Court of Appeals No. 33615-8-III

Supreme Court No. 94087-8

IN THE SUPREME COURT
STATE OF WASHINGTON

SHAMROCK PAVING, INC., a Washington corporation,

Petitioner,

v.

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS, husband and wife,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is Shamrock Paving, Inc. ("Shamrock"). Shamrock was the respondent below and the defendant in the trial court.

II. COURT OF APPEALS DECISION

Shamrock seeks review of the Court of Appeals' decision in *Douglass v. Shamrock Paving, Inc.*, --- Wn. App. ---, 384 P.3d 673 (Div. III, 2016). A copy of the decision is attached hereto as Appendix A.

III. INTRODUCTION

This case presents an opportunity for the Court to clarify when a plaintiff may—and may not—recover "remedial action" costs under the Model Toxics Control Act ("MTCA"). It also invites needed clarification on whether a court must account for a plaintiff's ultimate recovery—or lack thereof—in deciding whether the plaintiff has "prevailed" under MTCA's fee-shifting statute.

Harlan and Maxine Douglass (the "Douglasses") sued Shamrock to recover the cost of cleaning up small amounts of petroleum that were released onto their property. The trial court found that the amount of petroleum released was too small to pose a threat—or even a potential threat—to humans or the environment. On that basis, the court entered

judgment for Shamrock and awarded fees and costs to Shamrock as the prevailing party.

Division III affirmed the trial court's finding that the release was harmless. Nonetheless, the court reversed as to the Douglasses' claim for $950 in investigative costs (as distinguished from their claim for $12,236 in cleanup costs), holding that the Douglasses could potentially recover the cost of conducting soil testing as a "remedial action" cost. The court also held that the *Douglasses* were the prevailing party, despite the fact that they might be awarded nothing on remand.

This Court now has the opportunity to decide two questions that will enhance MTCA's utility as a remedial statute and provide needed guidance to lower courts. The first is whether a plaintiff can recover the cost of investigating a release that turns out to be harmless. Departing from longstanding Division II precedent, Division III held that the cost of investigating a release is *automatically* recoverable as a "remedial action" cost, even when there was never any threat or potential threat to human health or the environment. The Court should accept review to endorse the rule intended by the Legislature: that proving a threat, or at the very least a *potential* threat, is a prerequisite to recovering investigative costs.

The second question is whether a court must account for a plaintiff's actual recovery—or lack thereof—when deciding whether the plaintiff has "prevailed" for purposes of MTCA's fee-shifting statute. In a provision unique among remedial statutes, MTCA provides that damages awards must be "based on such equitable factors as the court determines are appropriate." RCW 70.105D.080. Under this framework, a plaintiff who establishes a *right* to recover remedial action costs may or may not be *awarded* such costs. Depending upon how the court balances the equities, the plaintiff may recover all of its costs, some of its costs, or no costs whatsoever.

Regrettably, Division III adopted a bright-line rule that plaintiffs who establish a right to recover remedial action costs are automatically entitled to prevailing party status—without regard to whether any remedial action costs are actually awarded. If left in place, this decision will allow plaintiffs to recover attorney's fees and costs without recovering a single dollar in remedial action costs. The Court should accept review to clarify that a prevailing party determination must account for what, if anything, a court awards after balancing any equitable factors it deems appropriate.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether a plaintiff claiming "remedial action" costs in a MTCA contribution action can recover costs expended on investigative measures which confirm that a nominal release of a hazardous substance is harmless.

2. Whether courts must account for a plaintiff's actual recovery of remedial action costs—or lack thereof—when making a prevailing party determination under MTCA's fee-shifting provision.

IV. STATEMENT OF THE CASE

A. Trial Court Proceedings

Shamrock adopts verbatim the Court of Appeals' description of the superior court proceedings and the facts proven therein:

> Harlan and Maxine Douglass own real property in Spokane, Washington. During the summer of 2013, Shamrock used the property, without permission, as a staging area for a paving project. While at the site, Shamrock frequently fueled equipment and sprayed diesel fuel as a cleaner. Shamrock also stored piles of asphalt grindings, cold mix, and paper joints on the property; all of these materials contained petroleum.
>
> After discovering Shamrock's unauthorized use of their property, the Douglasses instructed Shamrock to vacate. Shamrock complied and took steps to restore the property to its original condition. But the Douglasses were not satisfied. Concerned Shamrock had disposed hazardous substances, the Douglasses hired a company named Tetra Tech to conduct soil testing.

Tetra Tech first tested the soil in November 2013. The lone sample collected at that time revealed the presence of lube oil at a concentration of 2,000 mg/kg. Additional testing occurred the following January. This time two soil samples were taken. The first contained lube oil at 400 mg/kg, and the second contained 800 mg/kg. After receiving this second set of results, the Douglasses chose to clean their property by removing and disposing of 68 tons of soil. Postremoval, Tetra Tech took two final samples. The first showed lube oil at 220 mg/kg and the second showed lube oil at less than 100 mg/kg.

The Douglasses sued Shamrock for trespass and nuisance and filed a claim under the MTCA for recovery of remedial action costs. At trial, the Tetra Tech expert testified that after obtaining the first soil test results, he provided the Douglasses with three recommendations: take no action, remove a significant amount of soil, or do additional testing. The Douglasses chose to conduct additional surface soil testing. After the additional testing, the expert made the same three recommendations. This time the Douglasses opted to remove the soil.

