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No. 69568-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AUBURN VALLEY INDUSTRIAL CAPITAL LLC,
a Washington limited liability company,

Plaintiff/Respondent

v.

ROSS B. HANSEN, as single person, and NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company,

Defendants/Appellants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

At the heart of this appeal is the right of a property owner/landlord to recover the cost of cleaning up contamination caused by a tenant's industrial operations. The landlord, Auburn Valley Industrial Capital, LLC ("Auburn"), discovered contamination throughout the leased facility at levels posing a threat to human health and the environment. When the tenant, NW Mint, refused to cooperate in responding to the contamination, Auburn cleaned up the contamination and sued to recover its costs under the lease and the Model Toxics Control Act ("MTCA").

This appeal does not raise any issues of first impression. The central issue is whether Auburn is entitled to recover the cost of investigating and remediating the contamination at the leased premises under MTCA or the lease, or both.

Auburn's cost-recovery rights under MTCA are based on the plain language of the statute regarding "operator" liability and the recovery of "remedial action" costs. MTCA is intended to encourage parties who clean up contamination and to discourage recalcitrant parties who attempt to evade environmental responsibility.

Auburn's cost-recovery rights under the lease are based on clear and unambiguous terms prohibiting the release or disposal of "hazardous substances" anywhere on the leased premises.

The trial court's award of cleanup costs (November 2012 judgment) and its award of attorney fees and costs (June 2013 judgment) are consistent with Washington law and are supported by substantial evidence in the record.

II. RESTATEMENT OF THE ISSUES

NW Mint's opening brief regarding the November 2012 judgment lists eight issues. Op. Br. at 3-4. The first six issues pertain to MTCA liability. *Id.* at 3. In fact, all of the statutory elements for a MTCA cost-recovery claim can be reduced to two issues. NW Mint's seventh and eighth issues pertain to liability for cleanup costs under the lease. *Id.* at 3-4. NW Mint's liability under the lease, however, can be reduced to a single issue. The final issue is the award of Auburn's attorney fees and litigation expenses.[1] Thus, this appeal involves the following four issues:

1. **Did Auburn incur "remedial action costs" that were the "substantial equivalent" of a remedial action conducted by or supervised by the Department of Ecology?**
2. **Is NW Mint strictly liable for Auburn's "remedial action costs" as an "operator" under MTCA?**
3. **Is NW Mint liable for Auburn's cleanup costs based on its breach of Section 11 of the lease?**
4. **Did the trial court abuse its discretion in awarding attorney fees and cost under MTCA and the lease?**

[1] NW Mint did not state any issues in its supplemental brief regarding the June 2013 judgment awarding attorney fees and costs.

III. RESTATEMENT OF THE CASE

A. Introduction.

NW Mint entered into a commercial lease with the prior owner of the Auburn property in 2002.[2] Ex. 1, pp. 1, 20; RP 7/31/ at 35.[3] Auburn purchased the property in 2007. RP 7/31 at 10. The lease expired on April 30, 2010. RP 7/30 at 182; RP 7/31 at 62. This appeal involves only one claim (recovery of cleanup costs) among a number of claims decided by the trial court. *See* Section III(C)(3)(a) of this Brief.

B. Auburn Investigated and Remediated Hazardous Substance Contamination Caused by NW Mint's Operations.

1. NW Mint's Operations Generated "Hazardous Substances."

From 2002 until the Lease expired on April 30, 2010, NW Mint operated a minting/metal fabrication business in the Auburn facility. Op. Br. at 4-5. NW Mint's operations included electroplating (RP 8/14 at 172-73), melting (*id.* at 157), sandblasting *(id.* at 167), extruding (*id.* at 161-2), rolling (*id.* at 163), stamping (*id.* at 157), blanking (*id.* at 192), grinding

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[2] The lease was originally executed by "Ross B. Hansen dba Northwest Territorial Mint." Ex. 1, p. 1. Shortly thereafter, Mr. Hansen formed Northwest Territorial Mint, LLC. RP 8/14 at 208. NW Mint has not challenged the trial court's conclusion that Mr. Hansen and his LLC are "jointly and severally liable for all damages and fee and cost awards entered against Defendants in this matter." CL 30. This conclusion is based on unchallenged findings. FF 137-55. Consistent with these unchallenged conclusion and findings, Auburn refers to Mr. Hansen and/or his LLC as "NW Mint."

[3] Verbatim Report of Proceedings transcripts are cited based on the month and date of the trial court proceedings, e.g., "RP 7/30" or "RP 8/20." The transcript of the post-judgment trial court proceeding is cited as "RP 5/17/13."

(*id.* at 179-80), polishing (*id.* at 166), striking (*id.* at 190), and finishing (*id.* at 166) a variety of metals.[4] These operations caused releases of hazardous substances throughout the facility and also outside of the building. *See, e.g.*, Ex. 58 , p. 4; Ex. 173, pp. 127, 481, 606, 609 (roof, loading dock, oil/water separator). NW Mint's did not disclose to Auburn or to its own consultants the nature and extent of these hazards.[5] RP 7/30 at 165, 180-83; RP 7/31 at 33-34; RP 8/6 at 27-32; RP 8/20 at 123-24.

2. The Lease Included a Specific "Cleanliness Standard" for Hazardous Substances.

In Section 11 of the lease, NW Mint agreed that it would "not store, generate, dispose of or otherwise allow the release of any hazardous waste or materials in, on or under the Premises, Property ... or in any improvement placed on the Premises." Ex. 1 at § 11. NW Mint also warranted that its use of the Auburn facility "does not involve the use,

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[4] Department of Labor and Industry ("L&I") records confirmed the nature and extent of NW Mint's electroplating, molten metal processing, and other operations and confirmed the wide range of hazardous chemicals and hazardous substances used at the Auburn facility. Ex. 170, Tab C-F. The L&I records also confirmed that NW Mint was subject to numerous L&I inspection and enforcement proceedings related to improper use and storage of hazardous materials at the Auburn facility. Ex. 170, Tabs A-D.

[5] At trial, NW Mint's consultants conceded that they had not been provided complete and accurate information about the nature of NW Mint's operations and the types of hazardous chemicals and hazardous substances used in NW Mint's operations. RP 8/6 at 27-31; RP 8/20 at 123-24. NW Mint's toxicologist, Dr. Mackay, admitted that he had not been provided certain information about NW Mint's operations until shortly before trial and that he had previously made conclusions and had filed declarations that were "erroneous" and "contrary" to "true facts" about NW Mint's operations. RP 8/20 at 178-86.

production, disposal or bringing on to the Premises of any Hazardous Waste." *Id.* NW Mint agreed to indemnify Auburn with respect to:

> all ... cleanup costs, remedial actions, costs and expenses ... incurred or paid by ...[Auburn] ... by reason of, or in connection with ... the acts or omissions of [NW Mint] ... resulting in the release of any Hazardous Waste.

Id. It is undisputed that the term "Hazardous Waste," as used in the lease, is synonymous with the term "hazardous substances," as defined under MTCA.[6] Ex. 1, § 11, RCW 70.105D.010(1); CP 13-15.

3. Auburn's 2007 "Due Diligence" Investigation Established a Complete Defense to Its Potential MTCA Liability.

In 2007, Auburn purchased the property on which the Auburn facility is located. RP 7/31 at 10. Prior to purchasing the property, Auburn conducted pre-purchase "due diligence," including a "Phase I Environmental Site Assessment" to confirm that there were no "recognized environmental conditions" at the property that could give rise to "owner" liability under MTCA or its federal counterpart, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* RP 7/31 at 24; RP 8/1 at 12-13;

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[6] In addition to the prohibition in Section 11 regarding the release of hazardous substances, Section 13 of the lease imposed on NW Mint a general requirement to maintain and return the facility in good condition. Section 13(a) required NW Mint to "keep the Premises ...neat, clean and in good order, repair and in a sanitary condition" during the term of the lease. Ex. 1, p.5. Section 13(b) required NW Mint to "quit and surrender the Premises ... in a neat and broom clean condition" at the end of the lease. Ex. 1 at § 13.

Ex. 11; RCW 70.105D.040(3)(b). The trial court found that this 2007 environmental assessment of the Auburn property satisfied all of the elements for Auburn's complete defense to "owner" liability under MTCA.[7] FF 35-51.[8] NW Mint did not assign error to these findings.

4. Auburn Conducted "Closure" Inspections in 2010 to Confirm That the Condition of the Facility Complied With the Lease.

Auburn hired EBI Consulting ("EBI"), an environmental and engineering consulting firm, to conduct a post-lease inspection to identify any physical damage to the facility. RP 7/31 at 124-25; Ex. 80. Auburn repaired property damage identified by EBI. Ex. 80; Ex. 85; Ex. 155; RP 7/31 at 170-74. The trial court awarded $168,230.33 to reimburse Auburn for the cost of these repairs. FF 133-36; CL 18-19.[9]

In addition to inspecting the post-lease physical condition of the facility, Auburn retained EBI to investigate environmental conditions at the facility to determine: (1) whether any hazardous substances were present in the facility: and (2) whether the hazardous substances, if

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[7] The distinction between a "due diligence" Phase 1 assessment inspection of real property and a post-lease investigation to sample for the presence of hazardous substances is discussed in footnote 59, *infra*.

[8] References to the Findings of Fact and Conclusions of Law dated October 15, 2012 [CP1703-34] are cited in this Brief as "FF ##" and "CL ##." These citations are intended to incorporate the amendments to FF 125, CL 8, and CL 17 entered on November 14, 2012 [CP 1735-37]. These amendments were entered concurrently with entry of the November 14, 2012 judgment [CP 1738-43].

[9] NW Mint assigned error to these findings and conclusions (Op. Br. at 3-4) but has not listed any issues or made any arguments pertaining to this award.

present, would pose a potential health threat to future occupants.[10] RP 7/31 at 90-91; RP 8/1 at 49-53, 138, 182-85; Ex. 58.

EBI's initial investigation showed high levels of hazardous substance metal contamination throughout the facility. Ex. 58. NW Mint's environmental consultant agreed that EBI's initial sampling showed "high concentrations" of metals. Ex. 72, p. 2; RP 8/20 at 195.

5. Auburn Attempted to Work With NW Mint to Address the Contamination, but NW Mint Refused to Cooperate.

As soon as the results of EBI's initial environmental investigation were available, Auburn contacted NW Mint, provided a copy of the EBI report, and offered NW Mint an opportunity to address the contamination at the Auburn facility. Ex. 59. NW Mint did not respond and refused to accept any responsibility for the contamination. Exs. 60, 63, 67, 68, 69, 78, 91. The trial court made specific findings regarding NW Mint's

[10] Auburn conducted this initial environmental investigation for two reasons. First, NW Mint had refused to provide Auburn with information about materials, chemicals, and processes used in its minting/metal fabrication operations. RP 8/1 at 24-25, 30-40; RP 8/6 at 112-13; RP 8/8 at 5-10. Second, Auburn was aware of a letter from the Department of Ecology ("Ecology") in August of 2009 referring to "dangerous waste accumulation areas" in the facility and stating that "closure" of NW Mint operations would be subject to "Dangerous Waste Regulations." Ex. 18; RP 8/8 at 5-8. Auburn's concerns heightened when NW Mint failed to respond to Auburn's inquiries about Ecology's "Dangerous Waste" letter. RP 7/31 at 69-71; Ex. 19; RP 8/8 at 5-9. Despite these concerns, Auburn had no knowledge in April of 2010 of any actual or threatened releases of hazardous substances at the Auburn facility. RP 7/31 at 147; RP 8/2 at 39-42, 66-70; RP 8/1 at 49, 116-22.

recalcitrance. FF 90, 111.[11]

6. In Addition to Refusing to Cooperate with Auburn, NW Mint Rejected Proposals and Recommendations From Its Own Experts Regarding the Contamination.

Unbeknownst to Auburn, NW Mint contacted two environmental consulting firms regarding the results of EBI's environmental investigation. RP 8/16 at 14; RP 8/6 at 6. One of these consultants, AMEC, issued a proposal to NW Mint on May 28, 2010, which recommended further investigation of the contamination, including the use of "surface contamination limits" to protect future occupants of the Auburn facility:

> We and others have developed allowable surface contamination limits based on project-specific situations with the objective of preventing adverse health effects among either the public or persons occupationally-exposed to metal dusts. Therefore, we would need to develop our own risk-based criteria for the contaminants of concern for this project. We note that there are applicable standards for waste materials, including accumulations of dust or building materials contaminated by metals.

Ex. 72. p. 2; RP 8/20 at 188-90.

AMEC also offered "technical support ... to negotiate the cleanup criteria and any remediation with the Owner." Ex. 72 at 3. NW Mint did not accept AMEC's proposal to investigate the facility and to support NW

[11] NW Mint assigned error to these findings (Op. Br. at 4) but has not argued why these findings are in error and has not cited any evidence to support its assignments of error. In addition, NW Mint has not assigned error to the trial court's conclusion of law regarding NW Mint's recalcitrance: CL No. 14.

