

LUFKIN'S

No. 36220-1-II

Court of Appeals  
DIVISION II

STATE OF WASHINGTON

---

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

APPELLANTS,

v.

**CHAUNCEY and ELIZABETH LUFKIN, husband and wife;  
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 LUFKINS' RESPONSE BRIEF**

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## **I. INTRODUCTION**

Chauncey and Elizabeth Lufkin (hereinafter, collectively “Lufkin”) submit this response brief. The Court of Appeals should affirm the trial court’s dismissal of Morgan and Spears’ claims based on the partial summary judgment motion that was fully briefed to the trial court.

## **II. STATEMENT OF THE ISSUES**

Lufkin makes no assignment of error and states the issues on appeal are:

1. Whether Morgan and Spears can maintain tort claims for negligence, nuisance, trespass and strict liability against Lufkin for activities taken while Lufkin owned the same property.

2. Whether Lufkin is liable to Morgan and Spears under common law tort theories for alleged contamination migrating from Lufkin's property to Morgan and Spears’ adjacent properties when there is no evidence contaminants are migrating from Lufkin's property to their properties.

## **III. STATEMENT OF THE CASE**

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

A. Procedural History

Troy and Niki Pavlicek, Juliane Morgan (Morgan) and Richard and Cecile Spears (Spears) filed this 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 the Washington Model Toxics Control Act (MTCA), RCW 70.105D and common law theories of negligence, nuisance, trespass and strict liability for abnormally dangerous activities against Lufkin and Hytec, Inc., et al. (Hytec). The Pavliceks also asserted a claim against Lufkin for fraudulent concealment, and all plaintiffs asserted claims against Patricia and Pamela Matthews, who owned the subject property for a time.

Hytec moved for partial 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) The trial court granted Hytec's motion in its entirety and granted Lufkin's joinder dismissing of all negligence, nuisance, trespass (excepting Pavlicek's continuing trespass claim), and strict liability claims, at oral argument on June 20, 2006, with a written order entered on July 17, 2006. RP 27-31 (Verbatim Transcript of Hearing); CP 668-673 (Order Granting Partial Summary Judgment)

The trial court entered a stipulated order of voluntary dismissal of the MTCA claims, cross-claims and counter-claims of all parties on February 20, 2007. CP 683-689 The trial court entered a stipulated order of dismissal of all claims involving the Matthews sisters on April 2, 2007. CP 690-692 A stipulated order dismissing all claims of the Pavlicks was also entered.

Morgan and Spears filed their appeal of the trial court's order granting partial summary judgment to Lufkin and Hytec on April 23, 2007. CP 647-680 (Notice of Appeal)

B. Undisputed Facts

Although Morgan and Spears provided the trial court with a substantial volume of environmental documents, their supposition and that of their expert, John Kane, the following controlling facts are undisputed.

On September 17, 1975, application was made to the Thurston-Mason Health District for a permit to use remote undeveloped property owned by Lufkin (the Littlerock Property) as a solid waste disposal site for fiberglass, resin and other waste materials from Hytec's Tumwater facility. CP 73-77 (Houlihan Dec. Ex. 3) This waste had previously been disposed of at the Thurston County landfill. CP 522 (Berger Dec., Ex. 1; Lufkin dep. p. 38) On April 12, 1976, the Thurston-Mason Health District issued a solid waste disposal permit to Hytec (the "Permit") in accordance with

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. CP 82 (Houlihan Dec., Ex. 6) Hytec deposited limited solid waste on the Littlerock Property for a short time thereafter. There is no evidence Hytec deposited waste in breach of any standard of care or in substantive violation of the Permit.

