No. 94087-8

SUPREME COURT
OF THE STATE OF WASHINGTON

COA No. 33615-8-III

SHAMROCK PAVING, INC., a Washington Corporation

Petitioner

v.

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS

Respondents/Cross-Petitioners

ANSWER TO PETITION FOR REVIEW & CROSS-PETITION

Joseph P. Delay, WSBA No. 2044
601 West Main Avenue, Suite 1212
Spokane, WA 99201-0684
(509) 455-9500
marigail@dctpw.com

Steven J. Hassing, WSBA No. 6690
425 Calabria Court
Roseville, CA 95747
(916) 677-1776
sjh@hassinglaw.com

Attorneys for Petitioner, Harlan D. Douglass

TABLE OF CONTENTS

DOUGLASS' ANSWER TO SHAMROCK'S PETITION

DOUGLASS' CROSS-PETITION

TABLE OF AUTHORITIES

Administrative Codes

Rules of Appellate Procedure

DOUGLASS' ANSWER TO SHAMROCK'S PETITION

I. INTRODUCTION

The underlying premise of Shamrock's Petition is that its release of hazardous substances onto Douglass' property during an 89 day trespass while it serviced, fueled and oiled sixteen pieces of heavy equipment was so inconsequential that Douglass' decision to spend $950.00 to test for contamination was unreasonable.

Shamrock even argues that because the contamination was only exactly at the threshold at which the Department of Ecology requires reporting and cleanup and did not exceed it that Douglass acted unreasonably in removing the 68 tons of soil that Shamrock contaminated. Shamrock argues that Douglass, a real estate developer, should have "done nothing". Then what? Perhaps quietly have sold the land to an unsuspecting future buyer?

In an attempt to convince this Court that the waste oil it released onto Douglass' property was innocuous, Shamrock employs this misleading half-truth;

> ***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***

(Shamrock Petition @ pg 6)

The statement misleads because since Douglass' environmentalist took samples from three separate locations the fact

that the final two samples were taken after the initial sample rather than at exactly the same time is meaningless because all three samples were taken from *different* areas. (RT; 273, 279, 289). The first sample was obtained November 24, 2013. (CP 729). It tested at 2,000 mg/kg, the exact threshold at which DOE mandates cleanup[1]. The final two samples were taken two months later on January 24, 2014 and tested at 800 mg/kg and 400 mg/kg. (CP 729). One was taken from an area 25-30 feet northwest of the initial sample. The other from 25-30 feet southeast of the first sample. (RT 273, 279, 289).

The fact that the concentration of lube oil in the latter two samples was less than in the first sample in no way diminished the potential threat revealed by high concentration of oil in the first sample. Shamrock's attempt to diminish the toxicity of the first sample by indicating that the last two samples were taken closer to the time of the cleanup is nonsense designed to mislead. It's clear the Shamrock would like this Court to wrongly believe that the contamination was somehow lessened prior to cleanup.

Shamrock then makes the following statement to this Court;

> ***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] Had it tested at 2,001 mg/kg, it would have been classified as a *threat to human health or the environment.*

(Shamrock Petition @ pg 19).

But what about the 2,000 mg/kg test revealed by the first sample? Shamrock then built upon the half-truth, arguing;

> ***Despite having those negative test results in hand, the Douglasses charged ahead with a cleanup.*** (Id)

II. COUNTERSTATEMENT OF ISSUES

A. Is a release of a hazardous substance correctly characterized as *nominal* or *harmless* when it tests at the exact level at which the DOE mandates cleanup or must it at least be characterized as a *potential* threat to human health or the environment

B. Must the Court of Appeals allow the Superior Court to first rule on equitable factors before designating Plaintiff the prevailing party even where defendant was a trespasser that released hazardous substances on Plaintiffs' property, some of it intentionally?

III. SHAMROCK'S PETITION SHOULD BE DENIED

A. There is no split between Division II and Division III on the question of whether a MTCA plaintiff must prove that a release of a hazardous substance resulted in a threat or potential threat to human health or the environment in order to recover *costs* of investigation.

