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Supreme Court No. 97889-1

SUPREME COURT
FOR THE STATE OF WASHINGTON

PORT OF ANACORTES, a Washington municipal corporation,

Respondent,

v.

FRONTIER INDUSTRIES, INC., a Washington corporation; EINO "MIKE" JOHNSON and LORIE A. JOHNSON, a married couple; and ITOCHU INTERNATIONAL, INC., a foreign corporation,

Petitioners.

PLAINTIFF'S AMENDED ANSWER TO DEFENDANTS' JOINT PETITION FOR REVIEW

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I. INTRODUCTION

Defendants'[1] Petition for Review ("Petition") of the Division 1 Court of Appeals' decision affirming[2] denial of Defendants' summary judgment motion is replete with fatal flaws. Simply stated, there is no legitimate basis for further review, and the Court of Appeals properly sent this case back to the trial court for development of the necessary factual record at trial. This Court should resultingly deny Defendants' Petition.

Indeed, the sole question at this stage is whether Defendants satisfy the substantive requirements for this Court to accept review. Because Defendants neither satisfy nor brief any appropriate standard that warrants review, the simple answer is no.

This appeal originates from the Port of Anacortes' (the "Port") action for contribution under the Model Toxics Control Act, Chapter 70.105D RCW ("MTCA") due to Defendants' admitted historical practice of depositing industrial wood waste debris in the marine environment. Under MTCA, owners and operators are strictly liable for the disposal or release of hazardous substances. The extent of a party's MTCA liability is not solely based on time periods of ownership or operation. Rather, liability is ultimately a highly fact-specific determination made by the trial court upon full development of the record.

Defendants made a strategic decision to contest their liability by moving for summary judgment at an early stage in litigation. In so moving,

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[1] Itochu International, Inc. ("Itochu"), Eino and Lorie Johnson ("Johnsons"), and Frontier Industries, Inc. ("Frontier") (collectively, "Defendants").

[2] *Port of Anacortes v. Frontier Industries, Inc.*, __ Wn. App. __, 447 P.3d 215 (Div. 1 2019 (the "Opinion").

Defendants claimed that MTCA does not explicitly list wood waste as a hazardous substance. Put differently, Defendants attempted to make a premature effort to absolve themselves from their polluting activities despite MTCA's clear directive that polluters are required to pay their fair share to clean up their pollution.

In opposition, the Port briefed on the association between MTCA and the Sediment Management Standards, WAC 173-204 ("SMS") relating to wood waste in the marine environment. That briefing provided unchallenged declarations on the science behind industrial wood waste decomposition in the marine environment detailing how that wood waste releases hazardous substances during decomposition. The trial court denied the Defendants' summary judgment motion.

The Defendants filed an interlocutory appeal. The Court of Appeals affirmed the trial court's denial of summary judgment. Despite not reaching the Port's arguments regarding the SMS[3], the Court found that the basic statutory language of MTCA may subject Defendants to liability for hazardous substances released by their actions on the property. Liability would be ultimately dependent upon what facts are proven at trial. In brief, the Court of Appeals explained that although the release occurred through degradation of wood waste, it is nonetheless a "release" for the purposes of MTCA. Given this holding, the Court affirmed denial of summary judgment and remanded the case back to the superior court for trial without addressing the Port's argument on the interplay of the SMS and MTCA.

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[3] *See* Opinion at 7, n. 12.

In light of that holding, the Defendants now petition this Court for review. Defendants' Petition improperly seeks review under the inapplicable standards set forth in RAP 13.5(b)(3), which would not warrant review *even if* it were the correct standard. Defendants fail to brief, let alone meet, the correct standards for review in RAP 13.4(b). These significant failures mandate this Court deny the Petition.

II. RESTATEMENT OF THE ISSUES

1. Under RAP 13.4(b), review of an appellate court's decision may only occur if the decision conflicts with a Court of Appeals or Supreme Court Decision, is a significant question of constitutional law, or is an issue of substantial public interest. The Court of Appeals issued an Opinion applying the plain language of RCW 70.105D.020 to the facts and finding a "release" occurred under the statute for which Defendants may be liable, depending on facts to be determined at the future trial. Defendants failed to cite, let alone satisfy, these criteria for review. Given Defendants failure to brief or meet the RAP 13.4(b) requirements, should the Court deny review?

2. The Court of Appeals' Opinion held that under the specific facts in the record a "release" occurred under RCW 70.105D.020. In doing so, the Court of Appeals affirmed the denial of summary judgment without reaching the Port's arguments on the relationship between the Model Toxics Control Act and Sediment Management Standards. Defendants' "issue presented" has no bearing on the Court of Appeals' Opinion which affirmed denial. Given this lack of relevance, should the Court deny review or be otherwise sure to reach all pertinent issues presented by both parties?

