United States District Court,
N.D. Texas, Lubbock Division.
THE BURLINGTON NORTHERN & SANTA FE RAILWAY CO., Plaintiff,
v.
POOLE CHEMICAL CO., INC. and Skinner Tank Company, Defendants,
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE CO., Intervenor,
v.
SKINNER TANK COMPANY, Defendant.
No. Civ.A. 5:04CV047-C.

May 10, 2005.

ORDER

CUMMINGS, J.

On this date the Court considered Third-Party Defendant Skinner Tank Company's Motion for Summary Judgment against Burlington Northern & Santa Fe Railway Co., filed on November 17, 2004. The Court also considered Burlington Northern & Santa Fe Railway Co.'s Response to Third Party Defendant's Motion for Summary Judgment filed on December 7, 2004, and Third-Party Defendant's Reply Brief in Support of Motion for Summary Judgment filed on December 22, 2004. The Court notes that Skinner filed a Reply without seeking leave of court. Local court rules state that Judge Cummings will not entertain replies unless otherwise ordered. See *http://www.txnd.uscourts.gov/judges/scummings_ req.html*. Nonetheless, the Court will consider the Reply in this instance. The Court GRANTS Skinner's Motion for Summary Judgment.

I.
PROCEDURAL HISTORY

Plaintiff, the Burlington Northern Santa Fe Railway Co. ("BNSF"), files a direct action against Third-Party Defendant Skinner Tank Company ("Skinner") by way of including Skinner in Plaintiff's First Amended Complaint filed on July 16, 2004. Skinner filed a motion for summary judgment as to the First Amended Original Complaint; however, because BNSF sought leave to amend the complaint and leave was granted, the Court denied Skinner's motion as moot in that it addressed a non-live pleading. BNSF filed its Second Amended Original Complaint on November 10, 2004, which is now the live pleading before the Court. On November 17, 2004, Skinner filed its Motion for Summary Judgment, along with a brief and appendix in support, addressing the Second Amended Original Complaint. BNSF filed its Response on December 7, 2004. Skinner filed a Reply on December 22, 2004, without first seeking leave of Court.

Because this case also involves Poole Chemical Co., Inc. ("Poole"), the Court finds it relevant to include the fact that Skinner filed a Motion for Summary Judgment against Poole on July 8, 2004, which was granted by order and judgment dated August 27, 2004. Poole has appealed the August 27, 2004 order and judgment to the Fifth Circuit Court of Appeals on various grounds including whether the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 *et seq.*) ("CERCLA") preempts section 16.012 of the Texas Civil Practice and Remedies Code. The issues raised in that appeal may have direct bearing on Skinner's Motion for Summary Judgment presently before the Court. At issue specifically is whether Skinner must meet the definition of "responsible person" under CERCLA before CERCLA's preemption provision will operate to preempt a Texas statute of repose.

II.
BACKGROUND

On September 13, 1988, Skinner submitted a Proposal and Acceptance to Mr. Jim Poole, of Poole, whereby Skinner agreed to erect two tanks on Poole's property. Skinner was to furnish all necessary labor, transportation, supplies, and materials to erect the two tanks on Poole's property. Skinner completed the installation of those tanks on October 28, 1988. Skinner warranted the tanks against defects for one year. One of the tanks ruptured on January 29, 2003, releasing 200-300 thousand gallons of liquid ammonium polyphosphate onto an adjacent right-of-way. The right-of-way was owned by BNSF. BNSF sued Poole through several state and federal causes of action, contending that Poole was liable for damages to its property

as well as for the costs of removing the chemicals. Poole denied liability and claimed a third party's acts or omissions were the sole cause of the release of the chemicals and the alleged damages. Poole sued Skinner on April 19, 2004, alleging several product liability causes of action. Poole asserted that Skinner designed, manufactured, fabricated, constructed, assembled, maintained, and tested the above-ground chemical storage tank that ruptured. Poole claimed that the tank was in a defective condition which rendered it unreasonably dangerous. Poole also claimed that the allegedly defective condition was a producing and proximate cause of the injuries and damages suffered by Poole and BNSF. Summary judgment has been granted by a prior order of this Court in favor of Skinner as to Poole's claims against Skinner.

