

No. 64102-6-I

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

William G. Hulbert, III; Tanauan Hulbert Martin, and David Francis
Hulbert, William Hulbert Mill Co. Limited Partnership, and William G.
Hulbert, III; and Tanauan Hulbert Martin, as trustees of the William G.
Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust,

Appellant,

v.

The Port of Everett,

Respondent.

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

		Page
I.	Introduction.....	1
II.	Statement of the Case.....	3
	A. Parties.....	3
	B. The Industrial History of the Site.....	3
	C. The Hulberts Provided the Port a Limited Indemnity as Part of the Purchase and Sale Transaction.....	4
	D. The Litigation.....	5
III.	Summary of the Argument.....	7
IV.	Argument.....	10
	A. The Trial Court’s Decision That the Contract Does Not Bar the Port’s MTCA Claims Should Be Upheld.....	10
	1. The Plain Language of the Agreement Shows that the Port Did Not Release, Waive, or Otherwise Agree to the Termination of its Statutory Right to Equitable Contribution.....	10
	a. The Hulberts Confuse the Termination of One Right with the Release of Another: Indemnity is <i>Not</i> Contribution....	10
	b. No Express Release in the Agreement.....	13
	c. No Implied Release in the Agreement.....	14
	2. The Extrinsic Evidence of the Hulberts’ Unexpressed, Subjective Intent Is Irrelevant, Inadmissible, and Insufficient to Create a Genuine Issue of Material Fact.....	20
	a. Declaration of William Hulbert, III	23
	b. Declaration of Jack Martin.....	24
	c. Declarations of Vicki Pierce.....	25
	d. The Hulberts’ Interpretation of the Agreement Defies Logic.....	27
	e. Public Policy Supports the Port’s Interpretation of the Agreement.....	31
	B. The Judgment Declaring That the Contract Is Not a Bar to MTCA Contribution Was Properly Certified.....	32

C.	The Attorney Fees Awarded by the Trial Court Were Reasonable.....	34
1.	Standard of Review.....	35
2.	Burden of Proof.....	36
3.	The Trial Court’s Determination Was Based on Tenable Grounds.....	36
D.	The Port Should be Awarded Its Attorney Fees on Appeal.....	40
V.	Conclusion.....	40

APPENDICES

Appendix A.....	Certificate and Indemnity Regarding Hazardous Substances
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TABLE OF AUTHORITIES

	Page
<u>Washington Cases</u>	
<i>Absher Const. Co. v. Kent School Dist.</i> , 79 Wn. App. 841, 917 P.2d 1086 (1995).....	39
<i>Bird-Johnson Corp. V. Dana Corp.</i> , 119 Wn.2d 423, 427, 833 P.2d 375 (1992).....	32
<i>Car Wash Enterprises v. Kampanos</i> , 74 Wn. App 537, 547, 874, P.2d 868 (1994).....	16
<i>City of Seattle (Seattle City Light) v. Washington State Dept. Of Transp.</i> , 98 Wn. App. 165, 169-170, 989 P.2d 1164 (1999).....	32
<i>Fluor Enter., Inc., v. Walter Constr., Ltd.</i> , 141 Wn. App. 761, 766-767, 172 P.3d 368 (2007).....	33
<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.</i> , 143 Wn. App. 345, 363, 177 P.3d 755 (Div. 1, 2008).....	35
<i>Hearst Comm 'ns, Inc. v. Seattle Times</i> , 154 Wn.2d 493, 503, 115 P.3d 262 (2005).....	10, 20, 21, 24, 27, 31
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 695-696, 974 P.2d 836 (1999).....	20
<i>Lindsay Credit Corp. v. Skarperud</i> , 33 Wn. App. 766, 772, 657 P.2d 804 (1983).....	32
<i>Loeffelholz v. C.L.E.A.N.</i> , 119 Wn. App. 665, 690 (2004).....	41
<i>Lynnot v. Natural Union</i> , 123 Wn.2d 678, 683 (1994).....	26
<i>Wachovia SBA Lending v. Kraft</i> , 138 Wn. App. 854, 858-859, 158 P.3d 1271 (Div. 2, 2007).....	35

Federal Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 247-248 (U.S. Dist. Col., 1986).....24

Bowen Engineering v. Estate of Ralph T. Reeve,
799 F.Supp. 467, 483-486 (D. N.J. 1992).....18