III. STATEMENT OF THE CASE

The Opinion sets out the facts in a fair and detailed fashion, and the Port generally concurs with that rendition of the facts. Op. at 2-7. But the Port would be amiss if it did not point out two particular facts that require attention in this Answer.

Here Defendants' Petition incorrectly proclaims that "the Court of Appeals reached a holding on the certified question that dictated reversal of the Superior Court's decision on the certified question," (Pet. at. 4) yet that proclamation simply and starkly contrasts with the truth for multiple reasons. The crux of the question on appeal was whether Defendants could be liable for cleanup costs associated with the industrial wood waste they deposited in the marine environment. The Court of Appeals carefully considered the arguments and briefing of the parties and issued a general denial of Defendants' summary judgment motion. This denial requires a trial to determine relevant factual issues including, but not limited to, when Defendants' wood wastes deteriorated and released listed hazardous substances into the marine environment.[4]

The Court of Appeals plainly applied MTCA and recognized that a release of hazardous substances occurred for which Defendants may be liable as a result of the industrial wood wastes that Defendants deposited into the marine environment. Op. at 11. Given this holding, the Court found

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[4] Importantly, the Court of Appeals heard opinions and different issues by both parties regarding Defendants' liability. In sum, Defendants broadly argued that they had no liability whatsoever under MTCA for the industrial wood waste they deposited into the marine environment. In contrast, the Port argued that under MTCA and the SMS industrial wood waste in the marine environment is a hazardous substance subject to remediation here. Washington State Department of Ecology argued in amicus briefing that the Court did not need to reach these arguments to find Defendants could be liable under MTCA.

no need to reach the Port's arguments about the interplay between MTCA and the SMS. *Id.* at 12. The Court of Appeals denied Defendants' Motion for Reconsideration. *See* Order Den. Joint Mot. for Recons. at 2.

Now, Defendants bring their instant Petition before this Court asking for review under RAP 13.5(b)(3). Pet. at 5.[5] Defendants make several unsubstantiated claims in that Petition:

- That the Court of Appeals somehow rested its decision on an inadequately briefed or raised issue;
- That they need a clearer ruling limited to their certified question "for the issue of third-party joinder and preventing unjust attorney fee exposure"; and
- That they need a clearer ruling to resolve MTCA's equitable factors.

Pet. at 6, 9, 12. None of these arguments are well-founded.

Defendants' Petition mostly regurgitates their denied Motion for Reconsideration and fails to cite, let alone discuss, the applicable standards for review by this Court. *See* Mot. for Recons. at 4, 6, 9. Defendants also set out a purposefully broad and meaningless "issue" that attempts to obfuscate the ultimate issue of potential liability.[6] Not only is that issue

[5] As an aside, Defendants wrongly cite to RAP 2.3(3), which governs the scope of review of a trial court decision by the appellate court, rather than RAP 15.3(b)(3), which contains the (inapplicable) review standard cited by Defendants in the Petition. Pet. at 5.

[6] Importantly, Defendants claim that their stated issue is somehow relevant to a determination of liability under MTCA. It is not. The Court of Appeals correctly noted that a "release" occurred under MTCA during Defendants' operation of the site. Here, that release was the breakdown of the wood waste in the marine environment which released listed hazardous substances. In denying the appeal on this ground, the Court of Appeals did not need to (and indeed did not) address the Port's argument that industrial wood waste itself is a hazardous substance in this instance under MTCA through the SMS.

irrelevant, but Defendants fatally briefed the wrong standard of review. They do not provide any argument discussing the applicable criteria for review under RAP 13.4(b), and regardless the Petition fails to meet those criteria.

IV. ARGUMENT

THE COURT SHOULD DENY A DEFENDANT'S PETITION FOR REVIEW WHEN THE PETITION FAILS TO DISCUSS OR ARGUE ANY OF THE PROPER CRITERIA FOR REVIEW UNDER RAP 13.4(B) AND FAILS TO PROVIDE ARGUMENT SUPPORTING THEIR INCORRECTLY BRIEFED STANDARD.

Defendants' Petition must meet one of four requirements to obtain Supreme Court review of a decision terminating review. *See* RAP 13.4(b). The Petition fails to address <u>any</u> of these criteria; instead it erroneously cites to RAP 13.5(b)(3) as the vehicle by which this Court should grant review.

These failures irreparably conflict with Defendants' obligations under both RAP 13.4(b) and RAP 13.4(c)(7) to: (1) articulate the reasons for review; and (2) provide "[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in [that section], with argument." *See* RAP 13.4(b) and RAP 13.4(c)(7).