Shamrock's expert testified that the Douglasses' soil test results were below the cleanup levels established by the Department of Ecology (Department). This meant there was neither an obligation to report the release to the Department nor was it required—or even common—to conduct any cleanup. Shamrock's expert explicitly stated he did not consider the concentrations found on the property to be a threat or potential threat to human health or the environment.

A jury returned a verdict in favor of the Douglasses' claims for trespass and nuisance and awarded them $17,300.00. The court heard the Douglasses' MTCA claim. Despite finding Shamrock contributed to the release of hazardous substances and was thus liable under the MTCA, the court did not order payment of remedial costs. The court reasoned the precleanup concentrations of

> petroleum on the Douglasses' property were too insignificant to constitute a threat or potential threat to human health or the environment. The court awarded attorney fees and costs to Shamrock, the prevailing party, in the amount of $97,263.

Douglass, 384 P.3d at 675-76 (footnotes omitted).

B. Court of Appeals Proceedings

On appeal, Division III agreed that the quantities of petroleum released "were too small to pose a potential threat to human health or the environment." *Id.* at 674. Importantly, the court recognized that the levels of contamination identified by the Douglasses immediately prior to the cleanup—400 mg/kg and 800 mg/kg—were well below the Department of Ecology's minimum cleanup threshold of 2,000 mg/kg. *Id.* at 678 & n.9. The court also noted testimony by Shamrock's expert to the effect that, even at the highest level of detected contamination, there was no threat or potential threat to human health or the environment. *Id.* at 678. The court thus affirmed the trial court's conclusion that the property was not sufficiently contaminated to pose a threat or potential threat—and that, as a result, the property "did not require remedial cleanup." *Id.* at 677, 678.

Despite agreeing that the Douglasses were not entitled to recover *cleanup* costs, the court reversed as to the Douglasses' claim for *investigative* costs. In the court's view, the soil testing performed by the

Douglasses' expert amounted to "remedial action" as defined in RCW 70.105D.020(33), and was therefore potentially compensable as a "remedial action cost" under RCW 70.105D.080. In reaching that conclusion, the court reasoned that the definition of "remedial action" extends not only to identifying and mitigating actual threats to human health or the environment, but also to identifying whether a potential threat exists:

> By its plain terms, [the definition] is not limited to actual cleanup efforts. Actions taken to identify and investigate the need for cleanup are also covered. Furthermore . . . an investigation need not reveal an actual threat to qualify as remedial. Thankfully, not all potential threats turn out to be dangerous. By extending the remedial action definition to include the identification and investigation of potential threats, the MTCA covers actions and expenditures taken to discern whether a potential threat in fact poses a danger to human health or the environment.

Id. at 677.

The court remanded the case to the trial court to evaluate any equitable factors it deemed appropriate in connection with a potential award of investigative costs. *Id.* at 677-78. The court further concluded that the Douglasses were the "prevailing" party. *Id.* at 678.

V. ARGUMENT

Acceptance of discretionary review is governed by RAP 13.4(b). Under RAP 13.4(b)(2), the Court may accept review if the decision below

conflicts with a published decision of the Court of Appeals. Review may also be accepted under RAP 13.4(b)(4) if the petition involves an issue of substantial public interest.

The Court should accept review under RAP 13.4(b)(2) to resolve a conflict between Division II and Division III on the question of whether a plaintiff can recover remedial action costs when the fact finder concludes that a release does not pose a threat or potential threat to human health or the environment. Review of this issue is also appropriate under RAP 13.4(b)(4) as a question of substantial public importance. The Court should endorse the rule that flows naturally from the statute's text: that proof of a threat or potential threat to human health or the environment is a prerequisite to recovering "remedial action" costs.

The Court should also accept review under RAP 13.4(b)(4) to provide needed guidance on whether courts must account for the amount of remedial action costs actually recovered by the plaintiff—if any—when making a "prevailing party" determination under MTCA's fee-shifting provision. The Court should reject the rule adopted below and hold that a prevailing party determination must account for what costs, if any, a court awards after applicable equitable factors have been considered.

A. The Court should accept review to resolve a split between Division II and Division III on the question of whether a MTCA plaintiff must prove that a release of a hazardous substance caused a threat or potential threat to human health or the environment in order to recover "remedial action" costs.

The Court should accept review to reconcile a conflict between Division II and Division III on the question of whether a plaintiff must prove that a release of a hazardous substance caused a threat or potential threat to human health or the environment in order to recover "remedial action" costs. Consistent with the statute's text, Division II has long required plaintiffs to prove that a release caused a threat or potential threat. Division III departed from that precedent, holding that proof of a threat or potential threat is not required as to claims for investigative costs (as distinguished from cleanup costs).

An overview of the statute is in order. As relevant here, MTCA allows landowners who take "remedial action" in response to a release of a hazardous substance to bring an action to recover costs incurred in taking such action. RCW 70.105D.080. The term "remedial action" is defined as follows:

> any action or expenditure . . . *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 studies

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

RCW 70.105D.020(33) (emphasis added).

This case turns on the meaning of the phrase, "to identify [a] threat or potential threat." Shamrock contends that this is a gerund phrase that refers to *the act of identifying* threats and potential threats. Under this reading, "remedial action" means actions that *result in the identification of* a threat or potential threat. In other words, actions are only "remedial" if they identify a threat or potential threat that needs to be remediated. If an action reveals that no threat or potential threat exists, by contrast, then it is not "remedial" within the meaning of RCW 70.105D.020(33).