Responding to a citizen inquiry, the Department of Ecology (DOE) investigated the property owned by Lufkin in 1990. CP 356-390 (Berger Dec., Ex. 2) Although ranked in a hazard sites database, Lufkin was advised that the property was not a significant hazard to public health in 1993. CP 391, 658 (Mayberry Dec., Ex. 6) DOE did not subsequently contact him until 2003. Lufkin was out of title, holding only a vendor's interest, and no longer the owner of the Littlerock property when he sold it to the Mathews sisters in 1995. CP 135-139 (Real Estate Contract) Because the Mathews sisters were not able to complete their short plat and meet payments, the property was forfeited to Lufkin over two years later in 1998. CP 140-143 (Declaration of Forfeiture) After the completion of the subdivision (approved by Thurston County Planning), Lufkin sold two five-acre parcels to the Pavliceks and, then, the remaining two five-acre parcels to Joseph Monte in 1998. CP 158 (Houlihan Dec., Ex. 15) Monte

inquired after finding fiberglass waste during construction of a road on the property and was advised by Lufkin that a portion of the property had been used for the disposal of fiberglass waste. CP 598-631 (Mayberry Dec., Ex. 1, Monte dep. excerpts) That disclosure and the presence of fiberglass waste on the property owned by Monte did not impair his use and enjoyment of that property from 1998 to 2002. *Id.* Monte sold those parcels in 2002 to Morgan and Spears. CP 160-172, 172-181 (Houlihan Dec., Ex. 16 and 17) Both Morgan and Spears were represented by or had access to realtors. CP 160, 173 (Houlihan Dec., Ex. 16 and 17)

Waste deposited by Hytec does exist on portions of property now owned by Morgan and Spears as well as on property remaining in Lufkin's ownership. However, 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 (Houlihan Dec. Errata, Spears dep. p. 175, ll. 16-19; Morgan dep. pp. 84-85) In fact, the waste deposited by Hytec in the late 1970s remaining on the property now owned by Lufkin is in a position that is downgradient of the groundwater flow directions from the Morgan and Spears wells. CP 465-466 (Berger Dec., Ex. 14) 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 31-318, 300 (Houlihan Dec. Errata, Spears dep. 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. CP 439-449 (Berger Dec., Ex. 11) 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"). *Id.* Subsequent water quality data indicated no compounds above MTCA screening criteria. CP 460-461 (Berger Dec., Ex. 14) The water was safe for drinking.

#### **IV. ARGUMENT**

Spears and Morgan argue that the trial erred in granting summary judgment because of adherence to the doctrine of caveat emptor. However the trial court's ruling relied upon the sound rationale of a majority of jurisdictions faced with the issue of a property owner's duty of reasonable care for activities on his property to subsequent owners of the same property.

Neither Morgan nor Spears purchased their property directly from Lufkin or Hytec. They were remote purchasers and admittedly never spoke with Lufkin, his representatives or Hytec or its representatives at any time prior to purchasing their property. Morgan and Spears were represented by or had access to real estate professionals in their purchase of the property and had full opportunity to investigate the prior use of the property.

While it's true that the doctrine of caveat emptor has been subject to exception in the state of Washington none of those exceptions apply to aide a purchaser of bare land in a claim against a prior remote owner. Any support for a legal obligation to disclose latent defects/conditions of residential property is based upon a vendor/purchaser relationship. There is no such relationship in this case nor any fiduciary or quasi-fiduciary relationship between appellants and respondents.

The evidence presented was that Hytec deposited solid waste, not "hazardous waste," on the property pursuant to a solid waste permit issued by the applicable governmental agency. There is no evidence that this governmental agency determined that Hytec deposited hazardous waste in violation of the substantive requirements of the permit or law. It was ten years or more after Hytec's deposit of solid waste that regulatory authorities first investigated the Littlerock Property. Despite the presence

of contaminants on the Morgan and Spears properties, there is no evidence of a human health hazard to Morgan, Spears or the public, nor is there any evidence of contamination migrating from the current Lufkin property to the Morgan and Spears properties during their ownership.