The Opinion does not merit review by the Court at this time for three reasons. First, the Petition fails to cite or discuss the relevant standards. Second, the Opinion does not satisfy the correct standards. Third, Defendants will have the ability to appeal the trial court's final decision *after* the relevant factual record is developed at trial. As such, the best course of action is to let the record continue to fully develop in the trial

court. After trial, Defendants may avail themselves of appellate review if they feel it is warranted at that time.

A. This Court should not grant a petition for review where Defendants fail to satisfy or provide briefing on any one of the four requirements for review under RAP 13.4(b).

1. RAP 13.4(b), rather than the RAP 13.5(b), lays out the correct requirements for review by this Court.

Defendants erroneously cite to and discuss RAP 13.5(b) as the applicable standard for review of the Court of Appeals' Opinion. However, it is clear that Defendants must meet one of the four requirements under RAP 13.4(b) to obtain review by this Court. RAP 13.4(b). *See* Clerk's Letter Sent by E-Mail Only to All Parties (Nov. 27, 2019).

2. Defendants neither brief nor satisfy any of the requirements for review under RAP 13.4(b).

Not only does the Petition fail to discuss the applicable RAP 13.4(b), but Defendants cannot satisfy any of the requirements set out by RAP 13.4(b) in order to warrant review.

This Court accepts petitions for review under RAP 13.4(b) <u>only</u>:

> (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). Put simply, petitioners like Defendants here "must demonstrate that the Court of Appeals decision conflicts with a decision of this court or another Court of Appeals decision, or that [they are] raising a significant constitutional question or an issue of substantial public interest." *In re Matter of Dove*, 188 Wn. 2d 1008, 398 P.3d 1070 (2017). The Port addresses each of these criteria in turn despite Defendants' failure to discuss any of them.

First, the Opinion does not conflict with any decision by this Court or the appellate courts of this State, as MTCA liability relating to or arising out of industrial wood waste deposits in the marine environment is an issue of first impression in Washington. The mere fact that this is an issue of first impression is neither a basis for review provided in RAP 13.4 nor recognized by this Court. *See In re Coats*, 173 Wn. 2d 123, 132-33, 267 P.3d 324 (2011) (recognizing "petitioner must persuade us that **either** the decision below conflicts with a decision of this court or another division of the Court of Appeals; that it presents a significant question of constitutional interest; or that it presents an issue of substantial public interest that should be decided by this court.") (emphasis added); *see also Matter of Dove*, 188 Wn. 2d 1008, 398 1070 (2017) ("To obtain review in this court, Mr. Dove **must** demonstrate that the Court of Appeals decision conflicts with a decision of this court or another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest.") (emphasis added).

Accordingly, being an issue of first impression is not by itself a cognizable basis for review. This is particularly the case where, as here, the appeal is an interlocutory appeal of the trial court's denial of summary judgment. The effective result of this denial is that there will be a trial to establish all the relevant facts. Based on those narrow set of facts to be established, the trial court will then determine the extent of Defendants' liability under MTCA. There will be ample time for any aggrieved party to pursue additional appeals after a full trial.

Second, this matter strictly relates to liability under the statutorily created MTCA. More precisely, liability where the industrial wood waste Defendants deposited into the marine environment caused a release of hazardous substances. This does not raise any question of either federal or state constitutional law, let alone a "significant" question.

Finally, the lawsuit does not involve an issue of substantial public interest. *See, e.g., State v. Watson*, 155 Wn. 2d 574, 577, 122 P.3d 903 (2005) (finding a decision concerning validity of a sentencing memorandum of substantial public interest when it had the immediate potential to affect all sentencing hearings in Pierce County); *see also In re Adoption of T.A.W.*, 184 Wn. 2d 1040, 387 P.3d 626 (2016) (finding an issue of substantial public importance in determining the scope of the ability to terminate parental rights pertaining to Native American tribes). This Court examined what does and does not quality as a substantial public interest in *In re Flippo*. *In re Flippo*, 185 Wn. 2d 1032, 380 P.3d 413 (2016). There, the Court found that the validity of imposing legal financial obligations more

than a year after judgments on personal restraint petitions were final was an issue of a substantial public interest because of its potential to broadly impact personal restraint petitions. *Id.* The Court recognized it was a commonly occurring issue and affected a number of existing proceedings in lower courts at the time. *Id.* Conversely, this Court found no substantial public interest in examining a claim of whether a party's guardian ad litem was able to adequately communicate during trial. *See In re Dependency of P.H.V.S.*, 184 Wn. 2d 1017, 389 P.3d 460 (2015).

Here, the Opinion applies MTCA in a straightforward manner to the narrow set of facts on the record. Defendants' Petition focuses on how the Opinion will impact them in the pending case (i.e. their alleged potential exposure to attorneys' fees, etc.) and do not discuss a broader public interest. As such, the Opinion is relevant to the particular dispute between the Port and Defendants, and not some greater substantial public interest. The Court should deny the Petition because it does not meet RAP 13.4(b)'s requirements for review.