The Court should not accept Shamrock's Petition for Review under RAP 13.4(b)(2) because there is no conflict created between decisions of Division II and this *Douglass* decision. In fact Division II has never ruled on recovery of *investigative* costs as opposed to *cleanup* costs. Clearly, the holding in *Seattle City Light v. Wash. Dep 't of Transportation,* 98 Wn.App. 165 (1999) was limited to *cleanup costs*. (*Id* at 167). Cost of *investigation* was never mentioned and was

therefore not before the Court. Accordingly, Douglass is not in conflict with that Division II case.

Shamrock's argument was completely debunked by Division III;

> **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 not inconsistent with the rule recognized here; that investigative costs, undertaken to discern whether such a threat exists, are compensable.**

(Douglass v Shamock at 677).

Shamrock is now reduced to speculating that Division II, relying upon *Seattle City Light*, "would have" decided *Douglass* differently than did Division III.

To its credit, Shamrock seems to recognize that encouraging property owners to investigate potentially dangerous releases encourages good stewardship and promotes preservation of the environment. (Shamrock Petition @ pg 12).

Perhaps the best way to illustrate the folly of Shamrock's argument that investigation costs should not be awarded without a finding that the hazardous substance constituted a threat to human health or the environment is to look directly to RCW 70.105D.020(33) which provides the definition of remedial action.

> **Remedy or remedial action means any action or Expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.**

The definition clearly includes "***any*** investigative activities with respect to ***any*** release of a hazardous substance and any health assessments…conducted ***in order to determine*** the risk or potential risk to human health.

Division III performed a sober analysis of the legislature's intent in drafting the definition of remedial action. The Court analyzed the statute's plain language with a view toward giving effect to its purpose. (*Douglass* at 676, 677). One of the policies behind the statute is to make clean land available for future social use. (RCW 70.105D.010(4)). The purpose of the MTCA is to facilitate the cleanup of contaminated lands promote a healthful environment for future generations. (*Seattle City Light* at 169). The MTCA's declared policy is to hold parties accountable for "irresponsible use and disposal of hazardous substances." *PacifiCorp Environmental v. WSDOT*, 162 Wn.App. 627, 656, 259 P.3d 1115 (2011); RCW 70.105D.010(2).

Division III noted that the definition is broadly worded and that by its plain terms is not limited to actual cleanup efforts. Actions taken

(*Douglass* at 677). The definition specifically includes *any* investigation of *any* release of a hazardous substance. It does not require that the release constitute a threat or potential threat as it does for the cleanup itself. (RCW 70.105D.020 (33)).

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. *Dep 't of Ecology v. Campbell & Gwinn, L.L.* C., 146 Wn.2d 1, 9-10 (2002). Contrary to Shamrock's argument, Division III was not required to add words to the statute to arrive at its interpretation. Division III got it exactly right when it stated;

> **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 danger to human health or the environment.**

(*Douglass at 677*).

B. On the facts of this case, with the equities so obviously favoring Plaintiff, the reviewing court need not await the trial court's final decision on what portion of costs will be awarded Plaintiff prior to designating Plaintiff the prevailing party

Review should not be granted under RAP 13.4(b)(4) on the basis that the prevailing party cannot yet be known because on the facts already established, it is clear that because the equities overwhelmingly

favor Douglass, the trial court will obviously award Douglass most, if not all of his $950.00 cost of investigation.

On remand, the trial court may consider whatever equitable factors it determines are appropriate. RCW 70.105D.080; *Dash Point Village Assocs. v. Exxon*, 86 Wn.App. 596, 607, 937 P.2d 1148, (Div 1, 1997). Accordingly, in addition to any other factors the trial court will consider, it will likely also consider the following;

1. Shamrock was a trespasser;

2. Shamrock's trespass lasted 89 days;

3. Shamrock *intentionally* sprayed petroleum products over Douglass' property daily while cleaning its asphalt paver;

4. Shamrock stored up to 16 pieces of heavy paving equipment on Douglass' property daily;

5. Shamrock continuously fueled and serviced its equipment on Douglass' property;

6. Shamrock was recalcitrant at trial and facts establishing the number of pieces of equipment stored on Douglass' property, Shamrock's failure to attempt to ascertain the record owner of the property, the cleaning of the asphalt paver by spraying diesel into it, etc., had to be elicited by painstaking effort on cross-examination.