Mint in negotiations with Auburn for an appropriate cleanup.[12]

NW Mint also contacted another environmental consultant, Elisabeth Black, a Certified Industrial Hygienist, regarding the metal dust contamination at the Auburn facility. Ex. 220 at 1. She reviewed EBI's initial investigation report and submitted a proposal to NW Mint dated June 3, 2010. Ex. 220. Ms. Black did not question EBI's initial sampling results. RP 8/6 at 10. She advised NW Mint to clean up the contamination without further investigation.[13] Ex. 220; RP 8/6 at 9-10. NW Mint did not accept Ms. Black's recommendation. RP 8/6/ 18-19.

In August of 2010, NW Mint again contacted Ms. Black and asked her to take samples of the metal dust contamination. *Id.* She took samples in October 2010 and issued a report in November 2010 confirming EBI's findings regarding the nature and extent of contamination. Ex. 219; RP 8/6 at 31-21, 50-51. She again recommended a "thorough cleaning" of the facility "by an experienced abatement firm with training in Hazardous Waste Operations" to address the potential health hazards posed by the hazardous substance metals in the facility. Ex. 219, pp. 4-5; RP 8/6 at 40.

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[12] According to AMEC's experts, the Auburn project "went completely dark" for over 16 months (until October of 2011) after NW Mint rejected AMEC's May 28, 2010 proposal to address the contamination. RP 8/20 at 191-92.

[13] Ms. Black proposed the following: (1) prepare a surface dust cleaning protocol, (2) obtain bids from three "hazardous materials abatement contractors" to clean the facility, and (3) perform follow-up surface wipe sampling "to verify that metal dusts have been adequately removed." Ex. 220, pp. 1-2.

NW Mint rejected her recommendations and did not undertake any cleanup of the facility.[14] RP 8/6 at 19-20, 44.

7. Auburn Implemented a Response to Address the High Levels of Contamination Caused by NW Mint's Operations.

a. Auburn Used "Surface Contamination Limits" to Determine the Presence of Hazardous Substances.

Regulatory surface contamination limits apply to indoor building areas. RP 8/1 at 68. For example, experts for both parties agreed that lead dust (a hazardous substance metal) on interior building surfaces is subject to EPA's regulatory surface contamination limits. RP 8/1 at 68; RP 8/6 at 42-43; RP 8/20 at 167. Lead dust was found in the Auburn facility at levels exceeding these regulatory surface contamination limits.[15] Ex. 219, Table 1; RP 8/6 at 43-43.

Experts on both sides agreed that surface wipe sampling and surface contamination limits are properly used to determine whether a

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[14] Ms. Black testified that she would have set surface contamination limits based on using "clean" areas of the Auburn facility as "reference" or "background" levels of contamination. RP 8/6 at 15. Her approach would have resulted in cleanup levels for some hazardous substance metals that would have been even more stringent than the surface contamination limits used by EBI. *Id.* Ms. Black agreed that using surface contamination limits is a reasonable approach for evaluating compliance with a lease that prohibited the release of hazardous substances. RP 8/6 at 85-86.

[15] NW Mint's own consultant found lead dust in 11 of 14 floor samples at levels exceeding federal surface contamination limits. Ex. 219; RP 8/6 at 2-3. These regulatory limits apply to the Auburn facility based on "child-occupied" uses allowed under the City of Auburn zoning code. Ex. 203, pp. 1-2; RP 8/6 at 42-43. NW Mint's toxicologist acknowledged that the lead dust at the Auburn facility posed a "potential threat to human health" that "would have to be addressed." RP 8/20 at 167-88.

facility is safe for future occupancy, even in the absence of state or federal regulatory standards. RP 8/1 at 68-70; RP 8/6 at 20-21, 109-10; RP 8/20 at 157-58, 189-90, Ex. 72, p. 2; Ex. 219, pp. 1-3.

b. Auburn Conducted a Risk Assessment, Which Established Regulatory Cleanup Levels Under MTCA and Confirmed That the Metal Dust Posed a Threat to Human Health.

In October 2011, NW Mint's consultants questioned whether the contamination at the Auburn facility posed human health risks. CP 3630-31 (¶¶ 13-14). In response, Auburn retained a toxicology expert, Dr. John Schell, to conduct a human health risk assessment. RP 8/8 at 162. Dr. Schell (1) performed a risk and toxicological assessment of the facility, (2) established health-based cleanup standards for the facility, and (3) confirmed that the "residual metals" at the facility posed a threat to human health. RP 8/9 at 10-28; Ex. 160.[16] NW Mint's toxicologist, Dr. Chris Mackay, testified that Dr. Schell "did a good job" on the risk assessment.[17] RP 8/20 at 86. NW Mint's consultants did not perform any risk assessment, and they provided no evidence that the facility was safe for

[16] Exhibit 160 is Dr. Schell's declaration dated March 12, 2012, filed in support of Auburn's response to NW Mint's motion for summary judgment on MTCA liability issues. Dr. Schell used his declaration at trial as a "recorded recollection" under ER 803(a)(5), and portions of the declaration were read into evidence. RP 8/9 at 7, 12, 16, 22-24, 65-66, 70, 82-84, 100-02, 106.

[17] Dr. Mackay disagreed with one value Dr. Schell used as a "reference dose" for copper. RP 8/20 at 86-87. However, this did not alter his overall endorsement of Dr. Schell's risk assessment. *Id.* None of NW Mint's experts challenged Dr. Schell's ultimate conclusion: that hazardous substance metals at the Auburn facility exceeded MTCA's regulatory cleanup standards based on a human health risk assessment. RP 8/9 at 27-28; Ex. 160.

use by future occupants.[18]

Dr. Schell's risk assessment was based on a "bulk dust" sample collected in October 2010, when Ms. Black was collecting "surface wipe" samples.[19] RP 8/8 at 101-02. The laboratory analyzed the bulk dust sample and measured the levels of hazardous substances. RP 8/8 103-06. Dr. Schell then calculated specific regulatory MTCA cleanup levels for the hazardous substance metals. RP 8/9 and 26-28. The hazardous substance metals exceeded MTCA cleanup levels, confirming that the metal dust posed a threat to human health and required removal to make the facility safe for future occupants. RP 8/9 at 38-39; Ex. 160.

8. Auburn's Remediation Contractor, Clean Harbors, Removed the Hazardous Substance Contamination Inside and Outside of the Building.

The trial court entered 15 findings of fact regarding Clean Harbors' cleanup of the contamination at the Auburn facility and EBI's issuance of

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[18] MTCA requires that human health risk assessments consider the potential future use of a facility. WAC 173-340-740(1)(a). Dr. Schell based his risk assessment on future residential use of the property, which is the "reasonable maximum exposure scenario" required under MTCA regulations. WAC 173-340-740(1)(a); RP 8/9 at 30-31, 96-97. Residential use of the Auburn facility is allowed under the City of Auburn Zoning code. Ex. 203, pp. 1-2; RP 8/9 at 16. NW Mint's toxicologist, Dr. Mackay, agreed with the residential land use assumption used in Dr. Schell's risk assessment. RP 8/20 at 78.

[19] Dr. Schell testified that the bulk dust sample was representative of contamination throughout the facility. RP 8/9 at 62-62. Dr. Schell testified that it is his practice to rely on analytical laboratories to determine whether sample size requirements are met. *Id.* He testified that the laboratory's acceptance of the sample confirmed that the sample size did not affect the validity of the lab test results. *Id.* at 35. NW Mint has not cited any evidence to show that the size of the bulk dust sample affected the validity of the laboratory test results.

a 912-page "final closure report" documenting the investigation and remediation work at the Auburn facility. FF 113-22; Ex. 173. NW Mint has not challenged any of these findings.

The documentation regarding the remediation of the Auburn facility included certifications that the material removed from the facility did not include any "hazardous wastes." RP 8/7 at 114. Ex. 173, pp. 483-500. Clean Harbors did not certify the absence of "hazardous substances" in this material.[20] The trial court found that the contaminated material removed by Clean Harbors was treated and therefore could be disposed of as "non-hazardous waste." FF No. 114 (unchallenged).

9. Auburn Provided Detailed Documentation Regarding Its Investigation and Remediation of the Auburn Facility.

On October 17, 2011, EBI provided Auburn with an initial certification that the cleanup work had been completed. Ex. 137. In March of 2012, EBI issued a "Facility Cleaning and Decontamination

[20] Clean Harbors' project manager, Matt Dunn, testified that prior to removal and off-site disposal of the contamination debris from the Auburn facility, Clean Harbors treated the "hazardous substances" with a phosphate material so that these "hazardous substances" would not be in a leachable form requiring disposal in a special "hazardous waste" landfill. RP 8/7 at 98-102. This pre-removal treatment ensured that the debris would pass the Toxicity Characteristic Leaching Procedure "TCLP" test and would not result in the classification of the material as "hazardous waste" under the federal Resource Conservation and Recovery Act ("RCRA"). RP 8/7 at 99-102, 134-35. The TCLP test does not rule out the presence of hazardous substances, and it is not a test to evaluate human health risks of exposure to hazardous substances. RP 8/7 at 102, 172; RP 8/20 at 162-63. Demolition/remediation debris containing hazardous substances is not "hazardous waste" under RCRA unless it fails the TCLP test. RP 8/7 at 99-102.

Certification and Environmental Closure Report." Ex. 173. This final 912-page closure report includes extensive documentation regarding the investigation and remediation work performed by EBI and Clean Harbors, including laboratory test results, plans and specifications for remediation work, daily work logs, and photographic records of work performed. *Id.*

C. Proceedings Below.

1. Auburn Filed Lawsuits Against NW Mint in 2009 and 2010.

Auburn sued NW Mint in 2009 for injunctive relief and damages after NW Mint blocked access to a telecommunications "common area" in Auburn's building. Auburn sued NW Mint in 2010 for property damage and contamination discovered at the expiration of NW Mint's lease. The two lawsuits were consolidated in February 2011.

2. For Three Years, NW Mint "Aggressively Litigated" Auburn's Claims.

There are over 600 separate entries in the trial court dockets for these two consolidated lawsuits from Auburn's first lawsuit in November 2009 until the trial court awarded attorney fees and costs in June 2013.[21]

NW Mint filed no fewer than 19 separate unsuccessful motions in the 2010 lawsuit alone, including three unsuccessful motions for

[21] There are 58 docket entries in Cause No. 09-2-41614-1 KNT. As of August 31, 2013, there are 544 docket entries in Cause No. 10-2-41256-5 KNT.

reconsideration[22] and two unsuccessful summary judgment motions seeking dismissal of Auburn's MTCA and breach of lease claims. CP 3558-60; CP 3870-71. In addition to these unsuccessful trial court motions, NW Mint filed three separate motions for discretionary review in this Court.[23]

NW Mint filed nine trial court motions and one motion for discretionary review in this Court seeking to exclude Auburn's experts.[24] On appeal, NW Mint has not presented any issues or arguments challenging Auburn's experts.

The trial court made a specific finding regarding NW Mint's litigation approach: "This case was aggressively litigated by [NW Mint] and Auburn had the right to respond in kind." Supp. FF 10 (CP 3589).[25] NW Mint has not assigned error to this finding.

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[22] CP 0900-01, 0902-03, 1182-83, 1652-53, 1668-69, 1670-72, 1673-74, 1675-77, 1680-81, 3613, 3625-26, 3698-99, 3854-55, 3856-57, 3858-60, 3870-71, 3970-71, 3581-82; RP 8/7 at 57 (oral motion).

[23] April 27, 2011 (Cause No. 66970-2-1); March 12, 2012 (Cause No. 68365-9-1); and April 11, 2012 (Cause No. 68551-1-1. This Court issued letter rulings rejecting two of NW Mint's motions. May 20, 2011 (Cause No. 66970-2-1); April 11, 2012 (Cause No. 68551-1-1). NW Mint withdrew the third motion. March 16, 2012 (Cause No. 68365-9-1).

[24] CP 0900-01, 0902-03, 1182-83, 1668-69, 1673-74, 1680-81, 3854-55, 3856-57; April 11, 2012 letter ruling (Cause No. 68551-1-1). In addition, NW Mint made an unsuccessful oral motion for a *Frye* hearing during trial. RP 8/7 at 57.

[25] References to the trial court's Findings of Fact and Conclusions of Law dated June 4, 2013 [CP 3585-93] are cited as "Supp. FF ##" or "Supp. CL ##." These supplemental findings and conclusions were entered concurrently with the trial court's entry of a supplemental judgment awarding attorney fees and litigation expenses on June 4, 2013 [CP 3583-84].

3. The Trial Court Found NW Mint Liable Under MTCA and Under the Lease.

a. The Trial Court Awarded $869,746.53 for "Remedial Action" Costs, Property Damage and Lost Rent (the November 2012 Judgment).