Further, this Court should not permit Defendants to remedy their failure to discuss RAP 13.4(b) in a reply brief. The failure to raise <u>and</u> brief an issue in the opening Petition requires this Court to disregard any argument on reply. *See* RAP 13.4(c)(7) and RAP 13.7(b). Even if a party mentions an issue in their petition but still fails to address it as required by RAP 13.4(c)(7), the Court must disregard that issue. *See State v. Korum*, 157 Wn. 2d 614, 623-25, 141 P.3d 13 (2006) (declining to review argument on an issue raised in petitioner's argument section but not the concise

statement of issues, as required in the petition for review under RAP 13.4(c)(7)); *see also In re Detention of A.S.*, 138 Wn. 2d 898, 922 n. 10, 982 P.2d 1156 (1999) (explaining that in the absence of argument on an issue in a petition of review, the Court will not consider the argument and waive it).

Strict enforcement of this rule is important to maintain fairness to a responding party, such as the Port. Allowing otherwise would give Defendants the opportunity to strategically withhold analysis of critical issues and then provide an unrebutted reply. The Court should not consider any argument by Defendants regarding the standards in RAP 13.4(b) on reply.

B. Defendants inappropriately rely on RAP 13.5(b)(3) and still fail to satisfy the exacting requirement of that rule for review by the Court.

Even if the Court were to consider review under the inapplicable standard in RAP 13.5(b)(3), the Petition fails to meet that standard for review. There is nothing to suggest that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of [this Court's] jurisdiction." RAP 13.5(b)(3).

The Court of Appeals correctly stated that it could "affirm [the] trial court's decision on a motion for summary judgment **on any ground** supported by the record." *Pac. Marine Ins. Co. v. Dep't of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (Div. 2 2014). The Court of Appeals was further correct in that it could affirm on those grounds "whether or not the argument was made below." *Bavand v. OneWest Bank*, 196 Wn. App. 813, 825, 385 P.3d 233 (Div. 1 2016). Moreover, to the extent the Court of

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Appeals relied on Ecology's amicus briefing, it could freely do so. *See State v. Duncan*, 185 Wn. 2d 430, 440, 374 P.3d 83 (2016) (en banc) ("Appellate courts will not usually decide an issue raised only by amicus, but may choose to do so."). Simply put, no impropriety exists in the Court of Appeals' Opinion.

The Court of Appeals merely found reasonable grounds supporting the trial court's denial of a summary judgment motion and therefore remanded the case for a full and complete trial on the merits. Defendants will have the opportunity to present any and all relevant facts and arguments at trial. Defendants fail to show that a departure from the accepted and usual course of judicial proceedings occurred in any way. Review would be improper under this standard even if RAP 13.5(b)(3) applied (which it does not).

The standards of review themselves anticipate that discretionary review requires something more than simple disagreement. Here there is simply no reasoning that warrants review under the standards outlined by this Court. In that light the proper action is for the Court to deny review.

C. The issue presented by Defendants has no relevance to the Court of Appeals' Opinion, which did not rest its decision on that basis and did not need to address the Port's primary arguments.

Defendants' Petition asks this Court to review as its issue whether "Wood debris is not a 'hazardous substance' under Washington's Model Toxics Control Act ('MTCA') as a matter of law." Pet. at 1. But given the holding in the Opinion, a review of that issue does not mandate a different result even if this Court found in favor of Defendants. Again, this provides

another reason for the Court to deny review. More exactingly, the Opinion itself already found:

> Here, defendants argue that wood debris does not fit within the established definitions for hazardous waste. Ecology, while not a party in this case, submitted an amicus brief essentially conceding that wood debris itself does not fit into the definitions of a hazardous substance in RCW 70.105D.020(13). **We agree.**
>
> **However**, the evidence in the record demonstrates that wood debris results in a release of listed hazardous substances as it breaks down in the marine environment.

Op. at 10 (emphases added).

In short, the Court recognized that wood debris itself was not included in the definition of a hazardous substance in RCW 70.105D.020(13). But this was never the argument of the Port, who instead discussed the particular issue of industrial wood debris in the <u>marine environment</u>. Thus, the Port's briefing addressed the relationship between MTCA and the SMS. The Court's holding—affirming denial of summary judgment in light of Defendant's argument—means that the issue raised is unavailing. This is not a new issue in this matter and was briefed extensively in the lower courts. The only reason this issue was left undecided was because the Court of Appeals affirmed denial of summary judgment on other grounds.

