

LASCO BATHWARE,
et al.

NO. 36220-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents,

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**RESPONDENTS HYTEC, INC., LASCO BATHWARE, INC.,
TOMKINS INDUSTRIES, INC., and TOMKINS, PLC'S RESPONSE
BRIEF**

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I. INTRODUCTION

Respondents Hytec, Inc., Lasco Bathware, Inc., Tomkins Industries, Inc., and Tomkins, PLC (collectively "Hytec Defendants") prevailed in the trial court on partial summary judgment resulting in the dismissal of Appellants Juliane Morgan, Richard and Cecile Spears, and Troy and Niki Pavliceks'¹ common law claims for nuisance, trespass, negligence and strict liability. The trial court's summary judgment decision was well reasoned and should be affirmed in its entirety.

In 1976, defendant Hytec, Inc. ("Hytec") disposed of certain limited quantities of solid waste materials on a portion of a remote 45-acre tract of land near Littlerock, Washington owned by Hytec's then president and principal owner, defendant Chauncey Lufkin. Hytec disposed of solid waste at Lufkin's property with his knowledge, consent and pursuant to a permit issued by the Thurston-Mason County Health District. Subsequent to the cessation of Hytec's disposal at the property, Lufkin sold Hytec, sold his entire 45-acre parcel, reacquired the 45-acres, subdivided it, sold ten acres to Appellants Troy and Nicki Pavlicek ("Pavlicek"), and sold another ten acres to Joseph Monte who then conveyed five acres to

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

Appellant Juliane Morgan ("Morgan") and five acres to Appellants Richard and Cecile Spears ("Spears").

Now, more than twenty years after Lufkin's and Hytec's activities on Lufkin's property, the Appellants asserted that Hytec and its affiliates are liable under common law theories of negligence, nuisance, trespass and strict liability for alleged contamination of Appellants' properties.² As the trial court determined below, these common law claims are both legally and factually unsupportable.

First, to the extent Appellants base their common law claims on Hytec's disposal of waste while Appellants' predecessor-in-interest Lufkin still personally owned their respective properties, those claims fail as a matter of law. A subsequent property owner has no cause of action for negligence, nuisance, trespass or strict liability against a prior permissive user of the same property for alleged damage inflicted upon their own property. Second, Appellants' common law claims against the Hytec Defendants for alleged migration of contaminants from Lufkin's remaining portion of his 45-acre tract onto Appellants' respective properties fail because none of the Hytec Defendants has ever been and is not the current owner of the property adjacent to Appellants' property. Moreover,

² Appellants' common law claims were in addition to their statutory claims under the Washington Model Toxics Control Act, RCW 70.105D ("MTCA"). Appellants voluntarily dismissed their MTCA claims after the Hytec Defendants prevailed on the common law claim summary judgment motion.

Appellants produced no evidence that contaminants actually migrated from Lufkin's property to Appellants' property during their ownership. Finally, the disposal of solid waste at a remote, undeveloped parcel of rural land over 30 years ago does not now and did not then constitute an abnormally dangerous activity.

Before moving to the statement of this case and legal argument, a note of caution is warranted. As in the trial court briefing, Appellants' briefing in this Court risks leaving the reader with the impression that the Hytec Defendants and the Lufkin Defendants should be lumped together under the single rubric of "prior owners." Much of the Appellants' briefing is devoted to the application of tort and contract law principals governing or relevant to the relationship between vendors and vendees in the sale of real property. A critical distinction is lost, however, in Appellants' briefing – none of the Hytec Defendants ever owned the real property at issue in this case. Never. The Hytec Defendants never sold any of the real property to the Appellants. This distinction is central to parsing Appellants' arguments and evaluating the well reasoned cases supporting the trial court holding that a prior lessee, licensee or user of real property simply does not owe a legal duty to subsequent future owners of the same property. We respectfully request that this Court keep in mind this critical distinction throughout this Appeal.

The Hytec Defendants never owned the 44 acres and used the property for disposal with the full knowledge and consent of the prior, and then current, owner Chauncey Lufkin. The trial court correctly determined that Washington law should not allow a current property owner to maintain a tort action against a prior licensee/user of the same exact real property where that licensee/user had the permission of the then current property owner. We respectfully urge that a reasoned review of the trial court's decision and the relevant case law will lead this Court to the same conclusion. The Hytec Defendants respectfully request that the trial court decision be affirmed in its entirety.

II. COUNTER-ASSIGNMENTS OF ERROR / ISSUES ON APPEAL

None. The Hytec Respondents support the trial court's decision in its entirety. On the legal issues of first impression in this matter concerning tort claims by current property owners against previous permissive users of the same property, the trial court fashioned a decision which is consistent with the existing body of Washington tort law. The decisions from other jurisdictions from which the trial court drew its support provide a solid foundation for the legal principals enunciated in the trial court's decision.

The issues presented in the summary judgment motion relevant to this Appeal were:

1. Whether Plaintiffs can maintain tort claims for negligence, nuisance, trespass and strict liability against the Hytec Defendants for activities taken while Plaintiffs' predecessor Lufkin owned the same property. CP 12-41 (Motion).

2. Whether the Hytec Defendants are liable to Plaintiffs under their common law tort theories for alleged contamination migrating from Lufkin's property to Plaintiffs' adjacent properties during their ownership when: (1) the Hytec Defendants do not own or have any interest in Lufkin's property; and (2) there is no evidence contaminants are actually migrating from Lufkin's property to Plaintiffs' properties. CP 12-41 (Motion).

III. COUNTER-STATEMENT OF THE CASE

A. Procedural History

Plaintiffs Troy and Niki Pavlicek, Juliane Morgan and Richard and Cecile Spears filed their lawsuit May 28, 2004 and filed a First Amended Complaint on July 12, 2004. CP 3-11 (First Amended Complaint). The First Amended Complaint asserted claims under MTCA and common law theories of negligence, nuisance, trespass and strict liability for alleged abnormally dangerous activities against the Defendants Lufkin and the Hytec Defendants. The Pavliceks also asserted a claim against Lufkin for fraudulent concealment, and all plaintiffs asserted claims against Patricia and Pamela Matthews, who owned the Littlerock property for a short time under a failed land sale contract 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). Lufkin filed a joinder in that motion on June 1, 2006, CP 268-281 (Joinder and Motion). The trial court granted the Hytec Defendants' motion in its entirety at oral argument on June 20, 2006, with a written order entered on July 17, 2006. RP 27:15-31:13 (Verbatim Transcript of Hearing), CP 668-673 (Order Granting Partial Summary Judgment).

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 Pavlicek's remaining common law claims and of all claims involving the Matthews sisters thereby resolving all claims in the case. Supp. CP (Orders).

On April 23, 2007, Plaintiffs Morgan and Spears timely filed their Notice of Appeal of the trial court's order granting summary judgment to Lufkin and Hytec on the common law claims. CP 647-80 (Notice of Appeal).