Burlington Northern and Santa Fe Ry. Co. v. U.S.,
129 S.Ct. 1870, 1874 (2009).....31

FMC Corp. v. Northern Pump Co.,
668 F.Supp. 1285, 1291-1292 (D. Minn., 1987).....19

Kerr- McGee Chemical Corporation v. Lefton Iron & Metal Company,
14 F.3d 321, 327-328 (7th Cir. 1994).....19

Mardan Corp. v. C.G.C. Music, Ltd.,
804 F.2d 1454, 1456 (9th Cir. 1986).....30

Purolator Products Corp. v. Allied-Signal, Inc.,
772 F.Supp. 124, 127-128 (W.D. N.Y., 1991).....18

Southfund Partners III v. Sears, Roebuck and Co.,
57 F.Supp. 2d 1369, 1374 (N.D. Ga., 1999)16

Southland Corp. v. Ashland Oil, Inc.,
696 F.Supp. 994, 1002 (D. N.J. 1988) rev'd on other grounds, 1988 WL 125855 (D. N.J. 1988).....13, 14, 15, 16, 17, 18

Wiegmann & Rose Intern. Corp. v. NL Industries,
735 F.Supp. 957, 961-962 (N.D. Cal. 1990).....16

Statutes

42 U.S.C. § 9601, et seq.....14, 28

RCW 70.105D, et seq.....1, 6, 11, 28

WAC 173-340-545.....6

Other Authorities

18 Am. Jur. 2d <i>Contribution</i> § 1 (updated 2009).....	11, 12
41 Am. Jur. 2d <i>Indemnity</i> § 1 (updated 2009).....	11
Black's Law Dictionary 521 (5 th ed. 1979).....	13
5 C.J.S. <i>Appeal and Error</i> § 908 (2009).....	36

I. Introduction

The trial court properly granted summary judgment that the parties' Agreement¹ is not a bar to the Port's² MTCA³ contribution claims because the Agreement added to the Port's rights by requiring the Hulberts⁴ to *indemnify* the Port, but it did not take away any of the Port's *MTCA contribution* rights, which were unchanged by the Agreement.

The Agreement contains no express or implied waiver or release of the Port's rights under MTCA, in fact it is silent about them altogether. It is silent despite the fact that the Hulberts were aware of the concept of an "express release or waiver of liability" inasmuch as they signed the Certificate containing representations that they had not given such a release to third parties.

The Hulberts are incorrect in asserting that the expiration of their

¹March 8, 1991 Agreement for Purchase and Sale ("Agreement"). Clerk's Papers ("CP") 1462-1494. Pursuant to RAP 10.4(c), exhibit D to the Agreement, entitled Certificate and Indemnity Regarding Hazardous Substances ("Certificate") (CP 1484-1491) attached to this brief as Appendix A.

²Defendant and respondent, the Port of Everett ("Port").

³Model Toxics Control Act, RCW 70.105D, et seq.

⁴Plaintiffs and appellants, herinafter referred to as "the Hulberts."

contractual indemnity obligation implies the Port's waiver or release of the Port's *statutory contribution* rights.

The Hulberts' indemnity obligation was tantamount to a three year insurance policy for the Port during which the Hulberts were required to pay the *full* cost of any and all environmental liabilities including expenses and attorney fees that the Port might incur by having purchased the site, regardless of who was actually responsible for the presence of the Hazardous Substances on the property and regardless of any contribution or equitable liability allocation for which these other parties would have been responsible. In contrast, the Port's MTCA contribution rights only allow the Port to require the Hulberts to pay their equitable allocation of the Port's remedial action costs for the site based upon the Hulberts' own responsibility for the presence of Hazardous Substances on the property.

The *contractual indemnity* rights are completely different from and independent of the *statutory contribution rights*. It is incorrect to blur them together and then argue that the creation and subsequent expiration of the one implies the release and waiver of the other.

The trial court's decision granting the Port's motion for summary judgment, certifying that judgment as final, and awarding the Port its

reasonable attorneys fees as provided for in the Agreement should be upheld.

II. Statement of the Case

A. Parties

Prior to the sale of the property to the Port of Everett, the Hulberts, each owned the property at issue in this litigation (“the Site”) along with third party defendant Hulbert Mill Company, LP.⁵ Brief of Appellants 1.

