

NO. 36220-1-II

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

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

Appellants,

v.

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

Respondents.

APPEAL FROM THE THURSTON COUNTY
SUPERIOR COURT

Cause No. 04-2-01079-6

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE	2
A. Procedural History	2
B. Facts Relating To Contamination Of The Morgan And Spears Properties.....	4
IV. ARGUMENT.....	14
A. Standard of Review	14
B. Summary of Argument.....	14
C. The Trial Court Erred In Granting Summary Judgment To Lufkin And Hytec On Plaintiffs' Common Law Claims	16
1. <i>Caveat Emptor</i> Does Not Bar Plaintiffs' Claims.....	16
2. Lufkin and Hytec Should be Subject to Liability to Subsequent Landowners for Their Negligent Use of the Property.....	20
3. Lufkin and Hytec Should be Subject to Liability for Creating a Nuisance on the Morgan and Spears Properties	25
4. Appellants' Nuisance Claims Are Not Barred by RCW 7.48.160	34
5. Lufkin and Hytec May Be Subject to Liability for Trespass on the Morgan and Spears Properties	37
6. Lufkin and Hytec Should be Subject to Strict Liability for Their Abnormally Dangerous Acts	42
V. CONCLUSION.....	47

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
Analytical Measurements v. Keuffel & Esser Co., 843 F. Supp. 920 (D.N.J. 1993).....	43, 46
Arcade Water Dist. v. United States, 940 F.2d 1265 (9 th Cir. 1991)	31
Atherton Condo. Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990)	17
Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985).....	38, 39, 41
Bruskland v. Oak Theater, Inc., 42 Wn.2d 346, 254 P.2d 1035 (1953)	36
Buggsi Inc. v. Chevron U.S.A., 857 F. Supp. 1427 (D. Or. 1994).....	43, 44
Clark County Citizens United, Inc. v. Clark County Natural Resources Council, 94 Wn. App. 670, 972 P.2d 941 (1999).....	14
Deaconess Hosp. v. Washington State Highway Comm'n, 66 Wn.2d 378, 403 P.2d 54 (1965).....	37
Dickgieser v. State, 153 Wn.2d 530, 105 P.3d 26 (2005)	14
Fradkin v. Northshore Utility District, 96 Wn. App. 118, 977 P.2d 1265 (1999)	40, 41
Great Northern Ry. Co. v. Oakley, 135 Wash. 279, 237 P. 990 (1925)	34
Grundy v. Thurston County, 155 Wn.2d 1, 117 P.3d 1089 (2005)	14

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
Hanlin Group v. International Minerals & Chem. Group, 759 F. Supp. 925 (D. Me. 1990).....	27, 29, 43, 46
Hartley v. State, 103 Wn.2d 768, 698 P.2d 77 (1985).....	14
Higgins v. Intex Recreation Corp., 123 Wn. App. 821, 99 P.3d 421 (2004)	21
Kenny v. Scientific, Inc., 497 A.2d 1310 (N.J. Super. 1985).....	45
Klein v. Pyrodyne Corp., 117 Wn.2d 1, 810 P.2d 917 (1991)	43, 47
Langan v. Valicopters, 88 Wn.2d 855, 567 P.2d 218 (1977)	44
Lockheed v. AC&S, Inc., 109 Wn.2d 235, 744 P.2d 605 (1987).....	24
Loughlin v. United States, 209 F.Supp.2d 165 (D.D.C. 2002), vacated on other grounds, 393 F.3d 155 (D.C. Cir. 2004)	18, 22
Mangini v. Aerojet-General Corp., 230 Cal. App.3d 1125 (1991).....	passim
Miotke v. Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984)	25, 29, 36
New Meadows Holding Co. v. Washington Water Power Co., 102 Wn.2d 495, 687 P.2d 212 (1984).....	42
New York v. Shore Realty Corp., 759 F.2d 1032 (2 nd Cir. 1985).....	43
Newhall Land & Farming Co. v. Superior Court, 19 Cal. App. 4 th 334 (1993)	passim
Pfeifer v. Bellingham, 112 Wn.2d 562, 772 P.2d 1018 (1989)	17, 22
Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303 (3 rd Cir. 1985)	26, 27, 29

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
Ravan v. Greenville County, 434 S.E.2d 296 (S.C. App. 1993).....	21, 33, 35
Redevelopment Agency v. Burlington N. & Santa Fe Railway Corp., 2007 U.S. Dist. LEXIS 44287, *30 (E.D. Cal. 2007).....	31, 40, 41
Rosenblatt v. Exxon Co., 642 A.2d 180 (Md. 1994).....	18
Shields v. Spokane School Dist., 31 Wn.2d 247, 196 P.2d 352 (1948)	36
Siegler v. Kuhlman, 81 Wn.2d 448 P.2d 1181 (1972)	43
State v. Ventron Corp., 468 A.2d 150 (N.J. 1983)	45
Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6 th Cir. 1988).....	43
Swartzmen v. Atchison, 842 F. Supp. 475 (D.N.M. 1993)	43
T&E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991)	46
Tenaya Assoc. Ltd. P'ship v. U.S. Forest Service, 1993 U.S. Dist. LEXIS 20905 (E.D. Cal. 1993).....	31, 40
Tiegs v. Watts, 135 Wn.2d 1, 954 P.2d 877 (1998)	36
Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93 (D. Mass. 1990).....	17, 46
Westwood Pharmaceuticals v. National Fuel Gas Dist. Corp., 737 F. Supp. 1272 (W.D.N.Y. 1990), aff'd, 964 F.2d 85 (2 nd Cir. 1992).....	27, 29
Wilcox v. Henry, 35 Wash. 591, 77 P. 1055 (1904).....	29

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
Wilson Auto Enterprises, Inc. v. Mobil Oil Corp., 778 F. Supp. 101 (D.R.I. 1991)	17, 35
Wilson v. Key Tronic Corp., 40 Wn. App. 802, 701 P.2d 518 (1985)	28
Zimmer v. Stephenson, 66 Wn.2d 477, 403 P.2d 343 (1965)	37
 Other Authorities	
Prosser & Keaton on Torts, § 64 at 446-47 (5 th ed. 1984).....	23
RCW 7.48.120	30, 34
RCW 7.48.140(1).....	34
RCW 40.21A.010	33
RCW 64.06.020	21
RCW 70.95.010(2).....	28
RCW 70.105D	6
RCW 70.105D.010	33
Restatement (Second) of Torts § 158(b)-(c).....	42
Restatement (Second) of Torts § 160	42, 44
Restatement (Second) of Torts § 161(1).....	42, 44
Restatement (Second) of Torts § 353	21, 26
Restatement (Second) of Torts § 520	46
WAC 173-301-180	41
WAC 173-301-301	39
WAC 173-340-330	27
WAC 173-340-800	23
WAC 173-351-990, App. III	15

I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to defendants-appellees on plaintiffs-appellants' claims for negligence, nuisance, trespass, and strict liability for abnormally dangerous activities.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether owners or users of land who create a latent defect by knowingly dumping hazardous wastes on the land owe a duty to subsequent owners of the property to avoid harm to their use and enjoyment of the property or, at a minimum, to notify them of the existence of the hazardous waste.

2. Whether owners or users of land who knowingly dump hazardous wastes on the land can be held liable to subsequent owners of the property for creation of a private and public nuisance by contamination of soil and groundwater on the land.

3. Whether owners or users of land who knowingly dump hazardous wastes on the land can be held liable in trespass to subsequent owners of the property for creating and maintaining physical contamination of the soil and groundwater on the land.

4. Whether knowingly dumping hazardous waste on bare land that has received no preparation as a hazardous waste landfill and that is

intended for future residential use may be an abnormally dangerous activity, subjecting the landowner and disposers to strict liability to subsequent owners of the property.

5. Whether tort remedies for interference by a prior landowner or user with a subsequent landowners' exclusive occupation, use and enjoyment of property are wholly supplanted by the Model Toxics Control Act ("MTCA"), RCW 70.105D, or contract remedies.