B. The Littlerock Waste Disposal Site.

In 1975, defendants Chauncey and Elizabeth Lufkin purchased an approximately 45-acre tract of remote, undeveloped rural land southwest of Littlerock, Washington, near the intersection of Mima-Gate Road and Bordeaux Road (the "Littlerock Property"). CP 44-265 (Houlihan Dec., Ex. 1). At the time of the purchase, Mr. Lufkin was the president and principal owner of Hytec, a manufacturer of fiberglass products, such as sinks, tubs, and other bathroom inserts. *Id.* (Houlihan Dec., Ex. 2).

On September 17, 1975, an application was submitted to the Thurston-Mason Health District for a permit to use the Littlerock Property as a solid waste disposal site for fiberglass, resin and other waste materials from Hytec's Tumwater facility. *Id.* (Houlihan Ex. 3). On April 12, 1976, the Thurston-Mason Health District issued a solid waste disposal permit to Hytec (the "Permit") under the Solid Waste Management program enacted in 1969, RCW 70.95 et seq. and the Regulations Governing Solid Waste Handling and Facilities adopted by the Thurston-Mason District Board of Health that were in effect during that time period. *Id.* (Houlihan Dec., Ex. 6). It is undisputed that Hytec deposited solid waste on the Littlerock Property. It is undisputed that Defendants Tomkins Industries, Inc., Lasco Bathware, Inc. and Tomkins PLC never owned, occupied, operated or

disposed of materials at the Littlerock site. Similarly, it is undisputed that Hytec never owned the Littlerock site.

C. **The Sale of Hytec to Philips.**

On December 20, 1986, Philips Industries, Inc. ("Philips"),³ an Ohio corporation, entered into a purchase and sale agreement (the "Agreement") with Mr. Lufkin under which Philips agreed to buy and Mr. Lufkin agreed to sell all of the issued and outstanding stock of Hytec. *Id.* (Houlihan Dec., Ex. 10). The sale did not include the Littlerock site. *Id.*

D. **Sales of the Littlerock Property.**

As set forth above, the Lufkins purchased the Littlerock Property in 1975. In 1995, Lufkin entered into a real estate contract ("Real Estate Contract") to sell the Littlerock Property with Patricia and Pamela Mathews ("Mathews"). *Id.* (Houlihan Dec., Ex. 11). Approximately two years later, Mathews defaulted on their loan agreement with Lufkin and the Littlerock Property was reconveyed to Lufkin. *Id.* (Houlihan Dec., Ex. 12).

After return of the Littlerock Property from Mathews, Lufkin subdivided the Littlerock Property and began selling off smaller portions.

³ Defendant Tomkins PLC acquired Philips in 1990. In 1991, Philips changed its name to Tomkins Industries, Inc., another Defendant in this action. Tomkins Industries, Inc. is the parent company of Defendants Lasco Bathware, Inc. and Hytec.

Id. (Houlihan Dec., Ex. 13). On November 30, 1998, more than twenty years after Hytec ceased its disposal activities on the Littlerock Property and more than 10 years after Lufkin sold Hytec to Philips, Lufkin sold two adjacent five-acre parcels to Plaintiff Pavlicek. *Id.* (Houlihan Dec., Ex. 14).

On December 4, 1998, Lufkin sold another ten-acre portion of the Littlerock Property to Joseph Monte ("Monte"). Prior to that sale, Lufkin and Monte discussed the history of the Littlerock Property, including Hytec's earlier waste disposal activities. CP 511 (Lufkin Dep. 78:5-15); CP 528-529 (Monte Dep. 19: 21-20). Monte, in turn, later sold five of his ten acres to Plaintiff Morgan and the other five acres to Plaintiff Spears. The sales to Morgan and Spears occurred on February 15, 2002 and February 6, 2002, respectively. Cp 44-265 (Houlihan Dec., Exs. 16 and 17). It is undisputed that the remaining approximately 25 acres of the Littlerock Property is still owned by Lufkin and is adjacent to Plaintiffs' properties. CP 3-11 (Amended Complaint).

Both prior to and during this litigation, Morgan and Spears have failed to produce any evidence that contaminants have migrated from Lufkin's property into their soils and groundwater, and have admitted that they have no knowledge of such contamination. CP 316, 300 (Spears dep. at p. 175, ll. 16-19; Morgan dep. at pp. 84-85). To the extent Morgan

and Spears have conducted their own tests of the well water on their properties, they found nothing that would make their water unsafe for consumption. CP 314-318, 300. (Spears dep. at p. 92, ll. 12-22, p. 125, ll. 6-24, p. 175, ll. 8-19, and p. 194, ll. 11-24; Morgan dep., p. 84, ll. 18-25 and p. 85, ll. 1-13).

In addition to Morgan and Spears testing of their own properties, in 2004, Stemen Environmental collected and tested water samples from the Pavlicek and Morgan residential water systems. The concentrations of the compounds detected in 2004 were all less than the respective MTCA cleanup levels and appropriate Maximum Contaminant Levels ("MCL") for drinking water set by the Washington State Department of Health ("WDOH"). However, since the analyses by Stemen Environmental were not performed by a Washington State Department of Ecology ("Ecology")-accredited laboratory, the testing was re-done by Lufkin's new consultant, Insight Geologic, PLLC.

On December 30, 2004, Insight Geologic collected water samples from the Pavlicek and Morgan wells. Those samples were analyzed for the presence of volatile organic compounds ("VOCs"), semi-volatile organic compounds ("sVOCs") and metals (arsenic, cadmium, chromium, lead and mercury) by an Ecology accredited laboratory using appropriate analytical methodology. Chromium was detected in the water sample

from the Pavlicek well at a concentration of 0.024 mg/l. This concentration is less than Ecology's MTCA Method A cleanup level for groundwater of 0.050 mg/l and less than the WDOH MCL of 0.100 mg/l. No other metals, VOCs or sVOCs were detected in the water samples.

E. The Lawsuit.

On July 12, 2004, Pavlicek, Morgan and Spears filed a First Amended Complaint alleging causes of action against the Lufkin and the Hytec Defendants for negligence, trespass, nuisance, strict liability, and liability under the MTCA. (the "Lawsuit"). CP 44-265 (Houlihan Dec., Ex. 21). Plaintiffs' claims against the Hytec Defendants arise out of the alleged contamination of their respective properties by Hytec's materials at the Littlerock Property and the alleged migration of contaminants from Lufkin's 25 acres into the soil and groundwater of Appellants' properties. *Id.*

IV. LEGAL ARGUMENT

A. Summary Judgment Standard.

Appellate review of summary judgment rulings is *de novo*. *Grundy v. Thurston County*, 155 Wn.2d. 1, 6, 117 P2d. 1089 (2005). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). The purpose of a summary judgment is to avoid an unnecessary trial by permitting the Court to grant relief where there is no genuine factual dispute. *State ex rel Bond*, 62 Wn.2d 487, 488, 383 P.2d 288 (1963). Material or genuine facts, within the meaning of Civil Rule 56, are those upon which the outcome of litigation depends. *Zedrick v. Kosenski*, 62 Wn.2d 50, 380 P.2d 870 (1963).