B. The Industrial History of the Site

The Hulberts⁶ owned the Site from at least the 1920s until March 8, 1991. CP 1512; Br. of Appellants 5. For more than 50 years of their ownership, the Site was used for industrial purposes. The Hulbert Mill operated at the Site until much of it burned down in 1956. CP 1512. After that, numerous industrial operations were conducted on the site by the Hulberts and by tenants who leased parcels within the property from them. CP 1512-1513.

⁵The successor in interest to the William Hulbert Mill Company Corporation, and the partners of which included each of the plaintiffs and appellants. CP 1515.

⁶Including one of the Hulberts’ predecessors, the William Hulbert Mill Co. Corporation.

C. The Hulberts Provided the Port a Limited Indemnity as Part of the Purchase and Sale Transaction

In 1991, the Hulberts' representative approached the Port about selling this piece of industrial real estate. CP 1333. During the ensuing negotiations, the parties were aware that the property likely had environmental issues, so the Port requested that the Hulberts indemnify the Port for any environmental liability arising from the Site. *Id.* In contrast to a contribution right, the requested indemnity would assure the Port that regardless of who asserted a claim against it and under what theory of law it was asserted, as long as the claim involved hazardous substances as defined in the Certificate,⁷ the Hulberts would be obligated to pay for all of the Port's liabilities for a period of three years after the sale. The creation and expiration of the indemnity obligation did not affect the Port's unrelated contribution rights because the Agreement reflects the parties' intent that the indemnity benefit the Port by adding to and not taking away from the Port's rights. The Agreement contains no releases or waiver by

⁷Certificate and Indemnity Regarding Hazardous Substances, attached as Exhibit D to the Agreement ("Certificate"). CP 1484-1491.

the Port⁸

The parties also agreed as part of their transaction to perform a Phase I site investigation.⁹ The inspection resulted in the identification of certain areas of concern, so the parties negotiated for the Hulberts to pay for (or otherwise be responsible for the occurrence of) the follow up work specifically recommended in the Phase I report. The Hulberts were required to establish an escrow account for paying for the follow up work in order to assure the Port that money would be available for that purpose. CP 1467-1469.

D. The Litigation

In 2006, the Washington State Department of Ecology (“Ecology”) required the Port to perform additional remedial investigation and cleanup work at the Site. In order to protect its MTCA contribution rights by

⁸The Agreement is also fully integrated, it states:
This Agreement contains the entire agreement between the parties hereto with respect to the subject matter hereof, and no addition to or modification of any term or provision shall be effective unless set forth in writing, signed by both Seller and Buyer.

CP 1472-1473.

⁹A Phase I investigation typically consists of a visual site inspection coupled with a review of historical records to identify potential areas of environmental concern for further investigation. It typically does not include any sampling or sample analysis.

complying with the MTCA notice requirements¹⁰, the Port sent routine notice letters to all the PLPs that it had identified, informing them that the Port was about to begin the cleanup work.¹¹ The Hulberts responded to the routine notice by suing for a declaration that the Agreement barred the Port's MTCA contribution rights and seeking to enjoin the Port's cleanup with an emergency motion for a temporary restraining order. CP 1883-1894. The trial court properly denied the motion, but the Hulberts nonetheless pursued their contractual claims and served extensive discovery requests on the Port. The Port later answered and counterclaimed for MTCA contribution. CP 1791-1812.

The Port then brought a motion for summary judgment declaring that the Agreement is not a bar to the Port's MTCA contribution claims. The Hulberts responded with a cross motion for the opposite ruling. CP

¹⁰WAC 173-340-545 states that written notification must be "mailed at least fifteen days before beginning construction of the interim action or cleanup action to the last known address of the following persons:... (v) Persons potentially liable under RCW 70.105D.040 known to the person conducting the interim action or cleanup action."

¹¹The Port also initially notified the Hulberts of their potential liability for the remedial work under the indemnity provision of the Certificate. Shortly thereafter, the Port withdrew this notice in writing after recognizing the three year limitation on the contractual indemnity provision.

1554-1564; 1404-1415. Although the Hulberts were given additional time to procure affidavits, no affidavits were filed that allege that the parties ever negotiated for, much less that the Port ever agreed to, a release or waiver of potential future contribution claims against the Hulberts. CP 1972-1973. The Hulberts instead rely solely upon assertions of an alleged unexpressed, subjective unilateral intention to create a release. It was upon these cross motions that the trial court determined the Agreement was not a bar and entered the orders and judgment that are now on review.

