S
community thereof;	)	MOTION FOR SUMMARY
TIM JACKSON and ROBERTA	)	JUDGMENT
JACKSON, individually, as well as the)	
marital community thereof;)	
IBEX CONSTRUCTION, INC., a)	
Washington corporation; INLAND)	
NORTHWEST EQUIPMENT AUCTION,)	
INC., d/b/a REINLAND AUCTIONEERS, a)	
Washington corporation; REINLAND, INC.,)	
d/b/a/ REINLAND EQUIPMENT)	
AUCTION, an Idaho corporation;)	
REINLAND PROPERTIES, L.L.C., an)	
Idaho limited liability company; THOMAS)	
REINLAND and KUNYA REINLAND,)	
individually, as well as the marital)	
community thereof; ASHLEY REINLAND)	
and JOHN DOE REINLAND, individually,)	
as well as the marital community thereof;)	
and JOHN DOE 1-5, entities or individuals,)	
)	
Defendants.)	

I. RELIEF REQUESTED

Plaintiff Felix Schuck ("Schuck"), by and through his attorneys of record, Janelle Carney, Sara Maleki, and James Gooding of GLP Attorneys, P.S, Inc., asks this Court to deny

1 Defendants Reinland Auctioneers, Reinland Equipment Auction, Reinland Properties, L.L.C.,
2 Thomas Reinland, Kunya Reinland, and Ashley Reinland’s (collectively “Reinland”) motion for
3 summary judgment.

4 Briefly, Reinland owed multiple duties to Schuck with respect to the disposal of the
5 chlorine gas tank, including: (1) a duty under the Hazardous Waste Management Act (HWMA);
6 (2) a general duty to exercise ordinary care for their actions; and (3) a duty as the supplier of
7 dangerous business chattel under Restatement (Second) of Torts §388 and §392. Disposing of
8 dangerous waste containers is also an inherently dangerous activity under Restatement §520
9 subject to strict liability. These are questions of law decided in Schuck’s favor.

10
11 Otherwise, the remaining arguments in Reinland’s motion largely center on notice,
12 breach, and proximate cause – classic questions of fact for the jury. In fact, in a companion case
13 arising out of the same incident, *Anderson et. Al v. Beck et. ux., et. al*, No. 18-2-01432-2, this
14 Court already denied Gordon Beck’s motion for summary judgment, holding that “there are
15 genuine issues of material fact as to the scope of Mr. Beck’s duty and causation.”

16 This being Reinland’s motion for summary judgment, the Court must view all facts, and
17 inferences therefrom in the light most favorable to Schuck. With this in mind, Reinland has
18 failed to demonstrate that they are entitled to summary judgment dismissing Schuck’s theories
19 of liability based on the disputed factual record before the Court and the issue of Thomas
20 Reinland’s credibility that can only be determined by the jury.

21 **II. RELEVANT FACTS**

22 **A. Case facts.**

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1 Plaintiff Schuck was injured on August 12, 2015, when he was exposed to toxic chlorine
2 gas released from a cylinder (also referred to as a tank) while at work at Pacific Steel &
3 Recycling in Spokane, Washington. As a result of the exposure, he suffered severe respiratory
4 distress, sustained serious and permanent lung damage, and now suffers from lung issues and
5 PTSD related to the incident.

6 **B. Facts relevant to Reinland's summary judgment motion.**

7 On August 12, 2015, dismissed Defendants Tim Jackson, Roberta Jackson ("the
8 Jacksons"), and Ibex Construction, Inc. ("Ibex") (together referred to as "the Jacksons) owned,
9 maintained, and controlled the property located at 8119 N. Regal in Spokane, Washington. In
10 the course of winding up the Ibex business, Tim and Roberta Jackson, as the owners of Ibex,
11 sold almost all of the sellable items and scrap kept on the 8119 N. Regal property to Defendants
12 Reinland. **Exhibit 1** to Maleki decl. – Bill of Sale between Ibex and Reinland; **Exhibit 2** to
13 Maleki decl. – Thomas Reinland depo at 19:15-21. Based on the agreement with the Jacksons,
14 Reinland could leave anything on the property they did not want, they were not required to take
15 everything. **Reinland depo** at 17:18-22; 19:7-9.

17 Thomas Reinland never asked Mr. Jackson if he had any hazardous materials on his
18 property. *Id.* at 58:1-5. Thomas inspected the property to determine what items he wanted to
19 take to be auctioned and considered everything else he left behind to be scrap metal. *Id.* at
20 142:2-9. However, Thomas did not visually look at every item on the property that he purchased
21 or do an inventory to determine if there was anything hazardous. *Id.* at 109:17-110:8.

23 And while Thomas allegedly did not recall seeing the cylinder before it exploded, he
24 testified that had he seen the cylinder, not knowing its contents, he would have left it on the
25

1 property. *Id.* at 110:9-111:5. Yet, of the seven to eight days Thomas spent on the Jackson/Ibex
2 property, he did not spend any time looking at cylinders or containers trying to determine if they
3 were hazardous. *Id.* at 113:9-16.

4 Reinland then hired Defendant Gordon Beck to pick-up and arrange for recycling or
5 disposing any items that Reinland chose not to auction. Thomas did not ask Beck anything
6 about his qualifications to be doing this kind of work. *Id.* at 68:16-19. The arrangement
7 provided that Beck would receive 60 percent of any items salvageable for scrap and Reinland
8 would receive 40 percent. *Id.* at 35:9-17.

9
10 **C. Facts regarding the chlorine gas tank's presence on the Jackson/Ibex property.**

11 According to the testimony of Scott Sander, the owner of L&S Tires who leases land
12 from the Jacksons, the tank involved in the gas exposure of August 12, 2015, did come from the
13 land located at 8119 N. Regal Street, Spokane, WA and had been there for at least 18 years.
14 Furthermore, the Jacksons and Mr. Sander had walked out that direction and had passed the
15 scrap pile where the tank was located multiple times. **Exhibit 3** to Maleki decl. – Sander depo.
16 at 9:5-19.