On November 14, 2012, following a three-week bench trial, King County Superior Court (Honorable Regina Cahan) entered a judgment against NW Mint in the amount of $869,746.53. CP 1738-43. The trial court entered 155 findings of fact and 31 conclusions of law in support of the judgment. CP 1703-34 (amended by CP 1735-37). The November 2012 judgment consists of the following:

MTCA "remedial action" costs:[26]	$391,573.23	(CP 1736)
2009 lawsuit damages:	$9,995.77	(CP 1732)
Lost rent:	$299,947.20	(CP 1731-32)
Property damages:	$168,230.33	(CP 1725-26)
TOTAL	$869,746.53	(CP 1738)

NW Mint has not appealed the trial court's award of the "2009 lawsuit damages." Op. Br. at 3, fn 3. In addition, NW Mint has not listed any issues or made any argument regarding the trial court's award of "lost rent" ($299,947.20) or "property damages" ($168,230.33). The only portion of the November 2012 judgment addressed in NW Mint's opening brief is the award of Auburn's cleanup costs in the amount of

[26] The trial court record includes extensive accounting documentation, including invoices and detailed backup receipts, in support of Auburn's claim for recovery of its "remedial action costs." Exs. 109, 158, 173, 188, 193, 292. FF 125 (as amended – CP 1736).

$391,573.23. Auburn has two separate and independent legal bases for recovery of these cleanup costs: the cost-recovery provisions of MTCA (RCW 70.105D.080) and Section 11 of the lease. Ex. 1 at § 11.

b. The Trial Court Awarded $1,582,046.61 for Attorney Fees and Litigation Expenses (the June 2013 Judgment).

On June 4, 2013, the trial court entered an order and a supplemental judgment awarding Auburn $1,582,046.61 for its attorney fees and litigation expenses. CP 2583-84; CP 3585-93. The trial court entered 16 findings of fact and nine conclusions of law in support of the supplemental judgment. CP 3587-93. NW Mint has not assigned error to any of the trial court's findings or conclusions and has not presented any issues for review regarding the June 2013 supplemental judgment.

IV. STANDARD OF REVIEW

This Court's review of a trial court's findings of fact and conclusions of law is a two-step process. First, this Court determines whether the trial court's findings of fact are supported by substantial evidence in the record.[27] *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234, 1240 (1999). If so, this Court then decides whether those findings support the trial court's conclusions of law.

[27] Substantial evidence is "evidence that would persuade a fair-minded person of the truth of the statement asserted." ***Cingular Wireless, LLC v. Thurston County***, 131 Wn.App. 756, 768, 129 P.3d 300 (2006).

Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).[28]

When confronted with conflicting expert testimony, the trial court may accept the testimony of one expert and reject the testimony of another. *Alpine Industries, Inc. v. Gohl*, 30 Wn.App. 750, 754-55, 637 P.2d 998 (1981).

A trial court's interpretation of a contract is reviewed *de novo. Knipschield v. C–J Recreation, Inc.*, 74 Wn.App. 212, 215, 872 P.2d 1102 (1994). Interpretation of a statute is a question of law reviewed *de novo* under the "error of law" standard. *City of Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). Whether particular statutory language applies to a factual situation is also a conclusion of law, reviewed *de novo*. *127 Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn.App. 899, 908, 73 P.3d 424 (2003).

Mixed questions fact and law are reviewed under the "error of law" standard. *Dep't of Revenue v. Boeing*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975). Resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts. *Tapper v. Employment Sec. Dep't*, 122

[28] NW Mint contends that 20 of the 35 challenged findings entered by the trial court are actually conclusions of law or mixed questions of fact and law. However, NW Mint cites no legal authority to supports its contention (Op. Br. at 15, fn. 13) that any finding of fact that includes a term defined under MTCA must be reviewed *de novo* as a conclusion of law.

Wn.2d 397, 403, 858 P.2d 494 (1993).

To reverse an award of attorney fees and litigation expenses, it must be shown that the trial court manifestly abused its discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

V. ARGUMENT

A. NW Mint Made No Arguments and Cited No Record Evidence in Support of its Assignments of Error to the Trial Court's Findings and Conclusions Regarding the November 2012 Judgment.

NW Mint assigned error to 35 of 155 findings of fact and 20 of 31 conclusions of law entered by the trial court regarding the November 2012 judgment. Op. Br. at 3-4. However, NW Mint's opening brief is nothing more than a "broadcast condemnation" of these findings and conclusions, an approach which this Court and the Washington Supreme Court have determined to be insufficient:

> The lessees, as appellants, have set out as assignments of error the trial court's entry of findings of fact Nos. 7 through 15, the trial court's conclusions of law, and the failure of the trial court to enter 23 proposed findings and conclusions. A broadcast condemnation of each finding and conclusion such as this is of no assistance to an appellate court in ascertaining the contentions raised on appeal. ... As stated in *Knatvold v. Rydman*, 28 Wash.2d 178, 183, 182 P.2d 9, 12 (1947):
>
> > The assignments that the trial court erred in making fourteen findings of fact, without any attempt to show wherein the findings were erroneous or lacked evidenciary [sic] support, is an invitation to us to search the record and see if we can find any error. It is not our function or duty to search the record for errors, but only to rule as to errors specifically claimed.

Olson v. Scholes, 17 Wn.App. 383, 388, 563 P.2d 1275 (1977).

Remarkably, with only one exception, in its entire argument on MTCA liability NW Mint makes no references to any specific findings of fact. Op. Br. at 21 (citing FF 99). Even that single reference fails to provide any argument or evidence in support of that assignment of error.[29] *Id.* NW Mint has not complied with the basic requirements of RAP 10.3:

> RAP 10.3 requires an appellant to present argument to the reviewing court as to why specific findings of fact are in error and to support those arguments with citation to relevant portions of the record. Whitney provides no argument or citation to the record to support his many challenges to the findings. Because Whitney's challenges are insufficiently briefed, we decline to address them and conclude that the findings of fact are verities.

In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 465-66, 120 P.3d 550 (2005).

NW Mint's briefing is insufficient to support its assignments of error. All of the findings of fact listed in NW Mint's opening brief (Op. Br. at 4) but not supported by argument, should be deemed verities on appeal. *Whitney*, 155 Wn.2d at 465-66. Similarly, this Court should uphold the trial court's conclusions of law where NW Mint has failed to argue that any specific conclusion is legally erroneous or lacks evidentiary

[29] The single reference to FF 99 pertains to MTCA issues. NW Mint cites only six other specific findings of fact and five conclusions of law, all of which pertain to NW Mint's liability under the lease. NW Mint did not assign error to three of these six lease-related findings. Op. Br. at 42 (FF 36-38). Its citations to two other findings appear to be mistaken and are not supported by any argument that these findings are erroneous. *Id.* at 47 (FF 107, 110). The sixth reference to a lease-related finding summarizes the finding but presents no argument that the finding is erroneous. *Id.* at 47, fn. 80 (FF 18). Finally, NW Mint cites and quotes five lease-related conclusions of law, but fails to show how these conclusions lack support in the record. *Id.* at 40 (CL 11,12) and 47 (CL 15-17).

support in the record. *Olson*, 17 Wn.App. at 388.

B. Auburn's "Remedial Action Costs" Are Recoverable Because the Metal Dust Contaminants Are "Hazardous Substances" That Posed a "Threat or Potential Threat" to Human Health.

1. NW Mint's Arguments Ignore the Statutory Elements of a MTCA Cost-Recovery Claim.

MTCA authorizes a party such as Auburn to bring a private action to recover "remedial action costs" from a party liable under MTCA.[30] NW Mint's entire opening brief makes only one reference to "remedial action costs." Op. Br. at 24. NW Mint concedes that determining "remedial action costs" is a key element of Auburn's MTCA cost-recovery claim. *Id.* However, NW Mint does not quote or even cite the MTCA definition of this term. "Remedial action" is broadly defined under MTCA.[31] RCW

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[30] MTCA's private cost-recovery authority is set forth in RCW 70.105D.080:

> ... a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs. ... Recovery shall be based on such equitable factors as the court determines are appropriate. Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. ... The prevailing party in such action shall recover its reasonable attorneys' fees and costs.

Id. (emphases added).

[31] MTCA defines "remedial action" as follows:

> "any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects

70.105D.020(26). As set forth below, Auburn incurred "remedial action" costs "to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment." *Id.* NW Mint has failed to show otherwise.

2. Auburn Proved the First Element of Its Cost-Recovery Claim: The Metal Dusts and Residues at the Auburn Facility Are "Hazardous Substances" Under MTCA.

a. The Metals That Contaminated the Auburn Facility Are Defined as Hazardous Substances Under "Federal Cleanup Law" Incorporated Into MTCA.

Each of the metals at issue in this case is a "hazardous substance" under MTCA because each is defined as a "hazardous substance" under CERCLA, the federal counterpart to MTCA. CP 13-15; RCW 70.105D.020(10)(c). Experts on both sides agreed that the metals found at the Auburn facility are "hazardous substances" as defined under MTCA. RP 8/1 at 65-66; RP 8/14 at 123; RP 8/20 at 116. *See* RCW 70.105D.020(10). The trial court made findings that specific metals found at high levels at the Auburn facility (arsenic, lead, chromium, selenium, silver, copper, and zinc) are defined as "hazardous substances" under MTCA and CERCLA. FF 93-94. NW Mint has not made any argument challenging the trial court's findings that the metal dusts at the Auburn

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studies conducted in order to determine the risk or potential risk to human health."

RCW 70.105D.020(26)(emphases added).

facility are "hazardous substances" under MTCA.[32]

b. NW Mint's Arguments About Hazardous Substances in the Form of "Dust" Are Without Merit.

NW Mint contends that the requirements of the lease and MTCA should not be applied to the hazardous substances at the Auburn facility because these hazardous substances were in the form of "dust." Op. Br. at 17, 21-23. There is no "dust" exception to NW Mint's liability under MTCA or under the lease with respect to the disposal or release of hazardous substances. RCW 70.105D.040, .080; Ex.1 at § 11.

MTCA regulations specifically contradict NW Mint's argument that MTCA excludes "dust." First, MTCA soil cleanup standards apply to "the soil fraction less than two millimeters [.0787 inches] in size," which is inclusive of "dust" and other small particles. WAC 173-340-740(7). Second, MTCA regulations specifically provide that "more stringent" soil cleanup standards can be applied "to address the potential health risk posed by dust at a site." WAC 173-340-740(1)(c)(iii)(emphasis added).[33]

Under MTCA, the definition of "site" is the same as the definition of "facility." WAC 173-340-200. "Facility" is broadly defined to include

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[32] NW Mint concedes no minimum level of a hazardous substance is required to meet this element of a prima facie MTCA case." Op. Br. at 23, fn. 36.

[33] This "more stringent" approach to establishing cleanup standards for "dust" is understandable in light of testimony from experts on both sides that dust particles and metal vapor fumes pose a greater human health risk than larger particles of hazardous substances. RP 8/6 at 35-36; RP 8/9 at 18-20; RP 8/20 at 175.

a "building," such as the Auburn facility, as well as any other place a hazardous substance has come to be located.[34] Therefore, the plain language of MTCA confirms that hazardous substances in the form of "dust" in a "facility" or "building" are within the broad scope of MTCA. Similarly, the terms of NW Mint's lease explicitly apply broadly (with no "dust" exclusion) to releases of hazardous substances anywhere on the Auburn property, not just within the building. Ex. 1 at § 11.

3. Auburn Proved the Second Element of Its Cost-Recovery Claim: The Hazardous Substances Posed a "Threat or Potential Threat" to Human Health or the Environment.

Experts on both sides conceded that the hazardous substances at the Auburn facility posed a "threat or potential threat" to human health. RP 8/6 at 8, 26-27, 36-37, 45-46, 56; RP 8/7 at 63-64; RP 8/8 at 156-57; RP 8/9 at 5-6, 38-39; RP 8/16 at 132-33; RP 8/20 at 167-68, 197.

The most compelling evidence of the threat that NW Mint's contamination at the Auburn facility posed to human health and the environment is the risk assessment conducted by Auburn's toxicology expert, Dr. John Schell. Dr. Schell's risk assessment and his development of site-specific MTCA cleanup levels confirmed that the contamination

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[34] "Facility" means "(a) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) any site or area where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located" RCW 70.105D.020(4) (emphases added).

posed a threat to human health. *See* Section III(B)(7)(b) of this Brief discussing Dr. Schell's risk assessment.

4. Auburn Proved the Third Element of Its Cost-Recovery Claim: There Were "Releases" and "Threatened Releases" of Hazardous Substances at the Auburn Facility.

MTCA specifically provides for recovery of the cost of "any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance." RCW 70.105D.020(26) (emphasis added). Significant portions of Auburn's remedial action costs fall into this "investigative and monitoring" category. Exs. 58, 79, 93, 115, 148, 158, 160, 173 (pp. 86-265).

a. Auburn Proved There Were "Releases" of Hazardous Substances to the Environment.