A party that opposes a motion for summary judgment cannot rely solely on mere allegations or on the denials contained in the pleadings to defeat the motion. *Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 119 P.3d 329, 329-30 (2005); CR 56(e). Rather, the nonmoving party must affirmatively assert facts that raise genuine issues to be resolved. *Flower v. T.R.A. Industries, Inc.* 127 Wn.App. 13, 26, 111 P.3d 1192 (2005); CR 56(e).

B. The Negligence Claims: Appellants Cannot Maintain Tort Claims for Negligence, Nuisance, Trespass and Strict Liability Against the Hytec Defendants for Waste Disposal Activities Undertaken While Lufkin Owned Appellants' Properties.

The majority of jurisdictions have held that previous owners and occupiers of property are *not* liable to subsequent owners of the same

property for harm to their own property. Although no Washington court has considered the issue, the reasoning of the majority of jurisdictions is persuasive, and the Washington Supreme Court would most likely refuse to allow Appellants' to maintain their common law tort claims against a non-owner, permissive user such as the Hytec. The Hytec Defendants' Motion for Partial Summary Judgment is based primarily on the simple proposition that none of the Hytec Defendants can be liable under the Appellants' common law theories because they never owned the property and Lufkin, the owner of the Littlerock property when the wastes were disposed, consented to the disposal of the wastes. The majority of other states agree with this proposition. The fact that Mr. Lufkin knowingly consented to the disposal of the wastes provides a complete defense to the Appellants' common law claims against the Hytec Defendants. Appellants' opposition never addresses this "consent defense" even though it is specifically discussed in one of the key cases upon which they rely.

This Court should adopt the reasoning of the majority of jurisdictions that subsequent owners of real property cannot impose negligence, nuisance, trespass or strict liability on a prior owner, tenant or consensual user of the same property. This Court should resist

Appellants' efforts to expand potential tort liability. The Hytec Defendants' Motion for Partial Summary Judgment should be affirmed.

1. The Hytec Defendants Had No Duty to Appellants as Remote Purchasers of a Portion of Lufkin's Property.

Appellants alleged that the Hytec Defendants are liable to Appellants under a negligence theory for "fail[ure] to exercise reasonable care in storing, disposing of, and releasing hazardous and solid waste at the Littlerock Property." CP 3-11 (Amended Complaint at ¶ 27, p. 5). However, in order to prove actionable negligence, Appellants must establish the following elements: (1) the existence of a duty owed to the complaining party; (2) breach of that duty; (3) injury; and (4) that the claimed breach was a proximate cause of the resulting injury. *See Webstad v. Stortini*, 83 Wn.App. 857, 924 P.2d 940 (1996). The threshold determination in any negligence case is whether the defendant owed a duty of care to the plaintiff. *Id.* Whether a defendant owes a duty of care to a plaintiff is a question of law. *Id.* When no such duty of care exists, a defendant cannot be subject to liability for negligent conduct. *Id.*

The Appellants' brief confuses this simple, fundamental hierarchy of tort elements. The Appellants' arguments skip directly to the "reasonableness" of Hytec's waste disposal activities – in other words whether Hytec's actions violate a duty owed to Appellants. They really

are putting the “cart before the horse” in their evaluation. The first inquiry should be “is there a duty owed to Appellants” not whether Hytec acted reasonably. Here, the Court need not progress any further beyond the question of legal duty to Appellants. Simply put, Hytec owed no legal duty to act in any manner – reasonable or unreasonable – with respect to the Appellants. As discussed below, Hytec as a permissive user of the Littlerock Property, owned no legal duty to the Appellants – or any other remote, future owner of the Littlerock Property.

In circumstances almost identical to this case, the majority of courts have held that a property owner, let alone a short term permissive user like Hytec, does not owe a duty of reasonable care in the disposal of hazardous materials on his or her own property to subsequent owners of the same property. *See, e.g., Cross Oil Co. v. Phillips Petroleum Co.*, 944 F.Supp. 787 (E.D. Mo. 1996); *Dartron Corp. v. Uniroyal Chemical Co., Inc.*, 893 F.Supp. 730 (N.D. Ohio 1995); *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F.Supp. 101 (R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F.Supp. 93 (Mass. 1990); *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 640 A.2d 950 (R.I. Sup. Ct. 1994); *Rosenblatt v. Exxon Co.*, 335 Md. 58, 642 A.2d 180 (1994).

In *Wilson*, the plaintiff Arthur Wilson ("Wilson") bought a parcel of developed land from an entity named Little Rest Realty Company

("LRRC"). Before this transaction, Mobil Oil Corporation ("Mobil") had leased the land for the operation of a retail gas station for several decades from LRRC and its predecessors. Mobil's lease with LRRC ended four months before Wilson bought the property. Mobil vacated when its lease ended. After discovering gas station related contamination on the property after the sale, Wilson and his company brought suit against Mobil alleging various common law claims, including negligence.

On a motion to dismiss, the District Court dismissed Wilson's common law claims, including the negligence claim. With regard to the negligence claim, the Court held that Mobil owed no duty to Wilson to maintain the property in a certain condition. The District Court adopted the reasoning set forth in *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F.Supp. 93, 100 (D.Mass 1990), in which the Federal District Court of Massachusetts explained that the common law does not:

support the imposition of a duty on an owner of land to maintain his or her property in a certain condition or to refrain from any activity affecting the property which would extend to future owners of the land. The imposition of such a duty would be unreasonable because such future owners may not be known or even contemplated at the time the landowner creates or maintains a condition on his or her property.

Important to this case, the *Wilson* Court further pointed out that because Mobil "was a lessee and not an owner of the property only diminishes

Mobil's possible obligations to subsequent purchasers" and that "the seller's former *lessee*, as a matter of both logic and public policy, owes no such duty." *Wellesley Hills*, 747 F.Supp. 93 (Mass. 1990) The Court further stated that any claim by a purchaser against its vendor would be based on contractual privity or misrepresentation. *Id.*

As in *Wilson*, in this case there is no basis to find that Hytec had a duty of reasonable care to Appellants in disposing of waste at the Littlerock Property. Hytec, as a licensee or occupier, and with the permission of Lufkin, the property owner, deposited waste at the Littlerock Property more than twenty years before any of the Appellants purchased their properties. Furthermore, there were at least two, and in the cases of Morgan and Spears, three intervening owners of Appellants' properties since Hytec deposited solid waste at the Littlerock Property. The entire Littlerock Property was transferred by Defendant Lufkin to Mathews in 1995. Two years later it was transferred back to Lufkin. In 1998, Lufkin then transferred a portion of the Littlerock Property to Pavlicek and a portion to Monte. In 2002, Monte transferred five acres to Morgan and five acres to Spears. There is no basis in the common law to extend a duty from Hytec, a short term, transient licensee and occupier, to such remote purchasers.

2. Chauncey Lufkin Consented to Hytec's Disposal of the Waste Materials which Provides a Complete Defense to the Appellants' Nuisance, Trespass, Strict Liability and Negligence Claims.