In naming Douglass the prevailing party and ordering that he be awarded attorney fees and costs it was apparent that Division III understood that on the particular facts of this case, the equities sufficiently favored Douglass so that he would be awarded most, if not all, of his cost of investigation. Accordingly, there is no basis for further review of this portion of the Division III decision.

DOUGLASS' CROSS-PETITION

I. IDENTITY OF CROSS-PETITIONER

This Cross-Petition is filed by Harlan Douglass, individually and as Personal Representative of the Estate of Maxine H. Douglass. Harlan and Maxine Douglass were plaintiffs and appellants. Maxine Douglass passed away in November of 2016.

II. COURT OF APPEALS DECISION TO BE REVIEWED

Douglass seeks review of the Court of Appeals' decision in *Douglass v. Shamrock Paving*, ---Wn.App. ---, 384 P.3d 673 (Div. III, Nov. 2016).

III. ISSUE PRESENTED FOR REVIEW

Does a hazardous substance measuring at exactly 2,000 mg/kg, by definition, constitute at least a *potential threat* given the following three facts?

(1) 2,000 mg/kg is the minimum cleanup level set by the legislature for soil contaminated by lube oil[2];

(2) 2,000 mg/kg provides the threshold, so that contamination in excess of that level constitutes a threat to human life or the environment *requiring* clean-up; and,

(3) the definition of "remedial action" includes, not only eliminating threats but eliminating ***potential*** threats to human health *or the environment*;

[2] WAC 173-340-740(2)(b)(i); WAC 173-340-900

IV. STATEMENT OF THE CASE

Cross-Petitioner, Harlan D. Douglass, owns a parcel of undeveloped land in Spokane County. (CP 729). Cross-Respondent, Shamrock Paving, Inc., is a paving contractor. (CP 729). During 89 days between June 1, 2013 and August 28, 2013, Shamrock trespassed on Plaintiffs' Property, using it as a staging area for sixteen pieces of heavy paving equipment while working on a nearby road project. (CP 729)(*Douglass* @ 675). Environmental testing after Shamrock was kicked off of Douglass' property established contamination by lube oil measuring 2,000 mg/kg, 800 mg/kg and 400 mg/kg. (CP 730)(*Douglass* @ 675). To his credit, Douglass remediated his property of contamination by removing and disposing of 68 tons of soil. (CP 730).

The trial court found that Shamrock released unknown amounts of hazardous substances onto Douglass' property consisting of gasoline, lube oil, and diesel. (CP 729). The trial court also found that Douglass' effort was the substantial equivalent of a Department of Ecology supervised cleanup. (CP 733). The trial court ultimately found that Shamrock was liable under the Model Toxic Control Act, RCW 70.105D, et seq. (CP 732-33). However, the trial court denied Douglass any relief on his private right of action under MTCA concluding that he failed to show that Shamrock's release of hazardous substances constituted a threat or potential threat to human health or the

environment. (CP 730). Douglass contends that he established that the release constituted a *potential* threat.

On appeal, Division III reversed the trial court, finding that Douglass' investigation of the contamination—but not the cleanup—qualified as a remedial action and that Shamrock is liable for costs of investigation subject to the trial court's consideration of equitable factors. (*Douglass* @ 677). Division III agreed with the trial court that Shamrock was not liable for the cleanup costs because the contamination did not *exceed* 2,000 mg/kg. (*Douglass* @ 678).

V. REVIEW SHOULD BE GRANTED UNDER RAP 13.4(b)(2) BECAUSE BY FAILING TO GIVE MEANING TO THE WORDS *POTENTIAL THREAT*, THE *DOUGLASS* DECISION IS IN CONFLICT WITH PUBLISHED DECISIONS OF DIVISIONS I AND II AS WELL AS THE APPLICABLE STATUTE

A. The decision conflicts with RCW 70.105D.020(33) which provides the definition of remedial action

The MTCA defines "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 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).