NW Mint asserts there were no "releases" or "threatened releases" of hazardous substances to the "environment" at the Auburn facility. Op. Br. at 27-28. As detailed below, NW Mint's assertion ignores documentary and testimonial evidence, including from NW Mint's own experts, proving that there were both actual releases and threatened releases of hazardous substances to the environment at the Auburn facility. Exs. 58, 79, 170 (Tab F, photos 44-49), 173 (pp. 127, 481, 588-89); RP 8/14 at 57; RP 8/20 at 22 (Dr. Mackay's estimate of a release of "a microgram per minute" of silver fumes to the environment during melt operations).

b. NW Mint's Arguments About "Releases" of Hazardous Substances Are Unsupported by Legal Authority and Conflict with the Broad Remedial Purposes of MTCA.

NW Mint's arguments about whether there were "releases" of hazardous substances at the Auburn facility (Op. Br. at 27-32) rely on a narrow interpretation of "environment," a term used in the definition of "release" under MTCA.[35] "Environment" is not defined in the MTCA statute but is defined in MTCA regulations as follows:

> "Environment" means any plant, animal, natural resource, surface water (including underlying sediments), groundwater, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington.

WAC 173-340-200.

NW Mint contends, without citation to any legal authority, that the term "land surface" must be interpreted to exclude roofs, concrete loading docks, and similar man-made land surfaces. Op. Br. at 28. NW Mint's narrow interpretation of the term "land surfaces" would exclude from MTCA's broad scope any "releases" of hazardous substances on the exterior surface of any building or structure or on any man-made land surface such as a street, sidewalk, parking lot, or school playground. Such an interpretation would restrict MTCA to a narrow category of land

[35] "Release" under MTCA is defined as "any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances." RCW 70.105D.010(25).

surfaces, contrary to the broad remedial purposes of MTCA.[36] Under NW Mint's narrow approach, applying MTCA only to releases on land surfaces consisting solely of "soil" – and would allow polluting parties to escape liability for contamination on a wide range of "facilities," improved surfaces, and developed properties where such contamination is most likely to be found.

In effect, NW Mint argues that the definition of "land surface" should be narrowly limited only to surfaces consisting entirely of "soil," as defined under MTCA.[37] Op. Br. at 20. Excluding all non-soil land surfaces in urban and other developed areas from the reach of MTCA would be directly contrary to the statute's express purpose and policies:

> (1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. ...
>
> (2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. ... The main purpose of [MTCA] is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters. ...
>
> (4) It is in the public's interest to ... clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.
>
> (5) ...[I]t is essential that sites be cleaned up well and

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[36] Courts have broadly interpreted the terms "release" and "threatened release." ***Amoco Oil Co. v. Borden. Inc.***, 889 F.2d 664, 669 (5th Cir.1989).

[37] In fact, federal cases under CERCLA confirm that the term "land" is not limited to "soil" but must be must be interpreted to include buildings. *See* footnote 47, *infra.*

> expeditiously, [and] each responsible person should be liable jointly and severally.

RCW 70.105D.010.

These policies specifically refer to "sites." Under MTCA, "site" means the same as "facility," which includes buildings and a wide range of man-made land surfaces as well as "any site or area where a hazardous substance ... has ... come to be located." WAC 173-340-200. NW Mint's narrow view of "land surface" as an element of the "environment" is contrary to MTCA's broad scope and declared policies. NW Mint's proposed narrow definitions of "environment" and "land surface" have never been adopted by any Washington or federal court under MTCA or CERCLA.[38]

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[38] The holdings of cases cited by NW Mint regarding "releases" and "threatened releases" (Op. Br. at 27-31) do not support NW Mint's argument that it is not liable under MTCA. None of the cases cited involved facts comparable to the Auburn facility where there were releases of hazardous substances to exterior land surfaces and outside air. The following is a summary of the actual holdings of the cases cited by NW Mint: *See* ***Cyker v. Four Seasons Hotel Ltd***, No. 90-1129-Z, 1991 WL 101 (D. Mass. 1991)(no CERCLA liability for chemical releases to indoor air); ***Fertilizer Institute v. U.S. E.P.A***, 935 F2d. 1303 (D.C. Cir. 1991)(vacating proposed EPA regulation because it erroneously interpreted "release" under CERCLA to include placement of a hazardous substance into an "unenclosed containment structure" regardless of whether the substance actually volatilizes into the air or migrates into water or soil); ***3550 Stevens Creek Associates, Ltd. V. Barclays Bank***, 915 F.2d 1355, 1361 (9th Cir. 1990)(no CERCLA liability for sale of building with asbestos containing materials because no "disposal" of hazardous substances and no evidence that asbestos fibers "may enter the environment or be emitted into the air"); ***Greco v. United Technologies Corp.***, 277 Conn. 337, 343-44, 356-57, 890 A.2d 1269 (2006) (CERCLA does not preempt statute of limitations for state law wrongful death claim because CERCLA definition of "release" excludes exposure "solely within a workplace," [no similar exclusion in MTCA]); ***KN Energy, Inc. v Rockwell International Corp.***, 840 F.Supp. 95, 99 (D. Colo. 1993)(denying motion to dismiss CERCLA claim because complaint sufficiently alleged release of hazardous substances into the environment); ***Sycamore Industrial Park Associates v. Ericsson, Inc.***, 546 F.3d

c. NW Mint's Own Experts Testified There Were Releases of Hazardous Substances to the "Environment" - Hazardous Substance Metal Fumes Released to the Air Outside of the Auburn Facility.

One of NW Mint's experts, Peter Jewett, provided the trial court with some of the clearest evidence of on-going releases of hazardous substances into the "environment." He described releases of hazardous substances from NW Mint's operations to air outside of the building:

> Q. Can you explain a little bit about the processes that led to the deposition of the metal chunks on to the roof?
> A. My understanding is that they melted silver, so it created silver fumes, and this -- they had a hood that captured those fumes, so those are hot. I mean, they are 1,600 degrees, something like that. So that hot vapor is now going out a stack. So the minute that hot vapor meets cold

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847, 852 (7th Cir. 2008)(sale of property with asbestos-laden boiler system not a "disposal" under CERCLA where there was "no real possibility of asbestos entering the environment"); ***Powell Duffryn Terminals, Inc. v. CJR Processing, Inc.*** 808 F.Supp. 652 (N.D. Ill. 1992)(no allegation in complaint that hazardous substances in storage tanks were "capable of escaping into the environment"); ***Diverse Real Estate Holdings L.P. v. Int'l Mineral & Chemical Corp.***, No. 91 C 8090, 1995 WL 110138, p. 7 (N.D. Ill. 1995) (no threat of release under CERCLA based on "no evidence of a release of hazardous substances [from constructed pond] into the surrounding groundwater over the last thirty-six years"); ***Rivas v. Safety-Kleen Corp.***, 98 Cal.App.4th 218, 222, 234, 1991 Cal. Rptr.2d 503 (2002) (upholding dismissal of claims against manufacturers and suppliers of toxic chemicals; holding that California statute of limitations is not preempted by CERCLA, which expressly excludes "exposure to persons solely within a workplace" from the definition of "release"; CERCLA is not intended to address personal injury claims); ***Miller v. Mandarin Homes, Ltd.***, 305 Fed.Appx 976, 979 (4th Cir. 2009)(expert's testimony, "speculative as to the presence of a landfill and as to the existence of contamination," was inadmissible under *Daubert*); ***Elec. Power Bd. Of Chattanooga v. Westinghouse Elec. Corp.***, 716 F. Supp. 1069, 1080-81 (E.D. Tenn. 1988)(no CERCLA claim where electric transformers are "consumer products in consumer use," not "facilities," and leakage of dielectric fluids was not released as "waste"); ***Covalt v. Carey Canada Inc.***, 860 F.2d 1434, 1437, 1439 (7th Cir. 1988) (no CERCLA preemption of personal injury claim based on workplace exposure because "[a]sbestos encountered at work is not a toxic waste" and "[t]he interior of a place of employment is not 'the environment' for purposes of CERCLA").

> air, the air will cool down, the metals no longer exist in a vapor phase, and therefor solidify. So it would almost be immediate that that material would solidify and fall out, and that's why you see the chunks approximate to that vent.

RP 8/14 at 57; Ex. 170, Tab F, Photos 44-49.

Mr. Jewett's testimony regarding these releases of hazardous substance metal vapors to the "cold air" outside of the building is consistent with the results of EBI's sampling, which showed that the highest levels of silver contamination found anywhere at the facility were near the furnace exhaust vent on the roof of the building where the metal vapors had solidified after being released to outside air. Ex. 173, pp. 127, 481, 588-89. NW Mint's toxicologist, Dr. Mackay, corroborated Mr. Jewett's testimony regarding releases of metal vapor particulates to the environment. He calculated that NW Mint's melting operations caused metal vapor releases to outside air at a rate of "a microgram per minute." RP 8/20 at 22-24.

This evidence provided by NW Mint's own experts alone is sufficient to support the trial court's finding of fact regarding releases of hazardous substances to the air outside of the building. (FF 106)

d. NW Mint's Arguments About What "Ecology Determined" Ignore Rules of Statutory Interpretation and Are Based on Testimony From a Single Ecology Employee.

NW Mint's argument that the trial court failed to give "due

deference" to "Ecology's decisions regarding the [Auburn facility]" (Op. Br. at 19) is fatally flawed in three ways. First, NW Mint misstates the rule of law regarding deference to an agency's interpretation of statutes it is charged with administering. Op. Br. at 19. An agency's interpretation of a statute within its expertise is accorded "great weight" only if the statute is ambiguous. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004), quoting *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Where a statute is not ambiguous, this Court interprets the meaning *de novo* and may substitute its judgment for that of the agency. *Id.* NW Mint has not argued that any of MTCA's statutory terms relevant to Auburn's cost-recovery action are ambiguous, and there is no evidence that Ecology offered any agency interpretation of any ambiguous statutory or regulatory provision of MTCA in this case.[39]

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[39] NW Mint cites six cases (Op. Br. at 19, ff. 23-26) in support of its argument that the trial court should have deferred to "Ecology's testimony and determinations" regarding the Auburn facility. ***Port of Seattle v. Pollution Control Hearings Bd.***, 151 Wn.2d 568, 593, 90 P.3d 659 (2004)(Ecology defending challenge to agency's § 401 water quality certification); ***State, Dep't of Ecology v. Theodoratus***, 135 Wn.2d 582, 957 P.2d 1241 (1998)(Ecology defending agency conditions on final water right certificate); ***Kittitas County v. E. Wash, Growth Mgmt. Hearings Bd.***, 172 Wn.2d 144, 256 P.3d 1193 (2011)(Ecology participated as amicus; Court confirmed Ecology's authority over appropriation of groundwater); ***United States v. Hoffman***, 154 Wn.2d 730, 116 P.3d 999 (2005)(deferring to Ecology regarding ambiguous statutory term); ***State, Dep't of Ecology v. PUD No. 1 of Jefferson County***, 121 Wn.2d 179, 849 P.2d 646 (1993)(confirming Ecology's authority to impose instream flow condition on § 401 water quality certification); ***State, Dep't of Ecology v. Tiger Oil***, 166 Wn.App. 720, 271 P.3d 331 (2012)(Ecology lawsuit to enforce MTCA consent decree; Ecology's investigative

Second, NW Mint's entire case for deference is based on statements it solicited from a single Department of Ecology employee, Russ Olsen.[40] Op. Br. at 13-15, 18-19. As discussed below, Mr. Olsen's statements were the product of NW Mint's attempts to manipulate and mislead him regarding the Auburn facility. NW Mint's "evidence" about what Ecology "determined" regarding the Auburn facility is tainted by its misconduct.[41]

Nine months before trial, NW Mint attempted to a solicit statement from an Ecology employee, Russ Olsen, to support its contention that the Auburn facility was "not a MTCA site." In February of 2012, NW Mint filed a declaration from one of its consultants, Peter Jewett, in support of a

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and remedial decisions reviewed under arbitrary and capricious standard).

Unlike the present case, each of these cases involved a challenge to a decision or the authority of Ecology. Not one of these cases is comparable to the facts of the present case, where one Ecology employee with no demonstrated authority to represent the agency (RP 8/13 at 5-11) provided factual testimony regarding applications submitted to the agency.

[40] ***Bostain v. Food Exp., Inc.,*** 159 Wn.2d 700, 716-17, fn. 7, 153 P.3d 846 (2007)(party's reliance on a letter from an agency employee is misplaced; "the employee's subjective understanding of the agency's intent is not a formal administrative decision entitled to any weight"), citing ***City of Sunnyside v. Fernandez***, 59 Wn.App. 578, 581, 799 P.2d 753 (1990)(agency interpretations to be accorded deference are "expressions of the agency's legislative and regulatory power and ... informal rulings of the agency or its officers"; an agency employee's subjective understanding of agency intent is not an agency interpretation).