III. Summary of the Argument

The trial court properly determined that the Agreement does not bar the Port's current MTCA contribution claims. The Port met its burden of proof by establishing that the Agreement's clear and unambiguous language contains no release, waiver or other type of relinquishment (either express or implied) by the Port of its rights granted by MTCA or any other environmental statute.

In response, the Hulberts have argued, in circles, that their obligation to indemnify the Port was so broad as to encompass the MTCA claims at issue, and that since the *indemnity* has terminated, the Port's right to seek *MTCA contribution* also terminated. This makes no sense and

does not reflect the parties' mutual intent manifested in the Agreement. The Hulberts are confusing the creation and termination of one right (contractual indemnity) with the release of another different right (statutory contribution). The fact that the parties intended the Certificate to only *add* to the Port's rights as opposed to *taking away* from them, is evidenced by the fact that the Certificate was written to require only the Hulberts' signatures and not the Port's. The Port was merely the beneficiary of the Hulberts' obligations and promises set forth in the Certificate. Thus, there was no reason for the Port to sign the document. Further, even though the Hulberts' indemnity obligation was indeed broad enough to encompass MTCA claims, nothing in the Agreement (including the Certificate) evidences any intent by the parties to exchange the Hulberts' contractual indemnity obligation for the waiver or release of any of the Port's rights at all. Therefore, neither the creation, nor the existence, nor the expiration of the Hulberts' indemnity obligation has any effect on the Port's statutory contribution rights. It follows that with the termination of the *indemnity*, the Port is now left with its *MTCA contribution* claims for the Hulberts' equitably allocated share of environmental liability .

No amount of authority and argument supporting the broad nature of the Hulberts' contractual indemnity obligations, nor self-serving evidence of the Hulberts' subjective, unexpressed, unilateral intentions can create a waiver or release where none exists. The Port never agreed to give up its rights under MTCA or any other environmental statute. The Hulberts have not and cannot identify any term in the Agreement that evidences such a waiver or release. If they truly intended for the Port to waive or release these rights then they should have written words to that effect in the Agreement. Because they did not do so, the Port's motion for summary judgment was properly granted and should be upheld, and the Hulberts' authority, argument and self-serving declarations do nothing to alter this conclusion.

Finally, the contract issues in this litigation are indeed segregable from the remaining MTCA contribution claims, and the Hulberts have acknowledged as much when they filed their original complaint, which contained only contract claims. CP 1885-1894. The trial court properly certified the judgment regarding the contract claims as final. This certification as well as the judgment awarding the Port its reasonable attorney fees for defending the contract claims, should be upheld.

IV. Argument

A. The Trial Court's Decision That the Contract Does Not Bar the Port's MTCA Claims Should Be Upheld

1. The Plain Language of the Agreement Shows that the Port Did Not Release, Waive, or Otherwise Agree to the Termination of its Statutory Right to Equitable Contribution

The role of a court in interpreting and construing contracts is to give effect to the objective manifestation of the mutual intention of the parties. *Hearst Comm'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The mutual intent manifest in the Agreement is to add to the Port's rights, not to take away from them. The Agreement contains the Hulberts' indemnity obligation, but no waiver, release or other alteration of the Port's MTCA contribution rights. Further, the Agreement does not create a waiver or release of the Port's statutory *contribution* rights simply because it puts a time limit on the Hulberts' contractual *indemnity* obligations.

a. The Hulberts Confuse the Termination of One Right with the Release of Another: Indemnity is *Not* Contribution

At issue in this case is the Port's statutory *contribution* right, so the

creation and subsequent expiration of an unrelated contractual *indemnity* right is irrelevant. The Hulberts' contrary assertion is a logical *non sequitur* resulting from the Hulberts' confusion of remedies by repeatedly using the terms 'indemnity' and 'contribution' interchangeably. To the contrary, these are two separate and distinct types of remedies derived from two different sets of rights.

Stated simply, indemnity is an obligation by one party to make another whole for a loss that the other party has incurred.