One of the main cases cited by Appellants in misguided support of their opposition to partial summary judgment, *Magini v. Aerojet General Corp.*, 230 Cal.App. 3rd 1125 (1991), actually supports granting the Hytec Defendants' motion. As set forth above, none of the Hytec Defendants owned the property at any time and Chauncey Lufkin knowingly consented to the disposal of waste at the property.

As cautioned above, Appellants' brief at times leaves the impression that Hytec should be lumped in the same "prior owner" category as Lufkin. Appellants' arguments gloss over a critical distinguishing fact – none of the Hytec Defendants are a prior *owner* of the property. This critical distinction, however, was not lost on the *Mangini* Court.

The *Mangini* Court acknowledged the clear distinction between prior owners of the property and prior lessees or users. Where an owner of property seeks damages for creation of a nuisance by a prior lessee, the lessee has a defense that his use of the property was undertaken with the consent of the owner. *Id.* at 1138. The Court went on to state that:

Moreover, consent as a defense is necessary to avoid absurd results. Suppose for example, A leases Blackacre to

B for the purpose of operating a quarry. B lawfully uses the land for that purpose and, at the end of the lease term, returns the land to A with a substantial and inevitable hole in the ground. We dare say it would be absurd to allow A to sue B for creating the inevitable hole that was the very object of the lease... Nor is a successor owner in any better position than A. “Where the original owner has lost the right to sue by authorizing the construction of the private nuisance...he clearly can pass no right to sue to his grantee.” (citation omitted) Nor is a defense of consent vitiated simply because plaintiffs seek damages based on special injury from a public nuisance. “Where special injury to a private person or persons entitles such person or persons to sue on account of a public nuisance, both a public and a private nuisance, in a sense, are both in existence. *Id.* (citation omitted).

Appellants also cite to *Newhall Land v. Mobil Oil Corp.*, 19 Cal.App.4th 334, 23 Cal.Rptr.2d 377 (1993) in support of the imposition of nuisance liability on the Hytec Defendants. The Appellants neglect to mention, however, that the *Newhall* Court specifically adopted the *Mangini* Court’s “consent defense” for prior lessees. *Id.* at p. 345.

The “absurd result” that the *Mangini* Court sought to avoid is exactly the result that would occur here if liability is imposed on Hytec for the disposal of waste that Defendant Lufkin consented to and facilitated on the exact same property that Appellants now own. Lufkin knew that the wastes would be placed on his property, where they would be placed and how they were placed on the land. He consented to and benefited from these actions. Appellants, as successor owners to Mr. Lufkin, cannot now

complain of an alleged nuisance and other torts arising from the very acts to which he consented. The logic of this consent defense applies equally to each of the Appellants' common law claims for negligence, nuisance, trespass and strict liability. Where the Appellants' predecessor in legal interest has consented to the acts, such consent bars Appellants from bringing tort claims for the natural and intended consequences of the acts consented to. Appellants' damages, if any, are more properly addressed under in their contractual and statutory MTCA causes of action.

Even following the Appellants' own case law, the proper course of action is to grant the Hytec Defendants' motion.

3. Appellants' Arguments Regarding Negligence Claims Miss the Point.

As set forth above, many courts nationwide have found that prior property owners and occupiers owe no duty to subsequent buyers to exercise reasonable care in the use of the land. Rather than address this issue, Appellants devote a significant portion of their briefing to discussing *caveat emptor*, the obligations of vendors to disclose latent defects to vendees and the allocation of risk between sellers and buyers in a real estate purchase and sale transaction. While these arguments may have some relevance to Mr. Lufkin – the former owner of the Littlerock

Property now owned by Appellants – these arguments have no relevance to the Hytec Defendants.

It is undisputed that the Hytec Defendants never owned the Littlerock property – they are not prior owners, have no contractual privity with the Appellants and are not subject to the obligations of a seller to buyer regarding disclosure of conditions – latent or otherwise – at the Littlerock Property.⁴ It is undisputed that none of the Hytec Defendants had any control whatsoever over the Littlerock property at the time Lufkin sold the parcels to the Pavliceks and Joe Monte. It is further undisputed that none of the Hytec Defendants had any control over Mr. Monte's property when he sold it to the Appellants. Applying disclosure obligations imposed on sellers of real estate to an intermittent prior user of the subject property some 30 years after the use terminated is simply too great a stretch even for the elastic principals of tort law.

Appellants' arguments concerning the scope of *caveat emptor* as between a seller and purchaser of real property and any alleged failure to disclose the history of the property are not applicable to this Court's consideration of the Hytec Defendant's alleged liability. As set forth in the *Wellesly* and *Mangini* decisions, however, Hytec's status as a non-

⁴ Interestingly enough, the Appellants do not even have contractual privity with Mr. Lufkin. He did not sell them the property. Rather, Joe Monte sold them the Property but Appellants have elected, for whatever reason, not to sue Mr. Monte.

owner user of the Property at the consent of Chauncey Lufkin is, however, highly relevant to granting the Hytec Defendants' Motion.

The Appellants also failed to produce any facts indicating that the waste disposal by Hytec was performed negligently or somehow violated Lufkin's consent to the disposal of the wastes. The Appellants' merely state that a jury could potentially find that the disposal was "unreasonable." CP 327. This bare, unsupported statement is insufficient to preclude granting Hytec's Motion. A party that opposes a summary judgment motion cannot rely solely on mere allegations to defeat the motion. *Tiffany Family Trust v. City of Kent*, 155 Wn.2d 225, 19 P.3rd 329, 330; CR 56 (e).

Appellants' reliance on the *Donald v. Amoco Production Co., et. al.*, 735 So.2d 161 (1999), and *Newhall Land v. Mobile Oil Corp.*, 19 Cal.App.4th 334, 23 Cal.Rptr.2d 377 (1993) to support a negligence cause of action is misplaced. As discussed in more detail below in the discussion of Appellants' trespass claims, each of these cases is factually and legally distinguishable from this matter. The *Donald* case involved knowingly entrusting radioactive wastes to completely incompetent and incapable third party contractors. Here there the record shows that the waste was disposed with the consent of the landowner at a permitted disposal site. The *Newhall* Court involved negligence claims against a

prior owner of the same property. Here the Hytec Defendants never owned the Littlerock Property and most significantly, the *Newhall* Court specifically adopted and confirmed the *Mangini* court's consent defense for prior lessees and users.

The Appellants also argue that there must be some common law action available to remedy "all" of their damages because it would be inequitable to allow the Hytec Defendants to be relieved of any obligation to address the wastes. The common law tort remedies Appellants' seek to impose do not in themselves guarantee a recovery of "all" their damages. Common law claims are subject to myriad defenses both factual and legal which may leave a claimant without any remedy for harm.

Moreover, as noted by the trial court, the Appellants do retain other causes of action to potentially remedy their alleged harm. The Appellants have potential contract actions against Joe Monte – the very person that sold them their respective pieces of the Littlerock Property. They also have potential claims under MTCA to recover any "response costs" that they may incur pursuant to that statute. The Appellants, however, have elected only to pursue the Lufkins and the Hytec Defendants. Appellants posit that they would be left naked without a remedy and that this Court should therefore cloak them in the protection of a negligence cause of action. Appellants do not stand naked without a

remedy. They have potential contract claims. They have potential MTCA claims for response costs they may incur. Distorting bedrock principals of tort law should not be the means by which to protect Appellants from their own remedy election.