Division III rejected this interpretation. In its view, the definition of "remedial action" includes not only actions that identify (result in the identification of) a threat or potential threat, but also actions to determine whether a threat or potential threat exists. *Douglass*, 384 P.3d at 677.

The distinction, while subtle, is significant. Under Shamrock's interpretation, a plaintiff must prove that a release *caused* a threat or potential threat in order to recover remedial action costs. Under Division III's interpretation, by contrast, the plaintiff can recover remedial action costs regardless of whether the release caused a threat or potential threat. This broader interpretation changes the outcome of cases in which (as

here), the fact finder concludes that a release was harmless and did not require a cleanup.

Shamrock's interpretation is supported by the plain language of the statute and is consistent with Division II's decision in *Seattle City Light v. Wash. Dep't of Transp.*, 98 Wn. App. 165 (1999). The plaintiff in *Seattle City Light* sued the Department of Transportation ("DOT") to recover the cost of removing hardened asphalt that DOT had caused to be deposited at a Superfund site. *Id.* at 167-68. As relevant here, DOT opposed the claim on the ground that the removal of the asphalt did not qualify as "remedial action" under MTCA because the asphalt, even if deemed a "hazardous substance," did not pose a threat or potential threat to human health or the environment. *Id.* at 176. Applying the definition of "remedial action," Division II sided with DOT, holding that proof of a "threat or potential threat" is strictly required:

> WSDOT argues that it should not be responsible for [cleanup costs] because the asphalt that it contributed to the site did not pose a threat to human health or the environment. We agree and hold that before a court may equitably allocate remedial action costs in a contribution action, *the party seeking contribution under RCW 70.105D.080 must demonstrate that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment.* In this case, WSDOT's hardened asphalt did not contribute to a threat or potential threat to human health or the environment.

98 Wn. App. at 176 (emphasis added) (citations omitted).

Division III distinguished *Seattle City Light* on the ground that it involved a claim for *cleanup* costs rather than *investigative* costs. *Douglass*, 384 Wn. App. at 677. But that is a distinction without a difference. *Seattle City Light* applies the same statutory text at issue here: the definition of "remedial action." The language on which Division II relied—"any threat or potential threat posed by hazardous substances"—applies across the board to all types of remedial action. There is no reason to believe Division II would have parsed the definition any differently, let alone reached the opposite conclusion, had the plaintiff been seeking an award of investigative costs rather than cleanup costs.

Division III departed from *Seattle City Light* in an effort to encourage property owners to investigate potentially dangerous releases. Specifically, the court reasoned that allowing plaintiffs to recoup the cost of investigating "*any* potentially hazardous release, *even if the release turns out to be harmless*, encourages good stewardship and promotes preservation of the environment." *Douglass*, 384 Wn. App. at 677 (emphasis added).

Shamrock agrees that promoting good stewardship and protecting the environment are important objectives. What Division III failed to

recognize, however, is that the statute advances those objectives on its face, without the need for broad construction. Critically, the definition of "remedial action" includes not only the identification of actual threats, but also the identification of "*potential*" threats. RCW 70.105D.020(33) (emphasis added). Thus, a plaintiff is not required to prove that a release resulted in an *actual* threat to recover investigative costs; if the investigation reveals a mere *potential* threat—*i.e.*, a threat that is sufficiently serious, but that may not ever come to fruition—the cost of the investigation is fully compensable. Allowing recovery when there is a mere potential threat is a powerful incentive to pursue investigations.

Division III's broader interpretation violates basic canons of statutory construction. When interpreting a statute, a court's objective is to honor the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). If the meaning of a statute is plain on its face, a court must give effect to that meaning as a definitive expression of intent. *Id.* at 9-10. As a corollary, courts may not add words to a statute that the Legislature did not use unless "imperatively required to make the statute rational." *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 526 (2007).

As illustrated below, Division III's interpretation adds words to the statute that the Legislature chose not to use:

RCW 70.105D.020(33) – "Remedial Action"	
Statutory Text	Division III Interpretation
to identify . . . any . . . threat or potential threat posed by hazardous substances	to identify <u>whether</u> . . . any . . . threat or potential threat posed by hazardous substances <u>exists</u>

Adding the words *whether* and *exists* is not "imperatively required" to make the statute rational. *Ingram*, 162 Wn.2d at 526. To be sure, the gerund construction offered by Shamrock—that investigative costs are only recoverable if they *result in the identification of* a threat or potential threat—is perfectly rational. By making recovery contingent on proof of a threat or potential threat, the Legislature sought to hold MTCA plaintiffs to a minimum standard of proof. The Legislature recognized that, without that requirement in place, MTCA plaintiffs would recover investigative costs as a matter of right in *every single case*, regardless of the size of the release or whether it posed any danger.

There is no reason to believe that the Legislature intended to hold defendants strictly liable for investigative costs. Indeed, the text of the statute forecloses such a rule. The Court should take this opportunity to endorse the rule intended by the Legislature and properly recognized by

Division II in *Seattle City Light*: that "remedial action" costs, including investigative costs, are only recoverable when the plaintiff proves that a release has caused a threat or a potential threat to human health or the environment.

B. The Court should accept review to clarify that prevailing party determinations under MTCA's fee-shifting provision must account for the amount of remedial action costs, if any, the plaintiff is awarded after the court has balanced applicable equitable factors under RCW 70.105D.080.