Morgan and Spears have remedies for the contamination of their property under MTCA. Lufkin is pursuing its investigation and clean up responsibilities under an Agreed Order with DOE. CP 399-421 Morgan and Spears also have an option to sue their common vendor Joesph Monte. They elected not to pursue Mr. Monte on a contract theory or on a “failure to disclose” tort theory, even though Mr. Monte was aware of the fact that fiberglass waste had been deposited on the property and that a governmental agency had been involved. CP 598-631 (Mayberry Dec., Ex. 7)

In summary, there is no basis to move away from the majority rule that previous owners of property are not liable in common law to subsequent owners of the same property for harm to their own property. There is no applicable law in Washington, or any recognized exception to the doctrine of caveat emptor, which would create such a duty or allow such liability to be imposed upon previous owners of the property.

A. Standard of Review

This Court reviews an order granting summary judgment de novo. *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 252, 143 P.3d 590 (2006) (citing *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 119 P.3d 1173 (2005)). Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Cerrillo v. Esparaza*, 158 Wn.2d 194, 200, 142 P.3d 155 (2006). In the Court's review, it is to consider all facts, and reasonable inferences from those facts, in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). However on summary judgment, Morgan and Spears, as the nonmoving party, may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 832, 848, 92 P.3d 243 (2004).

On review of an order granting a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. RAP 9.12. The appellate court should refuse to consider factual allegations in the appellants' brief in an appeal from summary judgment, where no other proof of the allegations could be

found in the record on appeal. *Southcenter View Condominium Owners' Association v. Condominium Builders, Inc.*, 47 Wn.App. 767, 736 P.2d 1075 (1986).

B. Morgan and Spears Cannot Maintain Tort Claims for Negligence, Nuisance, Trespass and Strict Liability Against Lufkin for Waste Disposal Activities Undertaken While Lufkin Owned Morgan and Spears' 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.

1. Lufkin Had No Duty to Morgan and Spears as Subsequent Remote Owners of a Portion of Lufkin's Property for Actions Taken While Lufkin Owned the Property

Morgan and Spears allege that Lufkin is liable to them under a negligence theory. CP 9 (First Amended Complaint p. 5, ¶¶ 24-26) However, to prove actionable negligence, Morgan and Spears must establish: (1) the existence of a duty owed to them; (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.* If a duty of care does not exist, it matters not what a jury might conclude from the facts. Morgan and Spears would have the court ignore the duty element and focus on the “reasonableness” of the waste disposal at the site – an impermissible “backwards” analysis.

The majority of courts facing nearly identical situations have, however, held that a property owner or occupier 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, 100 (D.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, and Mobil vacated when its lease ended. After discovering chemical 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.

The Court further stated that any claim by a purchaser against its vendor would be based on contractual privity or misrepresentation.

As in *Wilson*, in this case there is no basis to find that Lufkin had a duty of reasonable care in storing, disposing of, or releasing hazardous and

solid wastes at the Littlerock Property to Morgan and Spears. Hytec, as a licensee or occupier, with the permission of Lufkin, the property owner, and with Permit deposited waste at the Littlerock Property more than twenty years before Morgan and Spears purchased their properties. There were intervening owners of the properties after Hytec deposited solid waste at the Littlerock Property (Lufkin to Mathews in 1995; Mathews to Lufkin in 1998; Lufkin to Monte in 1998; Monte to Morgan and Spears in 2002). There is no basis in the common law to extend a duty from Lufkin to such remote purchasers.

Similarly, Morgan and Spears allege that Lufkin failed to exercise reasonable care in using, authorizing, or allowing the Littlerock Property to be used for storage, disposal, and release of hazardous and solid waste. Morgan and Spears cite no Washington law which creates such a duty owed to subsequent owners of a portion of the property. Lufkin allowed the property to be used for the disposal of fiberglass waste by Hytec and the applicable Permit was obtained. Morgan and Spears have not and cannot establish any duty *owed to them* (purchasers of a portion of the property some 20 years thereafter) that was breached by Lufkin by allowing the Littlerock property to be used for disposal of waste pursuant to Permit.