The majority of courts have found that a subsequent owner cannot bring a negligence claim against a prior non-owner permissive user of the same property because that permissive user has no legal duty to the subsequent owner. In the absence of a legal duty owed by the Hytec Defendants to Appellants, there can be no liability in tort. This Court should follow the majority rule and affirm the trial court decision.

C. The Nuisance Claims: Hytec, as a Prior Licensee of Lufkin, is Not Liable to Appellants for Nuisance.

Identical to their allegations of negligence, Appellants allege that the Hytec Defendants "[b]y storing, disposing of, and releasing hazardous and solid wastes at and from the Littlerock site, Hytec and Tomkins have created a public and private nuisance, as defined in RCW 7.48.120 through 7.48.150, affecting the Plaintiffs' properties." CP 3-11. As with Appellants' negligence claim, the current owner of property cannot sue the former owner or licensee of the same property for nuisance. Appellants' nuisance claims fail as a matter of law.

1. Appellants Cannot Sustain a Claim for Private or Public Nuisance Against a Prior Owner or Licensee of the Same Property.

a) *Private Nuisance.*

An "actionable nuisance" is defined as:

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 an 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.

RCW 7.48.010. In Washington, the law of nuisance has been exclusively applied as a means of resolving conflicts between neighboring contemporaneous land users to address impairment of real property. *See, e.g., Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998)(plaintiff's farms located across highway from polluting pulp mill); *Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985)(plaintiff property owners downwind from ASARCO smelter); *Maas v. Perkins*, 42 Wn.2d 38, 253 P.2d 427 (1953)(contamination to plaintiff's property across street from contemporaneous users of properties for bulk plant and service station); *City of Benton City v. Adrian*, 50 Wn.App. 330, 748 P.2d 679 (1988)(discharge of excess irrigation water flowed onto plaintiff's property); *Wilson v. Key Tronic Corp.*, 40 Wn.App. 802, 701 P.2d 518

(1985)(plaintiff property owners near landfill); *see also Washington Real Property Deskbook* § 106.2(16). There is no basis in Washington law to expand the law of nuisance to permit recovery in the circumstances alleged here: namely, where current owners of property seek recovery against a prior licensee of the same property for a consensual condition created on the exact same property during the prior ownership of the claimant's property.

The majority of jurisdictions addressing this precise issue have held that previous owners and occupiers are *not* liable to subsequent owners of the same property for nuisance. *See, e.g., Lilly Industries, Inc. v. Health-Chem Corp.*, 974 F.Supp. 702 (S.D. Ind. 1997); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609 (1997); *Cross Oil Co. v. Phillips Petroleum Co.*, 944 F.Supp. 787 (E.D. Mo. 1996); *Dartron Corp. v. Uniroyal Chemical Co., Inc.*, 893 F.Supp. 730 (N.D. Ohio 1995); *55 Motor Avenue Co. v. Liberty Industrial Finishing Corp.*, 885 F.Supp. 410 (E.D. N.Y. 1994). *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F.Supp. 101 (R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F.Supp. 93 (Mass. 1990); *Rosenblatt v. Exxon Co.*, 335 Md. 58, 642 A.2d 180 (1994); *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303(3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985). As explained in the Washington Real Property Deskbook § 106.2(16):

There are three prevailing grounds relied upon by the courts in shielding prior owners from nuisance liability: (1) the rule of caveat emptor, which obligates purchasers to make their own inspections of the premises, and renders a previous owner free of responsibility for defective conditions at the time of the transfer. *Hercules, Inc.*, 762 F.2d at 312. (2) The evolution of nuisance "as a means of resolving conflicts between *neighboring contemporaneous* users [Emphasis added]." *55 Motor Ave. Co.*, 885 F.Supp. at 421 (quoting *Hercules, Inc.*, 762 F.2d at 314; *see also Wellesley Hills*, 747 F.Supp. at 98-99; *Wilson Auto Enters., Inc.*, 778 F.Supp. at 106.) **Consequently, an owner's/lessee's activities conducted on land during its occupancy do not give rise to a cause of action in nuisance to a subsequent occupant of land.** *Rosenblatt*, 642 A.2d at 190. (3) A belief that "the wisdom of extending this common law doctrine into the area of environmental claims is questionable considering that Congress and state legislatures are working to formulate acceptable parameters of the rights and liabilities of the parties in this area." *55 Motor Ave.*, 885 F.Supp. at 421. (emphasis added).

Washington law is consistent with these authorities and does not support expansion of a common law nuisance claim by a subsequent purchaser of property against a permissive licensee of a remote prior owner of the same property. As in the out-of-state cases cited above, the law of nuisance in Washington has been applied exclusively to resolving conflicts between neighboring contemporaneous land users. Here, Hytec is not a contemporaneous user of the remaining Lufkin property. Moreover, the conditions, if any, of the Plaintiff properties were created when the entire 44 acres were owned by Lufkin. In these circumstances,

Appellants cannot sustain private nuisance claims against Hytec Defendants.

Furthermore, a suit for private nuisance between successive owners of the same property would effectively displace the market's allocation of risks and subject sellers to unbargained-for future liability to remote buyers. As stated in the cases cited above, claims against prior owners or occupiers for alleged contamination to the same property are properly addressed by Congress and state legislatures. In this state, such environmental claims fall under the MTCA, not common law nuisance, and Appellants did, in fact, assert MTCA claims against the Hytec Defendants. For these reasons, Appellants' private nuisance claims should be dismissed.

b) Public Nuisance.

Appellants' claim for public nuisance fails as a matter of law as well. The distinction between a public nuisance and a private nuisance lies in the number of persons or properties which are affected by the interference. RCW 7.48.130. There is no material difference between a public and private nuisance claim in the context of subsequent private landowners seeking to sue the previous owner or occupier for contamination of the same property. For the same reasons Appellants'

private nuisance cause of action fails, so does their claim for public nuisance. *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 626-27 (M.D. Penn. 1997).

2. Appellants' Nuisance Claims Are Simply a Restatement of Appellants' Negligence Claim and Should Be Dismissed on That Basis.

A nuisance claim that is simply a restated negligence claim need not be considered separately from the negligence claim. *Kaech v. Lewis County PUD No. 1*, 106 Wn.App. 260, 281, 23 P.3d 529 (2001). If the alleged nuisance is the result of the defendant's alleged negligence conduct, negligence rules apply. *Id.*

In *Kaech*, plaintiffs John and Margaret Kaech ("Kaech") sued the Lewis County PUD, No. 1 ("PUD") for negligence, nuisance, trespass, inverse condemnation, and intentional and negligence misrepresentation, claiming that leaking insulators allowed stray voltage to harm their dairy cows. At the end of Kaech's case, the court granted the PUD's motion to dismiss the trespass, nuisance and misrepresentation claims. Kaech appealed that ruling. The Court of Appeals upheld the dismissal of the nuisance claim finding that the same set of facts supported the claim of negligence as the claim of nuisance and Kaech's claim was a "negligence claim with multiple theories."