III. STATEMENT OF THE CASE

A. Procedural History.

This appeal concerns residential land owned by plaintiffs-appellants Juliane Morgan and Richard and Cecile Spears near Littlerock, Washington. Unbeknownst to Morgan and the Spears, this land was contaminated with hazardous waste dumped by the former owner of the land, defendant-appellee Chauncey Lufkin, and the company he owned, defendant-appellee Hytec, Inc.

Plaintiffs Troy and Niki Pavlicek, Juliane Morgan, and Richard and Cecile Spears filed this case on May 28, 2004 and filed a First Amended Complaint on July 12, 2004. CP 3-11 (First Amended

Complaint).¹ The First Amended Complaint asserted claims under MTCA and common law theories of negligence, nuisance, trespass, and strict liability for abnormally dangerous activities against Lufkin and Hytec, Inc. and its corporate successors, Lasco Bathware, Inc., Tomkins Industries, Inc. and Tomkins PLC (collectively, “Hytec”). The Pavliceks also asserted a claim against Lufkin for fraudulent concealment, and all plaintiffs asserted claims against Patricia and Pamela Mathews, who owned the Littlerock property for a relatively brief period of time under a failed seller-financed transaction with Lufkin. *Id.*

The Hytec defendants moved for summary judgment on the negligence, nuisance, trespass, and strict liability claims on May 22, 2006, CP 12-41 (Motion), and Lufkin filed a joinder in that motion on June 1, 2006, CP 268-281 (Joinder and Motion). Hytec and Lufkin essentially argued that prior owners and users of property could not be held liable in tort to subsequent owners of the same property. The trial court granted this motion at oral argument on June 30, 2006, with a written order entered on July 17, 2006, except with respect to the Pavliceks’ continuing trespass claims against Lufkin. CP 667 (Minute Entry); RP 27:15-31:13

¹ The Pavliceks resolved all of their claims against Lufkin and Hytec prior to appeal and are not parties to this appeal.

(Verbatim Transcript of Hearing), CP 668-673 (Order Granting Partial Summary Judgment).

Discovery and litigation proceeded on the MTCA claims and the Pavliceks' remaining common law claims for continuing trespass and fraudulent concealment. On February 20, 2007, the trial court entered a stipulated order of voluntary dismissal of the MTCA claims, cross-claims, and counter-claims of all parties. Supp. CP (Order). On March 26, 2007, the trial court entered stipulated orders of dismissal of the Pavliceks' remaining common law claims and of all claims involving the Mathews sisters, thereby resolving all claims in the case. Supp. CP (Orders). Plaintiffs-appellants Morgan and the Spears timely filed their Notice of Appeal of the trial court's order granting summary judgment to Lufkin and Hytec on their common law claims on April 23, 2007. CP 674-80 (Notice of Appeal).

B. Facts Relating To Contamination Of The Morgan And Spears Properties.

In 1975, Chauncey Lufkin bought a parcel of approximately 44 acres of undeveloped land adjacent to the Capitol State Forest near the town of Littlerock, Washington. CP 502 (Lufkin Dep. 44:6-8). At the

time, Lufkin owned Hytec, Inc., a manufacturer of fiberglass spa, tub and shower inserts.²

Lufkin anticipated developing the land for residential use. CP 502 (Lufkin Dep. 44:16-19). However, before that occurred, Hytec used the parcel to dispose of waste from its industrial operations. Hytec deposited its waste in several existing depressions on the site during the mid 1970s. CP 503-04 (Lufkin Dep. 58:20-59:6); CP 78 (Application for Solid Waste Disposal Site § 5.2(I)). There is no evidence the depressions were lined or prepared in any way. The waste then was covered with dirt and replanted. The waste included not only scraps of fiberglass, but drums and containers holding resins and solvents used in the manufacturing process. CP 95 (Lufkin Response to Interrogatories). Lufkin admitted at deposition that liquid as well as solid wastes were deposited at the site. CP 505-08 (Lufkin Dep. 36:10-38:22, 133:17-25).

Lufkin applied to the Thurston-Mason Health District for a solid waste disposal permit for the property in September 1975. CP 74-78 (Application). The nature of the “solid waste” proposed for disposal was described as “90% fiberglass and polyester resin – 5% sawdust – 5% misc.” CP 76 (Application § 5.2(G)). The application made no mention

² Lufkin sold all of Hytec’s stock to Philips Industries in 1986. CP 102 (Stock Sale Agreement). Tomkins PLC subsequently acquired Philips Industries, which changed its name to Tomkins Industries, Inc. CP 15. Lasco Bathware is another subsidiary of Tomkins Industries which may have assumed certain of Hytec’s assets or operations.

of metal drums, chemical containers, or liquid wastes. Moreover, Hytec began dumping its waste at the property before the permit was approved. CP 80 (Letter from Thurston-Mason District Health Officer). In March 1976, the Health District advised Lufkin that Hytec was “dumping illegally” and instructed it to cease dumping until further action on the permit. *Id.* The district did not issue the permit until April 12, 1976. CP 86 (Permit). The permit, which was issued to “Hytec Chemical,” rather than Lufkin, expired December 31, 1976 and there is no record it was ever renewed. *Id.*; CP 46 (Decl. of John Houlihan ¶ 8). However, Lufkin testified that Hytec used the site for dumping “for a couple of years.” CP 503 (Lufkin Dep. 58:5-10).

In 1990, the Washington Department of Ecology (“Ecology” or “DOE”) contracted with Science Application International Corporation (“SAIC”) to conduct an investigation of the Littlerock site. CP 356-57 (Letter from Ecology). SAIC detected several types of toxic chemicals, including methylene chloride, an industrial solvent, in soil gas samples from the site. CP 359-61 (Soil Gas Survey Results). SAIC also conducted a magnetic survey that suggested the presence of buried drums or other large metallic objects on the site. CP 363-66 (Geophysical Survey Results). Because no one lived at the site, Ecology initially assigned it a hazard site ranking of 3 (on a 1 to 5 scale). CP 368-89 (Site Ranking

Worksheets). In 1992, because of the expansion of Ecology's hazardous sites inventory, its ranking was further reduced. Lufkin was notified of the ranking and the site's inclusion on the Hazardous Sites List. CP 391 (Letter from Ecology to Chauncey Lufkin).

In 1995, Lufkin attempted to sell the Littlerock property to the Mathews in a seller-financed transaction. CP 145-49 (Real Estate Contract). However, the Mathews defaulted on their obligations and ownership of the property reverted to Lufkin in 1998. CP 509-10 (Lufkin Dep. 66:18-67:5); CP 151-54 (Declaration of Forfeiture).

In late 1998, Lufkin sought approval from Thurston County to subdivide 20 acres of the Littlerock property. CP 156-58 (Declaration of Large Lot Subdivision). He promptly sold 10 acres (two five-acre lots) to Troy and Niki Pavlicek and another two five-acre lots to Joseph Monte. CP 169-73 (Deeds). The Pavliceks erected a home and installed a domestic well in 1998. CP 517 (T. Pavlicek Dep. 18:8-15). Monte sold his lots to Juliane Morgan and Richard and Cecile Spears in 2002. CP 175-82, 189-97 (Purchase & Sale Agreements and Deeds). Morgan built a home on her lot in 2002, which was supplied with water from a well installed by Monte as a condition of the sale. The Spears live in California and planned to retire to Littlerock to be near their daughter. CP 534-36 (Spears Dep. 15:1-15, 42:23-43:2). They moved a container of personal

possessions to the property but have not built on the lot because of their subsequent discovery of the contamination caused by Hytec's waste.