Morgan and Spears also allege that Lufkin failed to exercise reasonable care in notifying purchasers of the storage, disposal, or release of solid hazardous waste at the site and that hazardous waste and substances may be migrating onto the subdivided parcels. However, Morgan and Spears are unable to provide any authority which identifies any duty that a prior owner of a piece of property has to notify a purchaser of a prior deposit of fiberglass waste.<sup>1</sup>

Morgan and Spears also fail to produce any facts indicating that the waste disposal by Hytec was performed negligently or somehow substantively violated the Permit. Morgan and Spears merely state that a jury could potentially find that the disposal was “unreasonable.” CP 327 This bare, unsupported statement is insufficient to preclude summary dismissal. CR 56(e)

Morgan and Spears argue that there must be some common law action available to remedy “all” of their damages because it would be inequitable to allow Respondents to be relieved of any obligation to address the wastes. But the common law tort remedies Morgan and Spears advance do not in themselves guarantee a recovery of “all” their damages. Defenses, both factual and legal, may leave a claimant without any remedy for harm. Further, Respondents are addressing the

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<sup>1</sup> See the authority previously cited for the proposition that there is no basis in common law to extend any duty from the Lufkins to remote purchasers.

investigation and cleanup of any contamination by virtue of the Agreed Order.

Additionally, Morgan and Spears, as noted by the trial court, do retain other causes of action to potential remedy their alleged harm. RP 31 They have potential contract and “failure to disclose” tort claims against Joseph Monte—the person who sold them their respective parcels of the Littlerock Property. Morgan and Spears also have potential claims under MTCA to recover any incurred “response costs”. They have elected only to pursue Respondents.

Morgan and Spears cite authority from the minority rule jurisdictions in seeking to impose a duty on a prior owner. But even these cases do not support the imposition of a duty on a remote prior owner who allowed the deposit of solid waste on his property pursuant to a government issued solid waste permit. There is no showing that Lufkin knew “hazardous waste” was to be deposited or that disposal of illegal waste was knowingly and intentionally being done. The Hytec waste had previously been deposited in the Thurston County landfill and a Permit had been issued by the appropriate regulatory authority. There is no evidence that the deposit of the waste by Hytec was in breach of any then existing standard of care or violated any substantive requirement of the Permit. Even many years later, after the DOE’s investigation, Lufkin was

informed that there was no perceived hazard to public health and subdivision of the property was allowed by Thurston County Planning.

Morgan and Spears' reliance on a minority rule jurisdiction (California) and its cases, *Mangini v. Aerojet-General Corp.*, 230 Cal.App.3d 1125 [281 Cal.Rptr. 827] (1991); *Newell Land and Farming v. Superior Court*, 19 Cal.App.4d 334 (1993); and *Redevelopment Agency v. Burlington Railway*, Slip Copy, 2007 WL 1793755 (E.D.Cal.) is inapposite. The *Newell* court's holding was dependent on "regarding as true" allegations that the prior owners had "illegally discharged hazardous substances onto the ground knowing these substances would pollute the soil and enter the groundwater and then failed to disclose the existence of the contamination when the property was sold." *Newell*, supra, at 351. There is no such evidence as to Lufkin actions or knowledge here. Fiberglass solid waste was deposited pursuant to a government issued solid waste permit. There was no illegal, knowing discharge of hazardous substances resulting in known pollution. Further, Lufkin disclosed the use of the property to dispose of fiberglass waste to his purchaser on the sale to Mr. Monte, Morgan and Spears' predecessor. The *Redevelopment Agency* decision simply relies on California's "broad and strict" nuisance liability and the *Newell* decision. *Redevelopment Agency*, supra.

Morgan and Spears' reliance on *Donald v. Amoco*, 735 So.2d 161, 175 (Miss. 1999) and *Ravan v. Greenville County*, 434 S.E.2d 296 (S.C.App. 1993) is also misplaced as to Lufkin's alleged liability. In neither of these cases was the liability of a prior remote owner at issue; it was the liability of generators and transporters of hazardous waste.