17 Kyle Miller, a friend of dismissed Defendant Gordon Beck, walked the property on the
18 morning before the incident occurred, and he testified that he saw the tank located on Ibex's
19 property on the day of the incident. **Exhibit 4** to Maleki decl. – Declaration of Kyle Miller.
20 Gordon Beck also testified that the tank that exploded came from the Jackson's property.
21 **Exhibit 5** to Maleki decl. – Beck depo. at 14:11-15:25.

22
23 According to the testimony of Scott Sander, the owner of L&S Tires who leases land
24 from the Jacksons, there were several ways available to identify the contents of the tank before
25

1 moving it, including looking at the label stamped into the metal, or bringing in an outside expert
2 from a gas company to look into the contents further. **Exhibit 3** to Maleki decl. – Sander depo.
3 at 31:9-18; 32:1-9.

4 **D. Testimony of Schuck’s auctioneering expert Mike Brandly, Auctioneer, CAI, CAS,**
5 **AARE.**

6 Mike Brandly, Auctioneer, CAI, CAS, AARE, an experienced auctioneer with over 35
7 years of experience in the auctioneering industry and has provided the Court with opinions
8 regarding Reinland. Brandly decl. and **Exhibit A** to Brandly decl. – Brandly report. Brandly is
9 a graduate of the Certified Auctioneer Institute and the Accredited Auctioneer of Real Estate
10 and Contract Auction Specialist programs. **Exhibit A** to Brandly decl. – Brandly report at pg. 1.
11 He is a life member of the National Auctioneers Association (NAA), an active member for the
12 Ohio, Michigan, Indiana and West Virginia auctioneer associations, and has taught classes
13 regarding auctioneering at the NAA Conference and Show and NAA Designation Academy. *Id.*
14 He also teaches at the Certified Auctioneer’s Institute and is the Executive Director of The Ohio
15 Auction School, a certified pre-licensing auction school. *Id.* Brandly holds an Ohio real estate
16 broker’s license, and has taught real estate pre-licensing and post-licensing classes at Hondros
17 College of Business and Columbus State Community College since 2003. *Id.* at pg. 1-2.
18 Finally, Brandly has been published extensively on the auction method of marketing, including
19 laws and customary practice, and he is currently an approved continuing legal education
20 instructor for attorneys as certified by the Supreme Court of Ohio. *Id.* at pg. 2. He has been
21 retained in auction-related litigation cases in several states. *Id.*
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1 Based on Brandy's review of the evidence and testimony in this case, it is his opinion
2 that Thomas Reinland, as an experienced auctioneer with over 30 years of experience in the
3 commercial/industrial industry, was expected to have considerable experience with equipment
4 such as the subject chlorine tank. *Id.* Thomas Reinland should have been aware of the
5 expectation that auctioneers in the United States are required to be competent to perform their
6 given assignments or to become competent in order to perform their assignments, or should
7 decline or withdraw from their assignments if they are not able to do so. *Id.* Furthermore, any
8 auctioneer in the United States has a duty to disclose any latent material facts regarding an item
9 prior to disposition, especially if they pose a hazard. *Id.*
10

11 It is Brandy's opinion, on a more likely than not basis, that Thomas Reinland failed to
12 meet the standard of care for an auctioneer, failed to properly inspect property being purchased,
13 failed to properly inspect property when selling/disposing, failed to inform or notify Gordon
14 Beck of material issues, and failed to inform Schuck of material issues. *Id.* It is also his opinion
15 that Mr. Reinland did not meet the standard of competency nor his duty to adequately protect
16 the public. *Id.*
17

18 **III. ISSUES PRESENTED**

- 19 a. Is there a dispute of a material issue of fact regarding whether Defendants
20 Reinland are potentially liable person under the Hazardous Waste
21 Management Act? Short Answer: YES
22 b. Is there a dispute of a material issue of fact regarding whether Defendants
23 Reinland owed a legal duty to Plaintiff Schuck under common law
24 negligence theories? Short Answer: YES
25

26 **IV. EVIDENCE RELIED UPON**

1 Schuck relies upon this motion and memorandum, along with the Court file and
2 pleadings therein, and the declaration of Sara Maleki with exhibits attached.

3 **V. ARGUMENT**

4 **A. Summary Judgement Standard and reliance on self-serving deposition testimony.**

5 The burden is on the moving party to establish its right to judgment as a matter of law.
6 *Hansen v. Horn Rapids O.R.V. Park*, 85 Wn. App. 424, 932 P.2d 724, review denied, 133 Wn.
7 2d 1012, 946 P.2d 402 (1997). The Court must consider all facts submitted and all reasonable
8 inferences from the facts in the light most favorable to the non-moving party in a summary
9 judgment motion. Where undisputed facts are reasonably susceptible to more than one
10 interpretation, summary judgment may be improper. *Hash v. Children's Orthopedic Hosp. &*
11 *Medical Cntr*, 49 Wn. App. 130, 741 P.2d 584 (1987), aff'd, 110 Wn. 2d 912, 757 P.2d 507
12 (1988). Even where evidentiary facts are undisputed, if reasonable minds could draw different
13 conclusions from those facts, then summary judgment is not proper. *Moneysavers Pharmacy,*
14 *Inc. v. Koffler Stores, Ltd.*, 37 Wn. App. 602, 682 P.2d 960 (1984). Summary judgment is not
15 proper where competing inferences may be drawn from the evidence. *Hudesman v. Foley*, 73
16 Wn.2d 880, 441 P.2d 532 (1968).

17
18 Here, Reinland has failed to establish or present any undisputed material facts. Viewing
19 all facts in the light most favorable to Schuck, Reinland's motion for summary judgment should
20 be denied.
21

22
23 Credibility determinations are for the trier of fact and are not subject to review. *State v.*
24 *Thomas*, 150 Wn. 2d 821, 874, 83 P.3d 970 (2004).