Recovering remedial action costs in a MTCA contribution action is a two-step process. First, the plaintiff must establish liability by proving the following elements: (1) that the plaintiff owns the property; (2) that the defendant caused a release of a hazardous substance on the property; (3) that the plaintiff took remedial action to address the release; and (4) that the remedial action was the substantial equivalent of actions that would have been taken by the Department of Ecology. RCW 70.105D.040; *Seattle City Light*, 98 Wn. App. at 169-70.

If liability is proven, the plaintiff must then convince the court to award remedial action costs "based on such equitable factors as the court determines are appropriate." RCW 70.105D.080. Courts have broad discretion in identifying and weighing equitable factors. *Dash Point Village Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607 (1997); *PacifiCorp. Envtl. Remediation Co. v. Wash. Dep't of Transp.*, 162 Wn. App. 627, 665

(2011). Factors commonly considered include, *inter alia*, the amount of hazardous waste involved, the toxicity of the substance, and the extent to which the costs incurred by the plaintiff were necessary to remediate a threat or potential threat. *PacifiCorp.*, 162 Wn. App. at 665; *Douglass*, 384 P.3d at 677. Courts may consider "several factors, a few factors, or only one determining factor depending on the totality of circumstances presented." *PacifiCorp.*, 162 Wn. App. at 665-66 (quotation omitted).

Importantly, a defendant who is found liable at step one of this two-step framework may or may not be required to pay remedial action costs at step two. As explained in *Seattle City Light*, the defendant "may be required to pay *complete* response costs, or may not be required to pay *any* response costs, or may be required to pay some *intermediate* amount" depending on how the court views the equities. 98 Wn. App. at 175 (emphasis added) (quotation omitted).

Division III reversed at step one, holding that the Douglasses had established the elements of liability under the court's broad construction of "remedial action." *Douglass*, 384 Wn. App. at 676-77. The court thus remanded for a determination of what, if anything, the Douglasses were entitled to recover after the trial court had weighed any equitable factors it deemed applicable. *Id.* at 677-78.

Problematically, however, the court also remanded for an award of "total attorney's fees and costs" to the Douglasses as the prevailing party under RCW 70.105D.080. *Id.* at 678. "Because the Douglasses ha[d] *established the elements of a contribution claim*," the court reasoned, "they are entitled to prevailing party status and to reasonable attorney's fees and costs." *Id.* (emphasis added).

This approach to designating a prevailing party is fatally flawed. As noted above, establishing liability at step one does not automatically result in an award of damages. To recover damages, the plaintiff must further establish that an award of remedial action costs is appropriate in view of the equitable factors identified by the court. RCW 70.105D.080. Depending upon how the court weighs the equities, the plaintiff might recover all of its costs, some of its costs, or *no costs whatsoever*. *Seattle City Light*, 98 Wn. App. at 175.

The problem, of course, is that declaring a plaintiff the prevailing party at step one fails to account for the possibility that the plaintiff will recover nothing at step two. It should go without saying that a plaintiff who recovers nothing is not a "prevailing" party in any sense of the word. If the defendant avoids a judgment to pay remedial action costs, the defendant, rather than the plaintiff, is the prevailing party.

If the decision below stands, plaintiffs will be entitled to prevailing party status even when they recover nothing. Going forward, the sole requirement for attaining such status will be "establish[ing] the elements of a contribution claim" at step one. *Douglass*, 384 P.3d at 678. Whether the court actually awards remedial action costs after weighing the equities at step two will be irrelevant. This new regime will make it possible for defendants to be assessed thousands of dollars in fees and costs, without ever paying a penny in damages.

The public interest implications are obvious. The purpose of two-way fee shifting statutes like RCW 70.105D.080 is to "punish frivolous litigation and encourage meritorious litigation." *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667 (1999). The rule adopted by Division III turns that purpose on its head. Awarding fees and costs to plaintiffs who "establish the elements" of a contribution claim as a matter of right, regardless of whether they recover damages, promotes the filing of borderline and frivolous claims. It also gives plaintiffs and their attorneys a perverse incentive to litigate contribution claims as aggressively as possible, even when they know the prospect of recovering damages is remote.

This problem is not hypothetical. The facts of this case provide a compelling illustration. As the trial court and Division III appropriately concluded, the cleanup undertaken by the Douglasses was completely unnecessary. Soil testing performed immediately prior to the cleanup revealed contamination levels of 400 mg/kg and 800 mg/kg—both *less than half* the minimum cleanup threshold of 2,000 mg/kg established by the Department of Ecology.[1] *Douglass*, 384 P.3d at 675, 678 n.9 (citing WAC 173-340-740(2)(b)(i), WAC 173-340-900). This was objective evidence that the property "was not sufficiently contaminated to pose a threat or potential threat to human health or the environment" and therefore "did not require remedial cleanup." *Id.* at 677, 678.

Despite having those negative test results in hand, the Douglasses charged ahead with a cleanup. They then sued Shamrock for the full cost of the cleanup ($12,236), along with the cost of the soil testing ($950). At trial, the Douglasses were defeated by their own test results and recovered nothing. The Douglasses were justifiably assessed $97,263 in attorney's fees and costs as the non-prevailing party. *Id.* at 676.

On appeal, the Douglasses persuaded Division III that their soil testing was potentially recoverable as a "remedial action" cost. *Id.* at 677.