The MTCA was intended to provide for a safe and clean environment and to hold liable those responsible for release of

hazardous substances. (*City of Seattle* @ 169; RCW 70.105D.010). It was also intended to facilitate clean-up of hazardous substances released into the environment. (*Id*). The legislature included the word *potential* to describe the kind of threats to the environment that, though they might not exceed the threshold at which they are categorized a per se threat, they still meet the definition of remedial action once cleaned up. If the legislature had intended that only contamination levels exceeding the 2,000 mg/kg threshold be addressed, it would have had no reason to include the words, *or potential threat.*

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. *Dep 't of Ecology v. Campbell & Gwinn, L.L.* C., 146 Wn.2d 1, 9-10 (2002). If the legislature only intended that levels of contamination exceeding 2,000 mg/kg be mitigated, (*actual threat*), there would be no need to include the word *potential* in RCW 70.105D.020(33). It's a safe assumption that the MTCA's lack of a special definition for the word *potential* resulted from a view that the ordinary definition was adequate. That the word needed no special definition as a term of art for purposes of the Act. Additionally, the provisions of the MTCA are to be liberally construed. (RCW 70.105D.910).

Accordingly, this case is ripe for review, not only to resolve the conflict with the cases cited below but to properly interpret the statute.

Accordingly, this case is ripe for review, not only to resolve the conflict with the cases cited below but to properly interpret the statute.

When the legislature mandated that contamination levels exceeding 2,000 mg/kg be remediated it acknowledged that such levels constitute a threat. By mandating also that potential threats be remediated, the legislature acknowledged that the level of contamination need not necessarily reach the level of 2,001 to be threatening and therefore lesser levels can trigger required remediation. If a level of 2,001 mg/kg constitutes a threat, it defies logic to blindly accept the premise that a contamination level of 2,000 mg/kg is not at least, by definition, a potential threat.

B. The Division III decision in *Douglass* conflicts with decisions from Division I and Division II

Cited below are decisions from Divisions I and II, both of which confirm that not only cleanup of threats to human health or the environment satisfy the definition of remedial action, but cleanup of *potential threats* do as well.

"In order to impose remedial costs for cleanup on a defendant, a plaintiff must prove that the hazardous substance poses a threat or *potential threat* to human health or the environment". *Seattle City Light v. Dep't of Transp.*, 98 Wash.App. 165, 170, 989 P.2d 1164 (Div. 2, 1999).

"A cleanup, or remedial action, means any action to identify, eliminate, or minimize any threat or *potential threat* posed by

1185 (Div. 1, 2006). However, despite the fact that a concentration of 2,000 mg/kg would, by definition, constitutes a potential threat, Division III did not reverse the trial court on the issue of cleanup costs. This conflicts with the other cases cited which make clear that cleanup of potential threats constitute remediation.

C. The entire misunderstanding regarding whether Shamrock's release constituted a potential threat to human health or the environment had its genesis in the trial court's apparent misunderstanding of testimony of the DOE expert

Douglass argued that the trial court erred in finding that lube oil at 2,000 mg/kg did not constitute a *potential threat* to the environment. (28-31 AOB).[3] Such finding would have compelled the trial court to find that Douglass' clean up satisfied the definition of *remedial action*.

Douglass' argument focused on the fact that Shamrock's questioning of Mr. Leinart, the DOE expert, elicited testimony regarding the state of the site only *after* it was cleaned-up rather than *before* and that the trial court misunderstood that fact as evidenced by the wording it used in summarizing Leinart's testimony.

Division III carried this misunderstanding forward, determining that the trial court had not misunderstand Mr. Leinart's testimony. It concluded that the trial court had correctly understood Mr. Leinart's testimony to pertain to the *pre-cleanup* state of the site because;

[3] AOB stands for Appellants' Opening Brief

concluded that the trial court had correctly understood Mr. Leinart's testimony to pertain to the *pre-cleanup* state of the site because;

> **The Department witness had reviewed Tetra Tech's report documenting the *pre-cleanup* test results.**

(n 10 at page 11 *Douglass*).