1 Moreover, summary judgment is inappropriate when the material facts in support are
2 based solely on self-serving, conclusory testimony as they are here:

3 ‘...[W]here material facts averred in an affidavit are particularly within
4 the knowledge of the moving party, it is advisable that the cause proceed
5 to trial in order that the opponent may be allowed to disprove such facts by
6 cross-examination and by the demeanor of the moving party while
7 testifying.’

8 *Michigan Nat’l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438, review denied, 106
9 Wn.2d 1011 (1986) quoting *Felsman v. Kessler*, 2 Wn. App. 493, 496-97, 468 P.2d 691,
10 review denied, 78 Wn.2d 994 (1970).

11 Here, the Court should require Reinland to present their self-serving testimony regarding
12 Thomas Reinland’s total obliviousness to the presence of the chlorine gas tank (even though he
13 walked the property and removed items on the property for eight days) in front of a jury and
14 subject to cross-examination.

15 **B. There is a genuine issue of material fact whether Reinland breached their duties
16 owed to Schuck under the Hazardous Waste Management Act.**

17 “The Hazardous Waste Management Act (chapter 70.105 RCW) specifically provides a
18 private cause of action for damages: ‘[a] person injured as a result of a violation of this chapter
19 or the rules adopted thereunder may bring an action in superior court for the recovery of the
20 damages.’ RCW 70.105.097.” *Hickle v. Whitney Farms, Inc.*, 107 Wn. App. 934, 945, 29 P.3d
21 50 (2001). In order to enforce the HWMA, the Department of Ecology has promulgated detailed
22 regulations under chapter 173-303 WAC which “applies to **all persons who handle dangerous
23 wastes and solid wastes** that may designate as dangerous wastes including, but not limited to:

- 24 (1) Generators;
25 (2) Transporters;

- 1 (3) Owners and operators of dangerous waste recycling, transfer, storage,
2 treatment, and disposal facilities; and
3 (4) The operator of the state's extremely hazardous waste management facility.

3 WAC 173-303-020 (emphasis added). *See also K.P. McNamara Nw., Inc. v. State, Washington*
4 *Dep't of Ecology*, 173 Wn. App. 104, 124, 292 P.3d 812 (2013) citing *Hickle*, 148 Wn.2d at
5 919-20 (“WAC 173-303-070 requires any person who **generates** solid waste to determine
6 whether their solid waste is designated as dangerous waste and, upon determining that it is, that
7 person is subject to the dangerous waste regulations set forth in chapter 173-303 WAC.”)
8 (emphasis added).

9 1. *Reinland are “generators” for purposes of the HWMA.*

10 Under the HWMA, “ ‘[g]enerator’ means any person, by site, whose act or process
11 produces dangerous waste or whose act first causes a dangerous waste to become subject to
12 regulation.” WAC 173-303-040. (emphasis added). The Act defines “dangerous wastes” as:

13 *...any discarded, useless, unwanted, or abandoned substances...which are*
14 *disposed* of in such quantity or concentration as to pose a substantial present or
15 potential hazard to human health...

16 RCW 70.105.010(1) (emphasis added).

17 “A person may offer a designated dangerous waste only to a ... facility which is
18 operating ... [u]nder a permit issued pursuant to the requirements of this chapter[.]” WAC 173-
19 303-141(1). As the DOE technical guidance makes clear, even if a business hires a contractor to
20 handle its waste, it’s the businesses responsibility to ensure proper disposal.¹ Thus, hiring Beck
21 to facilitate disposing of the items Reinland purchased from the Jacksons, including dangerous
22 waste, does not relieve Reinland of their responsibility to ensure proper disposal.

23
24 ¹ Exhibit 6 to Maleki decl. – DOE technical guidance re hiring a contractor.

1 In this case there is, at a minimum, a genuine issue of material fact whether Reinland are
2 considered generators under the HWMA because their act of discarding/abandoning the chlorine
3 gas tank is what first caused the dangerous waste to become subject to regulation. Prior to
4 making the decision to discard/abandon the chlorine gas tank by removing it from the Jacksons'
5 property, the chlorine gas was not a "dangerous waste" as defined under the HWMA and
6 therefore not subject to regulation. Nor have the Defendants provided evidence that any other
7 person has been subject to regulation regarding the chlorine gas tank.

8 Likewise, removing dangerous waste from the site should be considered an act or
9 process *producing* hazardous waste because dangerous waste, as defined under the HWMA, did
10 not exist until the tank was removed to be disposed/scrapped.

11 A training module available from the EPA provides additional helpful explanations of
12 the definition of "generators" under the federal Resource Conservation and Recovery Act
13 (RCRA) that supports classifying Reinland as generators under the HWMA.²

14 The third key component of the generator definition is the phrase "act or
15 process." Because a generator is defined as the person whose act or process first
16 causes a hazardous waste to become subject to regulation, sometimes the
17 generator of a waste may not necessarily be the person who actually produced
18 the waste. For example, if a cleaning service removes residues from a product
19 storage tank excluded in §261.4(c), the person removing the residues is the first
person to cause the waste to become subject to regulation, not the owner of the
tank (i.e., the person who produced the waste).

20 EPA Training Module, Introduction to Generators. Accessed on 12-18-18 at
21 <https://www.epa.gov/sites/production/files/2014-12/documents/gen05.pdf> (emphasis added).

22 This example is also a good illustration of co-generators:

23
24 ² EPA rulings and technical guidance on this issue are persuasive since the HWMA is modeled after the federal
Resource Conservation and Recovery Act (RCRA).

1 In the above residue removal example, the person removing the waste from the
2 unit is not the owner or operator of the unit, but he or she may be considered a
3 generator. The owner or operator of the unit may also be considered a generator
4 since the act of operating the unit led to the generation of the hazardous waste. In
5 other words, both the remover of the waste and the owner or operator of the tank
6 are considered to be co-generators. In cases where one or more persons meet the
7 definition of generator, all persons are jointly and severally liable for compliance
8 with the generator regulations.