[1] Initial testing performed in November 2013 showed lube oil at a concentration of 2,000 mg/kg. *Douglass*, 384 P.3d at 675. Later testing performed in January 2014 immediately prior to the cleanup showed concentrations of 400 mg/kg and 800 mg/kg. *Id.*

Division III remanded with instructions to determine what portion of the $950 in soil testing costs, if any, the Douglasses should recover after all equitable factors had been considered. *Id.* at 677-78. The court pointedly noted that the Douglasses' decision to charge ahead with a cleanup after obtaining negative test results is a "negative equity" that cuts against an award of remedial action costs. *Id.* at 677.

The equities of this case strongly favor Shamrock. On remand, Shamrock will argue that the Douglasses are not entitled to *any* remedial action costs in view of their inequitable conduct. If the trial court agrees, Shamrock will have completely prevailed. Under Division III's new rule, however, the Douglasses would still be the prevailing party.

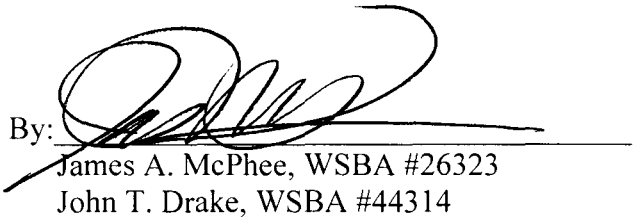
The Court should take this opportunity to adopt a more sensible rule: that a court must not designate a prevailing party until *after* it has balanced all equitable factors and awarded remedial action costs (if any). This rule strikes an appropriate balance between encouraging meritorious claims and penalizing plaintiffs who pursue cleanups and litigation in the face of objective evidence that no remediation was required.

VI. CONCLUSION

For the reasons addressed above, Shamrock respectfully requests that the Court accept review under RAP 13.2(b)(2) and (b)(4).

DATED this 23rd day of January, 2017.

WITHERSPOON BRAJCICH MCPHEE, PLLC



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CERTIFICATE OF SERVICE

I, Veronica J. Clayton, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 23rd day of January, 2017.

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Veronica J. Clayton

APPENDIX

384 P.3d 673
Court of Appeals of Washington,
Division 3.

Harlan D. Douglass and Maxine H. Douglass, husband and wife, Appellants,

v.

Shamrock Paving, Inc., a Washington corporation, Respondent.

No. 33615-8-III

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November 29, 2016

Synopsis

Background: Landowners sued paving company for trespass and nuisance and raised a claim under the Model Toxics Control Act (MTCA) for recovery of remedial action costs. A jury returned verdicts in favor of landowners on their trespass and nuisance claims, but the Superior Court, Spokane County, John O'Cooney, J., concluded that company was not responsible for remedial costs. Landowners appealed.

Holdings: The Court of Appeals, Pennell, J., held that:

[1] steps taken by landowners to test their soil for hazardous waste contamination after discovering that paving company had stored petroleum products on their property and sprayed diesel fuel as a cleaner were "remedial" under the MTCA, entitling them to compensation; but

[2] funds spent by landowners on cleanup of lube oil below minimum cleanup level identified by the Department of Ecology regulations did not qualify as remedial action costs.

Reversed and remanded.

West Headnotes (9)

[1] **Appeal and Error** ⇐ Conclusiveness in General

Unchallenged findings of fact become verities on appeal.

Cases that cite this headnote

[2] **Environmental Law** ⇐ Response and Cleanup;Liability

Purpose of the Model Toxics Control Act (MTCA) is to facilitate the cleanup of contaminated lands and promote a healthful environment for future generations. Wash. Rev. Code Ann. §§ 70.01.010 et seq., 82.21.010 et seq.

Cases that cite this headnote

[3] **Environmental Law** ⇐ Covered costs;damages

Proof of a Model Toxics Control Act (MTCA) remediation claim involves the following elements: (1) requesting party is financially responsible for remediation costs at a facility; (2) respondent was liable for a release or threatened release of hazardous substances at the facility; (3) remedial action was taken to address the release of hazardous substances; and (4) remedial action was the substantial equivalent of actions that would have been taken by the Department of Ecology. Wash. Rev. Code Ann. §§ 70.105D.040(3), 70.105D.080.

Cases that cite this headnote

[4] **Environmental Law** ⇐ Covered costs;damages

A party liable for a Model Toxics Control Act (MTCA) remediation claim may be required to pay complete response costs, or may not be required to pay any response costs, or may be required to pay some intermediate amount, depending on the court's equitable assessments. Wash. Rev. Code Ann. § 70.105D.080.

Cases that cite this headnote

[5] **Environmental Law** ⇐ Covered costs;damages

Steps taken by landowners to test their soil for hazardous waste contamination after discovering that paving company had stored petroleum products on their property and sprayed diesel fuel as a cleaner were "remedial" under the Model Toxics Control Act (MTCA), entitling them to compensation, despite fact that soil test results showed lube oil below cleanup levels established by the Department of Ecology; amount of hazardous waste released onto the property was not so clearly de minimis that no action was needed to ensure lack of danger as company had been releasing petroleum products onto the landowners' soil for approximately three months, and the amount of substances released was unknown, justifying an investigation. Wash. Rev. Code Ann. §§ 70.105D.020(13)(d), (33), 70.105D.080.