[41] NW Mint fails to cite any specific "Ecology decision" that should be entitled to special deference. NW Mint alleges that Ecology provided "testimony and determinations regarding MTCA's inapplicability to the [Auburn facility]," but no citations to any record evidence are provided. Op Br. at 19. Any "determination" by Mr. Olsen or Ecology regarding whether a "release" had occurred at the Auburn facility is a factual issue on which Mr. Olsen and Ecology are not entitled to special due deference. Op. Br. at 13-15.

motion for summary judgment regarding NW Mint's MTCA liability. CP 3717-34. As an exhibit to his declaration, Mr. Jewett filed a copy of an email from Mr. Olsen dated October 19, 2011. CP 3733.

Mr. Olsen's statements in the copy of the email provided to the parties and the trial court were illegible. *Id.* Mr. Jewett and NW Mint represented to the trial court that Ecology had determined that the removal of hazardous substance metals at the-Auburn facility "is not a MTCA cleanup action." CP 3718-19 (¶¶ 5-6). Auburn, however, obtained and filed a legible copy of Mr. Olsen's email, which contradicted NW Mint's assertion and confirmed that that he (and Ecology) would not rule out applying MTCA to interior building environments.[42] CP 3757 (¶ 13); CP 3824. The trial court then denied NW Mint's motion for summary judgment regarding MTCA liability. CP 3858-60.

Shortly thereafter, NW Mint filed a "motion to re-open summary judgment." CP 3872-82. That motion was based on a letter from the Ecology employee, Russ Olsen, in response to NW Mint's submission of an application to Ecology's Voluntary Cleanup Program ("VCP"). In his letter response to the VCP application, Mr. Olsen stated that "the release [NW Mint] reported does not constitute a hazardous waste site under

[42] In the previously illegible portion of the email, Russ Olsen informed Mr. Jewett that he could not say for certain whether a building with indoor contamination would be a MTCA site. CP 3821-24.

[MTCA]" because "metal dust was present in the building, but did not enter the 'environment.'" Ex. 260, p. 2.

In response to NW Mint's "motion to re-open summary judgment," Auburn explained to the trial court that Mr. Olsen's letter was based on incomplete and misleading evidence. CP 3883-96. Auburn explained that NW Mint had failed to give Ecology evidence of releases of hazardous substances at several locations outside of the building. RP 8/33 at 100-01; Ex. 173 at 127, 481. Auburn's response took NW Mint to task for deceiving an Ecology employee and for attempting to use the VCP program to obtain an opinion on MTCA liability that Ecology is not authorized to make. CP 3886-95. NW Mint immediately withdrew its motion to re-open the trial court's summary judgment ruling. CP 3961-62.

Nineteen days before trial, NW Mint produced a second letter from Mr. Olsen.[43] Ex. 285. The second letter was similar to the first, but there were three important changes. First, Mr. Olsen clarified that he was making "no determination as to whether there is a threatened release of a hazardous substance" at the Auburn facility. *Id.*, p. 1 (emphases added). RP 8/13 at 219.

Second, Mr. Olsen stated that "Ecology received no sampling data

[43] At trial, NW Mint's attorney described this VCP application as a "non-standard approach" that was "the only way I could get Ecology to provide its opinion on whether this was a MTCA site." RP 8/13 at 197.

of surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air." *Id.*, p. 2. This statement was not true. Auburn's final cleanup report (Ex. 173) – a 912 page report with detailed sampling data - had been made available to Mr. Olsen.[44] RP 8/13 at 134. Ex. 173.

Finally, Mr. Olsen's second letter stated that his "decision" did not determine the MTCA liability and cost-recovery issues between Auburn and NW Mint, specifically NW Mint's liability for the contamination at the Auburn facility, because "[s]uch determinations are made by a court." Ex. 285, p. 2. Mr. Olsen conceded at trial that neither he nor Ecology would issue an opinion regarding whether a facility "is a MTCA site":

> ... the purpose of the Voluntary Cleanup Program is to deal with independent cleanup sites, where the owner is actively pursuing cleanup in accordance with the regulation[s]. It isn't there to define sites or for purpose of sites, or whether or not something is a site.

RP 8/13 at 150 (emphasis added).

All of NW Mint's statements and arguments about what "Ecology determined" regarding the Auburn facility (Op. Br. at 113-15, 17-20) are

[44] Mr. Olsen conceded at trial that he had received the cleanup report (including sampling data). RP 8/13 at 134. He also admitted that he had only "skimmed" the narrative and had only "skimmed" the data tables in the 912-page document and the hundreds of pages of other reports provided to him. *Id.* at 136. Even if Mr. Olsen reviewed only the 912-page final cleanup report (and not the hundreds of pages of other documents submitted with the VCP application), he would have had to "skim" that report at a rate of 2.5 pages per second to review it in one hour, which is the total amount of time he estimated he spent reviewing "the entire package of the VCP application." RP 8/13 at 134.

tainted by NW Mint's manipulative and misleading actions. Moreover, Mr. Olsen's statements regarding NW Mint's VCP application are not determinations by the agency regarding NW Mint's liability for Auburn's remedial action costs, which is solely for the courts to decide, as Mr. Olsen conceded.[45] Ex. 285, p. 2. Mr. Olsen admitted that he had limited, if any, authority to speak for the Department of Ecology on any issues. RP 8/13 at 5-11. Finally, much of Mr. Olsen's testimony at trial turned out to be supportive of Auburn's position regarding its cost-recovery claim.[46]

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[45] The only "determination" made by Mr. Olsen was whether to accept an application to the Voluntary Cleanup Program. RP 8/13 at 161. His only "decision" regarding the Auburn facility was to reject NW Mint's VCP applications. He rejected the applications because he accepted NW Mint's misrepresentations about the nature and extent of contamination at the Auburn facility and because he didn't bother to review for himself the sampling evidence of releases to the environment outside of the building. RP 8/13 at 130-138.

Mr. Olsen's letters and testimony were based on his role as an employee in one program in one division of a regional office of a state agency. This cannot be deemed an agency determination regarding NW Mint's MTCA liability. Such a determination is exclusively within the jurisdiction and authority of the trial court and this Court:

> Ecology will not determine whether your independent remedial action is the substantial equivalent of an Ecology-conducted or Ecology-supervised remedial action. Such determinations are made by a court, not by Ecology. *See* RCW 70.105D.080.

CP 3911-12 ("VCP Overview" Department of Ecology website: http://www.ecy.wa.gov/programs/tcp/vcp/vcp2008/vcpservices.html)

[46] One of the headings of NW Mint's arguments refers to "Ecology's determination that MTCA does not apply to this case because "dust" is not 'soil.'" Op. Br. at 20. However, the only Ecology testimony cited (RP 8/13 at 21-22) does not provide evidence of any "Ecology determination" regarding the dust/soil issue, only factual information about Mr. Olsen's lack of experience with specific types of MTCA sites. Moreover, NW Mint's "Ecology's determination" argument is directly contrary to Mr. Olsen's testimony at trial confirming that "dust" is not excluded from MTCA regulations and that Ecology has not determined that MTCA is inapplicable to "dust."

e. Even if No Actual Releases Of Hazardous Substances to the Environment Had Occurred at the Auburn Facility, Auburn Would Be Entitled to Recover Its Remedial Action Costs Based on Proof of "Threatened Releases" of Hazardous Substances.

MTCA allows recovery of remedial action costs incurred to address "threatened releases" of hazardous substances. RCW 70.105D.020(26), RCW 70.105D.080. The trial court's conclusion regarding NW Mint's liability for the "release or threatened release of hazardous substances at the Auburn facility," CL 5, is consistent with federal cases decided under CERCLA, the federal counterpart of MTCA. Washington courts have found CERCLA cases to be persuasive authority when interpreting MTCA. *ASARCO v. Dep't. of Ecology*, 145 Wn.2d 750, 754, 43 P.3d 471 (2002) ("MTCA was modeled on CERCLA, and we have found CERCLA case law persuasive in interpreting MTCA").

NW Mint contends that MTCA liability cannot arise from contamination confined to interior building areas. Op. Br. at 27-32. NW Mint has not cited any relevant Washington case law, federal case law, statute or regulation to support this argument. Moreover, any such

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Q. Where in MTCA regulations, is dust excluded from the definition of soil?

A. It's not.

Q. So dust is regulated as soil if it meets the size fraction that's enumerated in the regulation?

A. Ecology would reserve the right, correct.

RP 8/13 at 173 (Russ Olsen).

argument ignores undisputed evidence that the metal dust contamination at the Auburn facility was not limited to areas inside the building. Ex. 173, pp. 127, 481; RP 8/14 at 57; RP 8/20 at 22-24.

Under CERCLA, investigation and cleanup costs are recoverable even when incurred to remove contamination that is limited to interior building areas. *See, e.g., BCW Associates, Ltd. v. Occidental Chemical Corp*, No. 86-5947, 1988 WL 102641 (E.D.Pa. 1988)(awarding $967,850.48 in response costs to investigate and remediate hazardous lead dust entirely within an industrial building).[47] The *BCW* court found that remediation costs were recoverable for addressing this metal dust contamination, even without any evidence of an actual release to the environment. *Id.* at 22; *See also Emhart Industries, Inc. v. Duracell Int'l,*

[47] In *BCW,* Firestone attempted to avoid CERCLA liability by arguing that disposal of hazardous substances within a warehouse was not disposal "into or on any land or water." *Id.* at 17. The *BCW* court rejected that "unduly narrow" interpretation: "It is clear that Congress intended the term" land" to encompass buildings and other types of real estate ...." *Id.* The same result was reached in ***Amland Properties Corp. v. Aluminum Co. of America***, 711 F. Supp. 784 (D. N.J. 1989). In *Amland*, Alcoa made an argument identical to NW Mint's "land surface" argument, contending that the spilling of hazardous substances (PCB-containing fluids) onto the floor of an industrial building "is not disposal 'into or on any land or water.'" *Id.* The *Amland* court rejected this argument, reasoning that "a disposal can be such that hazardous waste 'may' enter the environment; under Alcoa's reading, a disposal would require that the waste in fact reach the environment." *Id.* at 792 (spills or leaks of PCB's entirely within the plant building are considered "disposal" within the meaning of CERCLA). *See also* ***United States v. Fleet Factors Corp.***, 821 F. Supp. 707 (S.D. Ga. 1993)("if the phrase 'any land' is read so narrowly as to include only the open environment, the latter portion of the definition – such that the substances 'may enter the environment or ... the air ... or the water" – is mere surplusage;" holding that spilling of chemicals inside a building constitutes "disposal" under CERCLA).

Inc., 665 F.Supp. 549, 574 (M.D. Tenn. 1987)(spilling of hazardous substances (PCBs) indoors constituted "disposal" under CERCLA).

NW Mint erroneously contends that *BCW* is "an unreported [sic] CERCLA opinion" and that the decision "has been rejected by many courts." Op. Br. at 29. Both contentions are untrue. *BCW* was decided by a federal district court in the Third Circuit. Under Third Circuit rules, unpublished decisions may be cited as precedential authority.[48] Therefore, under GR 14.1(b), it is proper for Auburn to cite and for this Court to rely on *BCW* as persuasive authority in determining MTCA issues. *ASARCO*, 145 Wn.2d at 754.

NW Mint does not cite a single case in support of its assertion (Op. Br. at 29) that the *BCW* decision "has been rejected by many courts," and Auburn has found none.[49] NW Mint's statements about the *BCW* decision are erroneous and should be disregarded. *BCW* directly supports Auburn's claim for recovery of remedial action costs, allowing recovery for the

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[48] "Citing Unpublished Federal Appellate Opinions Issued Before 2007," Robert Timothy Reagan, Federal Judicial Center, March 9, 2007. Appendix A.

[49] A WESTLAW search shows that *BC*W has been cited in 35 federal and 2 state cases, but has never been "rejected" by any court. It was factually distinguished in one state court decision. ***Ruffing ex rel.Carlton v. Union Carbide Corp.***, 193 Misc.2d 350, 367-70, 746 N.Y.S.2d 798 (2002)(transfer of chemicals from clothing to wife to unborn child not a "release" under CERCLA). One state court and one federal court declined to follow *BCW* on issues unrelated to the present case. ***State v. Howe Cleaners, Inc.***, 188 Vt. 303, 339-40, 9 A.3d 276 (2010)(innocent-landowner defense); ***General Electric Co. v Litton Indus. Automation Systems, Inc.***, 920 F.2d 1415, 1422, fn. 10 (1990)(attorney fee award under CERCLA).

removal of indoor contamination, even without evidence of releases outside of the building. In this case, the record evidence shows that hazardous substances had been released inside and outside of the building, surpassing the requirements of *BCW*. Ex. 173, pp. 127, 481, 588-89; RP 8/14 at 57; RP 8/20 at 22-24,

The trial court found "there was a threat of future releases to the environment" at the time NW Mint vacated the Auburn facility. FF 98. This finding is supported by evidence that hazardous substances at the facility exceeded MTCA regulatory cleanup levels, that on-going releases to the environment had occurred, and that the contamination posed a human health threat. Ex. 160, ¶ 16; RP 8/9 at 10-28; RP 8/14 at 57; RP 8/20 at 22-24; Ex. 173 at p. 127, 481. NW Mint has not shown that the trial court's "threat of release" finding is erroneous.[50] FF 98.