6 *Id.*

7 Other states have reached similar conclusions when interpreting their state regulatory
8 statutes that are based upon the RCRA, like Washington's HWMA:

9 Comparatively, an "act" or "process" which first causes a hazardous waste to
10 become subject to the hazardous waste rules refers to an action/effort that first
11 causes a material to become classified as waste. A contractor may be the person
12 whose act first causes a hazardous waste to become subject to regulation under
13 the hazardous waste rules. For example, the act of the contractor may be
14 removing unwanted materials from product or raw material storage vessels. In
15 this instance, the contractor's act of removing unwanted materials first causes the
16 material to become a waste.

14 There are instances where there is more than one generator of a waste. For
15 example, if a site owner hires a second party to periodically clean a manufacturing
16 process unit, the owner of the process unit acts to produce the hazardous waste
17 and the person (contractor) who removes the hazardous waste from the unit
18 subjects it to regulation. The two parties have the responsibilities of a generator
19 because both parties contribute to the generation of a hazardous waste. One or
20 both parties can assume and perform the duties of the generator on behalf of both
21 of the parties. If both parties generate the waste, regardless of which party
22 assumed the duties, both parties are jointly liable as generators.

19 Ohio July 2014 Hazardous Waste Generator Handbook (Page 3 of 63). Accessed on 12/18/18 at
20 https://epa.ohio.gov/portals/32/pdf/gen_handbook.pdf. (emphasis added).

21 A landowner who excavates or removes contaminated soil that is a hazardous
22 waste from a site is a generator of hazardous waste, as the term is used in Conn.
23 Gen. Stat. § 22a-132, even though the contaminants may have been discharged,
24 spilled or lost, or filtrated or seeped, into the soil before the landowner owned the
25 site.

24 ...

1 The contaminated soil is itself a hazardous waste. It may differ from the
2 contaminants that were originally discharged, spilled or lost, or seeped or filtrated,
3 into the soil, which may or may not have been hazardous wastes. Irrespective,
4 however, of how the soil came to be contaminated, the Company's act or process
of excavating and removing contaminated soil from the site, where the soil is a
hazardous waste and a manifest is required to transport the soil away from the
site, is an "act or process [producing] hazardous waste."

5 ...
6 Further, there is no indication that any other person has been subject to regulation
with respect to the contaminated soil. Accordingly, the excavation and removal of
this hazardous waste from the site are acts by the Company that "first [caused] a
hazardous waste to become subject to regulation."

8 Connecticut Ruling 94-20, Hazardous Waste Assessment. Accessed on 12/18/18 at
9 [https://portal.ct.gov/DRS/Publications---Rulings/1994/Ruling-9420-Hazardous-Waste-
Assessment](https://portal.ct.gov/DRS/Publications---Rulings/1994/Ruling-9420-Hazardous-Waste-Assessment) (emphasis added).

10 Thus, it is irrelevant whether or not Reinland were the producers of the chlorine gas³
11 because Reinland (and the Jacksons) are responsible for first causing the chlorine gas to be
12 subject to regulation making them generators under the HWMA. Nevertheless, they also can be
13 considered producers of dangerous waste because removing dangerous waste from a site can be
14 considered an act or process of *producing* dangerous waste.

15
16 The chlorine gas tank constitutes dangerous waste under the HWMA – Reinland did not
17 dispute this in their motion. However, Pacific Steel and Recycling was not a facility operating
18 under a permit issued pursuant the requirements of WAC chapter 173-303 that was authorized
19 or capable of recycling or disposing of “dangerous waste,” such as chlorine gas. By improperly
20 disposing of the chlorine gas tank at a facility that was not permitted to handle such waste,
21
22

23 _____
24 ³ Though D argues there is a genuine issue of material fact on this issue as well considering the chlorine gas tank
had been present on Jackson/Ibex's property for at least 18 years before it was removed for disposal.

1 Reinland breached their duty under the HWMA. They are responsible “cradle to grave”⁴ for the
2 proper disposal of the chlorine gas tank regardless of whether they hired a contractor to dispose
3 of the waste for them.

4 On this basis alone, Reinland’s motion for summary judgment should be denied.

5 Finally, Reinland’s misplaced reliance on *Enthone, Inc. v. Bannon*, 211 Conn. 655, 560
6 A.2d 971 (1989), a nonbinding case from Connecticut, also supports this conclusion in multiple
7 ways.⁵

8 First, like the chemicals produced by Enthone that did not become classified as
9 hazardous waste until used by its customers and shipped back to Enthone, the chlorine gas tank
10 did not become classified as hazardous or dangerous waste under the HWMA until it became a
11 *discarded, useless, unwanted, or abandoned substance* that Reinland purchased and *disposed of*
12 from the Jacksons’ property. This was discussed in detail in above. Thus, like the customers in
13 *Enthone*, Reinland would be the “generators” of the dangerous waste under the HWMA’s
14 definition.
15
16
17

18 ⁴ The Department of Ecology’s technical guidance makes clear that generators of hazardous waste are responsible
19 for any legal or financial consequences from “cradle to grave”:

20 It’s the law: You are responsible for the dangerous waste your business generates from cradle to grave —
21 you’re responsible even after you send it for disposal. If you have a chemical spill that gets into the storm
22 drain, for example, you are responsible for the legal and financial consequences. If you send your waste to
23 a disposal facility that doesn’t manage the waste properly, you are responsible.

24 Exhibit 7 to Maleki decl. – DOE technical guidance re designating waste. (emphasis added).

25 ⁵ It is also noteworthy that the issue in *Enthone* was whether the defendant was subject to
Connecticut’s hazardous waste assessment tax, not whether the defendant was subject to state
and federal regulations (such as the HWMA and federal RCRA) applicable to “generators” of
hazardous waste when shipping waste to other facilities for treatment.