41 Am. Jur. 2d *Indemnity* § 1 (2009). In this case, the Hulberts' indemnity obligations are derived from the Agreement, and specifically from the Certificate, in which Hulberts agree to pay for *any and all* of the Port's environmental liabilities that arise from the release of hazardous substances at the Site prior to the sale. CP 1485.

In contrast, MTCA provides a statutory method for a party who is liable for remedial action costs, and who pays more than his or her equitable share of that liability, to bring an action "for contribution" to recover that party's equitable share of those remedial costs. RCW 70.105D.080. 'Contribution' is described by American Jurisprudence as follows:

[T]he right enjoyed by a person who is jointly liable with others and has paid more than his or her proper share in discharge of the joint liability to force the others to reimburse him or her to the extent of their liability.

18 Am. Jur. 2d *Contribution* § 1 (2009). It also reiterates that (in contrast to contractual indemnity):

The doctrine [of contribution] is founded *not upon contract*, but upon principles of equity, and assists in the fair and just division of losses, preventing unfairness and injustice.

18 Am. Jur. 2d *Contribution* § 1 (2009)(emphasis supplied). Thus, the difference between the indemnity rights created by contract to benefit the Port, and the Port's separate and independent MTCA contribution rights, is that under the indemnity the Port could have required the Hulberts to pay for 100 percent of all remedial costs or other damages from any environmental claims against the Port by any other liable party or government agency, without regard to equitable allocation. Further, the indemnity obligation would have prevented the Hulberts from counterclaiming for contribution from the Port as they currently have done. On the other hand, without the indemnity the Port may only seek recovery from the Hulberts under statutory environmental laws such as MTCA, and only for the Hulberts' equitable share of liability. It is clear

that contribution is wholly separate and distinct from indemnity. The fact that the Hulberts use these terms interchangeably confuses basic legal concepts and obfuscates the plain meaning of the terms actually written in the Agreement.

b. No Express Release in the Agreement

The Hulberts argue that the Agreement *expressly* precludes environmental liability after 1994, yet they do not cite to any term within the agreement whereby the Port releases or waives any rights, let alone its right to seek contribution. Br. of Appellants 21-23. Black's Law Dictionary defines the term 'express' as follows:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. *Declared in terms; set forth in words.* Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference.

Black's Law Dictionary 521 (5th ed. 1979)(emphasis added). Here, the Agreement contains no waiver or release whatsoever, much less an *express* release. The lack of an express waiver or release is, as a matter of law, insufficient to allocate the risk of environmental response costs.

Southland Corp. v. Ashland Oil, Inc., 696 F.Supp. 994, 1002 (D. N.J. 1988 *rev'd on other grounds*, 1988 WL 125855 (D. N.J. 1988)). In that case, the court stated:

While a contract can, under appropriate circumstances, act to preclude recovery of response costs, there must be an express provision which allocates these risks to one of the parties.

Id. The facts and circumstances in *Southland* are nearly identical to the facts and circumstances here. In *Southland*, Ashland sold an industrial site to Southland pursuant to an agreement which contained an “as is, where is” clause. The agreement also obligated Ashland to remove certain wastes from the site and to indemnify Southland for a limited time, with respect to Ashland’s pre-closing ownership and use of the site. When it later became time to clean up the site, Southland sought contribution from Ashland under CERCLA.¹² Ashland claimed defenses nearly identical to those raised by the Hulberts in response to the Port’s claims. As discussed more fully below, the *Southland* court came to the same conclusions reached by the trial court in this case. The defenses were rejected. *Southland*, 696 F.Supp at 1002.

c. No Implied Release in the Agreement

In the absence of an express provision, the Hulberts argue that unrelated provisions within the Agreement or the termination of the

¹²Comprehensive Environmental Response Compensation Liability Act, 42 U.S.C. § 9601, et seq., which is the federal analog to MTCA.

Hulberts' obligations under the Certificate somehow act to create a waiver or release of the Port's right to seek contribution for the Hulberts' share of environmental liabilities. This is contrary to law and logic as the *Southland* court recognized. The *Southland* court summarized the seller's arguments in the court below:

Ashland argues that the language of the contract evidences the parties' intent to transfer all waste disposal liabilities to Southland, if not at the time of sale, then at least within two years thereafter. In support of this contention, Ashland points to four specific clauses: the "as is, where is" provision (section 6.06); the indemnification provision (section 9.01); the waste removal provision (section 11.15); and the two-year survival provision (section 11.03). Southland maintains, however, that these same provisions show that there was never any intention to transfer CERCLA-like claims to it and that the absence of explicit language whereby Southland assumed this liability is further indication of this.