Lufkin did not inform the Pavliceks, Morgan, or the Spears of the history of dumping at the Littlerock site prior to their purchase of the lots or construction of their homes. CP 511-12 (Lufkin Dep. 78:2-11, 100:6-25); CP 518 (T. Pavlicek Dep. 26:13-24). Lufkin may have told Monte that fiberglass had been deposited at the site, but did not say anything about drums, solvent containers, or liquid wastes. CP 511 (Lufkin Dep. 78:5-15); CP 528-29 (Monte Dep. 19:21-20:2). Monte did not discover any such wastes during his limited activity on the property, CP 530-31 (Monte Dep. 27:8-12, 71:11-14), and he provided Morgan with a vacant land condition report indicating that he was not aware of any hazardous substances or contaminating uses of the property. CP 393-95 (Seller's Property Condition Report).

The first hint any of the plaintiffs had of the history of the site came in June 2002, when Morgan had a utility trench dug for her home. CP 548-51 (Morgan Dep. 23:9-18, 42:9-16, 47:19-48:1). This trench exposed metal drums and plastic jugs, as well as large amounts of fiberglass waste. CP 552-53, 569-70 (Morgan Dep. 57:7-58:14, 61:11-62:4). Morgan, however, did not realize the significance of these findings and believed it was an isolated case of someone dumping garbage on the

land. CP 571 (Morgan Dep. 63:15-16). Prior to that time, none of the plaintiffs saw any fiberglass waste, much less buried drums or chemical containers, on their properties. *E.g.*, CP 537-39 (Spears Dep. 23:10-17, 28:25-29:9); CP 519-22 (T. Pavlicek Dep. 27:23-28:2, 49:22-50:3).

At some point, Lufkin requested permission from Thurston County to subdivide his remaining 24 acres. In June 2003, the County informed him that it could not approve his application because of the site's hazard ranking:

It has recently come to the attention of this agency that there is an area of hazardous materials contamination caused by the dumping of materials from a fiberglass manufacturing business either on near this property. This contamination site has been ranked by the Washington State Department of Ecology (WSDOE) and is published on the state's Hazardous Sites List.

...[G]iven the potential significance of the contamination site, this department can not make a determination of adequate water quality for this subdivision and final approval of this large lot subdivision can **not be recommended at this time**. Before final subdivision can be recommended a No Further Action Notice must be issued by the WSDOE for the site clean up....

CP 397 (Letter from Thurston County Environmental Health Division to Chauncey Lufkin) (emphasis in original). Around this time, Morgan, the Pavliceks, and the Spears finally learned that the property had been listed as a hazardous waste site and used as a hazardous waste dump. CP 572

(Morgan Dep. 95:10-20); CP 581-82 (N. Pavlicek Dep. 15:17-20, 52:1-11); CP 523 (T. Pavlicek Dep. 52:3-12); CP 540 (Spears Dep. 48:1-5).

Lufkin engaged Stemen Environmental to investigate conditions at the site. CP 513-14 (Lufkin Dep. 101:23-102:5). In September 2003, Stemen submitted an application to include the site in Ecology's Voluntary Cleanup Program ("VCP"). CP 404 (DOE Agreed Order ¶ 11). Stemen conducted some preliminary testing at the site, including samples from the Morgan and Pavlicek wells. CP 404 (DOE Agreed Order ¶ 12). Stemen also dug several test pits on Lufkin's property, in which Richard Spears observed mounds of fiberglass waste and at least one plastic container. CP 541-42 (Spears Dep. 105:15-106:24).

In April 2004, Lufkin discharged Stemen. Stemen withdrew the VCP application and conveyed his raw sampling data to Ecology without a written report. CP 423 (Letter from Stemen to DOE). The data revealed detectable levels of several hazardous compounds in soil and water samples from the site, including concentrations of naphthalene in excess of the MTCA cleanup standard in one soil sample. CP 426-36 (Analytical Data Report). The data also showed detectable levels of naphthalene and 2-methylnaphthalene in the Morgan well and trichlorofluoromethane in

the Pavlicek well, though at levels below cleanup standards.³ CP 555-65 (Analytical Data Reports). Like the methylene chloride detected by SAIC, these chemicals all are designated by the State as hazardous constituents. *See* WAC 173-351-990, App. III.

Despite the relatively low concentrations detected, Morgan was reasonably concerned about her exposure to these chemicals, concerns that were reinforced by comments from Ecology's staff. CP 573-74 (Morgan Dep. 107:5-108:7). Morgan stopped drinking the water or using it to cook. CP 575-76 (Morgan Dep. 84:3-10, 86:13-14). Morgan also halted landscaping and similar work on her property because of uncertainties over the future of the land. CP 577-78 (Morgan Dep. 103:17-104:5). The Spears have not built on their property as a result of the contamination. CP 545 (Spears Dep. 192:16-25). They were told by the county that there is a hold on building permits for the site until the property is cleaned up. CP 543-44 (Spears Dep. 91:14-92:8, 191:2-25).

Following Stemen's termination, Lufkin hired another consultant, Insight Geologic, to investigate the site. Ecology refused Lufkin's request to enroll the site in the VCP, because the site is zoned for residential use. CP 405 (DOE Agreed Order ¶ 13). Lufkin and Ecology then negotiated

³ Methyl-naphthalene is commonly used to make resins and dyes, and trichlorofluoromethane has been used as an aerosol propellant, among other uses. CP 349 (Declaration of John Kane ¶ 12).

an Agreed Order under MTCA to govern investigation and cleanup of the site. Lufkin signed the order on July 22, 2005; it was subsequently modified to include Hytec as a signatory.

After signing the Agreed Order, Lufkin changed environmental consultants yet again. The newest consultant, Calibre, obtained approval from Ecology for a Remedial Investigation Plan in March 2006. That plan contemplated investigation of soil and groundwater conditions at the site at least through July 2006. CP 568 (Project Schedule). By the time of the summary judgment hearing before the trial court, Calibre had conducted only limited groundwater and soil sampling at the site.⁴ This groundwater sampling detected trichlorofluoromethane and methylene chloride in a borehole (B02) upgradient from the Morgan property and well and either on or immediately adjacent to the Spears' property. CP 444, 449 (Bi-Monthly Progress Report). Naphthalene and methyl-naphthalene, among other chemicals, were detected in other boreholes, though at concentrations below MTCA screening or reporting levels. *Id.* Ecology rejected Calibre's attempt to dismiss these findings as unrelated to waste from fiberglass production. CP 494 (DOE Review of Calibre Technical Memorandum). Ecology also noted that the compounds detected by

⁴ In April 2006, Calibre collected soil samples from nine locations and groundwater from five locations. CP 441 (Bi-Monthly Progress Report).

Calibre were among those previously detected in SAIC's 1990 investigation and Stemen's sampling of the Pavlicek well. *Id.*

Calibre did not include the results of its April 2006 soil samples in its May 2006 progress report to Ecology. CP 495 (DOE Review of Calibre Technical Memorandum). Calibre also did not report the results of its geophysical survey to detect subsurface anomalies, like buried drums. *Id.* However, the record before the trial court at the time of summary judgment did reflect Calibre's plans to excavate some of those anomalies, including up to ten "metallics" on Morgan's property alone. CP 498 (Email regarding Calibre investigation). Ultimately, a number of 55 gallon drums and metal buckets were removed from the Morgan and Spears properties during Calibre's investigation of the Hytec-Littlerock site. Calibre delineated two primary zones of metallic and fiberglass debris on the site located largely on the Morgan and Spears properties. Calibre is still in the process of negotiating a final clean-up plan for the site with the Department of Ecology, but it is likely that the plan will require extensive excavation of portions of the Morgan and Spears' properties.

IV. ARGUMENT

A. Standard of Review.

“When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court.” *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment will be affirmed if, but only if, “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c); *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005). As the Supreme Court has explained, a court ruling on a summary judgment motion must:

assum[e] facts most favorable to the nonmoving party. The burden is on the moving party to prove there is no genuine issue as to a fact which could influence the outcome at trial.

Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

This Court reviews the facts and law underlying a summary judgment ruling *de novo*, *Grundy*, 155 Wn.2d at 6, and determines questions of law without deference to the decision of the trial court, *Clark County Citizens United, Inc. v. Clark County Natural Resources Council*, 94 Wn. App. 670, 675, 972 P.2d 941 (1999).

B. Summary of Argument.

The Court should reverse the trial court’s grant of summary judgment to Hytec and Lufkin. No good or just reason exists to absolve

those who knowingly deposit hazardous wastes on unprepared vacant land from tort liability to subsequent residential owners who do not know or have reason to suspect the existence of the dumping.

Contractual and statutory remedies are not an adequate substitute for tort liability because of the limited scope of relief afforded by such remedies. Washington courts frequently have found that owners and users of property have a duty to avoid creation or maintenance of latent defects that may harm others on the property, and there is no just reason to exclude successor landowners from the scope of that duty or from actions to recover for damages when that duty is breached.

Washington courts also have held that those who contaminate soil and groundwater with hazardous wastes may be held liable for creating and maintaining a public and private nuisance and trespass. Nothing in the language of the nuisance statutes or the principles underlying nuisance and trespass law limits liability under these causes of action to adjacent, contemporaneous landowners. Successor owners who suffer interference with their exclusive possession, use, and enjoyment of their property as a result of latent defects knowingly created or allowed to continue by prior owners and users of property have suffered a nuisance and trespass actionable under law.

Finally, burying of hazardous wastes on unprepared bare land that is intended for residential use is an abnormally dangerous activity due to the uncommon and inappropriate nature of the activity and the high degree of risk that it poses to the health and well-being of subsequent occupiers of the land and others in the community. Owners and users of land that engage in such dumping should be held strictly liable for the damages caused, including injuries sustained by innocent successor owners.

C. The Trial Court Erred In Granting Summary Judgment To Lufkin And Hytec On Plaintiffs' Common Law Claims.

1. *Caveat Emptor* Does Not Bar Plaintiffs' Claims.

The arguments of Lufkin and Hytec and the trial court's decision with respect to each of plaintiffs-appellants' common law claims are premised on a common theory, that the doctrine of *caveat emptor* bars successor landowners from maintaining any tort claim against prior owners or users of their property no matter how negligent, noxious, or abnormally dangerous the prior use was. Courts in several jurisdictions have rejected this rule with respect to each of plaintiffs' causes of action, and there are sound reasons for this Court to follow their lead.

First, the doctrine of *caveat emptor* is extremely limited in Washington and has been rejected in many contexts by modern Washington law. For example, Washington has "abandoned the doctrine of *caveat emptor* as applied to the sale of new residential dwellings by

builder vendors,” *Atherton Condo. Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506, 518, 799 P.2d 250 (1990), and for injuries caused to the vendee or others by latent dangers on the land, *Pfeifer v. Bellingham*, 112 Wn.2d 562, 565, 772 P.2d 1018 (1989) (adopting principles of RESTATEMENT (SECOND) OF TORTS § 353); *Porter v. Sadri*, 38 Wn. App. 174, 178, 685 P.2d 612 (1984). The Washington legislature also has expressed support for full disclosure of hazardous conditions when property is sold. *See* RCW 64.06.020 (requiring full disclosure of all environmental hazards and other material defects during residential real property transactions). These actions by the legislature and the courts express a public policy of preserving a prior landowners’ liability for undisclosed hazardous conditions. Freeing Lufkin and Hytec from responsibility when they were the parties with control and knowledge of the hazardous waste disposal at the Littlerock site is not supported by any Washington precedent and is contrary to this policy.

Second, virtually all of the modern cases applying the doctrine of *caveat emptor* in the context of contaminated property involve sales of commercial and industrial properties to sophisticated commercial purchasers. *E.g.*, *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101 (D.R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93 (D. Mass. 1990); *Rosenblatt v. Exxon Co.*, 642 A.2d 180

(Md. 1994). Application of *caveat emptor* is significantly less defensible in residential land transactions, like this one, where buyers have less reason and resources to suspect latent contamination. *See Loughlin v. United States*, 209 F.Supp.2d 165, 172 (D.D.C. 2002), *vacated on other grounds*, 393 F.3d 155 (D.C. Cir. 2004) (distinguishing commercial property cases and declining to apply *caveat emptor* to residential properties).

Third, prohibiting tort claims like those asserted by Morgan and the Spears would cause an unjust distribution of harms, because the impact of the latent contamination on property use and enjoyment was not considered in the sales price of the land. Similarly, limiting subsequent landowners to contract remedies would immunize those responsible for the pollution whenever there is no contractual relationship between the injured owners and those who created the condition. For example, there could be no contractual balancing of risks and burdens between plaintiffs and Hytec because Hytec did not own the property and was not a party to the land sales. And it makes no sense to immunize Lufkin for the injury to Morgan and the Spears based on the fortuitous intervening sale to Monte, who had no knowledge and was provided no information regarding the prior hazardous waste disposal. *See Newhall Land & Farming Co. v. Superior Court*, 19 Cal. App. 4th 334, 350-51 (1993). The trial court thus

erred in suggesting that the impact of its summary dismissal of plaintiffs' claims was mitigated by the possibility of a contract action against Monte, because there is no evidence that Monte knew of the contamination or did anything that might be considered a breach of contract. RP 31:5-13 (Hearing Transcript). Absent a remedy in tort, the injuries caused by contamination to the land would fall heaviest on those innocent purchasers least responsible for creation of the harm.

Fourth, another common justification for exempting former property owners and users from liability in tort is absent in this case. The argument is based partly on the assumption that once the former owner cedes possession of the property, he no longer has any control over the premises and cannot go on the land to remedy a dangerous or injurious condition. PROSSER & KEATON ON TORTS, § 64 AT 446-47 (5TH ED. 1984). However, this ignores the culpability of the owners and users for creating and allowing the latent defect to persist in the first instance. Moreover, under MTCA, Ecology has authority to access property for remedial actions and to facilitate entry by potentially liable parties, like Lufkin and Hytec, for such purposes. WAC 173-340-800.

Finally, the reliance of the trial court and the courts in some other jurisdictions on the existence of statutory remedies is misplaced because those remedies do not provide full compensation for injured owners like

Morgan and the Spears. RP 31:5-13 (Hearing Transcript). MTCA allows recovery for costs of remediation, but provides no relief for plaintiffs' prolonged loss of use and enjoyment of their homes. Also, there is nothing in the statutory language or judicial interpretation of MTCA that suggests it was intended to preempt common law remedies. Viewing MTCA as a substitute, rather than a supplement, for common law remedies is an error this Court should correct.

2. Lufkin and Hytec Should be Subject to Liability to Subsequent Landowners for Their Negligent Use of the Property.

Lufkin and Hytec were not entitled to summary judgment on plaintiffs' negligence claims because a jury reasonably could conclude that dumping and burying hazardous chemicals and waste in unlined natural depressions was unreasonable. A jury also could conclude that Lufkin was negligent in failing to address the hazardous waste prior to subdividing and selling portions of the site for residential use, especially after being notified of the property's inclusion on the State's hazardous sites list. Finally, a jury could conclude that Lufkin should have known that the property's use as a waste dump and the hazardous site listing would be material to subsequent residents, that such facts would not be self evident to those parties, and that Lufkin acted negligently by failing to disclose this information to the subsequent owners and residents.

Despite these considerations, the trial court held as a matter of law that Lufkin and Hytec owed no duty to subsequent owners of the property to exercise reasonable care in their use of the land or to disclose to them the residual dangers. Although courts in some other states have held this way, several jurisdictions have reached the opposite conclusion.