1 Second, even if Reinland can show some fact that proves another person or entity first
2 caused the dangerous waste to be subject to regulation under the HWMA (which they have not),
3 under the ruling in *Enthone*, Reinland would still be required to follow the standards applicable
4 to “generators” of dangerous waste when shipping or transporting the waste off the Jackson’s
5 property to other destinations:

6 Enthone does not dispute the fact that federal and state regulations require that it
7 comply with the standards applicable to “generator[s]” of hazardous waste when
8 it transships such material from its West Haven facility to other destinations. Nor
9 does it contest that such regulations require it, when transshipping such material,
10 to file a uniform hazardous waste manifest and to adhere to the same rigid state
and federal requirements concerning packaging, labeling, marking, managing and
disposing of hazardous wastes that apply to “generator[s]” of hazardous waste.

11 *Enthone*, 211 Conn. at 659–60, 560 A.2d at 974.

12 **C. Reinland owed Schuck a common law duty to exercise ordinary care and there is a**
13 **genuine issue of material fact whether Reinland breached this duty and**
proximately caused Schuck’s injuries.

14 1. *Reinland owed Schuck the duty to exercise ordinary care when they purchased and*
15 *then undertook to remove and dispose of dangerous waste from the Jacksons’*
property.

16 “In an action for negligence a plaintiff must prove four basic elements: (1) the existence
17 of a duty, (2) breach of that duty, (3) resulting injury, and (4) proximate cause.” *Ranger Ins. Co.*
18 *v. Pierce Cty.*, 164 Wn. 2d 545, 552, 192 P.3d 886 (2008). “The existence of a legal duty is a
19 question of law for the court.” *McKown v. Simon Prop. Grp., Inc.*, 182 Wn. 2d 752, 762, 344
20 P.3d 661 (2015). In general, “a defendant’s duty is to exercise ordinary care.” *Simonetta v. Viad*
21 *Corp.*, 165 Wn. 2d 341, 348, 197 P.3d 127 (2008).

22 Our courts recognize the “general principle that ‘[a]n actor ordinarily has a duty to
23 exercise reasonable care when the actor’s conduct creates a risk of physical harm.’ ” *Michaels v.*
24

1 *CH2M Hill, Inc.*, 171 Wn. 2d 587, 608, 257 P.3d 532 (2011) citing Restatement (Third) of
2 Torts: Liability for Physical and Emotional Harm § 7(a) (2010).

3 Here, it is undisputed that prior to selling items off of their property at 8119 N. Regal
4 Street to Reinland for resale, disposal or recycling, the Jacksons admittedly did not investigate
5 what they were selling because they simply did not care. Likewise, Reinland compounded the
6 Jacksons' negligence by failing to do a full inspection or inventory of the items they were
7 buying. Notably, the chlorine gas tank was not small and was able to be identified by multiple
8 other persons who spent a limited amount of time on the Jacksons' property. Accordingly,
9 Reinland owed, as a matter of law, a duty to exercise ordinary care in the completion of
10 inspecting and selling or disposing of items purchased from the Jacksons' property.
11

12 Reinland's attempt to avoid this duty by claiming ignorance or lack of knowledge as to
13 the presence of the tank on the Jacksons' property is without merit. Willful blindness is not a
14 defense and Washington law is well established that reasonable care involves some level of
15 inspection or awareness. *See Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 127
16 P.3d 5 (2005). Reinland is liable cradle to grave for their dangerous waste, and the technical
17 guidance to the HWMA makes clear that if a person or business contracts with someone to
18 dispose of their waste or sends their waste to a disposal facility that doesn't manage the waste
19 properly, they are still responsible. Exhibit 7 to Maleki decl. – DOE technical guidance re
20 designating waste (emphasis added).
21

22 Accordingly, whether Reinland breached their general duty to exercise reasonable care
23 as to their actions is a question of fact for the jury to decide.
24
25

1 2. *Reinland owed Schuck the duty to exercise ordinary care when they sold/supplied*
2 *their property to Pacific Steel under Restatement § 388 and § 392.*

3 The Restatement (Second) of Torts § 388 defines the scope of the duty to warn owed by
4 a supplier of chattel,⁶ requiring suppliers of chattels to be aware of the dangerous propensities of
5 these chattels for others. That section is supplemented by § 392 of the Restatement when the
6 provision of the chattel is for a business purpose.⁷

7 The case law arising under § 388 and § 392 in Washington is clear. Reinland had a duty
8 to make a reasonable inspection of the chattel at issue, the gas cylinder, and to either address its
9 hazard or to warn others about it when they transferred possession and control of the chattel to
10 others. *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467-68, 423 P.2d 926 (1967)
11 (adopting § 388); *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 806-07, 613 P.2d 780 (1980)
12 (applying §§ 388, 392 to lease of forklift); *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 348-49,
13

14
15 ⁶ § 388 states that a person who directly or indirectly supplies a chattel to another will be liable for the harm to
those whom the supplier should expect to use the chattel if the supplier:

- 16 (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for
17 which it is supplied, and
18 (b) has no reason to believe that those for whose use the chattel is supplied will realize its
19 dangerous condition, and
20 (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts
21 which make it likely to be dangerous.

22 Restatement (Second) of Torts § 388 (emphasis added).

23 ⁷ § 392 states:

24 One who supplies to another, directly or through a third person, a chattel to be used for the
25 supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or
to those whom he should expect to be endangered by its probable use, for physical harm caused by
the use of the chattel in the manner for which and by persons for whose use the chattel supplied

- (a) if the supplier fails to exercise reasonable care to make the chattel safe for which it is supplied,
or

1 197 P.3d 127 (2008) (“suppliers” under §388 include vendors, lessors, or donors of a chattel;
2 suppliers must inspect chattel for hazards and abate them or warn others).