BNSF has also sued Skinner alleging that the workmanship during Skinner's installation was inadequate in that one or more of the welds in one of the tanks was improperly performed. BNSF alleges that said weld later became a contributing factor in the tank's failure. BNSF further alleges that the spill containment system and emergency shut-off systems installed by Skinner were not adequate and/or were done in a poor workmanlike manner resulting in the failure to stop the continued release and its impact on BNSF's property. BNSF also alleges that Skinner knew or should have known that any failure in workmanship would have resulted in a large release of hazardous substances that would invariably impact adjacent property owned by BNSF. BNSF alleges that Skinner was on notice of another failure of one of its tanks in another state in early 1988 due to a bad weld. BNSF further alleges that Skinner failed to advise and warn Poole as to the other failure or that Poole should conduct additional inspections and maintenance to protect against a weld failure. Finally, BNSF alleges that it only discovered the alleged failure of the tank to perform in a good and workmanlike manner after the rupture of the Poole tank and said discovery could not have been reasonably discovered sooner.

BNSF asserts claims of negligence and gross negligence against Skinner. *See* Compl. at ¶ 46. BNSF also asks for a declaratory judgment that Skinner is liable under 42 U.S.C. §§ 9607 and 9613(f) and under Texas Health and Safety Code §§ 361.001 *et seq.* *See* Compl. at ¶ 45.

III.
SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "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 judgment as a matter of law." Fed.R.Civ.P. 56(c). All evidence and justifiable inferences must be viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The moving party has the burden of establishing that no genuine dispute of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir.1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir.1993). No genuine issue of material fact exists unless a reasonable jury could find for the non-moving party. *Anderson*, 477 U.S. at 247.

After the moving party initially establishes an absence of a genuine issue of material fact, the non-moving party must provide significant probative evidence showing a genuine issue of material fact to defeat the summary judgment. *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir.1990). In reviewing the summary judgment evidence, "Rule 56 does not impose upon this Court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998). Rather, the Court need rely only on those portions of the submitted documents to which the nonmoving party directs the Court's attention. *Id.; see also Forsyth v. Barr*, 19 F.3d 1527, 1536-37 (5th Cir.1994) (finding that two volumes of summary judgment evidence were insufficient to preclude summary judgment when plaintiffs failed to identify specific portions which supported their claims).

A factual dispute alone does not defeat summary judgment. *Anderson*, 477 U.S. at 247. Thus, the nonmoving

party cannot submit a "mere scintilla of evidence"; the evidence must be sufficient for a jury to reasonably find in the non-moving party's favor. *Id.* at 252. Conclusory statements, speculation, and unsubstantiated assertions do not show a genuine issue of material fact. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir.1996) (en banc). If the non-moving party does not identify specific issues of disputed fact, the court may take the moving party's description of the facts as prima facie evidence supporting summary judgment for that party. *Eversly v. MBank Dallas*, 843 F.2d 172, 173-74 (5th Cir.1999). A party defending against a proper motion for summary judgment may not rely on mere denial of material facts or on unsworn allegations in the pleading or arguments and assertions in briefs or legal memoranda; rather, the party's response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *See Union Planters Nat'l Leasing v. Woods*, 687 F.2d 117, 119 (5th Cir.1982).

IV.
DISCUSSION

Repose Statute

Skinner argues that summary judgment should be granted for Skinner because Section 16.009 of the Texas Civil Practice and Remedies Code bars BNSF's Claims. The statute states:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.
>
> (b) This section applies to suit for:
>
> (1) injury, damage, or loss to real or personal property;
>
> (2) personal injury;
>
> (3) wrongful death;
>
> (4) contribution; or
>
> (5) indemnity.

Tex. Civ. Prac. Rem.Code § 16.009 (2004). The Legislature intended the statute to protect contractors who install such improvements from a perpetual threat of liability. *See Petro Stopping Centers, Inc. v. Owens-Corning Fiberglas Corp.*, 906 S.W.2d 618, 620 (Tex.App.-El Paso 1995, no writ). Once the repose statute applies, it serves as "a complete defense to personal injury action based on strict liability or negligence." *Reames v. Hawthorne-Serving Inc.*, 949 S.W.2d 758, 761 (Tex.App.-Dallas 1997, writ denied).

BNSF's claims arise from the alleged deficiency of construction of the tanks on Poole's property. Thus, BNSF's claims are prohibited because more than ten years have passed from the completion of construction of the tanks. BNSF's suit should have been filed prior to October 28, 1998, which was ten years after the completion of the construction.