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[50] NW Mint devotes four pages of its brief and cites eight CERCLA cases in support of its argument that Auburn's response costs were not "necessary." Op. Br. at 34-37. ***Iron Partners, LLC v. Maritime Admin***., No. 08-CV-05217, WL 2011 4502139 (W.D. Wa. 2011); ***Carson Harbor Village, Ltd., v. Unocal Corp.***, 270 F.3d 863 (9th Cir. 2001); ***Diverse Real Estate Holdings L.P. v. Int'l Mineral & Chemical Corp.***, No. 91 C 8090, 1995 WL 110138, p.7 (N.D. Ill. 1995); ***Regional Airport Auth. of Louisville v. LFG, LLC***, 460 F.3d 697 (6th Cir. 2006); ***G.J. Leasing Co. v. Union Elec. Co.***, 54 F.3d 379 (7th Cir. 1995); ***United States v. Hardage***, 982 F.2d 1436 (1oth Cir. 1992); ***Southfund Partners III v. Sears***, 57 F.Supp.2d 1369 (N.D. Ga. 1999); ***New York State Elec. & Gas Corp. v. First Energy Corp.***, 808 F.Supp.2d 417 (N.D.N.Y 2011).

All of these cases are based on a specific CERCLA provision limiting recovery of cleanup costs to "necessary costs of response ... consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A)(B) (emphasis added). This language and CERCLA's "cost-effective" requirement 42 U.S.C. § 9621(a) are both absent from MTCA and do not apply to Auburn's MTCA cost-recovery claim. ***Iron Partners, LLC v. Maritime Admin.***, No. 08-CV-05217, WL 2011 4502139 (W.D. Wa. 2011).

C. Auburn Met MTCA's "Substantial Equivalence" Standard Based on the "Overall Effectiveness" Standard of *Taliesen*.

Under MTCA, recovery of remedial action costs is allowed for "remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action." RCW 70.105D.080. NW Mint argues for a very narrow and restrictive "substantial equivalence" standard. Such a narrow standard would be contrary to Washington law and the broad and remedial purposes of MTCA.[51]

MTCA regulations provide specific guidance regarding the "substantial equivalence" standard for MTCA cost-recovery actions.[52]

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[51] MTCA encourages parties to investigate environmental conditions in facilities such as the former NW Mint facility and allows recovery of all "remedial action" costs incurred "to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment." RCW 70.105D.020(26).

[52] **Private Rights of Action**.

> (1) **Purpose**. ... The purpose of this section is to facilitate private rights of action and minimize department staff involvement in these actions by providing guidance to potentially liable persons and the court on what remedial actions the department would consider the substantial equivalent of a department-conducted or department-supervised remedial action. In determining substantial equivalence, the department anticipates the requirements in this section will be evaluated as a whole and that a claim would not be disallowed due to omissions that do not diminish the overall effectiveness of the remedial action.
>
> ....

The regulation's twin goals (facilitating private rights of action and minimizing Ecology's involvement in these actions), ensure that parties who act responsibly to investigate and clean up contamination can recover these costs without procedural barriers. WAC 173-340-545. This regulation has never been applied to punish remediating parties (such as Auburn) by imposing barriers to cost-recovery in favor of recalcitrant parties (such as NW Mint).

The leading Washington case on the "substantial equivalence" standard was decided by this Court. In *Taliesen Corp. v. Razore Land Co.*, 135 Wn.App. 106, 144 P.3d 1185 (2006), this Court rejected arguments virtually identical to those that NW Mint has asserted regarding the "substantial equivalence" test:

> Ecology considers an independent cleanup to be a "substantial equivalent" if it includes five elements listed in WAC 173-340-545(2)(c) [reporting the cleanup to Ecology; absence of Ecology objections to the cleanup; reasonable public notice; substantial compliance with technical cleanup standards; and documenting disposal of the hazardous substances].
>
> ....
>
> But the fact that Taliesen's cleanup did not satisfy the five

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> (4) **Technical standards and evaluation criteria**... This subsection shall be used to determine if the remedial actions have been conducted substantially equivalent with the technical standards and evaluation criteria contained in this chapter. ... When this chapter requires a consultation with, or an approval or determination by the department, such a consultation, approval or determination is not necessary for remedial actions to meet the substantial equivalence requirement under this section.

WAC 173-340-545 (emphases added).

> elements listed in WAC 173-340-545(2)(c) does not mean that it was not substantially equivalent to a cleanup conducted by Ecology. ... Ecology offers its regulations as "guidance" to private parties, not as absolute requirements. Substantial equivalence is determined by looking at the cleanup's "overall effectiveness."

135 Wn.App. at 119-20 (emphases added).

There is clear evidence (and no real dispute) regarding the "overall effectiveness" of Auburn's cleanup. In fact, virtually all of NW Mint's opposition to Auburn's MTCA cost-recovery claim before, during and after trial was based on its contention that Auburn's cleanup was too effective and that Auburn should have done less or nothing at all regarding the contamination at the Auburn facility. *See, e.g.,* Op. Br. at 48 (asserting that NW Mint's only obligation was to leave the facility in a "broom clean" condition).

Relying on *Taliesen*, the trial court properly concluded that Auburn's cleanup met MTCA's "substantial equivalence" standard based on the "overall effectiveness" standard rather than based on compliance with a checklist of specific regulations.[53] CL 6.

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[53] NW Mint attempted to offer "legal opinion" testimony regarding MTCA's "substantial equivalence" standard from two witnesses: Peter Jewett, NW Mint's "MTCA expert," and Russ Olsen, an Ecology employee. However, the trial court properly excluded "legal opinion" testimony from these two individuals regarding Auburn's cost-recovery claim. CP 1678. RP 8/13 at 10, 24-25, 211-12, 224-25. The trial court and this Court, not NW Mint's witnesses, have exclusive authority and jurisdiction to determine all aspects of Auburn's MTCA cost-recovery claim, including the "substantial equivalence" issue. RCW 70.105D.080; Ex. 285, p. 2; RP 8/13 at 219.

D. As an "Operator" Under MTCA, NW Mint is Liable for Auburn's "Remedial Action Costs."

1. NW Mint is "Strictly Liable" for Auburn's Remedial Action Costs Because NW Mint "Operated the Facility at the Time of Disposal or Release of the Hazardous Substances."

MTCA's declared policy is to hold parties accountable for "irresponsible use and disposal of hazardous substances." *Pacificorp Envir. Remediation Co. v. WSDOT,* 162 Wn.App. 627, 655-56, 259 P.3d 1115 (2011), quoting RCW 70.105D.010(2). MTCA provides that "[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances ... is strictly liable, jointly and severally, for all remedial action costs ... resulting from the releases or threatened releases of hazardous substances." RCW 10.105D.040. The trial court correctly determined that NW Mint is liable for Auburn's "remedial action costs" because NW Mint "operated the facility at the time of disposal or release of the hazardous substances."[54] FF Nos. 95, 98, 100, 106, CL Nos. 1-4.

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[54] NW Mint ignores the term "disposal" as used in RCW 70.105D.040. "Disposal" is not defined under MTCA, but CERCLA adopts the definition of "disposal" as set forth in the Solid Waste Disposal Act: as follows:

> [t]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 9601(29) (emphases added). Under CERCLA, parties are liable for disposal even where hazardous substances have not been released to the environment. *See, e.g.,* cases cited at fn. 47 *supra.*

2. NW Mint's Own Experts Confirmed That NW Mint's Operations Resulted in On-Going Releases of Hazardous Substances to the Environment.

NW Mint's own experts provided conclusive evidence that NW Mint's operations resulted in releases of hazardous substances to the "environment" – the air outside of the building. RP 8/14 at 57; RP 8/20 at 22-24. *See* Section V(B)(4)(c) of this Brief. These releases of hazardous substances to the outside air were confirmed by sampling that showed high levels of contamination on the roof of the facility. Ex. 173, pp. 127, 481. The testimony of either Dr. Mackay or Mr. Jewett alone on this issue would be sufficient to support the trial court's finding of fact regarding releases of hazardous substances to the air outside of the building (FF No. 106) and the trial court's conclusions of law regarding NW Mint's MTCA liability as an "operator" of the facility due to releases of hazardous substances to the environment. CL 2, 3. No other evidence of a "release" is required to establish NW Mint's MTCA liability.[55]

3. NW Mint's Assertions Regarding the Pre-Lease Condition of the Auburn Facility Are Speculative and Erroneous.

At no time during the three years prior to trial did NW Mint offer any evidence that the hazardous substance metal dust/residue at the

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[55] "Like CERCLA, no minimum level of 'hazardous substance' is required to trigger MTCA liability." ***City of Seattle v. WSDOT***, 98 Wn.App 165, 172, 989 P.2d 1164 (1999).

Auburn facility was attributable to sources other than its metal fabrication operations.[56] At trial, one of NW Mint's experts, Dr. Mackay, speculated that hazardous substances might have been present in various building construction materials. RP 8/20 at 42-47. However, Dr. Mackay conceded that his testimony about other possible sources of metal dust contamination was not based on analysis of data, but on conjectural "hypotheses":

> I have come up with a number of hypotheses with regards to it, you know. Without actually analyzing it, I can't, you know, stand and say, "This definitely came from in a -- or this came from this," but, you know, looking at, you know, the particular operations that went on at the facility, what the nature of the facility was, and the nature of the contaminants that we came up with, I can't see that the particular materials that we were dealing with at Northwest Mint were the ones that were the result of the hazards that were identified by Dr. Schell.

RP 8/20 at 46-47.

NW Mint's speculation about metal contamination attributable to construction activities at the facility prior to 2002 (Op. Br. at 4-5) is not supported by the evidence. The trial testimony cited by NW Mint refers

[56] In its response to EBI's initial investigation report (Ex. 58) in 2010, one of NW Mint's consulting firms, AMEC, suggested that the metal dust contamination might be attributable to "background" levels of metals naturally occurring the environment. Ex. 75 at 5-6. However, both AMEC experts conceded at trial that they had not conducted sampling or other analysis to show that the contamination at the Auburn facility could be attributed to "background" levels of metals in the environment. RP 8/16 at 138-39; RP 8/20 at 152-54. One of NW Mint's other consultants, Ms. Black, testified that the contamination at the Auburn facility could not be attributed to "background" levels of these metals. RP 8/6 at 34.

only to "concrete dust and steel dust," and makes no reference to any of the metals found in the facility in April of 2010. RP 8/2 at 94. In contrast, the testimony from NW Mint's own experts, confirmed that the hazardous substances requiring remediation resulted from NW Mint's metal fabrication operations. RP 8/14 at 57; RP 8/20 at 22-24. *See* Section V(B)(4)(c) of this Brief.

Consistent with testimony from both sides attributing the contamination to NW Mint's operations, the trial court entered a finding to this effect.[57] FF 106. NW Mint has not cited any record evidence showing that this factual finding is erroneous. It has offered only speculation that there might have been other sources of contamination. Op. Br. at 32-34. That speculation is contradicted by the testimony of NW Mint's own experts regarding releases of hazardous substance metals to the environment. RP 8/14 at 57; RP 8/20 at 22-24.

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[57] Dr. Mackay speculated that pre-2002 construction activities at the Auburn facility might have "contributed" to the level of hazardous substance metals found at the Auburn facility in 2010. RP 8/20 at 217-18. It was reasonable for the trial court to discount Dr. Mackay's speculative testimony about other possible sources of metal contamination in light of Dr. Mackay's dubious testimony on this issue. For example, Dr. Mackay testified that elevated levels of metal residues on the roof could be attributed to the steel surface of the roof. RP 8/20 at 155. In fact, the entire roof of the Auburn facility was covered with a rubber membrane, not steel. *Id.* The credibility of experts offering conflicting testimony is for the trier of fact. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).

E. NW Mint is Liable for Auburn's Cleanup Costs Based on NW Mint's Breach of Section 11 of the Lease.

Independent of NW Mint's liability under MTCA, NW Mint is liable to Auburn under the lease for the cost of investigating and cleaning up the contamination. NW Mint's liability under the lease arises from a straightforward application of the lease's prohibition regarding use, disposal, or release of "Hazardous Waste" found in Section 11.[58]

NW Mint argues that it is not liable for Auburn's cleanup costs under the lease because (1) Auburn did not prove any actual risk of harm to human health or the environment, (2) NW Mint complied with applicable statutes and regulations, and (3) NW Mint left the facility in a "broom clean" condition. Op. Br. at 40-49. These arguments lack merit.