Cases that cite this headnote

[6] **Environmental Law** ⇐ Covered costs;damages

Under provision of Model Toxics Control Act (MTCA) allowing requesting party to recover compensation for certain remedial actions, "remedial action" includes actions taken to identify and investigate the need for cleanup, and an investigation need not reveal an actual threat to qualify as remedial. Wash. Rev. Code Ann. §§ 70.105D.020(33), 70.105D.080.

Cases that cite this headnote

[7] **Environmental Law** ⇐ Covered costs;damages

Under CERCLA, recoverable response costs include investigatory costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 101, 42 U.S.C.A. § 9601.

Cases that cite this headnote

[8] **Environmental Law** ⇐ Covered costs;damages

Funds spent by landowners on cleanup of lube oil left by paving company that had stored petroleum products on their property and sprayed diesel fuel as a cleaner did not qualify as "remedial action" costs under the Model Toxics Control Act (MTCA); tested levels of lube oil were well below minimum cleanup level identified by

Department of Ecology regulations. Wash. Rev. Code Ann. §§ 70.105D.020(33), 70.105D.080; Wash. Admin. Code 173-340-740(2)(b)(i), 173-340-900.

Cases that cite this headnote

[9] **Environmental Law** ⇐ Covered costs;damages

For a cleanup effort to qualify as "remedial" under the Model Toxics Control Act (MTCA), the effort must address a hazardous substance posing a threat or potential threat to human health or the environment. Wash. Rev. Code Ann. §§ 70.105D.020(33), 70.105D.080.

Cases that cite this headnote

***674** Appeal from Spokane Superior Court, No. 13-2-03886-7, Honorable John O'Cooney.

Attorneys and Law Firms

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Opinion

Pennell, J.

¶1 The Model Toxics Control Act (MTCA), chapters 70.105D, 82.21 RCW, provides a statutory framework for recovery of hazardous waste remediation costs. Shamrock Paving Inc. admittedly discharged petroleum, a statutorily-defined hazardous substance, onto the Douglasses' property. Nevertheless, Shamrock denies responsibility for costs because the quantities released were too small to pose a potential threat to human health or the environment.

¶2 Shamrock's position is factually accurate and legally significant, but it is not dispositive. Our disagreement with Shamrock ***675** lies in the scope of what constitutes remedial action under the MTCA. By the statute's plain terms, remedial action includes not only site cleanup but also investigative efforts undertaken to identify the need for cleanup. When the Douglasses incurred costs in order to identify the extent of Shamrock's contamination, they engaged in compensable remedial action. Although the subsequent cleanup efforts could fairly be characterized as nonremedial, given the low level of contamination found, the Douglasses were nevertheless entitled to prevailing party status and an award of reasonable costs and attorney fees. The trial court's judgment in favor of Shamrock is therefore reversed.

FACTS [1]

[1] ¶3 Harlan and Maxine Douglass own real property in Spokane, Washington. During the summer of 2013, Shamrock used the property, without permission, as a staging area for a paving project. While at the site, Shamrock frequently fueled equipment and sprayed diesel fuel as a cleaner. Shamrock also stored piles of asphalt grindings, [2] cold mix, [3] and paper joints [4] on the property; all of these materials contained petroleum.

¶4 After discovering Shamrock's unauthorized use of their property, the Douglasses instructed Shamrock to vacate. Shamrock complied and took steps to restore the property to its original condition. But the Douglasses were not satisfied.

Concerned Shamrock had disposed hazardous substances, the Douglasses hired a company named Tetra Tech to conduct soil testing.

¶5 Tetra Tech first tested the soil in November 2013. The lone sample collected at that time revealed the presence of lube oil at a concentration of 2,000 mg/kg. Additional testing occurred the following January. This time two soil samples were taken. The first contained lube oil at 400 mg/kg, and the second contained 800 mg/kg. After receiving this second set of results, the Douglasses chose to clean their property by removing and disposing of 68 tons of soil. Postremoval, Tetra Tech took two final samples. The first showed lube oil at 220 mg/kg and the second showed lube oil at less than 100 mg/kg.

¶6 The Douglasses sued Shamrock for trespass and nuisance and filed a claim under the MTCA for recovery of remedial action costs. At trial, the Tetra Tech expert testified that after obtaining the first soil test results, he provided the Douglasses with three recommendations: take no action, remove a significant amount of soil, or do additional testing. The Douglasses chose to conduct additional surface soil testing. After the additional testing, the expert made the same three recommendations. This time the Douglasses opted to remove the soil.

¶7 Shamrock's expert testified that the Douglasses' soil test results were below the cleanup levels established by the Department of Ecology (Department). This meant there was neither an obligation to report the release to the Department nor was it required—or even common—to conduct any cleanup. Shamrock's expert explicitly stated he did not consider the concentrations found on the property to be a threat or potential threat to human health or the environment.

¶8 A jury returned a verdict in favor of the Douglasses' claims for trespass and nuisance and awarded them $17,300.00. The court heard the Douglasses' MTCA claim. Despite finding Shamrock contributed to the release of hazardous substances and was thus liable under the MTCA, the court did not order payment of remedial costs. The court reasoned the precleanup concentrations of petroleum on the Douglasses' property were too insignificant to constitute a threat or potential threat to human health or the environment. ***676** The court awarded attorney fees and costs to Shamrock, the prevailing party, in the amount of $97,263.13. The Douglasses appeal.