BNSF argues that Section 16.009 does not apply to the claims arising from designing the system, supplying the materials and parts used, and Skinner's alleged duty to train and advise Poole in the proper maintenance and inspection of the system because all of those claims are independent from the construction of improvements to Poole's real property. *See* Br. in Supp. Resp. at 6-7. While BNSF argues that Section 16.009 does not apply to a party who designs an improvement, when faced with a similar argument in *Rodarte v. Carrier Corporation*, the El Paso Court of Appeals stated in dicta that the "statute applies to an action arising out of a defective or unsafe condition in the construction of the unit and all of the claims against this [party] fall within the provisions of this statute." 786 S.W.2d 94, 96 (Tex.App.-El Paso 1990), *reversed on other grounds*, *Petro Stopping Centers, Inc. v. Owens-Corning*, 906 S.W.2d 619 (Tex.App.-El Paso 1995, no pet.). *See also Barnes v. Westinghouse Elec. Corp.*, 1991 WL 346303*1 (N.D.Tex.1991), *aff'd*, 962 F.2d 513 (5th Cir.1992) (holding that *all* claims *arising out of* the construction of a defective or unsafe condition are precluded by Section 16.009). Moreover, because BNSF went out of its way in its Second Amended Complaint to clarify that it was not asserting any product liability claims against Skinner, it will not now be allowed to argue or assert claims of defective design against Skinner pursuant to the allegations in the Second Amended Complaint. At any rate, pleading that the claims are not product liability claims does not prevent the application of Section 16.009 because the statute is based on the

construction of improvements to real property. *See id.*

Section 16.009 has also been held to preclude BNSF's claims of failing to advise, train, or instruct. Multiple courts hold that claims based on inadequate warnings are within the scope of Section 16.009. *See Rodart v. Carrier Corp.*, 786 S.W.2d 94, 96 (Tex. App .-El Paso 1990), *reversed on other grounds, Petro Shopping Center, Inc. v. Owens-Corning*, 906 S.W.2d 619 (Tex.App.-El Paso 1995, no pet.); *Barnes*, 1991 WL 346303, at *2.

BNSF also argues that section 16.009 does not apply to a party who supplies the material used to manufacture an improvement. *See* Br. in Supp. Resp. at 6- 7. Section 16.009 does not apply to someone who "do[es] no more than manufacture personalty that is subsequently attached as improvements to real property." *See Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex.1995). However, when a party not only supplies the part, but also annexes the improvement to real property, Section 16.009 precludes the suit. *Id.* Here, Skinner brought in component parts and manufactured a large storage tank on Poole's property. Thus, Skinner is protected as one who manufactured an improvement to Poole's property.

BNSF attempts to raise a fact issue in Paragraph 8 of its response by implying that the summary judgment evidence submitted by Skinner, *see* Def. Ex. 2-3, reflecting the construction of two tanks, does not prove that one of the tanks on the 1988 invoice was the tank involved in the accident. Skinner and Poole, the parties to the contract, agreed in prior pleadings that the tank involved in the accident was the tank purchased from Skinner in 1988. BNSF is not now allowed to contest whether the tank involved in the dispute is the same tank on the invoice. The parties to the contract are in a better position to know which tank was involved than BNSF. More importantly, BNSF has failed to point to proper and admissible summary judgment evidence to show that Skinner built more than two tanks on Poole's property. Skinner has directed the Court to summary judgment evidence showing the construction of two fifty-one by thirty-two foot tanks in 1988. BNSF cannot create a genuine issue of material fact by merely speculating or concluding that the tank involved in the dispute may not be the tank on the invoice. *See Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir.1996) (en banc). Conclusory statements, speculation, and unsubstantiated assertions do not show a genuine issue of material fact. *Id.*

Skinner, the third-party defendant, correctly points out that the exhibits attached to BNSF's Response are not properly admitted as summary judgment evidence. Exhibits four through ten and fifteen through seventeen, in BNSF's summary judgment appendix filed December 7, 2004, are printouts of web sites, a map with handwritten notes, and a symposium article. None of the exhibits is authenticated as required by Federal Rule of Evidence 901; nor are the exhibits certified or referenced in the affidavit submitted by BNSF. The Fifth Circuit has held that "unauthenticated documents are improper as summary judgment evidence." *King v. Dogan*, 31 F .3d 344, 346 (5th Cir.1994) (citing *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir.1991)). Further, exhibits four through nineteen are also irrelevant. The issue before the Court is the Statute of Repose. BNSF would need sufficient evidence suggesting that the tanks were constructed after 1994, the beginning of the statutory period allowed by Section 16.009, and exhibits four through nineteen do not address that issue.

