ISSUES:

(1) Are there any federal cases that are similar where the hazard initiated on the premises and someone was injured outside of the premises, e.g., an exploding package case?
(2) Any other statutory duty that could trigger dual persona?
(3) If the above 2 fail – how likely to win?

CONCLUSIONS:

Premises Liability:

- In this case, the biggest problem with the premises liability issue is that the package was not actually on the premises where Plaintiff was shot.

  There is case law below, which supports the conclusion that if a shipper has knowledge of a dangerous package, it has a duty to take reasonable care to prevent people who come in contact with that package from suffering injury. However, in the instant case, Tucker never actually came into contact with the package, e.g., the package didn't explode in his hands.

  There is helpful language from case law that supports the argument that a condition on land can create a catalyst for harm off the land or that an accident can result from a physical condition that emanated from the premises, e.g., liquid, an escaped animal, or a runaway vehicle. But liability in these cases attached after the dangerous condition came into contact with the person outside of the premises, e.g., the dangerous animal attacked someone off the premises, the water flooded land off the premises, or the runaway vehicle hit someone off the premises. The argument that someone's belief that a certain condition is on a premises can create a dangerous situation that harms someone is a novel idea that isn't supported by case law.

  There is case law from other jurisdictions that supports the conclusion that the ATX truck itself could be categorized as a premises. All of this case law is state law, and some is criminal case law. Even if we could make the argument, there is still the argument that the dangerous condition, i.e., the package, wasn't on the premises, i.e., the truck.

Dual Persona

- **Premises liability**: The biggest issue with this argument is that ATX implemented the tracking system in its capacity as an employer, not in its capacity as a landowner. In the context of a dual persona case with a landlord/employer, the argument is based on the landlord/employer's failure to meet some statutory code concerning the fitness of the building (a broken scaffolding, unsafe fire escapes, improper water drainage). In the

instant case, implementing the tracking system was done exclusively by ATX the employer, not ATX the property owner.

ANALYSIS:

Question: Are there any federal cases that stand for the premise that an initial hazard on land can create liability under the context of premises liability for an injury that happened off-site/off-premises?

In *Parrott v. Barney* (18 F. Cas. 1236), a California circuit court addressed a case in which an unknown party shipped nitroglycerine – a new and unknown explosive at the time – by conventional freight with no warning to the freight company. Handled like any other crate, the shipment exploded, killing several workers and destroying a significant part of the building in which the freight company was a tenant. The landlord and tenants of the building brought a premises liability action against the freight company. The court held that the freight company's liability to the tenants could only be based on negligence, and the freight company could only be negligent if it had knowledge of the dangerous nature of the shipment and despite that knowledge, took no special duty of care. Ultimately the court held that because the freight company had **no knowledge** of what was in the cargo, they could not be held liable.

The court drew many parallels between the facts of *Parrott* and cases involving escaped dangerous animals; water that had been diverted from its natural source into a reservoir that later escaped and caused damage to neighboring lands; blasting with gun or blasting powder upon the owner's premises that resulted in rock being thrown away from the premises and injuring neighbors. The court noted that in all of these examples, the premises owners knew of the dangerous character of the article.

> The properties of water and gunpowder are ***known to everybody***. The liability of water collected in large bodies to escape through pressure, and of gunpowder to violently explode and do injury, are ***known to all persons of common sense in civilized communities***, no matter how ignorant they may be in literary and scientific matters. ***It is a part of the common and general knowledge of the community, of which everybody is presumed to be possessed and of which, as such, the courts are bound to take judicial notice.***

Parrott v. Barney 18 F. Cas. 1236, at 8 (1871).

There are some similarities to be drawn between *Parrott* and the instant case. First, and importantly, ATX *knew* what was in the package that they diverted. It is also "common and general knowledge of the community" that drug trafficking is associated with violence – particularly gun violence. Therefore, unlike the freight company in *Parrott*, ATX had knowledge of the package, had knowledge of the dangers associated with the package, and placed their workers at risk despite their superior knowledge. The problem with the instant set of facts is that in *Parrott* and the cases it cited, the plaintiff was on the land where the damage occurred. For example, in the cases involving water, the damage was done in the place where the water was actually diverted. In *Parrott*, the

package exploded on the premises. In the instant case, the package was not on Plaintiff's truck – the shooter just believed it was. This makes the case more difficult to argue in a premises liability context because while the dangerous item may have originated on ATX' premises, the package wasn't on the premises, and based on the case law, the danger follows the package.