3 While the “suppliers” must be in the chain of distribution of the hazardous chattel, the
4 duty extends not only to the person or entity that directly received the chattel, but anyone in the
5 class that the supplier should expect to use the chattel. *Gall v. McDonald Industries*, 84 Wn.
6 App. 194, 203-04, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997) (citing cmt. a to
7 § 388, Division II found duty owed by truck lessor to lessee’s driver injured by defective brakes
8 to inspect and repair them).⁸ *Accord, Cook v. RSC Equip. Rental*, 2010 WL 3211909 (W.D.
9 Wash. 2010) at *3 (question of fact as to whether business breached its duty to inspect chattel).

10
11 In certain circumstances a duty to warn under § 388, or § 402A of the Restatement, does
12 not arise where the alleged dangerous condition of the chattel was obvious and known to the
13 plaintiff. However, the question of whether the hazard of the chattel was “known” or “obvious”
14 to the plaintiff is a *question of fact*. *Ewer v. Goodyear Tire & Rubber Co.*, 4 Wn. App. 152, 162,
15 480 P.2d 260, *review denied*, 79 Wn.2d 1005 (1971) (Goodyear failed to warn of hazard of
16 “bead breaking” in its tires during mounting). Whether Schuck or Pacific Steel had explicit
17 knowledge of the cylinder’s hazard is for the jury. Comment k to Restatement § 388 states: “It
18 is not necessary for the supplier to inform those whose use the chattel is supplied of a condition
19

20 (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to
21 inform those whom he should expect to use it.

22 ⁸ Illustration 3 to Restatement § 388 is apt on the foreseeable scope of the duty:

23 A sells or gives to B a can of baking powder. A knows that several, though not all,
24 of the lot of cans of which this can is a part have exploded when opened. He does
25 not inform B of this fact. While C, B’s cook, is attempting to open the can, it
explodes, causing harm to C’s eyes and also the eyes of D, B’s kitchen maid, who
is standing nearby. A is subject to liability to C and D.

1 which a mere casual looking over will disclose, *unless the circumstances under which the*
2 *chattel is supplied are such as to make it likely that even so casual an inspection will not be*
3 *made.*" (emphasis added).

4 Moreover, Reinland should have anticipated harm associated with cylinders of deadly
5 chlorine gas taken from the Jacksons' premises despite any alleged "obviousness" of their
6 danger because no person or entity involved, in fact, inspected the tank or discovered its danger.
7 Reinland did not perform even a casual inspection of the tank and simply identified it as
8 junk/scrap metal to dispose with Pacific Steel. And Pacific Steel was processing a high volume
9 of scrap metal and received a number of items from the Jacksons' property through Reinland.
10 Pacific Steel did not purchase just a single tank from Reinland or the Jacksons to recycle. It
11 bought whatever was seemingly recyclable from Reinland. Pacific Steel was not a facility
12 permitted to dispose of or recycle dangerous or hazardous waste in any event. Pacific Steel was
13 not in the business of addressing dangerous or hazardous wastes and did not have multiple days
14 to determine what the tank was *and* that it contained dangerous gas, as did Reinland.
15

16 Most pointedly, Schuck, performing his work at Pacific Steel, would not necessarily
17 have been aware of the cylinder's hazard, even if warnings were present on the cylinder itself.
18 Schuck did not handle the container and the machine it was placed into crushed recyclable
19 materials.
20

21 Here, there is no question that Reinland did not inspect the items they took from the
22 Jacksons' property for hazardous chlorine gas cylinders, nor did they warn anyone with regard
23 to them. There is a dispute concerning the level of inspection or investigation that would have
24 revealed that the tank was dangerous and whether such dangerous nature was "obvious," and
25

1 Reinland should have anticipated harm even if the alleged hazard was “obvious.” To the extent
2 the potential open or obvious dangerous nature of the chlorine gas tank is a viable defense
3 against Schuck’s common law negligence claims, this factual issue is for the jury to decide.

4 Simply put, Reinland had a duty to be aware of what hazards lurked within the items
5 purchased and/or taken from the Jacksons’ property and take steps to either abate such hazards
6 or warn others of them. Restatement (Second) of Torts § 388 cmt. k. When Reinland turned the
7 chlorine gas tank over to Beck and/or Pacific Steel to be sold or otherwise disposed of, then
8 those involved in its transport, processing, or disposal were within the foreseeable class put at
9 risk by Reinland’s delivery of the chattel to Pacific Steel. Accordingly, Reinland owed Schuck
10 a duty of care under Restatement §§ 388, 392.

11 Finally, Reinland hired Beck to remove and/or dispose of the scrap they purchased that
12 could not be auctioned (and even profited from this arrangement). As a result, Reinland is
13 vicariously liable for any negligent actions of Beck while performing such work. *See, e.g.,*
14 *Blancher v. Bank of California*, 47 Wn. 2d 1, 8, 286 P.2d 92 (1955) (“ [o]ne who employs an
15 independent contractor to do work, which the employer should recognize as necessarily
16 requiring the creation during its progress of a condition involving a peculiar risk of bodily harm
17 to others unless special precautions are taken, is subject to liability for bodily harm caused to
18 them by the failure of the contractor to exercise reasonable care to take such precautions.’ ”);
19 *see also Parrilla v. King Cty.*, 138 Wn. App. 427, 157 P.3d 879 (2007) citing Restatement
20 (Second) of Torts § 302B (a duty to guard against even a third party’s foreseeable criminal or
21 intentional conduct exists where an actor’s own affirmative act has created or exposed another to
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1 a recognizable high degree of risk of harm through such misconduct, which a reasonable person
2 would have taken into account).

3 **D. Disposing of dangerous waste containers is an inherently dangerous activity under**
4 **Restatement § 520 subject to strict liability.**

5 Section 519 of the Restatement provides that any party carrying on an “abnormally
6 dangerous activity” is strictly liable for ensuing damages. The test for what constitutes such an
7 activity is stated in section 520 of the Restatement. Both Restatement sections have been
8 adopted by our Supreme Court, and determination of whether an activity is an “abnormally
9 dangerous activity” is a question of law. *Klein v. Pyrodyne Corp.*, 117 Wn. 2d 1, 6, 810 P.2d
10 917 (1991) (citations omitted).