Moreover, even if the evidence were considered by the Court, it does not create a genuine issue of material fact. The map offered by BNSF of the tanks shows only two 500,000 gallon tanks on Poole's property. *See* Pl.Ex. 15. Skinner's properly admitted evidence shows that it constructed two 500,000 gallon tanks on Poole's property in 1988. *See* Def. Ex. 2-3. The dimensions of the two tanks constructed by Skinner are 51 feet diameter by 32 feet high. *Id.* The Court takes judicial notice that a calculation of those dimensions gives a volume that, when multiplied by the gallons of water contained in a cubic foot, arrives at a sum near 500,000. An accident report submitted by BNSF states that the tank that ruptured was a 500,000 gallon tank and 32 feet tall. *See* Pl.Ex. 19. BNSF's own pleadings allege that a 500,000 gallon tank ruptured. *See* Pl. Second Amend. Compl. at ¶ 11. Thus, the Court finds that no reasonable jury could determine that the ruptured tank at issue in this case was not one of the two constructed by Skinner in 1988.

BNSF also argues that Section 16.009 does not apply to negligence claims brought by the Plaintiff because, here, the

Plaintiff is not an owner claiming damage and Plaintiff is an innocent third party with no ability to inspect, use, or know of the negligence that led to the release of the waste. Yet, Section 16.009 does not distinguish between third-party defendants but instead refers to claimants. *See, e.g.*, Tex. Civ. Prac. Rem.Code § 16.009(a) (2004). Moreover, an intermediate Texas appellate court has held that section 16.009 applies to third parties claiming injury, even when the third party did not have an ability to inspect, use, or otherwise know of any alleged negligence. *Jackson v. Coldspring Terrace Prop. Owners Ass'n*, 939 S.W.2d 762, 768 (Tex.App.--Houston [14th Dist.] 1997, writ denied).

BNSF also attempts to argue that application of section 16.009 would violate the Texas Constitution. The Court does not deny access to the courts or violate the Texas Constitution by applying § 16.009 to this claim. This issue has been ruled upon by several Texas courts. *See Barnes v. J.W. Bateson Co., Inc.*, 755 S.W.2d 518, 521-22 (Tex.App.--Fort Worth 1988, no writ); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 923-24 (Tex.App.-- Dallas 1985, writ ref'd n.r.e.); *Sowders v. M.W. Kellogg Co.*, 663 S.W.2d 644, 648 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.). Section 16 . 009 was the same before, during, and after the accident at issue, and BNSF's access to the courts is not denied.

Preemption

BNSF argues that section 16.009 is preempted by CERCLA. Further, BNSF argues that CERCLA's preemptive federally required commencement date provided in 42 U.S.C. § 9658(a) would make the application of the discovery rule to be either the later of two years from the discovery of the injury occurring or two years from the end of the ten-year repose period. Thus, in this case, the statute of limitations would not begin until the date the tank ruptured, rather than the date Skinner installed the tank in 1988. BNSF alternatively argues that if section 16.009 is intended to preclude a discovery rule from applying, CERCLA would also preempt it.

This Court respectfully disagrees with *O'Connor v. Boeing North America*, 311 F.3d 1139, 1147 (9th Cir.2002). *O'Connor* involved a limitations statute where the limitations period did not begin until the injury was discovered. *Id.* This case involves a repose statute; repose statutes differ from limitations statutes in that, with repose statutes, all claims are cut off once the statutory period terminates. Section 16.009 involves a ten-year repose period and extends the period for two additional years from the date the claim is presented if the damage, injury, or death occurs in the tenth year. Tex. Civ. Prac. Rem.Code § 16.009 (Vernon 2004). The repose statute precludes BNSF from bringing claims against Skinner arising out of the construction of the tanks in 1988.

Skinner claims it is not a "responsible person" under CERCLA or the Texas Solid Waste Disposal Act, Tex. Health & Safety Code §§ 361.001 *et seq.*, ("TSWDA") statute. Skinner further argues that it was not intended to be covered by CERCLA because the Superfund Amendment (which included § 9658) was intended to apply to owners and operators of a facility, along with transporters of hazardous substances. Skinner argues that it merely manufactured and sold a tank to Poole in 1988.

CERCLA defines responsible persons as:

> (a) (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs.

42 U.S.C. § 9607(a).

From the facts alleged and the record before this Court, it is apparent that Skinner does not fit under any of the four categories listed in § 9607(a) as covered persons. BNSF argues that the Court should not focus on whether Skinner

was a "person responsible" under CERCLA because § 9658(a)(1) allows CERCLA to preempt any action brought under state law for personal injury or property damages which are caused by hazardous substances. Yet, CERCLA was intended to apply to current and former owners, operators, and transporters of hazardous waste. *See* *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1436-39 (7th Cir.1988).