Consequently, if the Court grants review it should be sure to reach all pertinent issues presented by both parties. The Court's Opinion is clear that in the marine environment, wood waste can release hazardous substances, thus establishing MTCA liability arising out of wood waste disposal in the marine environment. Review is not warranted in the first

place. But if the Court decides to grant review and take issue with the Opinion, it should also analyze the interplay between MTCA and the SMS as an independent ground upon which to deny Defendants' interlocutory appeal.[7]

V. CONCLUSION

The Court of Appeals' Opinion is well-informed and correct. Defendants' Petition fails to either address or satisfy the criteria for discretionary review under RAP 13.4(b). To the extent the Petition briefs RAP 13.5(b)(3) it likewise fails to satisfy that criteria for discretionary review. Since Defendants fail to satisfy any of the requirements for review, the Court should deny their Petition.

If, despite all of this, the Court grants Defendants' Petition, the Court should be sure to reach all of the relevant issues—particularly those raised by the Port—addressed in front of the Court of Appeals.

Respectfully submitted this 21st day of January, 2020.

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[7] *See* Opinion at 7, n.12 (where the Court of Appeals indicated it did not reach the SMS and MTCA interplay as it decided the appeal on different grounds).

VI. APPENDIX

Lennon, Erin, *Re: Supreme Court No. 9788-1 – Port of Anacortes v. Frontier Industries, Inc., et al. Court of Appeals No. 78726-8-I* (Nov. 27, 2019) (on file and sent to all parties).

Order Den. Joint Mot. for Recons (Oct. 24, 2019) (on file and sent to all parties).

Port of Anacortes v. Frontier Industries, Inc., __ Wn. App. __, 447 P.3d 215 (Div. 1 2019).

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Re: Supreme Court No. 97889-1 - Port of Anacortes v. Frontier Industries, Inc., et al.
Court of Appeals No. 78726-8-I

Clerk and Counsel:

On November 25, 2019, this Court received and filed the "JOINT PETITION FOR REVIEW". The matter has been assigned the Supreme Court cause number indicated above. On November 27, 2019, both parties emailed the Court with their opinions regarding whether this case should properly be designated a petition for review under RAP 13.4 or a motion for discretionary review under RAP 13.5. A copy of the letter that was attached to the email is attached for the Petitioner.

Whether the request for review is properly designated a petition for review or a motion for discretionary review depends on the nature of the decision by the Court of Appeals. If the decision by the Court of Appeals is a "decision terminating review" as defined in RAP 12.3, a request for review of that decision is a petition for review. See RAP 13.4. If the decision by the Court of Appeals is instead an "interlocutory decision" by the Court of Appeals, the request for review is a motion for discretionary review. See RAP 13.5. RAP 12.3 defines a "decision

terminating review" as a decision that is filed after review is accepted by the appellate court, terminates review unconditionally, and is a decision on the merits. In this case, the Court of Appeals accepted review on September 18, 2018, and the Court of Appeals issued its opinion terminating appellate review on August 19, 2019. While the original request for review by the Court of Appeals was interlocutory, the request for Supreme Court review is of a "decision terminating review" because the Court of Appeals accepted review and issued an opinion terminating review. While the trial court case may continue, the Court of Appeals terminated this appellate review. Therefore, the request for review of that Court of Appeals decision is correctly titled a "petition for review."

The $200 filing fee did not accompany the petition. The petition will be held until December 6, 2019, to allow the Petitioner time to pay the filing fee to this Court. If the filing fee is not received by December 6, 2019, it is likely that this matter will be dismissed.

The parties are advised that upon receipt of the filing fee, a due date will be established for the filing of any answer to the petition for review. The due date will be at least 30 days from receipt of the filing fee.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. For attorneys, this office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:sk

Enclosure for Petitioner

FILED
10/24/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PORT OF ANACORTES, a Washington municipal corporation, Respondent, v. FRONTIER INDUSTRIES, INC. a Washington, corporation; EINO "MIKE" JOHNSON and LORIE A. JOHNSON, a married couple; ITOCHU INTERNATIONAL, INC., a foreign corporation; Petitioners, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; ACE USA INSURANCE a Pennsylvania corporation; THE CHUBB CORPORATION, a Pennsylvania corporation. Defendants.	No. 78726-8-I DIVISION ONE ORDER DENYING JOINT MOTION FOR RECONSIDERATION

Petitioners Frontier Industries Inc., Eino "Mike" Johnson, Lorie Johnson and Itochu International Inc., filed a joint motion for reconsideration of the opinion filed on August 9, 2019. Respondent Port of Anacortes and Amicus Curiae Washington Department of Ecology filed responses. A panel of the court has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