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[58] Section 11 of the Lease provides:

> 11. HAZARDOUS WASTE. Tenant shall not ... dispose of or otherwise allow the release of any hazardous waste or materials in, on or under the Premises ... or in any improvements placed on the Premises. ... Tenant represents and warrants to Landlord that Tenant's intended use of the Premises does not involve the use, production, disposal or bringing on to the Premises of any Hazardous Waste. As used herein, the term "Hazardous Waste" includes any substance ... defined or designated as hazardous ... by any federal, state or local statute, regulation, rule or ordinance ... including, but not limited to ... the Washington Model Toxics Control Act ("MTCA") RCW 70.105D.010 et seq. ... Tenant shall indemnify ... Landlord against any and all ... cleanup costs, remedial actions, costs and expenses ... (including, without limitation, consultant fees, attorneys' fees and disbursements) which may be ... incurred or paid by ... Landlord ... by reason of ... the acts or omissions of Tenant ... resulting in the release of Hazardous Waste. This indemnity and Tenant's other duties under this paragraph 11 shall survive the termination of this Lease.

Ex. 1, § 11.

1. NW Mint's "Actual Risk" Argument Ignores Dr. Schell's Risk Assessment.

Section 11 of the lease does not require proof of an actual risk of harm to human health or the environment as alleged by NW Mint. Op. Br. at 40-44. In any event, the human health risk assessment performed by Dr. Schell established that the contamination at the Auburn facility exceeded MTCA's regulatory cleanup levels and posed a threat to human health. [59] RP 8/9 at 10-28; Ex. 160, ¶16.

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[59] In support of its "no actual risk" argument regarding its liability under the lease, NW Mint points to Auburn's 2007 Phase I Environmental Site Assessment ("ESA") and a later December 2010 Phase I ESA. Op. Br. at 40-44. NW Mint contends that these documents show that there was no contamination at the facility in 2007 or in April 2010 at the end of the lease. *Id.*

The trial court entered detailed findings of fact regarding Auburn's 2007 pre-purchase inspection of the Auburn property. FF Nos. 35-51. NW Mint has not challenged any of these findings. The trial court found that Auburn's 2007 "due diligence" investigation met industry and federal standards for such investigations and found that Auburn had no reason to know about "the extent to which [NW Mint's] coin/medallion minting operation could cause significant amounts of metal fumes, dusts and residues [to] be released throughout the facility and result in a threat or potential threat to human health or the environment." FF Nos. 36, 40, 41, 45, 47, 49, and 50 (all unchallenged).

NW Mint's arguments (Op. Br. at 4044) fail to acknowledge that pre-purchase "Phase I ESA" investigations do not involve sampling and testing at a facility and are not comparable to a "closure" inspection of a contaminated facility. RP 8/1/ at 14-15.

NW Mint also contends that a third Phase I ESA report prepared by EBI for Auburn in December of 2010, prior to the cleanup of the Auburn facility, found "no conditions that presented a risk to human health or the environment." Op Br. at 44. NW Mint ignores two important facts: (1) the December 2010 Phase I ESA report was a draft, not a final report, and (2) the report included a specific disclosure of the contamination problem caused by NW Mint's operations. Ex. 250, second title page, p. 22 (§ 4.3.9); RP 8/1 at 170-71, 178-79.

Finally, there are no factual or legal grounds to support NW Mint's contention that "residual metallic dust" was present at the Auburn facility "at lawful, de minimus levels." Op Br. at 44 (no citations to factual record or legal authority).

2. NW Mint's Obligation Under Section 11 of the Lease is Not Limited to Compliance With Applicable Regulations.

NW Mint contends it is "only liable if (1) it failed to comply with a statute, regulation or order related to hazardous wastes; and (2) Auburn incurred costs and expenses to 'effect such compliance.'" Op. Br. at 46. This argument misconstrues Section 11 of the lease. NW Mint assumed contractual liability for more than regulatory compliance. NW Mint agreed to avoid all releases of hazardous substances. Ex. 1 at § 11. Dr. Schell's risk assessment showed that the contamination exceeded MTCA's regulatory cleanup levels and that remediation was required to achieve compliance with MTCA. RP8/9 at 10-28; Ex. 160. Auburn incurred remedial action costs to achieve compliance with MTCA.[60] Exs. 109, 158, 188, 189, 193, 292; FF 125 (as amended – CP 1736). NW Mint has failed to show that the trial court's findings and conclusions regarding NW Mint's liability under the lease are in error. FF 10-16, 92-112; CL 11-17.

3. Section 13 is Not the Lease's Only "Cleanliness Standard."

NW Mint argues that the only "cleanliness standard" in the lease is the requirement in Section 13 that NW Mint "quit and surrender the Premises ... in a neat and broom clean condition." Op. Br. at 28. In effect, NW Mint argues that its cleanup obligations under the lease be

[60] Auburn's remedial action costs included cleanup work performed outside of the building. *See, e.g.*, CP 3898 (¶ 12), 3952-60.

determined without any reference to Section 11. This argument contradicts two basic rules of contract interpretation. First, where there is a conflict between a general requirement in a contract and a specific requirement, the specific provision controls. *Diamond B Constructors, Inc. v Granite Falls School Dist.*, 117 Wn.App 157, 165, 701 P.3d 966 (2003). In this case, Section 11 applies specifically to releases of hazardous substances as defined under MTCA. The specific terms of Section 11 take precedence over the more general provisions of Section 13 when determining NW Mint's liability for Auburn's cleanup costs.

Second, if Section 13 were deemed the only lease provision relevant to Auburn's claim for recovery of remedial action costs, this would render Section 11 superfluous. Washington courts consider the entire contract when determining the parties' intent and will not interpret a contract in a manner that would render specific terms meaningless or superfluous. *Diamond*, 117 Wn.App. at 165. The trial court properly considered and applied Section 11 of the lease in finding NW Mint liable for Auburn's cleanup costs. FF 10-16, 92-112; CL 11-17.

F. The Trial Court Did Not Abuse Its Discretion When It Awarded Auburn's Reasonable Attorney Fees and Litigation Expenses.

Auburn supported its motion for attorney fees and litigation expenses with six declarations and hundreds of pages of documentation

describing the work performed by its attorneys and experts. CP 1785-2294. Auburn provided all billing statements, invoices, expense receipts, spreadsheets, and every other relevant billing record in its possession. *Id.* CP 3992-4060.

NW Mint asserted that Auburn's fees and costs were "excessive" and asked the trial court to cut Auburn's fees by over 60 percent and Auburn's litigation expenses by over 70 percent. CP 2319, 2338. After a hearing on May 17, 2013, the trial court entered a supplemental judgment and order dated June 4, 2012, awarding Auburn the following:

Attorney fees prior to December 2012	$1,116,279.33
Attorney fees from December 2012 through entry of the Supplemental Judgment	$50,000.00
Litigation expenses	$425,767.28
Credit for security deposit	($10,000.00)
Total Award	$1,582,046.61

CP 3585-93 (6/4/12 Order); CP 3583-84 (supplemental judgment).

The trial court made specific attorney fee reductions:

Reduction for work on unsuccessful claim	($37,000)
Reduction for "duplicative efforts at trial"	($64,480)
Total reduction in attorney fees[61]	($101,480)

Supp. FF 8, 9 (CP 3589).

[61] Auburn had previously made significant adjustments to its claim for attorney fees and costs: $30,327.17 (fees prior to trial), $45,977.18 (post-judgment fees), and $34,853.14 (remedial action consultant costs). CP 4054, 4058. These adjustments by Auburn total $111,757.49. With the trial court's reductions, the total of all adjustment to Auburn's fees and costs is **$213,237.49** ($600, $30,327.17, $45,977.18, $34,83.14, and $101,480). This belies NW Mint's assertions that Auburn made no adjustments to its fees and costs and that the trial court abused its discretion by failing to reduce Auburn's fees and by "awarding every penny" of Auburn's costs. Supp. Br. at 1, 3, 4, 5, 8, 10.

1. NW Mint Failed to Make Assignments of Error or Present Any Issues Regarding the Supplemental Judgment.

The trial court entered 16 findings of fact in support of the June 2013 supplemental judgment. CP 3587-93. NW Mint did not assign error to any of these findings. Therefore all 16 findings of fact are to be considered verities on appeal.[62] NW Mint also failed to assign error to any of the trial court's nine conclusions of law (CP 3591-93) and did not list any issues for review by this Court regarding the supplemental judgment. NW Mint's supplemental brief fails to meet the minimum requirements of RAP 10.3(a)(3). *Knatvold v. Rydman*, 28 Wn.2d 178, 183, 182 P.2d 9, 12 (1947)("It is not our function or duty to search the record for errors, but only to rule as to errors specifically claimed.").

2. Even If NW Mint Had Assigned Error to the Trial Court's Findings and Conclusions, Its Arguments Are Not Supported by the Factual Record or by Washington Law.

NW Mint argues that the trial court abused its discretion by failing to reduce Auburn's fees for "wasteful and duplicative work," for time spent on one unsuccessful claim, and for post-judgment matters. Supp. Br at 1, 4, 6. NW Mint also argues that the trial court abused its discretion by

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[62] ***Humphrey Industries, Ltd. v. Clay Street Associates, LLC***, 176 Wn.2d 662, 675, 295 P.3d 231(2103)("unchallenged findings of fact become verities on appeal"); ***Davis v. Dept. of Labor and Industries***, 92 Wn.2d 119, 123, 615 P.2d 1279 (1980)("[I]t is unnecessary for us to search the record to determine whether there is substantial evidence to support [unchallenged findings]. They are the facts of the case.")

awarding Auburn "every penny" of its litigation expenses. *Id.* at 7. NW Mint's arguments ignore both the factual record[63] and Washington law.[64]

Washington courts apply an "expanded cost recovery" standard for attorney fees and cost awards under MTCA, which is intended to create "an incentive to foster environmental cleanup and discourage protracted and expensive efforts to evade environmental responsibility." *Louisiana-Pacific v. ASARCO*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997).[65]

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[63] The only citations to "evidence" in NW Mint's supplemental brief are citations to arguments in NW Mint's trial court briefing (fn. 10, 12-14, 18, 25), to trial court orders (fn. 19, 27), or to Auburn's motion/reply and supporting declarations (fn. 5, 17, 18, 25, 29, 31, 35, 38-40), none of which constitutes evidence that the court abused its discretion in determining the amount of Auburn's attorney fees and litigation expenses.

[64] The trial judge who watches a case unfold is in the best position to determine the proper award of attorney fees. ***Morgan v. Kingen***, 141 Wn.App. 143, 163, 169 P.3d 487 (2007). A trial court must determine a reasonable award of attorney fees based on evidence that "need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work, (i.e., senior partner, associate, etc.)" ***Bowers v. Transamerica Title Ins. Co.***, 100 Wn.2d 581, 597, 957 P.2d 632 (1982). In determining the amount of a fee award, the trial court must consider the purpose of the statute allowing for attorney fees. ***Absher Constr. Co. v. Kent Sch. Dist. No. 415***, 79 Wn.App. 841, 846, 917 P.2d 1086 (1995). "MTCA's declared policy is to hold parties accountable for 'irresponsible use and disposal of hazardous substances.'" ***Pacificorp Envir. Remediation Co. v. WSDOT***, 162 Wn.App. 627, 655-56, 259 P.3d 1115 (2011), quoting RCW 70.105D.010(2).

[65] Auburn also has a right to recover its attorney fees and costs under Section 24 of the lease, which provides in relevant part:

> COSTS, ATTORNEYS' FEES AND INTEREST. If Landlord employs an attorney or if Landlord brings suit ... for breach ... of this Lease ..., Landlord shall be awarded its attorneys' fees, statutory court costs, and all other litigation costs and expenses expended or incurred in connection with such action ... and in any appellate ... proceedings. Ex. 1, § 24.

Because Auburn's claims under MTCA and under the lease are inextricably intertwined, *ASARCO*'s "expanded cost-recovery" standard for MTCA litigation should govern the award of attorney fees and costs in this case. CP 3589 (Supp. FF 8). NW Mint has not made any argument to the contrary.

a. NW Mint's "Wasteful and Duplicative Work" Arguments Are Without Merit.

The burden is on the party challenging an attorney fee award to "demonstrate that 'duplicative effort' occurred because more than one attorney attended various court proceedings." *Fiore v. PPG Industries, Inc.*, 169 Wn.App. 325, 353. 279 P.3D 972 (2012). NW Mint has failed to meet that burden.[66] NW Mint complains that the trial court should have found that Auburn' attorneys communicated too much and that only one Auburn attorney should have reviewed pleadings or attended depositions or hearings. Supp. Br. at 3-4. No legal authority is cited in support of such a rule.[67]

b. The Trial Court's Reduction of Auburn's Fees for One Unsuccessful Claim Was Not an Abuse of Discretion.

Auburn did not prevail on one claim, the removal of tenant improvements ("TI removal") claim. The trial court found that this TI removal claim "constituted a minimal amount of work," that it "was simply a very minor part of the litigation," and that it was "inextricably

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[66] All of NW Mint's allegations are based on unfounded assumptions and estimates of hours or fee amounts. Supp. Br. at 1-3. NW Mint makes no reference to specific time entries, billing records or other evidence that would allow its allegations to be checked against record evidence. Supp. Br. at 3-4.