11 Section 520 of the Restatement lists six factors that are to be considered in determining
12 whether an activity is “abnormally dangerous”. The factors are as follows:

- 13 (a) existence of a high degree of risk of some harm to the person, land or chattels
14 of others;
15 (b) likelihood that the harm that results from it will be great;
16 (c) inability to eliminate the risk by the exercise of reasonable care;
17 (d) extent to which the activity is not a matter of common usage;
18 (e) inappropriateness of the activity to the place where it is carried on; and
19 (f) extent to which its value to the community is outweighed by its dangerous
20 attributes.

21 Restatement (Second) of Torts § 520 (1977).

22 As recognized by our Supreme Court, the comments to section 520 explain how these
23 factors should be evaluated:

24 Any one of them is not necessarily sufficient of itself in a particular case, and
25 ordinarily several of them will be required for strict liability. On the other hand, it
is not necessary that each of them be present, especially if others weigh heavily.
Because of the interplay of these various factors, it is not possible to reduce
abnormally dangerous activities to any definition. The essential question is

1 whether the risk created is so unusual, either because of its magnitude or because
2 of the circumstances surrounding it, as to justify the imposition of strict liability
3 for the harm that results from it, even though it is carried on with all reasonable
4 care.

5 *Klein*, 117 Wn. 2d at 6–7 citing Restatement (Second) of Torts § 520, comment *f* (1977).

6 For example in *Klein*, the court found that fireworks displays are abnormally dangerous
7 activities justifying the imposition of strict liability based on the presence of the factors stated in
8 clauses (a), (b), (c), and (d) of the Restatement. *Id.* at 7. Specifically, the court found that any
9 time a person ignites aerial shells or rockets with the intention of sending them aloft to explode
10 in the presence of large crowds of people, a high risk of serious personal injury or property
11 damage is created, no matter how much care pyrotechnicians exercise, they cannot entirely
12 eliminate the high risk inherent in setting off powerful explosives such as fireworks near
13 crowds, the dangerousness of fireworks displays is evidenced by the elaborate scheme of
14 administrative regulations with which pyrotechnicians must comply, and that presenting public
15 fireworks displays was not a matter of common usage. *Id.*

16 Likewise here, any time a dangerous waste tank containing chlorine gas is disposed of, a
17 high risk of personal injury is created. No matter how much care dangerous waste disposal
18 facilities exercise, they cannot entirely eliminate the high risk inherent in disposing of
19 dangerous waste. The dangerousness of disposing of dangerous waste is evidenced by the
20 elaborate scheme of administrative regulations under the HWMA (and the Model Toxic Control
21 Act) as well as similar federal regulations and disposing of dangerous waste is not a matter of
22 common usage. Further, Schuck contends that the factor in clause (e) is also present because the
23 dangerous waste disposal activity was inappropriately carried on in a scrap metal recycling
24

1 facility not permitted or qualified to handle such dangerous waste because Reinland did not
2 ensure such waste was properly disposed of. Thus, the Court should find that the dangerous
3 waste disposal here was an “abnormally dangerous activity” and Reinland should be strictly
4 liable for the ensuing damages Schuck suffered.

5 **VI. CONCLUSION**

6 For the reasons set forth above, Schuck respectfully asks the Court for an order denying
7 Reinland’s motion for summary judgment because there are genuine issues of material fact
8 regarding their liability under the HWMA and common law negligence which resulted in
9 Schuck’s toxic exposure and permanent injuries.
10

11 DATED THIS 3 day of September, 2019.

12 GLP ATTORNEYS, P.S., INC.

13  52487
14 _____
15 Alex French, WSBA #40168
16 Janelle Carney, WSBA #41028
17 Sara Maleki, WSBA #42465
18 James Gooding, WSBA #23833
19 Attorneys for Plaintiff
20
21
22
23
24
25

1 **CERTIFICATE OF SERVICE**

2 I hereby certify and declare under penalty of perjury under the laws of the State of Washington
3 that I caused the foregoing to be delivered to the following as indicated:

4 ***Counsel for Reinland Auctioneers, Reinland Equipment Auction,
5 Reinland Properties, LLC, Thomas Reinland, Kunya Reinland,
6 and Ashley Reinland***

7 Geoffrey Swindler
8 Law Office of Geoffrey Swindler
9 103 E Indiana Ave Ste A
10 Spokane, WA 99207

U.S. Mail
 Legal Messenger
 Facsimile
 Electronic Mail

11 ***Counsel for Reinland Auctioneers, Reinland Equipment Auction,
12 Reinland Properties, LLC, Thomas Reinland, Kunya Reinland,
13 and Ashley Reinland***

14 Peter Johnson
15 Johnson Law Group
16 103 E. Indiana Avenue, Suite A
17 Spokane, WA 99207

U.S. Mail
 Legal Messenger
 Facsimile
 Electronic Mail

18 DATED this 3rd day of September, 2019.

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Jeri Kopet



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

FELIX W. SCHUCK, a single individual,)	
	)	No. 17-2-02508-3
Plaintiff,)	
v.	)	DECLARATION OF MIKE BRANDLY
	)	IN SUPPORT OF PLAINTIFF'S
GORDON BECK and JANE DOE BECK,	)	AMENDED RESPONSE IN
individually, as well as the marital	)	OPPOSITION TO DEFENDANTS
community thereof;	)	REINLAND'S MOTION FOR
TIM JACKSON and ROBERTA	)	SUMMARY JUDGMENT
JACKSON, individually, as well as the)	
marital community thereof;)	
IBEX CONSTRUCTION, INC., a)	
Washington corporation; INLAND)	
NORTHWEST EQUIPMENT AUCTION,)	
INC., d/b/a REINLAND AUCTIONEERS, a)	
Washington corporation; REINLAND, INC.,)	
d/b/a/ REINLAND EQUIPMENT)	
AUCTION, an Idaho corporation;)	
REINLAND PROPERTIES, L.L.C., an)	
Idaho limited liability company; THOMAS)	
REINLAND and KUNYA REINLAND,)	
individually, as well as the marital)	
community thereof; ASHLEY REINLAND)	
and JOHN DOE REINLAND, individually,)	
as well as the marital community thereof;)	
and JOHN DOE 1-5, entities or individuals,)	
)	
Defendants.)	