However, the uncontroverted evidence is that Mr. Leinart read only the April 22, 2014 *post-cleanup* report.[4] (RT 606; 15- 606; 4). Yet, the trial court thought that Leinart had testified that the site, prior to cleanup, did not pose a threat to human health or the environment. (CP 733; Findings of Fact). However, the manner in which Shamrock's attorney had phrased his question required Leinart to address the site in its cleaned up state. Shamrock's attorney asked the following questions and received the following answer from Leinart;

> **Question: ... is it your judgment that the conditions and circumstances at that site *do not* constitute a Model Toxics Control Act release of a hazardous substance?**
>
> **Answer: That was my interpretation of the data and information that I got from the report, my conversation with Joe Delay and that I generated.**

(RT 630; 9- 19).

This Court is asked to remember that the report to which Mr.

[4] Leinart's entire testimony is at RT 592-631

Question: I'll take it a step further. Is it, also, your Judgment and your opinion that the conditions and circumstances of the site *do not* constitute a Model Toxic Control Act release of a hazardous substance *that is* a threat to human health and the environment?

Answer: That's correct

(RT 630; 20-25).

Douglass filed objections to the trial court's findings and conclusions regarding Leinart's testimony

On March 17, 2015, Douglass filed objections to the trial court's findings and conclusions and proposed additional findings and conclusions. There, Douglass specifically objected to the trial court's misstatement of evidence noted above. (CP 634, line 20-28)[5].

D. The prevailing party is entitled to attorney fees on appeal.

The prevailing party in a private right of action under MTCA shall recover its reasonable attorneys' fees and costs. (RCW 70.105D.080). The trial court awarded fees to Shamrock as the prevailing party at trial. Division III reversed that award and ordered fees paid to Douglass. Douglass requests that fees be awarded by this

[5] Douglass pointed the trial court to pages 6-8 of the objections (CP 626-628) which showed exactly how in its closing brief, Shamrock had taken Leinart's testimony and changed it from present tense to past tense to make it look like Leinart was testifying that The Property—before it had been cleaned up—did not constitute a threat. Douglass even provided that part of the transcript that detailed Leinart's entire testimony.

Court should he prevail in his quest to seek review by this Court. (RAP 18.1 (a) and (j).

VI. CONCLUSION

By including "potential" threats to human life or the environment within the definition of remedial action the legislature signaled its intent to avoid cut and dried calculations based upon arbitrary criteria. If contamination of 2001 mg/kg is considered a threat to human life or the environment certainly contamination measured at 2,000 mg/kg must be considered at least a potential threat.

RESPECTFULLY SUBMITTED this 20th day of February, 2017

Steven J Hassing, WSBA #6690
Attorney for Cross-Petitioner

Joseph P. Delay, WSBA #2044
Attorney for Cross-Petitioner

CERTIFICATE OF SERVICE

Case No: 94087-8

I, the undersigned, declare:

I am and at all times hereinafter mentioned was a citizen of the United States. I am over the age of eighteen years and not a party to the within action; my business address is 425 Calabria Court, Roseville, CA 95747. I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. On February 21, 2017, I served the foregoing described as:

1. **Respondents/Cross-Petitioners Answer to Petition for Review and Cross-Petition**

by the method indicated below, and addressed to the following:

James McPhee	[X] via US Mail
WORKLAND-WITHERSPOON	[ ] via Hand Delivery
Attorneys at Law	[X] via Electronic Mail
601 West Main Avenue, Suite 714	[ ] via Facsimile
Spokane WA 99201-0677	[ ] Overnight delivery

I declare under penalty of perjury under the laws of the State of California and the State of Washington that the foregoing is true and correct.

Signed at Roseville, California this 21st day of February, 2017

Kimberley A Hassing

Kimberley A. Hassing, paralegal to
Steven J. Hassing