The Washington authority cited by Morgan and Spears is not persuasive. *Atherton Condominium Association v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990) imposes liability on a builder-vendor to purchasers regarding latent defects in residential construction. The court extends the implied warranty of habitability exception to caveat emptor, but did not deal with the liability of a prior owner of bare land. *Pfeifer v. Bellingham*, 112 Wn2d 562, 772 P.2d 1018 (1989) and *Porter v. Sadri*, 38 Wn.App. 174, 685 P.2d 612 (1984) involve the liability of a vendor for concealment of a dangerous condition resulting in personal injury under Restatement (Second) of Torts, § 353 (1965), not the liability of a prior owner to a remote purchaser for a permitted waste disposal. Here, Morgan and Spears are remote purchasers who had no contact with Lufkin and who claim economic loss not personal injury or physical harm.

2. Lufkin is Not Liable to Morgan and Spears for Nuisance for Actions Taken While Lufkin Owned Their Property

Identical to their allegations of negligence, Morgan and Spears allege that Lufkin "[b]y engaging in, authorizing, or allowing the storage, disposal and release of hazardous and solid wastes at and from the Littlerock site, the Lufkins have created a public and private nuisance, as defined in RCW 7.48.120 through RCW 7.48.150, affecting the Plaintiffs' properties." CP 10 (First Amended Complaint p. 6, ¶ 37) As with Morgan and Spears' negligence claim, the current owner of property cannot sue the former owner of the same property for nuisance, and Morgan and Spears' nuisance claims fail as a matter of law.

a. Morgan and Spears Cannot Sustain a Claim for Private or Public Nuisance Against a Prior Owner of the Same Property

1. 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. Nuisance law has been exclusively applied in Washington 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 & Refining Co.*, 104 Wn.2d 677, 681-82, 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 where current owners of property seek recovery against a prior owner of the same property for a condition created on the property during the prior ownership.

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, 626-27 (M.D. Penn.

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, 100 (D.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.

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 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, the problems complained of by Morgan and Spears were created when the entire 45 acres were owned by Lufkin. In these circumstances, Morgan and Spears cannot sustain private nuisance claims against Lufkin.

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 MTCA, not common law nuisance, and Morgan and Spears did, in fact, assert MTCA claims against the Respondents.

## 2. Public Nuisance

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 a subsequent private owner suing the previous owner or occupier for contamination of the same property. For the same reasons Morgan and Spears' 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).

b. Morgan and Spears' Nuisance Claims Are Simply a Restatement of Their Negligence Claim

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 negligent 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."

Morgan and Spears' negligence claim and nuisance claim clearly allege the exact same facts. CP 3-11 (First Amended Complaint) Their nuisance claims are merely a restated negligence claim and should not be considered separately.

c. Hytec's Disposal of Waste at a Permitted Site Cannot Be Deemed a 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).

A permit was applied for and obtained for Hytec's disposal of solid waste. The Solid Waste Management program enacted in 1969, RCW 70.95 et seq., provided in pertinent part:

70.95.170 Permit for solid waste disposal site or facilities—Required. After approval of the comprehensive waste plant by the department no solid waste disposal site or disposal site utilities shall be maintained, established, substantially altered, expanded, or improved until the county, city, or other person operating such site has obtained a permit from the jurisdictional health department pursuant to the provisions of RCW 70.95.180.

70.95.180 Permit for solid waste disposal site or facilities—Applications, fee.

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(3) The jurisdictional health department shall investigate every application as may be necessary to determine whether an existing or proposed site and facilities meet all applicable laws and regulations, and conforms with the approved comprehensive solid waste handling plan, and complies with all zoning requirements.

(4) When the jurisdictional health department finds that the permit should be issued, it shall issue such permit. Every application shall be approved or disapproved within ninety days after its receipt by the jurisdictional health department.

CP 287 The regulations governing solid waste handling and facilities adopted by the Thurston-Mason District Board of Health that were in effect during the time period Hytec deposited waste at the Littlerock Property similarly provided, in pertinent part:

Section 4: Permit REQUIRED

Every person desiring to construct and/or operate a solid waste transfer station, landfill, incinerator, composting plant, reclamation site, or other facility in Thurston-Mason Health District and, before beginning operation, shall have a valid permit issued by the Health Officer (RCW 70.95.170).