ANALYSIS

The MTCA provides a private cause of action to recover remedial costs

[2] ¶9 The purpose of the MTCA is to facilitate the cleanup of contaminated lands and promote a healthful environment for future generations. *Seattle City Light v. Dep't of Transp.*, 98 Wash.App. 165, 169, 989 P.2d 1164 (1999). Under the MTCA, a person who incurs costs remediating a hazardous waste site may bring a private claim for financial recovery.

[3] ¶10 Proof of a MTCA remediation claim involves the following elements: (1) the requesting party is financially responsible for remediation costs at a facility, (2) the respondent was liable for a release or threatened release of hazardous substances at the facility under RCW 70.105D.040, (3) remedial action was taken to address the release of hazardous substances, and (4) the remedial action was the substantial equivalent of actions that would have been taken by the Department. RCW 70.105D.080; *Seattle City Light*, 98 Wash.App. at 175, 989 P.2d 1164.

[4] ¶11 Once a party establishes a right of recovery, the damage amount turns on equitable factors to be determined by the trial court. RCW 70.105D.080. "A liable party 'may be required to pay complete response costs, or may not be required to pay any response costs, or may be required to pay some intermediate amount,' depending on the court's equitable assessments." *Seattle City Light*, 98 Wash.App. at 175, 989 P.2d 1164 (quoting *Akzo Coatings, Inc. v. Aigner Corp.*, 909 F.Supp. 1154 (N.D. Ind. 1995)).

The Douglasses engaged in remedial action, justifying an award of costs

[5] ¶12 As owners, the Douglasses are responsible for remediation costs at their property. By releasing petroleum products at the site, Shamrock is liable for releasing a hazardous substance. [5] And the trial court made an undisputed finding that the actions taken by the Douglasses at their property were substantially equivalent to actions that would have been taken by the Department. [6] The only disputed element of the Douglasses' MTCA contribution claim is whether they engaged in "remedial action" as required by the statute.

¶13 At its heart, this case is about the scope of what constitutes remedial action under the MTCA. Shamrock contends remedial action applies only to measures taken to address hazardous waste contamination that actually poses a threat to human health or the environment. The Douglasses take a broader view. Under their construction, remedial action also encompasses steps taken to assess whether a hazardous waste discharge poses a threat. Resolving the parties' dispute involves legal questions reviewed de novo. *Williams v. Tilaye*, 174 Wash.2d 57, 61, 272 P.3d 235 (2012). Our analysis requires us to assess the statute's plain language with a view toward giving effect to its purpose. *Pac. Topsoils, Inc. v. Dep't of Ecology*, 157 Wash.App. 629, 641, 238 P.3d 1201 (2010).

[6] ¶14 The MTCA defines a "remedial action" as

> *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 ***677** and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

RCW 70.105D.020(33) (emphasis added). This is a broadly-worded provision. *Pac. Sound Res. v. Burlington N. Santa Fe Ry. Corp.*, 130 Wash.App. 926, 936, 125 P.3d 981 (2005). By its plain terms, it is not limited to actual cleanup efforts. Actions taken to identify and investigate the need for cleanup are also covered. Furthermore, contrary to Shamrock's position, an investigation need not reveal an actual threat to qualify as remedial. Thankfully, not all potential threats turn out to be dangerous. By extending the remedial action definition to include the identification and investigation of potential threats, the MTCA covers actions and expenditures taken to discern whether a potential threat in fact poses a danger to human health or the environment.

[7] ¶15 This broad interpretation of "remedial action" aligns with the liberal construction afforded to the MTCA. *See* RCW 70.105D.910; RCW 70.105D.010. Allowing parties to recover the costs of investigating any potentially hazardous release, even if the release turns out to be harmless, encourages good stewardship and promotes preservation of the environment. [7]

¶16 Our interpretation of "remedial action" is not at odds with our prior decision in *Seattle City Light*, 98 Wash.App. at 176, 989 P.2d 1164. *Seattle City Light* only addressed a request for cleanup costs. It did not consider a claim for investigative costs. The *Seattle City Light* rule that a defendant is not liable for cleanup costs absent proof of a potential threat to human health or the environment is consistent with the rule recognized here: that investigative costs, undertaken to discern whether such a threat exists, are compensable.

¶17 The steps taken by the Douglasses to test their soil for hazardous waste contamination were remedial under the MTCA. This is not a case where the amount of hazardous waste released onto the property was so clearly de minimis that no action was needed to ensure lack of danger. [8] Shamrock had been releasing petroleum products onto the Douglasses' soil for approximately three months. According to the trial court's findings, the amount of substances released was unknown. These circumstances justified an investigation.

The Douglasses' cost award turns on undetermined equitable factors

[8] ¶18 While the Douglasses are entitled to remedial action costs, their exact recovery amount is not something that can be resolved on appeal. Instead, the matter must be remanded for an assessment of equitable factors. RCW 70.105D.080. Relevant to the equitable issues on remand is the extent to which the Douglasses' actions qualify as remedial. *See Seattle City Light*, 98 Wash.App. at 175, 989 P.2d 1164. The expenditure of time and resources on nonremedial activities is a negative equity, weighing against a request for contribution.

¶19 After trial, the court determined the Douglasses' cleanup (as opposed to investigative) efforts were not remedial because their property was not sufficiently contaminated to pose a threat or potential threat to human health or the environment. The Douglasses challenge this assessment. Because the trial court's finding is relevant to the issues on remand, resolution of the Douglasses' complaints ***678** is warranted. The standard we utilize is quite deferential. The trial court's factual findings are reviewed for substantial evidence and its conclusions of law are reviewed to determine if they are supported by the findings of fact. *Imrie v. Kelley*, 160 Wash.App. 1, 6–7, 250 P.3d 1045 (2010).