For example, in *Donald v. Amoco*, 735 So.2d 161, 175 (Miss. 1999), the Court held that defendants had a duty, enforceable by later landowners, to ensure safe disposal of their hazardous waste because it was foreseeable the waste could pose a danger to the public. In *Ravan v. Greenville County*, 434 S.E.2d 296, 309 (S.C. App. 1993), the court also found that one who disposes hazardous waste on land owes a duty, actionable in negligence, to later owners of the property. These courts have concluded that handlers of waste have a general duty of care arising from the foreseeable risks to health and property, and no good reason exists to exclude later owners from the protections of this duty. This reasoning is consonant with Washington law on negligence, which emphasizes the role of foreseeability of injury in defining the scope of duty. *E.g.*, *Higgins v. Intex Recreation Corp.*, 123 Wn. App. 821, 837, 99 P.3d 421 (2004) (“Whether the defendant owed the plaintiff a duty ... turns on the foreseeability of the injury....”). It also is perfectly consistent with Washington cases like *Atherton Condominium Association*, 115

Wn.2d at 506, *Pfeifer*, 112 Wn.2d at 562, and *Porter*, 38 Wn. App. at 174, that have imposed duties on owners or users of land to avoid creation of latent defects that prove or may prove harmful to others.

In *Loughlin*, 209 F. Supp.2d at 170-72, the federal court held that a university that allowed its land to be used for disposal of hazardous wastes could be sued by successor property-owners for failing to take reasonable care in making the property safe after it learned of the pollution. And *Newhall*, 19 Cal. App. 4th at 348-51, held that persons who dispose of contaminated wastes can be sued for negligent failure to disclose this “material and concealed defect” to successor owners. This duty extends beyond the immediate purchaser, because it is foreseeable that property may be resold without the intervening purchaser ever discovering or being harmed by the pollution. *Id.* at 350-51. This conclusion is analogous to the reasoning in *Pfeifer*, 112 Wn.2d at 565, in which the Washington Supreme Court adopted the principles of RESTATEMENT (SECOND) OF TORTS § 353 to hold property vendors liable to vendees *and others* for latent, dangerous conditions on the land. If a property owner can foresee that hazards he places on the land may be injurious to others, there is no reason to either except subsequent owners of the land (who are those most likely to be harmed) from the scope of the duty, nor to hold that the duty exists only when physical injury results, as opposed to loss of use and

only when physical injury results, as opposed to loss of use and enjoyment and emotional distress arising from the hidden defect on the land.

In this case, the facts can support the conclusion that Lufkin and Hytec breached both duties to exercise reasonable care in the initial disposal of wastes and to respond appropriately to the after-effects of the improper dumping. Lufkin knew at least by 1993 that the land was included on the state's hazardous sites list, which comprises those sites "*where remedial action has been determined by the department to be necessary.*" WAC 173-340-330 (emphasis added). This designation signaled at least two things: the existence of a potential health hazard to future residents; and the likelihood of clean-up activities that would disrupt future use of the land. Moreover, it is well-recognized that landfills reduce property values and interfere with enjoyment of land. Almost 25 years before Hytec's dumping, the Supreme Court recognized in *Harris v. Skirving*, 41 Wn.2d 200, 202, 248 P.2d 408 (1952), that a proposed landfill would "decrease the value and salability of the [residents'] property; and that the general fear and alarm of the residents ... was reasonable and well-founded." Likewise, the Washington legislature found in 1969, "Improper methods and practices of handling and disposing of solid wastes pollute our land, air and water resources, blight our countryside, adversely affect land values, and damage the

overall quality of our environment.” RCW 70.95.010(2). Yet Lufkin chose in 1998 to subdivide and sell lots for residential use without undertaking any remedial action or apprising future residents that such steps could be needed. A jury could find that these omissions were material and unreasonable.

In addition, Lufkin’s exclusive knowledge of the existence of the site’s history supports imposition of a duty to act or disclose. The drums, containers, and other waste had been buried in part with a goal of creating a more even grade on the land. The areas where the waste was buried were replanted some 20 years before Lufkin sold the properties. Subsequent owners like Monte, Morgan and the Spears who walked the property would not observe anything amiss. A jury could find that Lufkin acted unreasonably by failing to disclose the material, latent defects in the land.

The Washington courts have held that manufacturers of dangerous substances have a continuing duty to warn users of the dangers associated with such products even if they do not learn of the risks until after the sale has taken place and the user’s exposure to the substance has ceased. In *Lockheed v. AC&S, Inc.*, 109 Wn.2d 235, 261, 744 P.2d 605 (1987), the Court wrote, “We believe that where a person's susceptibility to the danger of a product continues after that person's direct exposure to the product

has ceased, the manufacturer still has a duty after exposure to exercise reasonable care to warn the person of known dangers, if the warning could help to prevent or lessen the harm.” Here, nothing prevented Lufkin from informing Morgan or the Spears of the history and hazardous site listing of the property, and such warning would have prevented or lessened their harm. There is no sound reason for holding suppliers of hazardous products to a continuing duty to warn, but exempting owners of hazardous waste sites from the same obligation.

3. Lufkin and Hytec Should be Subject to Liability for Creating a Nuisance on the Morgan and Spears Properties.

Nuisance in Washington is a statutory action authorized by various provisions of RCW 7.48. A discussion of some of the statutory provisions is contained in *Miotke v. Spokane*, 101 Wn.2d 307, 330-31, 678 P.2d 803 (1984):

Nuisance actions in this state are specifically allowed by statute. RCW 7.48. RCW 7.48.010 defines actionable nuisances for which damages and other relief are available.

The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or any obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief.

A more specific definition of the elements of a nuisance action is provided in RCW 7.48.120:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

Nuisances are divided into public or private nuisances. “Public nuisance” is defined by RCW 7.48.130 as “one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.”

Lufkin and Hytec do not contest that contamination of soil and groundwater by disposal of hazardous chemicals can constitute an actionable nuisance. Rather, they argued, and the trial court agreed, that a successor landholder cannot maintain a nuisance action against prior property owners or occupiers for such contamination. Before the trial court, Lufkin and Hytec cited principally to *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 313-15 (3rd Cir. 1985), and cases that followed that opinion. Their reliance on that line of cases is misplaced for several reasons.

First, the holding in *Hercules* was limited to claims for *private* nuisance:

Accordingly, we reject Hercules' contentions that the limitations on private nuisance discussed in Part III, *supra*, apply equally to public nuisance, and that it is improper for a claimant to recover for or seek abatement of public nuisance when the alleged cause of the public nuisance is its own property.

762 F.2d at 315 n.13. Thus, *Hercules* expressly held that a landowner could sue its predecessor for creating a *public* nuisance, provided the later owner suffered special injury to its exercise of the public right that was subject to interference. *See also Hanlin Group v. International Minerals & Chem. Group*, 759 F. Supp. 925, 936 (D. Me. 1990) (same); *Mangini v. Aerojet-General Corp.*, 230 Cal. App.3d 1125, 1137 (1991) (same).

Westwood Pharmaceuticals v. National Fuel Gas Dist. Corp., 737 F. Supp. 1272, 1281-82 (W.D.N.Y. 1990), *aff'd*, 964 F.2d 85 (2nd Cir. 1992), reached the same conclusion and allowed the purchaser of a gas storage site to assert a public nuisance claim against the prior owner.⁵ The court specifically held that the doctrine of *caveat emptor* did not preclude this claim, *id.*:

This conclusion is bolstered by the nature of the alleged public nuisance involved here – contamination of the environment by hazardous substances. Knowledge about the hazards to public health and to the environment posed by hazardous wastes is increasing constantly, and this court is not willing to assume that the New York law of public nuisance is too inflexible to meet the growing public need

⁵ The court held that plaintiff's private nuisance action was barred because the plaintiff was a sophisticated commercial buyer that had had many years to discover and abate the nuisance. *Id.* at 1284.

for avenues to address these hazards, including lawsuits where public interests are being protected through a cause of action brought by a private party.