FILED
8/19/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PORT OF ANACORTES, a Washington municipal corporation, Respondent, v. FRONTIER INDUSTRIES, INC. a Washington, corporation; EINO "MIKE" JOHNSON and LORIE A. JOHNSON, a married couple; ITOCHU INTERNATIONAL, INC., a foreign corporation; Petitioners, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation; ACE USA INSURANCE a Pennsylvania corporation; THE CHUBB CORPORATION, a Pennsylvania corporation. Defendants.	No. 78726-8-I DIVISION ONE PUBLISHED OPINION FILED: August 19, 2019

CHUN, J. — The Port of Anacortes filed suit against defendants[1] under the Model Toxics Control Act (MTCA), which imposes strict liability on any owner or operator of a facility "at the time of disposal or release of . . . hazardous substances." RCW 70.105D.040(1)(b). Defendants' activities at the Port's log handling facility resulted in the accumulation of significant amounts of wood

[1] "Defendants" refers to Petitioners Frontier Industries, Inc., Eino "Mike" Johnson, Lorie A. Johnson, and Itochu International, Inc.

debris in the marine environment. Decomposition of such debris in the marine environment releases hazardous substances such as ammonia, benzoic acid, and phenols. Moreover, such hazardous substances existed in the water at the cessation of defendants' activities at the Port. This indicates that a release of hazardous substances occurred during defendants' tenure as operators of the facility. Therefore, we affirm the trial court's denial of defendants' joint motion for summary judgment.

I. BACKGROUND

The Port serves as a Washington port district and owns upland and aquatic property on Guemes Channel in Anacortes, Washington. The Port purchased the site in 1965. The property includes Pier 2, a deep-water marine terminal, and a "round log" handling facility. Round logs have had their leaves and branches removed but maintain their bark. The round log handling facility consists of the upland "log yard" and the "log pocket" in a small embayment in the water. Log handling occurred at this site for approximately four decades, from the mid-1960s to 2004.

From 1994 to 1997, defendant Frontier Industries, owned by Mike Johnson, leased the log yard and log pocket for log handling. Defendant Itochu International, Inc., a Japanese trading firm, also used the log handling facility to export logs to Japan. In 1997, log handling ceased for a time due to a downturn in the round log export business. Exports resumed later that year, and Johnson

entered an agreement with the Port for Itochu to serve as the exclusive round log user of the Port's facility. The Port closed the log handling facility in 2004.

Defendants handled tens of millions of board feet of round logs at the Port facility. A tugboat would pull large rafts, composed of many bundles of logs, into the log pocket. The tugboat would then deposit the logs in a north-south position within the log pocket. During low tide, the logs typically rested on the bottom of the log pocket. Removal of the logs required east-west positioning. A small gasoline-powered boat called a "log bronc" moved the rafts around inside the log pockets to reorient them. When the logs were properly situated, a large machine called a "Wagner" would go to the log pocket and retrieve bundles of logs with its hydraulic claws.

During this process, the logs shed bark while in the log pocket. Shedding occurred because the logs soaked in the salt water and rubbed and crashed against each other and the machinery. The shed bark deposited on the bottom of the log pocket.

Studies dating back to 1984 show that sediment with 20 percent wood waste by volume can cause a negative impact on the marine environment.[2] "Wood waste leaches and/or degrades into some compounds that can be toxic to aquatic life, such as phenols and methylated phenols, benzoic acid and benzyl alcohol, terpenes, and tropolones."[3] Wood debris decomposes into byproducts

[2] CP 287.
[3] CP 296-97.

"such as sulfides, ammonia, and phenols, which can cause or contribute to toxicity."[4] Additionally, "TVS [total volatile solids] and sulfides are known by-products of wood waste decomposition in the marine environment that are toxic to aquatic life."[5]

After the facility's closure, the Port assessed the environmental impacts of the log handling activities. Surface sediment samples contained contaminants such as benzene derivatives. The investigation also included the digging of eight test pits in the marine sediment to two feet below the mudline. All eight pits confirmed the presence of wood debris, with four of the test pits exceeding 50 percent wood waste by weight. The layer of deposited wood debris ranged in thickness from 11 inches to two feet. Two of the pits showed approximately 75 percent wood waste through two feet of sample sediment.

In 2008, the Washington State Department of Ecology (Ecology) required the Port to conduct chemical and biological toxicity testing to determine if the log pocket's wood waste posed an environmental risk. The testing found that the log pocket sediment samples contained higher concentrations of total sulfides than typically found in the Puget Sound. Additionally, the sediment samples failed to meet Ecology's criteria for benthic[6] abundance. Subsequent investigations

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[4] CP 288.

[5] CP 291.

[6] "Benthic" is defined as "of, relating to, or occurring on the bottom underlying a body of water." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 204 (2002). An expert for the Port described the importance of the benthic community as follows: "Benthic organisms, or benthos, are organisms that live on or near the sediment surface in a marine environment. A healthy and

provided additional evidence of adverse environmental effects from wood debris. In addition to wood waste, sediment samples contained metals, benzoic acid, dioxins, and furans in amounts exceeding required cleanup levels.