CP 289

Pursuant to the authority of RCW 70.95 et seq. and the Thurston-Mason District Board of Health regulations, Hytec obtained a permit to and did deposit solid waste at the Littlerock Property. As a matter of law, Hytec's waste disposal activities at the Littlerock Property cannot be deemed a private or public nuisance for which Lufkin is liable.

3. Morgan and Spears as Subsequent Purchasers Cannot Sue Lufkin, a Prior Owner, for Trespass for Activities While Lufkin Owned Their Properties

Morgan and Spears' allege that "[b]y engaging in or allowing the storage, disposal and release of solvents and other contaminants at and from their Littlerock property, the Lufkins have trespassed upon and caused a substantial adverse impact to the Plaintiffs' properties" CP 10 (First Amended Complaint p. 6, ¶ 32) 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 & Refining Co.*, 104 Wn.2d 677, 681-82, 709 P.2d 782 (1985) (applying the Restatement (Second) Torts § 158 definition of trespass) (emphasis added). 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 (D.Mass. 1990); Rosenblatt v. Exxon Co., 335 Md. 58, 642 A.2d 180 (1994).

In this case, Hytec deposited waste on the Littlerock Property with the permission of Lufkin and 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 prior owner of the property, to which trespass is alleged.

4. Lufkin is Not Strictly Liable to Morgan and Spears for an Alleged Abnormally Dangerous Condition, for Activities While Lufkin Owned their Properties

Morgan and Spears have alleged that "the storage, handling and disposal of hazardous waste constitute extra hazardous and abnormally dangerous activities or practices" and that "The 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 11 (First Amended Complaint pp. 7-8, ¶¶ 42-43) Morgan and Spears' strict liability claim fails for two reasons: (1) they cannot maintain a strict liability claim for an abnormally dangerous condition while Lufkin owned their properties; and (2) Hytec's disposal of solid waste was not an abnormally dangerous activity.

a. Morgan and Spears Cannot Maintain a Strict Liability claim Against a former Owner 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 have 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-Manufacturing, 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 (D.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 Lufkin had exclusive ownership. Portions of the Littlerock Property only became property of Morgan and Spears more than 20 years after the waste disposal. It would be contrary to the well settled principles of common law of strict liability to impose liability on Lufkin or Hytec for prior actions which occurred on property that only became property of *another* after the actions occurred.

b. 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, Hytec deposited waste on the Littlerock Property "including fiberglass debris and solvent containers from Hytec's manufacturing operations." CP 5 (First Amended Complaint p. 3) The solvent containers contained hardened resins. CP 523 (Lufkin dep. 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 in 1976, that property was 45 acres of remote, undeveloped and uninhabited property. CP 294-295 (Lufkin dep. pp. 44-45)

Under these facts, all of the Restatement of Torts § 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) Hytec did exercise reasonable care; and (d-e) the disposal occurred at an uninhabited remote and permitted solid waste disposal site where the activity was neither inappropriate to the place where it was carried on nor an activity of uncommon usage.

C. Morgan and Spears Have Not Proven that Any Contaminants Have Migrated From Lufkin's Property to Their Properties

Morgan and Spears' appear to assert that Lufkin is liable as a contemporaneous property owner under common law theories of negligence, nuisance, and trespass for contamination that allegedly continues to migrate from Lufkin's adjacent 25-acre parcel onto their property. CP 10 (First Amended Complaint)

Despite Morgan and Spears' allegation that "solvents and other contaminants have migrated and are migrating from Lufkins' property into

the soil and groundwater on Plaintiffs' properties," *there is no evidence of such migration*. The mere presence of waste or contaminants on or under their property does not prove or establish a trespass or migration from Lufkin's remaining property. The waste on Lufkin's remaining property is in a position that is groundwater flow downgradient from the Morgan and Spears property. CP 465-466 (Berger Declaration, Exhibit 14) As the current Lufkin property waste is *downgradient*, it is virtually impossible that contaminants would travel or migrate to the *upgradient* Morgan and Spears property. In any event, Morgan and Spears have not proven any such migration.