[67] NW Mint also complains that "two partner-level attorneys" represented Auburn at unspecified depositions and hearings. This complaint ignores that NW Mint had as many or more attorneys in attendance at 18 of the 21 depositions taken in this case and further ignores that while Auburn had no more than two attorneys at any deposition, NW Mint had three partners in attendance at eight separate depositions. CP 3425 (¶ 9).

intertwined" with Auburn's other property damage and contamination claims.[68] Supp. FF 8 (CP 3589). The trial court adopted Auburn's proposal to reduce its attorney fees by 100 hours ($37,000 based on an average billing rate of $370/hour). *Id.* The trial court found this reduction to be "reasonable and frankly, perhaps generous." *Id.* NW Mint has not assigned error to this finding. In addition, NW Mint has not cited a single instance of any attorney or consultant work that pertained solely or predominantly to the unsuccessful TI removal claim.[69]

c. The Trial Court Did Not Abuse Its Discretion In Awarding Fees for Post-Judgment Proceedings.

NW Mint complains that Auburn's attorneys "spent unnecessary time on post-judgment matters." Supp. Br. at 6. NW Mint does not cite a single billing record or any other evidence to support its contention. Not only did Auburn incur post-judgment fees preparing extensive documentation in support of its motion for fees and costs, it was

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[68] Auburn's fee documentation showed that in three years there were only six instances where Auburn's attorneys recorded time specifically for work on the TI removal claim. CP 3424-25 (¶¶ 6-8).

[69] NW Mint also ignores the applicable legal standard for adjusting a fee award based on an unsuccessful claim. An adjustment is appropriate only for identifiable work on an unsuccessful claim that is unrelated to the successful claims.

> Where ... the trial court finds the claims to be so related that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.

Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994). Auburn's claims for property damage and contamination were all integrally related and involved the same basic facts. Supp. FF 8 (CP 3589). NW Mint has failed to show otherwise.

compelled to respond to NW Mint's post-judgment discovery requests regarding Auburn's experts.[70] CP 3992-96. In addition, NW Mint's 831-page filing in opposition to Auburn's attorney fees motion resulted in over-length briefing and voluminous document submissions to the trial court by both parties.[71] CP 2110-22, 2295-2341, 3501-53.

d. The Trial Court Did Not Abuse Its Discretion in Awarding Auburn Litigation Expenses Under the "Expanded Cost-Recovery" Standard of *ASARCO*.

NW Mint asserts that certain litigation expenses incurred by Auburn were "inappropriate." NW Mint's arguments ignore the broad scope of cost-recovery for MTCA cases established by the Washington Supreme Court:

> RCW 70.105D.080 does not limit the award of attorneys' fees and costs to the prevailing party to actual fees of attorneys and RCW 4.84.010 costs, and the court is authorized to additionally award

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[70] NW Mint also complains about the trial court's award of $50,000 for post-judgment fees and costs incurred by Auburn between December 2012 and the entry of the supplemental judgment on June 4, 2013. Supp. Br. at 7; Supp. FF 15 (CP 3591). NW Mint fails to disclose that this $50,000 award reflects a $45,977.18 reduction in the fees and costs actually incurred by Auburn during this time. CP 4054, 4056.

[71] NW Mint alleges that the trial court "refus[ed] to give NW Mint the opportunity to challenge their [sic] reasonableness of Auburn's claimed fees." Supp. Br. at 7. In fact, NW Mint had almost five full months to respond to Auburn's motion for fees and costs. Under Civil Rule 54(d)(2) and King County Superior Court Local Rules, Auburn could have noted such a motion within six court days, which would have given NW Mint four court days to respond to the motion. Instead, Auburn offered NW Mint an extended motion schedule (six weeks). CP 2110 (12/13/12 motion noted for hearing on 1/25/13). This schedule was expanded to five months due to NW Mint's demand for post-judgment discovery regarding Auburn's litigation expenses. There is no merit to NW Mint's contention that it was not provided an opportunity to challenge Auburn's attorney fees motion. It had five months to do so.

other reasonably necessary expenses of litigation based upon such equitable factors as the court determines are appropriate.

Louisiana-Pacific v. ASARCO, 131 Wn.2d 587, 604, 934 P.2d 685 (1997).

The trial court properly concluded that granting a "full recovery" of Auburn's litigation expenses would encourage environmental cleanups and would "discourage protracted and expensive efforts to evade environmental responsibility." Supp. CL 4 (CP 3592), quoting *ASARCO*, 131 Wn.2d at 587. In addition, the trial court entered a conclusion (unchallenged) that "[w]hen a contract specifies that costs beyond statutory costs are recoverable, the prevailing party is not limited to statutory costs, and the intention of the parties will be enforced. *Ethridge v. Hwang*, 105 Wn.App. 447, 462 20 P3d 958 (2001)."[72] Supp. CL 3 (CP 390).

All of NW Mint' objections to Auburn's litigation expenses (Supp. Br. at 8-10) lack merit. Under *ASARCO*, prevailing MTCA parties are entitled to recover not only statutory costs under RCW 4.84.010, but also "other reasonably necessary expenses of litigation based upon such equitable factors as the court determines are appropriate."[73] *ASARCO*, 131

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[72] NW Mint is bound by the lease, which provides that the prevailing party is entitled to recover "statutory court costs, and all other litigation costs and expenses expended or incurred in connection with such action ...." Ex. 1, § 24.

[73] The trial court identified specific equitable factors in support of its award of attorney fees and costs. Supp. FF 16 (CP 3591). NW Mint has not challenged this finding.

Wn.2d at 604. ASARCO identifies a wide range of litigation expenses that are specifically allowed in MTCA cost-recovery actions. *Id.* at 592.

NW Mint has not shown that the trial court abused its discretion in awarding litigation expenses under the broad scope of *ASARCO.*

3. The Trial Court Did Not Abuse Its Discretion in Determining the Award of Reasonable Fees and Costs, Especially in Light of NW Mint's Aggressive Litigation Tactics.

Under Washington law, the "aggressive litigation tactics" of non-prevailing parties are a proper consideration when the trial court is determining the reasonableness of a prevailing party's attorney fees. *Fiore v. PPG Industries*, Inc. 169 Wn.App. 325, 354, n.17 (2012). NW Mint did not provide any evidence of its own fees and costs, which would have been "probative of the reasonableness of a request for attorney fees by prevailing counsel."[74] *Id.* at 354.

Consistent with *Fiore* and the record evidence, the trial court found: "This case was aggressively litigated by [NW Mint] and Auburn had the right to respond in kind."[75] CP 3589-90 (Supp. FF 10). NW Mint has not challenged this finding and has not shown that the trial court

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[74] The fees incurred by the party challenging a fee award "may well be the best measure of what amount of time is reasonable." *Fiore,* 169 Wn.App. at 354 (citation omitted). "Indeed, common sense indicates that the amount of fees incurred is often directly related to how aggressively an opposing party litigates a case." *Id.* at fn. 17.

[75] Examples of NW Mint's aggressive litigation tactics are described in Section III(C)(2) of this Brief.

abused its discretion when it awarded fees and costs that Auburn incurred in response to NW Mint's aggressive litigation tactics.

VI. AUBURN REQUESTS ATTORNEY FEES AND COSTS

Pursuant to RAP 18.1, Auburn requests an award of attorney fees and costs incurred in this appeal.[76]

VII. CONCLUSION

Auburn respectfully requests that this Court affirm the November 2012 judgment and June 2013 supplemental judgment and award Auburn its attorney fees and costs on appeal.

DATED this 3rd day of October, 2013.

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[76] Auburn bases this request on RCW 70.105D.080, RCW 4.84.330, and the lease (Ex. 1, § 24), all of which were the bases for the trial court's award of fees and litigation expenses.

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APPENDIX A

Citing Unpublished Federal Appellate Opinions Issued Before 2007

Robert Timothy Reagan
Federal Judicial Center
March 9, 2007

Federal Rule of Appellate Procedure 32.1 permits attorneys to cite to federal courts of appeals their unpublished opinions issued in 2007 or later. Unpublished opinions issued before 2007 may be cited to the courts if permitted by the courts' local rules. Following is a summary table of the federal courts of appeals' local rules on citations to their unpublished opinions issued before 2007.

All federal courts of appeals permit citation to their unpublished opinions in related cases to show res judicata, law of the case, and the like. But before 2007, federal appellate courts differed on the extent to which they permitted citations to their unpublished opinions in unrelated cases.

Seven courts—courts of appeals for the First, Third, Fifth, Sixth, Tenth, Eleventh, and District of Columbia Circuits—are considered "permissive" courts, in that they do not restrict citation to their unpublished opinions. But the court of appeals for the District of Columbia Circuit only permits citations to their unpublished opinions issued in 2002 or later.

Three courts—courts of appeals for the Fourth, Eighth, and Federal Circuits—are considered "discouraging" courts, in that they permit but discourage citation to their unpublished opinions issued before 2007, generally permitting such citations only when there is no published authority on point.

Three courts—courts of appeals for the Second, Seventh, and Ninth Circuits—are considered "restrictive" courts, in that they prohibit citations to their unpublished opinions issued before 2007 in unrelated cases.

The courts' rules in the following table are arranged so that similar rules appear together.

Citation Rules in Permissive Courts

Circuit	Citation Rules	Citation Rule Excerpts	Citations to Unpublished Opinions Issued in Unrelated Cases Before 2007	Note
First	1st Cir. R. 32.1.0	"An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance." 1st Cir. R. 32.1.0(a).		
Sixth	6th Cir. R. 28(g)	"Citation of unpublished opinions is permitted." 6th Cir. R. 28(g).		Formerly discouraging courts.
Tenth	10th Cir. R. 32.1	"Unpublished decisions are not precedential, but may be cited for their persuasive value." 10th Cir. R. 32.1(A).		
Eleventh	11th Cir. R. 36-2	"Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2.		
Third	3d Cir. I.O.P. 5.7	"The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing." 3d Cir. I.O.P. 5.7.	Permitted.	The court's Internal Operating Procedures discourage judges from relying on unpublished opinions.
Fifth	5th Cir. R. 47.5.3, 47.5.4	"Unpublished opinions issued before January 1, 1996, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a)." 5th Cir. R. 47.5.3. "Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to Fed. R. App. P. 32.1(a)." 5th Cir. R. 47.5.4.		Unpublished opinions issued before 1996 were considered precedent, but their citation was discouraged.
District of Columbia	D.C. R. 32.1	"Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, entered before January 1, 2002, are not to be cited as precedent. Counsel may refer to an unpublished disposition, however, when the binding (i.e., the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant." D.C. R. 32.1(b)(1)(A). "All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed opinions), entered on or after January 1, 2002, may be cited as precedent." D.C. R. 32.1(b)(1)(B).	Permitted if issued 2002 or later and not sealed.	Unpublished opinions in unrelated cases issued before 2002 may not be cited.

Citation Rules in Discouraging Courts

Circuit	Citation Rules	Citation Rule Excerpts	Citations to Unpublished Opinions Issued in Unrelated Cases Before 2007	Note
Federal	Fed. Cir. R. 32.1	"Parties are not prohibited or restricted from citing nonprecedential dispositions issued after January 1, 2007. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, and the like based on a nonprecedential disposition issued before that date." Fed. Cir. R. 32.1(c). "The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent." Fed. Cir. R. 32.1(d).	Discouraged.	Formerly a restrictive court.
Fourth	4th Cir. R. 32.1	"Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met." 4th Cir. R. 32.1.	Discouraged, but permitted if there is no published opinion on point.	If "there is no published opinion that would serve as well."
Eighth	8th Cir. R. 32.1A	"Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well." 8th Cir. R. 32.1A.		If "no published opinion of this or another court would serve as well."

Citation Rules in Restrictive Courts

Circuit	Citation Rules	Citation Rule Excerpts	Citations to Unpublished Opinions Issued in Unrelated Cases Before 2007	Note
Ninth	9th Cir. R. 36-3	"Unpublished dispositions and orders of this Court issued before January 1, 2007, may not be cited to the courts of this circuit, except in the following circumstances. (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case. (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." 9th Cir. R. 36-3(c).	Prohibited.	Permitted to request publication or rehearing.
Second	2d Cir. R. § 0.23(c)(2)	"Citation to summary orders filed prior to January 1, 2007, is not permitted in this or any other court, except in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata." 2d Cir. R. § 0.23(c)(2).		
Seventh	7th Cir. R. 32.1	"Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents." 7th Cir. R. 32.1(b). "No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding." 7th Cir. R. 32.1(d).		

No. 69568-1
King County Superior Court Case No. 10-2-41256-5KNT

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AUBURN VALLEY INDUSTRIAL CAPITAL LLC,
a Washington limited liability company,

Plaintiff/Respondent

v.

ROSS B. HANSEN, as single person, and NORTHWEST TERRITORIAL MINT, LLC, a Washington limited liability company,

Defendants/Appellants.

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