As evidenced by the almost identical allegations in Appellants' Amended Complaint, Appellants' negligence claim and nuisance claim clearly allege the exact same facts. The nuisance claim is merely a restated negligence claim and should be dismissed along with the Appellants' nuisance claim.

3. Hytec Disposed Waste at a Permitted Site and Such Activity Cannot Be Deemed a Private or Public Nuisance.

RCW 7.48.160 provides that "nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." This statute has been liberally construed to protect activities undertaken pursuant to general statutory authorization. *See, e.g., Carlson v. City of Wenatchee*, 56 Wn.2d 932, 935-36, 350 P.2d 457 (1960)(holding that placement of traffic signal control box which had fallen on a sidewalk injuring plaintiff could not constitute a nuisance because a state statute expressly authorized the city to place and maintain traffic signals and controls); *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 407-08, 403 P.2d 54 (1965)(holding that the construction of a highway which was built within 300 feet of plaintiff's hospital could not be enjoined as a nuisance where construction was authorized by a specific statute)

RCW 7.48.160 applies to public as well as private nuisances. However, in contrast to the law of private nuisance, the existence of a municipal ordinance, as well as a state statute, which authorizes a particular use of land precludes a finding that the use is a public nuisance. *Shields v. Spokane School District No. 81*, 31 Wn.2d 247, 254, 196 P.2d 352 (1948).

Pursuant to the authority of RCW 70.95 et seq. and the Thurston-Mason District Board of Health regulations, a permit to deposit solid waste at the Littlerock Property was applied for and issued in 1976. Certain waste was deposited at the Littlerock Property under that permit. As such, Hytec's waste disposal activities at the Littlerock Property cannot be deemed a private or public nuisance. *Id.*

D. The Trespass Claims: Subsequent Purchasers Cannot Sue a Prior Owner for Trespass.

Appellants allege that "[b]y storing, disposing of, and releasing solvents and other contaminants at the Littlerock site, Hytec and Tomkins have trespassed or caused a trespass upon Plaintiffs' properties." Complaint at p. 6, ¶ 33. This claim fails as a matter of law. Under Washington law, a party is only liable for trespass if he or she intentionally or negligently intrudes onto the property *of another*. *Olympic Pipe Line Co. v. Theony*, 124 Wn.App. 381, 393, 101 P.3d 430

(2004)(emphasis added). The Restatement (Second) of Torts § 158 (1965), which has been adopted by Washington courts, is consistent with this limitation, for it defines liability for trespass, in pertinent part, as follows:

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land *in the possession of the other*, or causes a thing or third person to do so.

See Bradley v. American Smelting and Refining Co., 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985)(applying the Restatement (Second) Torts § 158 definition of trespass). Courts around the nation have rejected similar efforts to sue someone for having trespassed on what was his or her own property at the time the action was taken. *See, e.g., Lilly Industries, Inc. v. Health-Chem Corp.*, 974 F.Supp. 702 (S.D. Ind. 1997); *Cross Oil Co. v. Phillips Petroleum Co.*, 944 F.Supp. 787 (E.D. Mo. 1996); *Dartron Corp. v. Uniroyal Chemical Co., Inc.*, 893 F.Supp. 730 (N.D. Ohio 1995); *55 Motor Avenue Co. v. Liberty Industrial Finishing Corp.*, 885 F.Supp. 410 (E.D. N.Y. 1994). *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F.Supp. 101 (R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F.Supp. 93 (Mass. 1990); *Rosenblatt v. Exxon Co.*, 335 Md. 58, 642 A.2d 180 (1994).

In this case, it is undisputed that Hytec deposited waste on the Littlerock Property at the direction and with Lufkin's permission and that the disposal occurred during Lufkin's exclusive ownership of the Littlerock Property. As such, there was no unprivileged intrusion on land in possession *of another*. Based on both Washington law and the weight of authority nationally, the Court should decline to extend the common law of trespass to include suits against a licensee of a prior owner for action the licensee took while the prior owner was in lawful possession of the property to which trespass is alleged.

Appellants also argue that the Hytec Defendants can be held liable for a trespass for the "unprivileged remaining on the property" of Appellants. Appellants' Brief at p. 41. A review of the Appellants' cases, however, shows that they are distinguishable from this matter. First, in *Fradkin v. Northshore Utility District*, 96 Wn.App. 118, 977 P.2d 1265 (1999), the trespass concerned the alleged tortious nature of the defendant's actions which exceeded the scope of defendant's easement to install a sewer line. Here, there is no allegation or indication that Hytec exceeded the scope of its permission to dispose of materials at the Littlerock Property. As such, there is no activity which exceeded Hytec's permission and consequently the waste remaining on the Littlerock Property is not a trespass.

Second, Appellants' reliance on *Donald v. Amoco Production Co., et. al.*, 735 So.2d 161 (1999), *Redevelopment Agency v. Burlington Northern*, 2007 U.S. Dist. LEXIS 44287 (2007) and *Newhall Land v. Mobile Oil Corp.*, 19 Cal.App.4th 334, 23 Cal.Rptr.2d 377 (1993) is misplaced. The *Newhall* case involved the knowing, illegal disposal and release of contaminants by prior property owners coupled with their failure to disclose such conditions to subsequent purchasers. Here, the record reflects that Hytec disposed of solid waste at a permitted disposal facility which it did not own. It is undisputed that none of the Hytec Defendants had any contact whatsoever with the Appellants in connection with their purchase of any portion the Littlerock Property. Furthermore and even more significant than the factual distinctions, the *Newhall* court specifically endorsed and confirmed the *Mangini* consent defense for lessees. The *Newhall* Court noted that imposing trespass liability on a lessee would lead to the "absurd results" that the *Mangini* court refused to allow. *Id.*

The *Redevelopment Agency* decision similarly does not provide support for imposition of trespass liability upon the Hytec Defendants. In that case, the trespass liability was founded upon prior tortious action of the defendants – the creation of a nuisance. Here, since Washington law does not support imposition of nuisance liability upon the Hytec

Defendants, under *Redevelopment Agency* there would be no predicate tortious act resulting in the trespass. Moreover, the *Redevelopment Agency* case also involved the disposal of hazardous waste without the consent of the prior owner which is distinguishable from this matter – it is undisputed that the disposal of solid waste at the Littlerock Property was with the full and complete consent of the landowner and also pursuant to a permit.

Finally, no support for Appellants' trespass claim against the Hytec Defendants can be found in the *Donald v. Amoco Oil* decision. The Mississippi court in that case based the imposition of trespass liability on the simple fact that the oil companies entrusted their radioactive wastes to contractors that the oil companies knew were absolutely incompetent and incapable of properly disposing of radioactive materials. *Id.* at p. 28. Here, Hytec disposed of solid waste at a permitted disposal site. There was no entrustment to known incapable and incompetent contractors which resulted in the illegal disposal of waste materials.