Section 9658(3)'s exclusion of § 9607 from the application of § 9658 is not a clear intent to remove § 9658 from the basic presumptions of CERCLA--that the defendant be a covered person under § 9607. The Court notes that had Congress desired that § 9607 not apply to § 9658, it could have expressly provided so. After all, it provided for the converse--that nothing in § 9658 was to apply to § 9607. The Court believes an intermediate California appellate court reasoned soundly when it opined:

> To establish a claim for cost recovery under CERCLA, a claimant must prove not only that the site in question was a "facility" and that a "release" or threatened release of a hazardous substance occurred, but must also show that the defendant falls within a category of "liable parties" as set forth in title 42 United States Code section 9607(a) and that the release or threatened release caused the claimant to incur "necessary costs of response." The four categories of "liable parties" as outlined in title 42 United States Code section 9607(a) are: (1) present owners and operators of a facility; (2) past owners and operators of a facility at the time of disposal; (3) arrangers for disposal or treatment; and (4) transporters. Noticeably absent from this list are manufacturers or distributors of products, the entities most likely to end up as defendants in a product liability lawsuit where personal injury is involved.

Rivas v. Safety-Kleen Corp., 119 Cal.Rptr.2d 503, 514-15 (Cal.App. 2 Dist.2002) (internal citations omitted).

However, the Court also notes that the intermediate California appellate court went on to state:

> Clearly, Congress intended section 9658 to have impact beyond actions for recovery of expenses incurred in cleaning up toxic waste sites. It applies by its terms to individual lawsuits for "personal injury, or property damages," not just "necessary costs of response," and can be invoked regardless of whether the defendants meet the statutory definition of "liable party" under title 42 United States Code section 9607(a).

Rivas, 119 Cal.Rptr.2d at 517 (Cal.App. 2 Dist.2002). This Court respectfully disagrees with the California court on its assertion that CERCLA preemption can be invoked for state law claims "regardless of whether the defendants meet the statutory definition of 'liable party' under ... section 9607(a)." This Court was unable to find any other court drawing the same conclusion that a party who does not meet the definition of responsible person falls under CERCLA preemption. Thus, this Court finds that BNSF's state law claims against a party who is/was not a prior owner, operator, or transporter of hazardous substances, fall outside of § 9658's preemption. [FN1]

> FN1. The Court notes that BNSF, differing from Poole, argues that it has asserted a CERCLA claim against Skinner. However, BNSF appears to base its CERCLA claim on its state law claims pursuant to 42 U.S.C. § 9658(a)(1). Thus, BNSF is really only asserting state law claims and not a basic or fundamental CERCLA cause of action. It is clear that Skinner does not fall within the categories of a "person responsible" to allow a claim based upon § 9607.

Finally, BNSF attempts to argue that, in any event, Skinner was an "arranger" under CERCLA. BNSF argues that CERCLA and the Texas Solid Waste Disposal Act impose liability on Skinner as an "arranger." The Court disagrees. No evidence properly before the Court would even infer that the manufacturer of a storage tank falls under the term "arranger." As the Fifth Circuit has opined, "[J]ust as a nexus must exist for operator liability to attach, there must also be a nexus that allows one to be labeled an arranger ." *Geraghty and Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 929 (5th Cir.2000). Arranger status is decided on a case-by-case basis using four factors, "including ownership of the substances, the intent of the parties to the transaction, who decided to place the substance at the facility, and who had authority to control disposal of the hazardous substances." *See* *Sea Lion, Inc. v. Wall Chem. Corp.*, 974 F.Supp. 589, 595 (S.D.Tex.1996). BNSF argues that Skinner had an

obligation to control the disposal of the waste and that, as a result, this Court should find that Skinner was an arranger. This argument fails because courts usually find arrangers when "the defendant had some actual involvement in the decision to dispose of waste." *R.R. St. & Co. v. Pilgrim Enters.*, 81 S.W.3d 276, 292 (Tex.App.--Houston [1st Dist] 2001, pet. granted). Although some courts have found arranger status without actual involvement, these cases involved an obligation to arrange for or direct the disposal of the waste. *Id.* In *Sea Lion,* that court found the defendant chemical company liable when it refused to take responsibility for the disposal of off-spec material delivered to it because the defendant knew that someone would have to dispose of the waste. *Sea Lion*, 974 F.Supp. 589, 595 (S.D.Tex.1996). This case is substantially different because Skinner is neither the chemical company nor the manufacturer and has no obligation to constantly direct the disposal of waste for each of its prior customers. Thus, the Court finds that BNSF has failed to come forward with evidence that would show a sufficient nexus exists to impose arranger liability upon Skinner.

V.

CONCLUSION

For the reasons discussed above, Skinner Tank Company's Motion for Summary Judgment is GRANTED.

SO ORDERED.