In April 2014, Ecology issued a Potentially Liable Person (PLP) Determination letter to the Port as owner of the log handling site. In response, the Port entered into an Agreed Order with Ecology promising to conduct a remedial investigation of the extent of the hazardous substances and a feasibility study on the options for cleanup, as well as draft a cleanup plan. As of June 2018, the remedial investigation and feasibility studies for cleanup of the log handling facility reached their final stages. The Port has paid, and has agreed to continue to pay, for remedial action at the site.

The remediation report lists wood waste as the first contaminant of concern. In addition, substances such as metals, LPAHs,[7] HPAHs,[8] cPAHs,[9] benzoic acid, phenols, dioxins, and furans contaminate the wood debris area and commingle within the wood waste. While many of these contaminants stem from the use of machinery during the log handling operations, hazardous substances such as benzoic acid and phenols also result from the decomposition and degradation of the wood debris in the marine environment. Site testing in the log

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diverse benthic community is a foundation of the aquatic food web and recycles nutrients between the sediment and water column in forms useable to other organisms."

[7] LPAHs are low molecular weight polycyclic aromatic hydrocarbons such as acenaphtene and flourene.

[8] HPAHs are high molecular weight polycyclic aromatic hydrocarbons such as benzo(a)pyrene, fluoranthene and chrysene.

[9] cPAHs are carcinogenic polycyclic aromatic hydrocarbons.

pocket demonstrated the presence of these contaminants as well as other known by-products of wood debris including ammonia and sulfides.

In July 2016, the Port filed a complaint seeking contribution from defendants under MTCA. The Port requested proportionate recovery of the costs of remediation for the site from these former operators.[10] The Port also sought declaratory judgment on two issues. First, the Port requested declaratory relief "that the Operator Defendants, as former owners and/or operators under RCW 70.105D.040(2), are strictly liable, jointly and severally, for all remedial actions costs resulting from releases or threatened releases of hazardous substances at the Site, a facility under RCW 70.105D.020(8)." Second, the Port claimed entitlement to declaratory judgment that defendants' insurance carrier is obligated to defend and/or indemnify the Port with respect to the environmental liability. Finally, the Port raised a breach of contract claim against the insurance company for failure to indemnify it for costs and liability incurred due to the damage caused by the hazardous substances.

Defendants jointly moved for summary judgment, requesting dismissal of all claims. Specifically, defendants sought to avoid liability on the ground that

[10] During oral argument, Itochu disputed its role as an operator of the log handling facility. Wash. Court of Appeals oral argument, Port of Anacortes v. Frontier Indus., No. 78726-8-I (July 12, 2019), at 2 min., 40 sec. through 3 min. 18 sec. (on file with the court). Itochu did not raise this issue in its briefing on review. We do not consider arguments made outside the briefing. RAP 10.3. For the purposes of this review, we assume Itochu operated the log handling facility as alleged.

wood debris does not constitute a hazardous substance.[11] The trial court denied the motion for summary judgment.

The trial court also denied defendants' motion for reconsideration, but certified the decision for review by this court under RAP 2.3(b)(4). A commissioner of this court accepted discretionary review to determine whether wood debris is a hazardous substance under MTCA.[12]

II.
DISCUSSION

Defendants contend that wood waste, as a matter of law, does not qualify as a hazardous substance under MTCA.[13] They ask us to reverse the trial court's ruling on this ground.

Appellate courts review de novo orders on motions for summary judgment and perform the same inquiry as the trial court. Owen v. Burlington N. & Santa Fe R.R., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). A court properly grants summary judgment where there exists no genuine issue as to any material fact,

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[11] Defendants also alleged that the Port could not meet its burden of producing evidence of a release or disposal of other hazardous substances during the time defendants operated the site. This issue is not on review.

[12] After completion of the briefing, the Port filed a motion to strike portions of defendants' reply briefing concerning argument about the validity of the Sediment Management Standards (SMS) under the Administrative Procedures Act (APA). A commissioner of this court referred the motion to strike to the panel for consideration with the merits. Because we do not reach the SMS arguments raised by the Port, the motion is moot and we need not rule on it.