Furthermore, Morgan and Spears' own testing of their properties' groundwater, to the extent they have done so, produced no results indicating that their drinking water is unsafe for consumption. CP 314-318, 300 (Spears dep. 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) Subsequent water quality data has indicated no compounds above MTCA screening criteria. 460-461

Without any evidence of any migration of contaminants from Lufkin's property into Morgan and Spear's groundwater or soils *during Morgan and Spears' ownership*, Morgan and Spears cannot sustain any of their common law claims based on the alleged migration of contaminants.

D. Washington Law Imposes No Duty on a Vendor or Prior Owner to Disclose to Remote Purchasers of Bare Land the Prior Use or Condition of the Property

Lufkin was not Morgan or Spears' vendor, so there can be no contractual claim against Lufkin. Morgan and Spears rely however on common law vendor/purchaser authority to make their arguments – not the facts we have here. Morgan and Spears bought, with the assistance of a realtor, their property from Joseph Monte. Morgan and Spears do not allege that any affirmative misrepresentations were made to them by Lufkin, nor have they made breach of contract, fraudulent concealment, or misrepresentation claims against their vendor, Joseph Monte. There is no basis under existing Washington law or the majority of jurisdictions to impose such a duty of disclosure upon Lufkin as a remote prior owner with whom Morgan and Spears had no dealings.

Even if Lufkin had been Morgan and Spears' vendor and thus in contractual privity, it is established that in Washington, where the sale of undeveloped land is concerned, there is no duty to disclose except that which is both material and that which could not be discovered by the buyers of the land. *Van Dinter v. Orr*, 157 Wn.2d 329, 138 P.3d 608 (2006) By implication, this puts the burden of discovering any material defects with the property on the buyers, and releases the seller from the obligation of disclosure except in very limited circumstances involving a

fiduciary or similar relationship. *Id.* Here, where Lufkin was not Morgan or Spears' vendor, the rationale applies further such that a purchaser of unimproved land is owed no duty from a remote prior owner (with whom the purchaser had no contact) to make any disclosures about the property. To hold otherwise, displaces the market's allocation of risk and subjects owners to unbargained for and unknown future liability to remote successor owners.

There was no (i) vendor-purchaser, (ii) fiduciary, or (iii) quasi-fiduciary relationship between Lufkin and Morgan or Spears. In the absence of such a relationship, as a matter of law, Lufkin owed Morgan and Spears no duty.

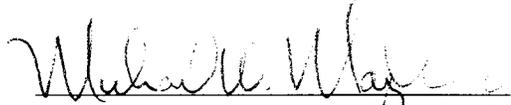
## V. CONCLUSION

Lufkin was entitled to the entry of an order dismissing all of Morgan and Spears' claims pursuant to the partial summary judgment motion which was fully briefed to the trial court.

The trial court's order dismissing Morgan and Spears' common law claims should be affirmed in its entirety.

DATED this 6 day of November, 2007.

OWENS DAVIES, P.S.

A handwritten signature in black ink, appearing to read "Michael W. Mayberry". The signature is written in a cursive style and is positioned above a horizontal line.

Michael W. Mayberry, WSPA #13776  
Attorneys for Respondents Lufkin

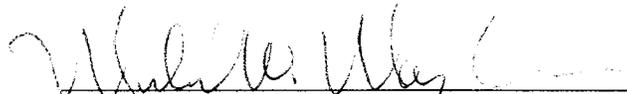
**CERTIFICATE OF SERVICE**

I hereby certify that I deposited a complete copy of Respondents Lufkins' Response Brief, including this Certificate of Service, by ABC Messenger Services to the Court of Appeals and to all counsel and in the United States Mail, first class postage prepaid, addressed to the following on this 6 day of November, 2007:

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