Southland, 696 F.Supp. at 1001.

Like *Southland*, the Hulberts argue that the Port took the site subject to the limitations in the Certificate. However, contrary to the Hulberts' attempt to distinguish it, this is in essence an "as is" clause. The *Southland* court began by rejecting the "as is" clause argument, stating:

As Southland correctly notes, an 'as is' provision is merely a warranty disclaimer and as such precludes only claims based on breach of warranty. *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F.Supp. 1049, 1055 (D.Ariz. 1984), *aff'd*,

804 F.2d 1454 (9th Cir. 1986). It does not act to shift liability from one party to an agreement to another and is inapplicable in a cause of action which is not based on breach of warranty. *Mardan, supra*. Therefore, standing alone, the 'as is' clause cannot defeat Southland's CERCLA claims.

Id. The same reasoning defeats the Hulberts' argument. *See also, Car Wash Enterprises v. Kampanos*, 74 Wn. App 537, 547, 874, P.2d 868 (1994); *Wiegmann & Rose Intern. Corp. v. NL Industries*, 735 F.Supp. 957, 961-962 (N.D. Cal. 1990) ("As is" clause only precluded liability for breach of warranty and did not release claim under CERCLA); *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F.Supp. 2d 1369, 1374 (N.D. Ga., 1999) ("As is" provisions do not release seller from liability on non-warranty claims).

Nor does a limited agreement to pay certain defined costs and establish an escrow for this purpose somehow evidence the Port's release of future claims. It is clear that this escrow was not established to fund all environmental liabilities as the Hulberts suggest, but rather those specifically identified in the Kleinfelder Phase I report. CP 1467-1468. Like the Hulberts, Ashland argued in the *Southland* case that its agreement to remove waste material, and the termination of that obligation two years later, should be construed to shift all further environmental liabilities to

the buyer. The *Southland* court made short work of rejecting that argument:

Based on the pure language of this provision, I find Ashland's argument untenable. This is merely a promise to do an act-to remove waste material upon proper notice. Assuming, *arguendo*, that the two-year limitation in section 11.03 neutralizes the effect of this promise, this would only suffice to defeat a breach of contract claim. This is far from being the express assumption of liability which Ashland argues it is.

Southland, 696 F.Supp. at 1001.

Similarly, the expiration of the Hulberts' contractual indemnity obligation does not operate to shift all future liability to the Port. The Hulberts are correct in their assertion that the language in the Certificate was broad enough to encompass MTCA liabilities, but without an express contractual release of liability, the Port's statutory contribution rights remain unaltered. These contribution rights are provided by MTCA, and the Port has not waived, released, or in any way given them up. Nor has it in any way agreed to accept or indemnify the Hulberts for *their* environmental liability. The *Southland* court recognized the illogical nature of this argument:

Finally, Ashland asserts that the inclusion of an indemnification provision in section 9.01 and its subsequent termination two years later, pursuant to section

11.03, is further support for its argument that the parties, by contract, provided for a release of all claims against Ashland arising out of its prior hazardous waste disposal. In pertinent part, section 9.01 provides:

Seller shall protect, defend ... indemnify and save and hold harmless Buyer.

Even if section 11.03 acts to terminate all of Ashland's promises within two years after Closing, this would only serve to bar those *breach of contract* claims based on indemnity and failure to remove hazardous waste. Excision of either section 9.01 or 11.15 from the contract does not convert the remaining contractual language into an express assumption of liability for all hazardous waste cleanup costs by Southland.

Southland, 696 F.Supp. at 1002.