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I, Mike Brandly, am over the age of eighteen and I am competent to testify in the above-entitled matter. I make this declaration on the basis of my personal knowledge, and my experience and training as a Certified Accredited Auctioneer and in Support of Plaintiff's Amended Response in Opposition to Defendant Reinland's Motion for Summary Judgment.

1. I have been retained by the Plaintiffs in the above captioned civil lawsuit to provide expert opinions in my capacity as a Certified Accredited Auctioneer with over 35 years of experience.

2. Attached as Exhibit A to my declaration is a true and correct copy of the report that I prepared in this matter. This report contains my opinions which are based on my training, education, experience, research, and my review of photographs, deposition transcripts and Interrogatory Responses. Any opinions expressed therein are made on a more probable than not basis.

I declare under penalty of perjury, pursuant to the laws of the State of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

DATED this 30 day of August, 2019 at 9:39 AM.


Mike Brandly, Auctioneer, CAI, CAS, AARE

EXHIBIT A

Mike Brandly, Auctioneer, CAI, CAS, AARE

4949 Hendron Road, Groveport, Ohio 43125-9370
Phone (614) 461-9229 mbrandly@mbauctioneer.com

August 29, 2019

GLP Attorneys, P.S. Inc.
Gina Guay, Senior Litigation Paralegal
601 W. Main Street, Suite 305
Spokane, WA 99201

RE: Felix W. Schuck/Edward Dumaw

Ms. Guay,

Per your request, find here my preliminary thoughts analyzing material facts in regard to the Felix W. Schuck/Edward Dumaw issue for which you contracted me about February 19, 2019.

I have been an auctioneer over 35 years and own and manage an auction house in Groveport, Ohio. I have conducted in excess of 2,500 auctions since 1983. In that time, I have also served as auctioneer for three different automobile auctions. I have sold commercial, agricultural and residential real estate at auction, conducted numerous other on-site personal property auctions all across the United States and been retained by various Probate, Bankruptcy and Civil courts to sell at auction various real and personal property.

I graduated from Missouri Auction School in 1983. I am a graduate of both the Certified Auctioneer Institute, the Accredited Auctioneer of Real Estate and Contract Auction Specialist programs. I have completed over 500 hours of auctioneer continuing education classes.

I am a Life Member of the National Auctioneers Association (NAA) and an active member of the Ohio, Michigan, Indiana and West Virginia auctioneer associations. Since holding the CAI, AARE and CAS designations, I am asked to teach classes regarding auctioneering at the NAA Conference and Show and NAA Designation Academy. Additionally, I am one of a select group of auctioneers who teach at the Certified Auctioneer's Institute. I also serve as Executive Director of The Ohio Auction School, a certified pre-licensing auction school, servicing students from all over the United States.

I hold an Ohio real estate broker's license, and have taught real estate pre-licensing and post-licensing classes at Hondros College of Business and Columbus State Community

College since 2003. Additionally, I teach real estate and auctioneering continuing education classes all over the United States including a class titled 'Auction Verdicts' which explores material auction court cases from the Supreme Court of the United States and various state supreme courts.

Since 2009, I have published extensively on the auction method of marketing, including laws and customary practice, and have been re-published in the NAA Auctioneer magazine, as well as numerous state auctioneer publications. Relatedly, I am an approved continuing legal education (CLE) instructor for attorneys, as certified by the Supreme Court of Ohio. I have been retained in auction-related litigation cases in Ohio, Indiana, California, Louisiana, Virginia, Oklahoma, West Virginia, Tennessee, Pennsylvania, Illinois and Texas.

My conclusions regarding this analysis are as follows:

1. Thomas Max Reinland (Reinland Equipment Auctioneers) has over 30 years experience in the commercial/industrial industry. Any auctioneer with this extent of experience including Mr. Reinland -- are expected to have considerable expertise regarding equipment such as this subject chlorine tank.
2. Auctioneers in the United States are required to be competent to perform their given assignments and/or acquire the necessary competency to perform their assignments or decline and withdraw from any such assignments.
3. Any auctioneer in the United States has a duty as auctioneer or owner to disclose to subsequent owners/possessors any latent material facts prior to disposition, especially those posing potential danger.
4. On a more than likely than not basis, Mr. Reinland:
 - a. Failed to meet the standard of care for an auctioneer
 - b. Failed to properly inspect property being purchased
 - c. Failed to properly inspect property when selling/disposing
 - d. Failed to inform or notify Gordon Beck of material issues
 - e. Failed to inform Schuck and Dumaw of material issues

As a result, Schuck and Dumaw were injured.

5. Mr. Reinland did not meet the standard of competency nor his duty to adequately protect the public.

My expert opinions are based upon my review of the following:

1. Deposition of Thomas Max Reinland, August 1, 2018
2. Deposition of Gordon Beck, July 11, 2018

3. Reinland Discovery responses
4. Reinland Equipment Auction website (snapshot)
5. Photographs of chlorine tank and associated site

Upon more related materials becoming available, I reserve the right to modify my opinions accordingly regarding this case.

I declare under the penalty of perjury, pursuant to the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read 'Mike Brandly', written in a cursive style.

Mike Brandly, Auctioneer, CAI, CAS, AARE

WILLIAMS KASTNER

September 12, 2019 - 3:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36754-1
Appellate Court Case Title: Felix W. Schuck v. Gordon Beck, et ux, et al
Superior Court Case Number: 17-2-02508-3

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Comments:

Sender Name: Ryan Vollans - Email: rvollans@williamskastner.com
Address:
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