Question: Does distance matter in the context of injuries sustained outside of the defendant's premises if the danger emanated from the premises?

In *Pacheco v. United States,* 220 F.3d 1126 (9th Circuit. 2000), the 9th Circuit addressed a case in which a nine-year-old girl, her mother, and her grandmother drowned while visiting a beach run by the United States Forest Service. While wading in the water, the girl was caught by a rip tide and pulled into the ocean. Her mother and grandmother tried to save her, but all three drowned. Notably, the *Pacheco* court pointed out that those who ran the beach had knowledge of the dangerous conditions on the beach, i.e., riptides, that they did not share with invitees. The court also highlighted other incidents in which invitees had suffered accidents due to the riptides. Despite these previous occurrences, no one warned invitees about the dangers on the property. The court held that the Defendants' liability came from the fact that they had **actual knowledge** of the dangers on the beach, that it was foreseeable that a child might drown, and that they failed to warn invitees.

In discussing the duty of the landowner, the court relied on the established California Court of Appeals rule that a landowner's duty of care encompasses a duty to avoid exposing persons to risks of injury that occur **off-site** if the landowner's property is maintained in a manner as to expose persons to an unreasonable risk of injury **off-site**.

There are significant thematic parallels between *Pacheco* and the instant controversy. The Court's holding hinged on the fact that the Forest Service ***had knowledge of a dangerous condition and failed to warn.*** This was the basis of their liability under a premises liability framework. In the instant case, ATX had ***actual knowledge*** of a dangerous condition that existed on their land, i.e., illegal drugs that were being illegally trafficked through their parcel delivery service. ATX' possession of illegal and illegally trafficked drugs created a dangerous condition on their premises. Despite having the actual knowledge that there was a dangerous condition on their land, ATX failed to warn Mr. Tucker of the dangers associated with that dangerous condition. Also, like the other drowning incidents that should have prompted the Forest Service to warn about dangerous rip tides, ATX drivers had been subject to numerous shootings, therefore giving ATX reason to warn about how the presence of illegal drugs could have amplified that particular danger.

Additionally, the *Pacheco* court did not address a dangerous condition on the actual land run by the Forest Service – there are several California cases that hold that landowners are not responsible for dangers that invitees face in the ocean. Instead, the court held that "a landowner's duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site. *Pacheco v. United States*, 220 F.3d 1126, 1132 (9th Cir. 2000). While Mr. Tucker was shot off-site, the way in which ATX maintained its property unreasonably exposed

Mr. Tucker to a dangerous off-site condition. Other courts have noted that a premises liability action can exist where there is a "physical nexus between the location where the accident did occur and the premises." *See Diocese of St. Petersburg, Inc. v. Arch Ins. Co*., 188 F. Supp. 3d 1289, 1294 (M.D. Fla. 2016 ("The accident was not a result of any physical condition which emanated from the premises*, such as flowing liquid, an escaped animal, or a runaway vehicle*."). Like the rulings from the California Court of Appeals, ATX maintained its property in a manner as to expose persons to an unreasonable risk of injury off-site. Specifically, ATX intercepted illegal and illicit drugs that were being trafficked through their service and failed to warn their parcel deliverymen – invitees who would be directly exposed to any risk of violence associated with the interception, possession or trafficking of illicit drugs –an obvious danger. That the eventual injury occurred off-site is immaterial.

The unhelpful fact from this case is that the ocean obviously abutted the beach where the drowning occurred – so it does not necessarily solve the distance problem. However, the court's reference to a "physical nexus" between a dangerous condition on-site and an injury off-site is helpful. Another unhelpful fact is that, while this is a federal case, it is applying California substantive law.

In *K. S. v. Santa Fe Pub. Schs*, No. 14-cv-385 SCY/KBM, 2015 U.S. Dist. LEXIS 193550 (D.N.M. June 11, 2015), the United States District Court for the District of New Mexico addressed a case in which the plaintiffs - a group of students who were molested by their teacher – brought suit against Defendants Santa Fe Public Schools and Vicki Sewing, who hired the teacher in 2001 and later dismissed him in 2005 for molesting students. After Sewing dismissed him with a neutral dismissal letter, the teacher got a job at the school where he molested the plaintiffs.