Appellants' trespass claims fail as a matter of law and the Summary Judgment Order should be affirmed.

E. The Strict Liability Claims: Hytec, as a Prior Licensee of Lufkin, is Not Strictly Liable to Appellants for an Alleged Abnormally Dangerous Condition.

Appellants alleged that "the storage, handling and disposal of hazardous waste constitute extra hazardous and abnormally dangerous activities or practices" and that "Defendants are strictly liable for all damages proximately caused by the storage, handling, disposal and release of hazardous wastes at and from the Littlerock site." CP 3 (Amended Complaint at pp. 7-8, ¶¶ 42-43). Appellants' strict liability claim fails for two reasons: (1) Appellants' cannot maintain a strict liability claim for an abnormally dangerous condition against the Hytec Defendants for actions taken while Lufkin owned Appellants' properties; and (2) Defendants' disposal of solid waste was not an abnormally dangerous activity.

1. Appellants' Cannot Maintain a Strict Liability Claim Against a Former Owner or Occupier of the Same Property.

Washington courts have adopted the modern doctrine of strict liability as set forth in Restatement (Second) of Torts §§ 519 and 520. *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 6, 810 P.2d 917 (1991) . Section 519 of the Restatement provides "one who carries on an abnormally dangerous activity is subject to liability to harm to the person, land or chattels *of another* resulting from the activity, although he has exercised the utmost care to prevent the harm." Restatement (Second) of Torts § 519 (1977)(emphasis added). The majority of jurisdictions that have considered the issue rejected strict liability claims by a subsequent owner

against a prior owner or occupier of the same property. *See e.g., Cross Oil Co. v. Phillips Petroleum Co.*, 944 F.Supp. 787 (E.D. Mo. 1996); *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950 (R.I. Sup. Ct. 1994); *55 Motor Avenue Co. v. Liberty Industrial Finishing Corp.*, 885 F.Supp. 410 (E.D. N.Y. 1994). *Wilson Auto Enterprises, Inc. v. Mobil Oil Corp.*, 778 F.Supp. 101 (R.I. 1991); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F.Supp. 93 (Mass. 1990); *Rosenblatt v. Exxon Co.*, 335 Md. 58, 642 A.2d 180 (1994).

At the time Hytec disposed of solid waste on the Littlerock Property, it did so while it was in rightful possession of the Littlerock Property. Portions of the Littlerock Property only became property of the Appellants long after the waste disposal. It would be contrary to the well settled principles of common law of strict liability to impose liability on Hytec for prior actions which occurred on property that only became property of another after the actions occurred.

2. The Disposal of Solid Waste Was Not Ultrahazardous or an Abnormally Dangerous Activity.

Section 520 of the Restatement (Second) of Torts lists six factors that are to be considered in determining whether an activity is "abnormally dangerous." The factors are as follows:

- (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.

Klein, 117 Wn.2d at 6. None of the factors is dispositive, and ordinarily several of them will be required for strict liability. *Id.* "The 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." *Id.* at 7. The question of whether to impose strict liability is for the court, not the jury, since it is usually not a question of fact, but rather a judgment about an activity in general. *Id.* at 6.

As alleged in Plaintiffs' Complaint, the Hytec Defendants deposited waste on the Littlerock Property "including fiberglass debris and solvent containers from Hytec's manufacturing operations." CP 3

(Amended Complaint at p. 3). The solvent containers contained hardened resins. CP 523 (Lufkin Dep. at p. 133-134). The waste that was deposited on the Littlerock Property fit within the definition of “solid waste”. At the time the waste was disposed at the Littlerock Property, that property was 45 acres of remote, undeveloped and uninhabited rural property.

Under these facts, all of the Restatement § 520 factors require a finding that Hytec's waste disposal activities were neither ultrahazardous or abnormally dangerous: (a) there was no risk to person, land or chattel *of others*; (b) there was no likelihood of harm resulting from the deposit of fiberglass and solidified resin waste; (c) the Hytec Defendants and Lufkin did exercise reasonable care and therefore any risk, was unavoidable; (d-e) the disposal occurred at a highly remote and governmentally authorized solid waste disposal site where the activity was neither inappropriate to the place where it was carried on nor an activity of uncommon usage; and (e) there is value to the community in depositing manufacturing waste materials in a remote and uninhabited location away from the public.

Furthermore, the Appellants urge the court to impose strict liability on the Hytec Defendants because there can be “an equitable balancing of social interests only if [the Hytec Defendants] are made to pay for the consequences of their acts” (citation omitted) Appellants’ Brief at p. 44. The Appellants also cite to the comprehensive regulation of waste disposal

and clean up as an indication that the activity is abnormally dangerous. *Id.* It is critical in parsing these arguments that the Court keep in mind that the disposal of *solid waste* – not hazardous waste as the Appellants contend – occurred over 30 years ago when there were limited regulations governing solid waste disposal and the Littlerock Property complied with the solid waste regulations because a permit was issued by Thurston County. Moreover, the Appellants’ briefing gives the impression that Hytec and Lufkin will escape all responsibility for the solid wastes unless the Court stretches this tort claim to cover Hytec and Lufkin. Simply put, that impression is incorrect. Hytec and Lufkin are both bound by the terms and conditions of an Agreed Order with the Washington Department of Ecology to investigate and remediate the waste materials located at the Littlerock Property. Appellants’ own briefing admits that the work under the Order has commenced and continues to this day. As such, the comprehensive regulatory scheme the Appellants’ allude to is already precipitating action at the Littlerock Property and this Court need not shoehorn this matter into a tort cause of action in order to foster clean-up action at the Littlerock Property.

The Court should affirm the dismissal of Appellants’ strict liability claims against the Hytec Defendants.

F. The Hytec Defendants Are Not Liable to Appellants Under Negligence, Nuisance, Trespass and Strict Liability Theories for Any Alleged Contamination Migrating to Appellants' Properties from Lufkin's Adjacent Property.

In addition to Appellants' common law claims against the Hytec Defendants for waste disposal on their respective properties prior to Appellants' ownership of their respective properties, Appellants appear to assert that the Hytec Defendants are liable under common law theories of negligence, nuisance, trespass and perhaps even strict liability⁵ for contamination that allegedly has and continues to migrate from Lufkin's adjacent 25 acre parcel onto Appellants' property. The only potential basis for Appellants' claims against the Hytec Defendants as a neighbor appears to be based on the fact that Hytec disposed of solid waste somewhere on the Littlerock Property some 30 years prior. Appellants allege that the solid waste disposed by Hytec on the portion of the Littlerock Property still owned by Lufkin has and continues to migrate onto Appellants' properties through the soil and groundwater. CP 3-11 (Plaintiff's Amended Complaint at p. 6.).

⁵ It does not appear that Plaintiffs allege that the Hytec Defendants are strictly liable for contaminants allegedly migrating from Lufkin's property to Plaintiffs' properties. Such an allegation would not make sense because the Hytec Defendants do not own the 25 acre parcel. Nonetheless, in an abundance of caution, the Hytec Defendants seek dismissal of such a claim for the same reasons as the other tort claims.