In this case, a jury reasonably could find that Hytec and Lufkin created and maintained a public nuisance actionable by Morgan and the Spears. RCW 7.48.140 enumerates public nuisances to include:

(1) To cause or suffer ... any offal, filth, *or noisome substance* to be collected, *deposited, or to remain* in any place to the prejudice of others....

(7) To erect, continue or use any building or other place for the exercise of any trade, employment, or manufacture, which by occasioning obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous to the health of individuals or of the public.

(emphasis added). RCW 7.48.130 more generally defines a public nuisance as “one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.” Numerous courts have concluded that contamination of groundwater constitutes a public nuisance. *E.g., Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 701 P.2d 518 (1985); *Newhall*, 19 Cal. App. 4th at 341. The pollution originating on the Littlerock site affects a community of landowners and residents beyond just the plaintiffs-appellants; Ecology directed Lufkin to study its impacts on all public and private wells within a one-mile radius of the site. CP 495 (DOE Review of Bimonthly Progress Report).

A jury also could find that Morgan and the Spears have suffered sufficient special injury to bring a claim for public nuisance. Plaintiffs, like the public, have a “fundamental and inalienable right to a healthful environment,” including soil and groundwater free of contamination. RCW 40.21A.010; 70.105D.010. Where this right is abridged, damages are available under statutory public nuisance remedies. *See Miotke*, 101 Wn.2d at 332-33 (polluted stream constitutes public nuisance actionable by adjacent landowners). But the contamination has a special impact on Morgan and the Spears, who are the most proximate landowners to the problem and have already had their use of land and water impacted by the dumping. *Id.*; *Wilcox v. Henry*, 35 Wash. 591, 596-97, 77 P. 1055 (1904) (adjacent landowner had sufficient special injury to sue slaughterhouse for public nuisance by virtue of living “within its immediate sphere”).⁶

Second, although nuisance cases in Washington have *typically* been brought between adjacent landowners concerning contemporaneous activities, nothing in the statutory definitions of either public or private nuisance limits the causes of action in this way. RCW 7.48.010 refers to

⁶ Thus, this case is distinguishable from *Hercules* and *Hanlin*, where plaintiffs’ harms were limited to remediation expenses, an economic harm different from the public right that was impaired. Here, the contamination has substantially impaired appellants’ enjoyment of their property by affecting use of their well water and ability to improve their land free from threats of future disruption. Other cases also have found sufficient special injury where later landowners have incurred testing or remediation costs. *Mangini*, 230 Cal. App.3d at 1138; *Westwood Pharm.*, 737 F. Supp. at 1281.

“any obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property.” RCW 7.48.120 refers to an “act or omission [that] either annoys, injures or endangers the comfort, repose, health or safety of others ... or in any way renders other persons insecure in life, or in the use of property.” RCW 7.48.140(1) specifically defines public nuisances to include “caus[ing] or suffer[ing] ... any ... noisome substance to be collected, deposited, *or to remain* in any place to the prejudice of others.” (emphasis added) Thus, the statutes contain no requirement that the harm be to a property other than the one on which the nuisance originates, nor do they require that the nuisance be the result of a contemporaneously occurring activity as opposed to a past noxious use or alteration of the land that the prior owner/occupier has caused or suffered to remain. The statutes do not create any exception from liability, direct or indirect, for former landowners and users, and the courts should not add or imply an exception where the legislature has not done so.

In *Mangini*, the California court held that a prior landowner could be held liable for creation of a private, as well as a public nuisance and that liability under the statute extended to creation of a nuisance on the same, not just adjacent, land:

[T]he California statutes do not limit recovery for nuisance to instances where there is an offensive use of neighboring lands. Rather, the broad language of section 3479 sanctions recovery for direct injury to a plaintiff's property constituting "an obstruction to the free use of property."....

Nor is it material that defendant allegedly created the nuisance at some time in the past but does not currently have a possessory interest in the property. "Not only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for ensuing damages."

230 Cal. App.3d at 1137 (citing cases); *see also Arcade Water Dist. v. United States*, 940 F.2d 1265, 1268 (9th Cir. 1991); *Redevelopment Agency v. Burlington N. & Santa Fe Railway Corp.*, 2007 U.S. Dist. LEXIS 44287, *30 (E.D. Cal. 2007) (railroads liable to present landowner for nuisance and trespass created by presence of petroleum waste on property that they previously used); *Tenaya Assoc. Ltd. P'ship v. U.S. Forest Service*, 1993 U.S. Dist. LEXIS 20905 (E.D. Cal. 1993) (allowing landowner to pursue continuing nuisance claim against owner who created the unlawful conditions despite numerous intervening possessors). In *Newhall*, 19 Cal. App. 4th at 343, the court reiterated this conclusion:

The California nuisance statutes have been construed, according to their broad terms, to allow an owner of property to sue for damages caused by a nuisance created *on* the owner's property. Under California law, it is not necessary that a nuisance have its origin in neighboring property. ... Similarly here, *Newhall* is not precluded from stating a cause of action for nuisance on the ground that

Mobil and Amerada could not cause a nuisance to their own property.

The court further noted that it would make no sense to “absolv[e] Mobil and Amerada from nuisance liability based on their ‘consenting’ to their own unlawful acts.” *Id.* at 345.

The *Mangini*, *Newhall*, and *Redevelopment Agency* decisions are based on California’s nuisance statute, which is substantively identical to the Washington law.⁷ By contrast, the cases cited by Lufkin and Hytec to the trial court mostly eschew any reliance on or citation to statutory nuisance schemes. Only *Mangini* and its progeny are based on interpretation of a statute analogous to that enacted in Washington, which does not on its face limit claims of private and public nuisance against prior owners of the same land.

Third, even under common law doctrines, courts in other states have rejected the contention that private nuisance actions are limited to suits against adjacent landowners and have found that predecessor owners and users can be held liable where their activities cause a continuing interference with the use and enjoyment of successive owners. For

⁷ Compare, for example, RCW 7.48.010 with California Civil Code § 3479, quoted here:

Anything which is injurious to health or is indecent or offensive to the senses, or an obstruction of the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

example, in *Donald*, 735 So.2d at 161, plaintiff sued several oil companies that had contracted with a prior owner to dispose of waste oil on plaintiffs' land. The Mississippi Supreme Court reversed the lower court's dismissal of plaintiff's nuisance and trespass claims, explaining that plaintiff has alleged "a physical invasion to the property and should recover if he can show the Oil Defendants were responsible for the physical invasion." *Id.* at 172.

Similarly, in *Ravan*, plaintiffs owned land that was "part and parcel" of a site previously used as a county dump. The court held their continuing nuisance claim against the prior owner and users should have gone to the jury, but that the failure to instruct on nuisance was harmless because they recovered the same damages on their negligence claim. 434 S.E.2d at 306-07.

Fourth, an exception for prior landowners would not benefit Hytec in any event, since Hytec never enjoyed any possessory interest in the party. At the same time, nothing in the statute limits nuisance claims to property owners, as opposed to those, like Hytec, who created the conditions that interfere with a plaintiff's comfortable enjoyment of life and property. Once again, the statutory language controls. The legislature chose to impose liability for nuisance by reference to the activity of causing, suffering or maintaining a condition that interferes with the use

and enjoyment of others, not by reference to the identity or status of the actor.

In sum, immunizing prior landowners or users of property from liability subverts the basic aim of Washington's nuisance laws. "The purpose of these nuisance statutes is to lead to the destruction of dangerous conditions and to afford protection to life and property." *Great Northern Ry. Co. v. Oakley*, 135 Wash. 279, 288, 237 P. 990 (1925). That goal can only be achieved if those most responsible for creation of a latent hazard, like Lufkin and Hytec in this case, can be held liable for the injuries it causes.

4. Appellants' Nuisance Claims Are Not Barred by RCW 7.48.160.

Hytec and Lufkin also argued before the trial court that plaintiffs' nuisance claims are barred by RCW 7.48.160, which provides that nothing that is done or maintained under the express authority of a statute can be deemed a nuisance. Hytec and Lufkin base this contention on the solid waste disposal permit issued to Hytec in April 1976. The trial court did not base its ruling on this argument, which in any event fails as a matter of both fact and law.