Plaintiffs, students at the school where the teacher was hired after being dismissed by Sewing, brought a premises liability claim against Santa Fe Public Schools and Sewing on the basis that "their failure to appropriately hire, supervise and monitor [the teacher] […] foreseeably created a broader zone of risk that posed a general threat to others *beyond property* borders" and that their failure to report allegations of sexual misconduct against the teacher to law enforcement or the Department of Children, Youth, and Families and their failure to use reasonable care in providing the teacher with "a neutral recommendation" enabled him to get a job at the school the plaintiffs attended. *K. S. v. Santa Fe Pub. Schs*, No. 14-cv-385 SCY/KBM, 2015 U.S. Dist. LEXIS 193550, at *10-11 (D.N.M. June 11, 2015).

Ultimately, the court rejected the plaintiffs' premises liability argument, but it did employ some language and reasoning that could be helpful to the instant argument. First, the court pointed out that the plaintiffs failed to "overcome the fact that none of the injuries complained of occurred on or near the premises Defendants SFPS and Sewing controlled. Instead, the injuries […] occurred on premises located within a different school district in a different city." *Id* *11 (D.N.M. June 11, 2015). The plaintiffs relied on cases that "recognize premises liability for injuries that occur outside the boundaries of the premises in question," but the court noted that those cases involved "injuries that occurred on property *immediately adjacent* to the premises." *Id.* However, the court went on to reason that "[t]his does not necessarily mean that premises liability is limited to adjacent property; the Court could envision a scenario, such as a public entity's failure to contain

nuclear waste, that could lead to liability beyond the immediately adjacent property." The court also held that the injuries that occurred at the plaintiff's school could not be seen to have emanated from the alleged negligent operation of the school from which he'd been dismissed. "The unsafe condition at issue, [the teacher's] alleged sexual abuse, occurred at a different school, in a different city, more than three years later." *Id.*

The instant case is better compared to the *K.S.* court's example of a public entity's failure to contain nuclear waste causing damage away from the site. However, in that example, the injury would occur from contact with the actual nuclear waste. Again, the issue is that the package wasn't actually on the premises where Plaintiff was shot.

Question: Can the ATX truck be a premises?

In *Gibbs v. Shuttleking*, 162 S.W.3d 603 (Tex. App.SSEl Paso 2005, pet. filed), the Texas appellate court held that "though a bus is not real property, […] it is nevertheless a workplace definite area and locality and thus is sufficiently similar to a 'premises' to fall under the purview of" the premises liability framework." *Id.* at 613. Fontenot v. FedEx Ground Package Sys., 146 F. App'x 731, 735 (5th Cir. 2005).

A line of Washington State criminal cases also classify a vehicle as a premises because a vehicle is a type of "building" *State v. Joseph,* 195 Wn.App. 737; *State v. Turner*, 103 Wn. App. 515; *State v. Barrera*, 2007 Wash.App. Lexis 232; *State v. Martin*, 2002 Wash.App. LEXIS 1901; *State v. Eaklor*, 1999 Wash.App. LEXIS 1075; *State v. Hutt*, 2004 Wash.App. LEXIS 3158; *State v. Parker*, 2014 Wash.App. LEXIS 2559; *State v. Martinez*, 2007 Wash.App. LEXIS 106.

Even if the court did accept the argument that the ATX truck could be classified as a premises, the package was never on the truck.

Question: What other statutory duty that could trigger dual persona?

Manufacturer or Distributor of Defective Products: The only other dual persona route that could *potentially* be applicable to the instant controversy would be to argue that ATX, through its collaboration with RedHat and Omnitracs to create the tracking app, manufactured a defective product. The biggest problem with this argument is that ATX does not sell – and is not in the business of selling – tracking apps. In cases where this type of dual persona has been applied, the danger that the employee faced was common to the general public. When an employer is a manufacturer selling to the public, the employer assumes all of the duties and liabilities of a manufacturer. In the instant case, ATX does not sell its tracking app to the general public, so the only way in which someone could be harmed by any defect in the product would be by working with ATX, which would fall under the Workers' Comp Act.[1]

[1] "Workers' Compensation: The Dual-Capacity Doctrine*," William Mitchell Law Review*: Vol. 6: Issue 3, Art.8. Available at: http://open.mitchellhamline.edu/wmlr/vol6/iss3/8