[9] ¶20 To be remedial, a cleanup effort must address a hazardous substance posing a threat or potential threat to human health or the environment. Ample evidence supports the trial court's conclusion that the Douglasses' property was not sufficiently contaminated to meet this standard. Even according to the Douglasses' own expert from Tetra Tech, the levels of contaminants found in the Douglasses' soil might not necessitate cleanup. Shamrock's expert was more direct. According to his testimony, even at the highest level of detected contamination, cleanup was not necessary as there was no threat or potential threat to human health or the environment. The trial court was entitled to find the defense expert credible.

¶21 Contrary to the Douglasses' claim, the trial court's findings were not based on confusion over whether a potential hazard could exist, despite the lack of any identified contamination exceeding the Department's cleanup levels.[9] The Douglasses correctly point out our case law does not condition responsibility for remedial action costs on a minimum level of toxicity. *Seattle City Light*, 98 Wash.App. at 172, 989 P.2d 1164. However, the trial court does not appear to have been confused on this point. Rather than deferring to a toxicity litmus test, the trial court relied on the totality of the evidence to conclude the levels of contaminants found in the Douglasses' soil prior to cleanup[10] did not raise potential hazards for human health or the environment.

¶22 The evidence at trial provided an adequate basis to conclude the Douglasses' property did not require remedial cleanup. Accordingly, funds spent on the cleanup (as opposed to funds spent on investigation) did not qualify as remedial action costs under the MTCA. This circumstance is a factor the trial court may consider as part of its equitable assessment on remand.

Attorney fees

¶23 Because the Douglasses have established the elements of a contribution claim under RCW 70.105D.080, they are entitled to prevailing party status and to reasonable attorney fees and costs, including fees on appeal. *Taliesen Corp. v. Razore Land Co.*, 135 Wash.App. 106, 141, 144 P.3d 1185, P.3d 1185 (2006).[11] We remand this matter to the trial court for an award of total fees and costs, including appellate fees and costs. In determining costs, the trial court shall utilize the lodestar method and shall consider the amount of time reasonably expended on the Douglasses' successful claims at a reasonable hourly rate. *Chuong Van Pham v. Seattle City Light*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007).

CONCLUSION

¶24 The trial court's judgment in favor of Shamrock Paving and related award of attorney fees is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, A.C.J.

All Citations

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Footnotes

1 Many of these facts are taken from unchallenged factual findings made by the trial court. Unchallenged findings of fact become verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wash.2d 119, 123, 615 P.2d 1279 (1980).

2 A piece of machinery chews up the existing road to create grindings. Those grindings are then used in repaving the road.

3 Cold mix is used to patch potholes.

4 A paper joint is a temporary joint. Paper is placed downstream of the joint directly onto the existing pavement surface. The paper is used because the asphalt mix does not stick to it. Paper joints assist vehicles in navigating drops between old and new asphalt.

5 Petroleum products are classified as a hazardous substance. RCW 70.105D.020(13)(d).

6 While the trial court did not separate investigative from cleanup efforts, the evidence is undisputed that the steps taken by Tetra Tech to investigate the Douglasses' soil was substantially equivalent to what the Department would have done. The Department expert described an initial investigation as reviewing the site, maps, and sample results. The Tetra Tech expert described engaging in substantially the same process. *See* WAC 173-340-545 (whether a private remedial action is the substantial equivalent of a department conducted action is determined according to "overall effectiveness"); *see also Taliesen Corp. v. Razore Land Co.*, 135 Wash.App. 106, 123, 144 P.3d 1185 (2006).

7 Our interpretation is also consistent with similar language in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, which has been held to provide persuasive authority in interpreting the MTCA. *See Seattle City Light*, 98 Wash.App. at 169–70, 989 P.2d 1164. Under CERCLA, recoverable response costs include investigatory costs. *Bd. Of County Comm'rs v. Brown Grp. Retail, Inc.*, 768 F.Supp.2d 1092 (D. Colo. 2011). While CERCLA requires response costs be "necessary," the MTCA does not. It can thus be inferred that intended recovery for "remedial actions" under the MTCA can be broader than under CERCLA.

8 We therefore reject Shamrock's concern that any contamination, no matter how small, could result in cost recovery under the MTCA. If, for example, someone working for Shamrock had merely slopped a small amount of engine oil onto the Douglasses' land, soil testing would not have been warranted to rule out the risk of harm. Recovery under that scenario would be unwarranted.

9 2,000 mg/kg is the minimum cleanup level for lube oil identified by the Department regulations. WAC 173-340-740(2)(b)(i); WAC 173-340-900.

10 We disagree with the Douglasses' claim that the trial court misunderstood the testimony from the Department witness. The issue at trial was whether contaminants in the Douglass property's soil posed a potential hazard in its precleanup state. The Department witness had reviewed Tetra Tech's report documenting the precleanup test results. Thus, it was reasonable for the court to understand the witness's comments to pertain to the property's precleanup state.

11 As explained in *Taliesen*, neither the net affirmative judgment rule nor a proportionality approach are applicable in this context. *Taliesen*, 135 Wash.App. at 142–43, 144 P.3d 1185.

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