In fact, not one of the cases cited by the Hulberts for the proposition that parties can contractually allocate environmental liabilities holds that the termination or completion of a limited indemnification by one party operates to shift all such liability to the other party. Every one of the cases that upheld the contractual allocation of liabilities involved an express release, waiver, or promise of indemnification by the party seeking contribution.¹³ All of the discussions in these cases about whether the

¹³See *Bowen Engineering v. Estate of Ralph T. Reeve*, 799 F.Supp. 467, 483-486 (D. N.J. 1992)(Plaintiffs seeking contribution expressly indemnified former board members from “any claim, action, suit or proceeding” in corporate by-laws); *Purolator Products Corp. v. Allied-*

parties contemplated environmental liabilities such as those under CERCLA are premised on the fact that there *was an express contractual release* or assumption of liabilities, the scope of which is in question. Here, environmental liabilities were clearly contemplated, including those under MTCA. These potential liabilities were the reason for the creation of the Certificate and Indemnity - to ensure that, at least for three years after the sale, the *Hulberts* would indemnify the *Port* for any such liabilities that might arise. However, no *rights* whatsoever were released by the Port. There was no express or implied release or waiver by the Port anywhere within the Agreement. In fact, the Port did not even sign the Certificate and Indemnity. This clearly shows that no party contemplated the Port being bound by or giving up rights under the Certificate.

Signal, Inc., 772 F.Supp. 124, 127-128 (W.D. N.Y., 1991)(Plaintiff seeking contribution had expressly assumed and agreed to indemnify against “any and all liabilities” within Sale agreement); *FMC Corp. v. Northern Pump Co.*, 668 F.Supp. 1285, 1291-1292 (D. Minn., 1987)(Plaintiff seeking contribution released “all claims, demands and causes of action”). *Kerr- McGee* similarly involved a purchase and sale agreement wherein the buyer *expressly* agreed to indemnify and to defend and to hold seller harmless. *Kerr- McGee Chemical Corporation v. Lefton Iron & Metal Company*, 14 F.3d 321, 327-328 (7th Cir. 1994).

**2. The Extrinsic Evidence of the Hulberts’
Unexpressed, Subjective Intent Is Irrelevant,
Inadmissible, and Insufficient to Create a
Genuine Issue of Material Fact**

The contents of the Agreement and the Certificate are undisputed, and the Agreement is fully integrated. It states:

This Agreement contains the entire agreement between the parties hereto with respect to the subject matter hereof, and no addition to or modification of any term or provision shall be effective unless set forth in writing, signed by both Seller and Buyer.

CP 1472-1473. No such writing adding to, or modifying the Agreement exists¹⁴. The Washington Supreme Court has made it clear that in interpreting fully integrated contracts, extrinsic evidence is only to be considered in order to explain specific words or terms in the contract, and not to create additional terms as the Hulberts have tried to do.

Since *Berg*, we have explained that surrounding circumstances and other extrinsic evidence are to be used ‘to determine the meaning of *specific words and terms used*’ and not to ‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’

Hearst, 154 Wn.2d at 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d

¹⁴The Hulberts admitted in response to the Port’s discovery requests that they have no written evidence of the final terms of the Agreement other than the Agreement itself.

683, 695-696, 974 P.2d 836 (1999)). The Hulberts have not and cannot point to any specific word or phrase that they are attempting to explain with the evidence that they submitted. The evidence is thus irrelevant.

Because extrinsic evidence may be used only to determine the meaning of specific words in the agreement, extrinsic evidence about the parties' desire . . . is irrelevant.

Hearst, 154 Wn.2d at 509. The plaintiff in *Hearst* also submitted evidence of its subjective intentions with respect to two provisions of their Joint Operating Agreement (JOA). The court reiterated that even if both parties intended as the plaintiff claimed, it would not affect the court's interpretation of what was actually written in the agreement.

If the parties intended the JOA could be terminated *only* upon a showing that the marketplace would no longer support two newspapers—a matter much debated here—they failed to express that intent within the agreement they wrote.

Hearst essentially asks us to rewrite the JOA by revising the loss operations clause, something we are not at liberty to do.

Hearst, 154 Wn.2d at 510. As in *Hearst*, the Hulberts have submitted multiple declarations which have no bearing whatsoever on the meaning of any identified term within the Agreement. Rather, they seek to impose an

additional term - a waiver or release by the Port of its statutory right to contribution - by arguing that this is what the *Hulberts* intended. These declarations are irrelevant and should not be considered by this Court.

However, even if the Court considers the evidence presented in the Declarations of William Hulbert, III, Jack Martin, and Vicki Pierce, this evidence is insufficient to raise a genuine issue of material fact. The declarations do not contain any evidence of mutual intent, they are merely self-serving statements of the Hulberts' alleged intentions with respect to the agreement - intentions which, even if true, were not expressed to the Port, nor written in the Agreement.