[13] Defendants argue the sole issue on review is whether wood debris is a hazardous substance and that we are limited to answering only this question. Specifically, defendants claim that the Port did not previously raise the issue of liability for disposal of non-hazardous materials that later decompose into hazardous substances. Defendants do not cite any legal authority to support their position. We may affirm the trial court's ruling on a summary judgment motion on any ground supported by the record. Pac. Marine Ins. Co. v. Dep't of Revenue, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

entitling the moving party to judgment as a matter of law. Owen, 153 Wn.2d at 787; CR 56(c). "The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach but one conclusion." GO2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 83, 60 P.3d 1245 (2003). We may affirm a trial court's decision on a motion for summary judgment on any ground supported by the record. Pac. Marine Ins. Co. v. Dep't of Revenue, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

This case requires us to interpret MTCA. We review de novo questions of statutory interpretation. Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd., 182 Wn.2d 342, 350, 340 P.3d 849 (2015). Our "fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then [we] must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Furthermore, "meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Campbell & Gwinn, 146 Wn.2d at 11. The court must interpret the language in a manner rendering no portion of the statute meaningless or superfluous. Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). The court defers to an agency's interpretation of its own regulations only if the statute presents ambiguity. Port of

Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

"The primary intent of MTCA is that '[p]olluters should pay to clean up their own mess.'" Pope Res., LP v. Dep't of Nat. Res., 190 Wn.2d 744, 751, 418 P.3d 90 (2018) (quoting State of Washington Voter's Pamphlet, General Election 6 (Nov. 8, 1988)). "The provisions of [MTCA] are to be liberally construed to effectuate the policies and purposes of this act." RCW 70.105D.910.

MTCA imposes strict liability on any owner or operator of a facility "at the time of disposal or release of . . . hazardous substances" there. RCW 70.105D.040(1)(b); See Weyerhauser Co. v. Commercial Union Ins. Co., 142 Wn.2d 645, 661, 15 P.3d 115 (2000). It provides for a private right of action for contribution or declaratory relief against liable persons to recover remedial costs. RCW 70.105D.080.

MTCA defines "hazardous substances" as:

> (a) Any dangerous or extremely hazardous waste as defined in RCW 70.105.010 (1) and (7), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter 70.105 RCW;
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> (b) Any hazardous substance as defined in RCW 70.105.010(10) or any hazardous substance as defined by rule pursuant to chapter 70.105 RCW;
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> (c) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);
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> (d) Petroleum or petroleum products; and
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> (e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to

> present a threat to human health or the environment if released into the environment.

RCW 70.105D.020(13).

Here, defendants argue that wood debris does not fit within the established definitions for hazardous waste. Ecology, while not a party in this case, submitted an amicus brief essentially conceding that wood debris itself does not fit into the definitions of a hazardous substance in RCW 70.105D.020(13). We agree.

However, the evidence in the record demonstrates that wood debris results in a release of listed hazardous substances as it breaks down in the marine environment. As discussed above, the wood debris decomposition products include ammonia, hydrogen sulfide, and benzoic acid. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) has designated these compounds as hazardous substances. 42 USC § 9601(14); 40 C.F.R. § 302.4. As hazardous substances designated under CERCLA, ammonia, hydrogen sulfide, and benzoic acid meet the definition of hazardous substances for MTCA under RCW 70.105D.020(13)(c). While wood by itself may not qualify as a hazardous substance, wood debris decomposing in the marine environment releases designated hazardous substances under MTCA.

For the question of liability, the issue then becomes when the release of the hazardous substances occurred as a result of wood debris decomposition in

the marine environment. As noted above, parties strictly liable under MTCA include, "[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances." RCW 70.105D.040(1)(b). "'Release' means 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.020(32).

The record shows that as of July 2004, sediment samples from the log pocket included detectible levels of hazardous substances known to be released during wood decomposition in the marine environment, including ammonia, benzoic acid, and phenols. While the chemicals of concern did not exceed Ecology's Sediment Quality Standards at that time, their presence at the cessation of log handling indicates a release of hazardous substances occurred during defendants' tenure as operators of the facility.[14]

In the context of defendants' motion for summary judgment, we must view the evidence in the light most favorable to the Port. In doing so, we determine that issues of fact exist regarding whether hazardous substances were released

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[14] Defendants point to microorganism activity as the cause of release of hazardous substances from the wood debris. But the MTCA provision here does not specify the types of actors required for liability. Liability attaches to "[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances." RCW 70.105D.040(1)(b). Release entails "entry" of a hazardous substance into the environment regardless of intent. RCW 70.105D.020(32). MTCA does not require owner or operator activity for liability. The fact of the release, rather than the actors involved in the release, triggers liability for an owner or operator. This adheres to the strict liability scheme established by the Act.

at the time defendants were operators at the log handling facility.[15] The trial court properly denied summary judgment.

Affirmed.

WE CONCUR:

[15] In light of this conclusion, we do not reach the following issues: (1) whether Ecology's SMS, promulgated through formal rulemaking, establishes wood waste as a hazardous substance, as argued by the Port, and (2) whether the disposal of a hazardous substance includes the disposal of a substance (such as wood debris) into an environment where it will cause a release of hazardous substances, as argued by Ecology.

CHMELIK SITKIN & DAVIS P.S.

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