The Hytec Defendants cannot be liable on these theories because: (a) none of them own or occupy Lufkin's property adjacent to Appellants' properties; and (b) Plaintiffs produced no evidence that contaminants have migrated up-gradient from Lufkin's remaining property to Appellants' Property during their ownership.

1. The Hytec Defendants Are Not Legally Responsible for Any Alleged Migration of Contaminants from Lufkin's Property to Appellants' Properties.

The Hytec Defendants do not now own or occupy the property adjacent to Appellants' properties from which the contaminants allegedly continue to migrate. Given that the Hytec Defendants do not own and have never occupied the property adjacent to Appellants' properties at the same time Appellants' owned their property, the Hytec Defendants cannot be liable as Appellants' neighbor for negligence, nuisance, trespass or strict liability. *Dartron Corporation v. Uniroyal Chemical Co., Inc.*, 917 F.Supp. 1173, 1180 (N.D. Ohio 1996); *Rudd v. Electrolux Corp.*, 982 F.Supp. 355, 371 (M.D. N.C. 1997).

In *Dartron*, Plaintiff Dartron Corporation ("Dartron") brought common law claims for negligence, nuisance and trespass against Uniroyal Chemical Corporation ("Uniroyal") alleging that Uniroyal's manufacturing operations on the property it sold to Dartron as well as its

operations on adjacent property contaminated and continues to contaminate Dartron's property. On summary judgment, the District Court found that Dartron's claims against Uniroyal in its role as prior owner of the property sold to Dartron all failed as a matter of law. In a subsequent summary judgment ruling, the District Court also dismissed Dartron's claims that Uniroyal was liable under its common law theories for depositing contaminants on the adjacent property that allegedly migrated to Dartron's property. In dismissing the second set of claims against Uniroyal as neighbor, the District Court held that because Uniroyal "does not own the neighboring land whence the contaminants allegedly migrated, it cannot be liable as Dartron's neighbor for negligence, nuisance or trespass." The Court refused to "stretch these causes of action too far" and approved of the following analogy:

Suppose that A builds a swimming pool on his property located adjacent to B's property, and then A sells his property to C. If the swimming pool begins to leak and flood B's property, B's action for nuisance or trespass should be against C, not A, [because] C is in control of the property from which the nuisance/trespass emanates and, therefore, is in the best position to abate the problem. Whether C thereupon has an action against A is a separate question. Just as in the case of the swimming pool, Dartron's causes of action, if any, are against the present owner of the Area C site, not [Uniroyal]. *Id.*

The Court in *Rudd* applied similar reasoning in holding that a prior owner of adjacent property was not liable for nuisance or trespass for

contaminated groundwater flowing from the adjacent property to the plaintiff's property. The Court in *Rudd* stated:

At the time contamination was discovered, SLE no longer owned the property, and, therefore, had no ability to remediate the soil to stop the trespass of any contaminants released while it owned the property. Rather, it became the current property owner's responsibility to clean up the contamination in order to stop the trespass. Under the common law, liability, if any, falls entirely on the current property owner. *Rudd*, supra.

The Hytec Defendants do not own the property adjacent to Appellants' properties, and never have owned this property. That property is owned by Lufkin. The Hytec Defendants last occupied or utilized the Littlerock Property more than twenty years before Appellants purchased their portions of the Littlerock Property that now sit adjacent to Lufkin's remaining portion of the Littlerock Property. As in both *Dartron* and *Rudd*, the current owner, Lufkin, if anyone, is the proper party against whom to assert Appellants' common law theories for alleged current migration of contaminated soil or groundwater from Lufkin's property onto Appellants' properties. Appellants' claims against the Hytec Defendants arising from the alleged migration of contaminants should be dismissed.

2. Appellants Produced No Evidence That Contaminants Actually Migrated Up-Gradient From Lufkin's Property To Appellants' Property During Their Ownership

Appellants' own brief states that there have been no detections of contaminants in their well water above applicable MTCA clean-up standards. Appellants' Brief at pp. 11-14. While contaminants may be present on Appellants' property, they produced no evidence that these contaminants migrated from Lufkin's property to Appellants' property during their ownership – a theory which is central to their common law claims founded on an unproven allegation of continuing migration.

Rather than presenting evidence that contamination migrated from Lufkin's property, Appellants' brief evidences the opposite – that the Appellants' properties are actually *up-gradient* of Lufkin's property. Appellants state that “This groundwater sampling detected trichloroflouromethane and methylene chloride in borehole B02 upgradient from the Morgan property and well and either on or immediately adjacent to the Spears property.” Appellants' Brief at p. 12. What this essentially means is that Appellants' are alleging that the contamination flowed up-hill against the natural flow of groundwater which is, to say the least, implausible. At best, Appellants have provided evidence that contaminants remain on their properties from permitted, consensual disposal activities more than 30 years prior to their ownership.

Such facts simply do not support any cause of action founded on the alleged current migration of contaminants from Lufkin's property to the Appellants' properties.

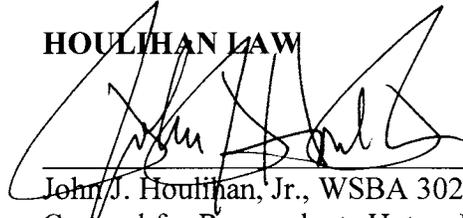
V. CONCLUSION

For the foregoing reasons, the Hytec Defendants request that Court affirm in its entirety the trial court's Order granting the motion for partial summary judgment dismissing Appellants' common tort law claims for negligence, nuisance, trespass and strict liability. Nationwide the majority of jurisdictions bar the Appellants' common law claims against prior owners or occupiers of the same property for acts that occurred during their prior ownership or occupation/use. Moreover, even the Appellants' own case law provides a robust defense to the Hytec Defendants because they undertook the waste disposal activities with the knowledge and consent of the prior owner, Chauncey Lufkin. Granting the Hytec Defendants' motion will not leave the Appellants standing naked without a remedy – they have both potential statutory MTCA and contract claims which are more appropriate mechanisms to address the allocation of alleged risks and liabilities in this instance.

The Hytec Defendants' respectfully request that the Court affirm the trial court Order in its entirety.

RESPECTFULLY SUBMITTED this 6th day of November, 2007

HOULIHAN LAW

A large, stylized handwritten signature in black ink, appearing to read 'John J. Houlihan, Jr.', is written over a horizontal line.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
SECOND DIVISION

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

Appellants,

v.

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

Respondents.

NO. 36220-1-II

DECLARATION OF
SERVICE

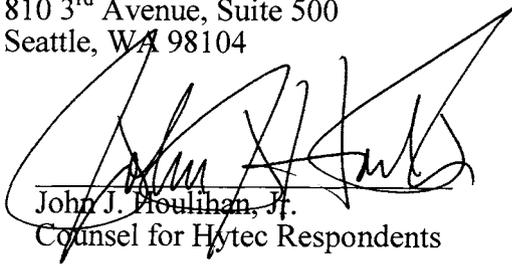
THIS IS TO CERTIFY that on November 6, 2007, the following
document:

Respondents Response Brief

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