As a factual matter, there is evidence that a substantial portion of Hytec's dumping occurred outside the authority conferred by the permit.

The permit was only effective for eight and a half months, between April 12 and December 31, 1976. CP 86 (Permit). However, the county noted in March 1976 that Hytec was “dumping illegally” prior to issuance of the permit, and Lufkin testified that waste disposal at the site continued “for a couple of years.” CP 80 (Letter from Thurston-Mason District Health Officer); CP 503 (Lufkin Dep. 58:5-10).

In addition, the waste deposited at the site, including numerous drums and other chemical containers, exceeded the scope of defendants’ permit application, which identified the proposed waste as 90% fiberglass and polyester resin, five percent sawdust and five percent “misc.” CP 76 (Application § 5.2(G)).

Similarly, the solid waste permit, by definition and scope of statutory authority, covered only solid wastes. *Cf.* WAC 173-301-301 (1973) (special provisions for sanitary landfills for hazardous and “problem wastes”). Yet Lufkin admitted that liquid wastes were deposited at the site, and some of the hazardous chemicals detected, like methylene chloride, are liquid in form. Disposal of liquid wastes exceeded Hytec’s authority under the solid waste permit and eliminates any immunity they might otherwise have enjoyed. *See Ravan*, 434 S.E.2d at 309 n.5 (solid waste permit did not immunize claims arising from disposal of liquid wastes); *Wilson*, 40 Wn. App. at 802 (action for negligence, nuisance and

trespass arising from disposal of toxic chemicals at county dump). In *Tiegs v. Watts*, 135 Wn.2d 1, 14, 954 P.2d 877 (1998), the Court held, “Discharges in violation of permit requirements constitute a nuisance which subjects violators to damages.” *See also Miotke*, 101 Wn.2d at 331-32 (same). By depositing wastes beyond those authorized by the permit, Lufkin and Hytec lost any protection they may have had under RCW 7.48.160.

As a legal matter, Washington courts long have held that even where a business is authorized to operate in a certain area, it can still constitute a nuisance in fact if it substantially interferes with the use and enjoyment of other landowners. *See Bruskland v. Oak Theater, Inc.*, 42 Wn.2d 346, 350-51, 254 P.2d 1035 (1953); *Harris*, 41 Wn.2d at 200 (county dump, though located on properly rezoned land, could still constitute a nuisance in fact); *Shields v. Spokane School Dist.*, 31 Wn.2d 247, 256-57, 196 P.2d 352 (1948) (trade school could be enjoined as a public nuisance despite general statutory authorization for trade schools and city approval of location). In *Tiegs*, 135 Wn.2d at 18-19, the Court held, “One who operates under a discharge contaminant or pollutant permit ... is not necessarily absolved of liability for damages under a nuisance per se theory if the discharge injures another’s property.” The “fact a governmental authority tolerates a nuisance is not a defense” if “the

actual discharge of contaminants or pollutants may be the proximate cause of the damage to another's property." *Id.* at 15. Similarly, the regulations applicable here required that solid waste disposal sites "shall be ... operated and maintained so as to prevent the creation of a nuisance." WAC 173-301-180 (1973).

This interpretation of the law confines RCW 7.48.160 to its proper limits. Where the legislature expressly authorizes a *specific* land use or activity, that usage is protected from nuisance claims absent negligence in construction or maintenance. *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 408-09, 403 P.2d 54 (1965). However, obtaining a land use or discharge permit from an administrative agency under a *general* statutory scheme is not by itself sufficient to immunize an alleged nuisance from liability under RCW 7.48.

5. Lufkin and Hytec May Be Subject to Liability for Trespass on the Morgan and Spears Properties.

One who causes an unpermitted entry on another's property, resulting in damage to that property, is liable in trespass for the damages proximately caused by his activities. *Zimmer v. Stephenson*, 66 Wn.2d 477, 483, 403 P.2d 343 (1965). A trespass may arise from an unpermitted *remaining* upon property, as well as an unpermitted entry. RESTATEMENT

(SECOND) OF TORTS §§ 158(B)-(C), 160, 161(1);⁸ *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 692, 709 P.2d 782 (1985) (where “defendant has caused actual and substantial damage to plaintiff’s property, the trespass continues until the intruding substance is removed”). This rule applies even if the tortfeasor no long has the ability to remove the offending objects. RESTATEMENT (SECOND) OF TORTS § 161(1). Trespassory entry may include movement that occurs naturally or that results from the nature of the materials and their location. *Id.* § 158(a); *Bradley*, 104 Wn.2d at 687 (trespass arising from drift of airborne particles).

In this case, there is ample evidence that Lufkin and Hytec disposed of chemicals and other wastes on the Littlerock site and that those materials are interfering with plaintiffs’ exclusive possession of their properties. There also is evidence, including the detections of hazardous chemicals in the Morgan and Pavlicek wells, that the substances dumped by defendants are not remaining in place, but are migrating into and

⁸ Restatement § 158 provides that one who “(b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove” may be held liable for trespass. Section 160 provides, “A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land (a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated....” Section 161(1) provides, “A trespass may be committed by the continued presence on the land of a structure, chattel or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.”

through the groundwater to other portions of the Littlerock site. The movement of these contaminants from their original location to other portions of the site constitutes a trespass upon plaintiffs' rights in their land.

Again, defendants' principal argument is that trespass may lie only against *adjacent* property owners, not prior owners or users of the land. However, courts in several jurisdictions have rejected this contention and held that prior owners and users can be held liable in trespass when their activities cause a continuing invasion of a subsequent owner's rights.

For example, in *Donald*, 735 So.2d at 161, the Mississippi Supreme Court held that oil companies that had disposed of waste on plaintiff's land prior to his ownership could be held liable for common law damages. The Court noted that labeling of the cause of action as nuisance or trespass made no substantive difference; the basic principle is that the defendants should be held liable if they are responsible for the physical invasion of plaintiff's property. *Id.* at 172. *Cf. Bradley*, 104 Wn.2d at 689 (noting that causes of action for nuisance and trespass may overlap and warning against "the fallacy of clinging to outmoded doctrines").

Similarly, the California courts have held that prior users and owners of land can be held liable for continuing trespasses to that land caused by their deposits of pollutants. *See Redevelopment Agency*, 2007

U.S. Dist. LEXIS 44287 *30; *Tenaya Assoc.*, 1993 U.S. Dist. LEXIS 20905; *Mangini*, 230 Cal. App. 3rd at 1141-42 (citing Restatement § 160 to conclude that failure to remove wastes gives rise to trespass and noting its applicability even when the affected land is subsequently transferred). In *Newhall*, 19 Cal. App. 4th at 345, the court explained,

a continuing trespass theory in a situation such as this, i.e., contaminants have been left on the property by a prior owner, is sanctioned by the Restatement Second of Torts. Section 161(1) provides "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it."

The court further explained that "the creation of a public nuisance qualifies as 'tortious' conduct under section 161(1) of the Restatement." *Id.* at 346. Thus, a subsequent landowner can state a claim for continuing trespass regardless of whether it also has suffered special injury sufficient to sustain a private cause of action for the public nuisance. *Id.* at 347.

At least one Washington case suggests that a continuing trespass claim can be premised on conditions created by the tortfeasor on plaintiff's own property. In *Fradkin v. Northshore Utility District*, 96 Wn. App. 118, 123-126, 977 P.2d 1265 (1999), the defendant had permission to install a sewer line on plaintiff's property, but the manner of installation caused creation of bog-like conditions in plaintiff's backyard. The court held that plaintiff properly alleged a continuing trespass against the utility

where it “did not use reasonable care to prevent the authorized construction project from harming Fradkin’s legally protected rights.” *Id.* at 124. The court cited *Bradley* and Restatement § 158, cmt. m, in noting that trespass includes “an unprivileged remaining on land in another’s possession.” *Id.* In such cases, “[t]he trespasser is under a continuing duty to remove the intrusive substance or condition.” *Id.* at 126.

