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.

REPLY TO RESPONDENT'S ANSWER

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Petitioner Shamrock Paving, Inc. ("Shamrock"), through counsel, submits the following reply to Respondents Harlan and Maxine Douglass' Answer to Petition for Review and Cross-Petition ("Answer"), pursuant to RAP 13.4(d).

I. INTRODUCTION

The Douglasses seek review of the trial court's finding of fact that the release in question did not pose a potential threat to human health or the environment. The Court of Appeals reviewed this finding below and correctly concluded that it was supported by substantial evidence. This Court should decline review of this case-specific issue and focus on the important questions of law raised in Shamrock's Petition.

II. COUNTERSTATEMENT OF NEW ISSUE

Whether the Court should review the trial court's finding of fact that the release in question did not pose a threat or potential threat to human health or the environment.

III. ARGUMENT

Acceptance of discretionary review is governed by RAP 13.4(b). The rule authorizes review in four circumstances:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1)-(4).

The new issue identified by the Douglasses does not satisfy any of these criteria. In a nutshell, the Douglasses are asking the Court to review the evidence presented at trial and overturn the trial court's factual finding that the quantity of lube oil released onto their property was too small to pose a potential threat to human health or the environment. In particular, the Douglasses contend (as they did in the Court of Appeals) that the trial court "misunderstood" the testimony of one of Shamrock's expert witness on the point of whether a potential threat existed *before* the Douglasses removed 68 tons of soil from the site. Answer at 13-15.

While confusingly styled as an issue arising under RAP 13.4(b)(2), this is a garden-variety sufficiency of the evidence challenge. The Court of Appeals treated it as such and summarily rejected it in a footnote:

> We disagree with the Douglasses' claim that the trial court misunderstood the testimony from the Department witness [Phil Leinart]. 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.

Douglass v. Shamrock Paving, Inc., 196 Wn. App. 849, 859 n.10 (2016) (emphasis added) (citations omitted).

As the Court of Appeals aptly observed, whether the site posed a threat or potential threat in its pre-cleanup state was the central issue at trial. Contrary to the Douglasses' assertions, the fact that Shamrock's counsel framed his questions of Mr. Leinart in the present tense rather than the past tense does not compel a reversal of the trial court's finding that no potential threat existed before the soil was removed. The trial court properly understood Mr. Leinart to be testifying about the condition of the site in its pre-cleanup state.

Moreover, assuming for the sake of argument that the court had been confused about the temporal dimension of Mr. Leinart's testimony, it was entitled to credit the testimony of Shamrock's other expert witness, Jeff Lambert. Mr. Lambert testified that the concentration of lube oil in soil samples taken by the Douglasses' expert—samples that were taken before any soil had been removed—did not reflect a threat or potential threat to human health or the environment. VRP 647, *ll.* 20-30; 648, *ll.* 13-16; 649, *ll.* 2-5. In response to a question from the jury that cut to the heart of the case, Mr. Lambert further testified that, even at the highest

detected pre-cleanup concentration, there was no potential threat to human health or the environment and therefore no need to move forward with a cleanup:

> Juror Question: Even though 2,000 parts per million of lube oil is not required to be reported to the [Department of Ecology], would you consider it standard or common practice to do a cleanup of a site with that reading?
>
> Mr. Lambert: No.

VRP 672-673, ll. 25-6.

As the Court of Appeals correctly concluded, the trial court, sitting as the trier of fact, was entitled to rely on this testimony in support of its finding that the site did not pose a potential threat in its pre-cleanup state. *Douglass*, 196 Wn. App. at 854, 859. The Court can rest assured that this finding is supported by substantial evidence. There is no need for further review.

IV. CONCLUSION

For the reasons addressed above, Shamrock respectfully requests that the Court decline review of the factual issue raised in the Douglasses' Answer and confine its review to the questions of law addressed in Shamrock's Petition.

DATED this 8th day of March, 2017.

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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 8th day of March, 2017.

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