For the same reasons, the trial court here erred in holding that Hytec could not be held liable for trespass because it had Lufkin’s consent to dump waste on his property. First, by allowing those hazardous materials to remain on the Morgan and Spears properties, Hytec has engaged in an unauthorized and “unprivileged remaining” constituting trespass. *Fradkin*, 96 Wn. App. at 124. Second, the courts in *Redevelopment Agency*, 2007 U.S. Dist. LEXIS 44287, and *Donald*, 735 So.2d at 161, held that prior users may be liable for trespass for ongoing contamination caused by their activities even where their entry on and use of the land was permitted by the prior owner. Third, just as it makes no sense to absolve polluters from liability “based on their ‘consenting’ to their own unlawful acts” on their own lands, *Newhall*, 19 Cal. App. 4th at 345, there is no just reason to shield from liability one who deposits dangerous materials on the property of another based on the consent of its

co-tortfeasor, particularly where, as here, there is a close relationship between the user of the land and the consenting property owner.

In short, as with appellants' negligence and nuisance claims no sound reason exists to allow *adjacent* property owners to assert claims against those who in the past created conditions injurious to the health, enjoyment or value of land, but to deny the same relief to innocent subsequent owners of the most directly affected land.

6. Lufkin and Hytec Should be Subject to Strict Liability for Their Abnormally Dangerous Acts.

Whether an activity is “abnormally dangerous” and subject to strict liability is determined under the six factors set forth in RESTATEMENT (SECOND) OF TORTS § 520. *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wn.2d 495, 500-01, 687 P.2d 212 (1984):

- (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.

No single factor is dispositive and not all factors need be present for strict liability to apply. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 7, 810 P.2d 917 (1991). Numerous courts have concluded that disposal of hazardous waste is an abnormally dangerous activity under this test. *E.g.*, *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1194 (6th Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051-52 (2nd Cir. 1985); *Buggsi Inc. v. Chevron U.S.A.*, 857 F. Supp. 1427 (D. Or. 1994); *Swartzmen v. Atchison*, 842 F. Supp. 475, 477 (D.N.M. 1993); *Analytical Measurements v. Keuffel & Esser Co.*, 843 F. Supp. 920, 927-28 (D.N.J. 1993); *Hanlin*, 759 F. Supp. at 934.

Washington law should follow this lead. In *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972), the Court imposed strict liability on hauling gasoline as freight. The Court's discussion presages a finding of abnormally dangerous activity in this case:

Stored in commercial quantities, gasoline has been recognized to be a substance of such dangerous characteristics that it invites a rule of strict liability – *even where the hazard is contamination to underground water supply* and not its more dangerous properties such as its explosiveness and flammability. *See Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969).

81 Wn.2d at 457 (emphasis added). There thus can be little doubt that the *intentional disposal* of other toxic pollutants on unprotected land, a much less common and more directly risky activity than storage or transport of

gasoline, constitutes an abnormally hazardous activity in this state. *Cf. Buggsi*, 857 F. Supp. at 1432 (“the abnormally dangerous nature of the activity can be proved by a showing that the activity is governed by stringent legislative or administrative regulations,” like those that govern hazardous waste storage, disposal, and clean-up).

In *Langan v. Valicopters*, 88 Wn.2d 855, 567 P.2d 218 (1977), the Supreme Court held that crop-dusting is an abnormally dangerous activity under the Restatement factors. The Court’s analysis is instructive here. Although recognizing “the prevalence of crop dusting” and acknowledging “that it is ordinarily done in large portions of the Yakima Valley,” the Court concluded “it is carried on by only a comparatively small number of persons,” “is not a matter of common usage,” and is “inappropriate” when conducted next to organic farms. *Id.* at 864. Despite the social value of pesticides in controlling insects and weeds, “there can be an equitable balancing of social interests only if appellants are made to pay for the consequences of their acts.” *Id.* at 865.

The same conclusion applies here. Burying hazardous wastes in unlined natural depressions involves a high degree of risk of soil and water pollution and harm to downgradient residents and land. The gravity of such contamination can be significant; “the potential for calamity lurking in an abnormally dangerous substance is precisely what justifies the

imposition of absolute liability.” *Kenny v. Scientific, Inc.*, 497 A.2d 1310, 1320 (N.J. Super. 1985). The risks of such contamination cannot be completely eliminated in circumstances such as this. *State v. Ventron Corp.*, 468 A.2d 150, 160 (N.J. 1983) (“With respect to the ability to eliminate the risks involved in disposing of hazardous wastes by the exercise of reasonable care, no safe way exists to dispose of [a hazardous substance] by simply dumping it onto land”). Dumping of chemical wastes is not a matter of common usage and is inappropriate in areas intended for residential development. Finally, although there is a need for disposal of industrial waste (though not by dumping in vacant lots), “there can be an equitable balancing of social interests only if appellants are made to pay for the consequences of their acts.” 88 Wn.2d at 865.

In light of these considerations, the trial court erred in concluding that disposing of hazardous waste on bare land does not constitute an abnormally dangerous activity. RP 30:24-31:4 (Hearing Transcript). The court seems to have been swayed by the fact that the land was undeveloped at the time the dumping occurred. However, Lufkin always intended residential development of the property. CP 502 (Lufkin Dep. 44:16-19). More fundamentally, the trial court ignored the severe risk that burying of hazardous waste on undeveloped land creates a hidden

time-bomb, posing a clandestine threat to future occupiers of the land and, through migration of wastes, to those living on distant properties.

Hytec and Lufkin again argued, in reliance on cases like *Wellesley Hills*, 747 F. Supp. at 93, that other jurisdictions do not allow strict liability claims to be brought by current against former owners and users. The Court should reject this position.

Under New Jersey law, “A landowner which conducts an abnormally dangerous activity on its property is strictly liable to subsequent owners of the property for any harm caused by that activity.” *Analytical Measurements*, 843 F. Supp. at 927 (citing *T&E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991)). “With knowledge of its activity and of its use of the land, the seller is in a better position to prevent future problems arising from its use of the property. And again, allowing a buyer to recover would place liability on the party responsible for creating the hazardous condition and marketing the contaminated land.” *T&E Indus.*, 587 A.2d at 1258.

Maine and Mississippi courts have reached the same conclusion. *See Hanlin*, 789 F. Supp. at 934; *Donald*, 735 So.2d at 161. Given the types of activities to which Washington has applied strict liability in the past, this Court should follow these courts and hold that prior owners and

users of land are not exempt from strict liability for damages caused by their abnormally dangerous activities.

The Washington courts have been particularly receptive to claims of strict liability for abnormally dangerous activities. The concurring opinion in *Klein* noted Washington's judicial independence in this regard. 117 Wn.2d at 19 ("I first note that no other jurisdiction has adopted a common law rule of strict liability for fireworks displays."). This progressiveness, coupled with the judicial and legislative erosion of *caveat emptor* discussed above, indicate that this Court should follow those jurisdictions that have refused to exempt prior owners and users from liability for abnormally dangerous activities like hazardous waste disposal, rather than those courts that have denied injured landowners a remedy for such harms.

V. CONCLUSION

For the reasons stated above, the Court should reverse the trial court's grant of summary judgment to Lufkin and Hytec and allow Morgan and the Spears to proceed with their negligence, nuisance, trespass, and strict liability claims.

RESPECTFULLY SUBMITTED this 6th day of August, 2007.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Appellants,

v.

CHAUNCEY and ELIZABETH
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LASCO BATHWARE, INC., a foreign
corporation; TOMKINS INDUSTRIES,
INC., a foreign corporation; TOMKINS
PLC, a foreign corporation,

Respondents.

NO. 36220-1-II

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