The Hulberts obviously understood the concept of an express release or waiver as they certified in the Agreement that they had given no express release or waiver to any previous owner or other potentially liable party with respect to claims based on hazardous substances. CP 1485. However, they failed to include any release or waiver by the Port in the Agreement, and they cannot manufacture one now, simply by declaring their present day belief that they thought they had a release 18 years ago when the contract was formed.

The most noteworthy aspects of the Hulberts' declaration is not what they say, but rather what they do not say. They are devoid of any testimony that any of the Hulberts or their agents ever asked for or even told, the Port they wanted a release or waiver, much less that anyone on behalf of the Port ever said that the Port would even consider providing a release or waiver to them. Even though the Hulberts were afforded additional time to obtain their declarations, they were unable to provide the essential, but missing evidence¹⁵

a. Declaration of William Hulbert, III

William Hulbert, III was not involved in negotiating the Agreement. Thus, he cannot testify to what was said. He can only testify as to what he intended and what he was told by his lawyer and his former brother in law. CP 1335-1336. These statements are in no way evidence of *mutual* intent, nor are they offered to explain any term or phrase in the Agreement. Further, even if true, they do not contradict any evidence

¹⁵The Hulberts responded to the Port's motion for summary judgment, which the Port set for hearing on September 14, 2007 (CP 1976-1977), by filing on September 4, 2007, a motion, titled Hulberts' Rule 56(F) Motion for continuance to Permit Affidavits to be Obtained, and Motion to Shorten Time. CP 1972-1973. The Port voluntarily continued the hearing on its summary judgment to November 30, 2007, to provide the requested time. CP 1966-1967.

offered by the Port, as the Port does not have any opinion or testimony about what was communicated to Mr. Hulbert by his attorney or representatives. The Port, however, has presented evidence that it did not make any such statements to the Hulberts or their attorneys or representatives. CP 1336; 1554-1564. The evidence presented in Mr. Hulbert's declaration is irrelevant to the interpretation of the words actually written in the Agreement, and certainly does not create a genuine issue of material fact regarding the interpretation of this Agreement. *Hearst*, 154 Wn.2d at 503-504.

b. Declaration of Jack Martin

Jack Martin's declaration that the Certificate was not created as an inducement to the Port to buy the property, but rather as a limitation on the Hulberts' environmental liabilities, clearly contradicts the express terms of the Certificate, which states:

In connection with and *as partial consideration for the purchase of property* commonly known as . . . Seller hereby certifies to Buyer and agrees as follows . . .”

CP 1484 (emphasis added). This type of self-serving statement that contradicts other uncontradicted evidence is insufficient to create a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 247-248 (1986) (the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment).

c. Declarations of Vicki Pierce

Vicki Pierce, the Hulberts' attorney during the negotiation of the Agreement, did not testify that the Port made any statements which would objectively manifest an intent to release future non-contractual rights upon the termination of the Hulberts' contractual indemnification obligations. Nor did she testify that she made any such statements to the Port. Again, this testimony only provided evidence of subjective, unexpressed "understandings." CP 1929-1930. If it really were Ms. Pierce's intent for the three year limitation in the Certificate to act as a bar to any future non-contractual claims, then she should have put an express release or waiver to that effect in the Certificate, and she should have required the Port to sign that document. Yet she did not do either. Regardless, even if all of Ms. Pierce's statements regarding her subjective understanding are true, they are not evidence of mutual intent, nor do they aid in the interpretation of any specific term in the Agreement, and as such they should not be considered by this Court.

Further, Ms. Pierce's statements in her September 4, 2007, declaration regarding the fact that the Port initially requested a 25 year indemnification period even if admissible,¹⁶ has no bearing on the interpretation of the final Agreement. CP 1929. The Port does not contradict this fact. It makes sense that the Port would seek a long indemnification period during which time it could require the Hulberts to pay any and all of the Port's environmental liabilities, regardless of fault or the Port's equitable share of liability under MTCA or any other environmental statute. If the Port had been successful in obtaining this 25 year indemnification period, it would have required the Hulberts to pay for all of the remedial costs it has paid over the last three years, as well as all of the future costs that the Port will pay at the site in the near future, much of which will likely be allocated to other liable parties, including the Port, under the current MTCA litigation. Obviously, however, the Port was only successful in obtaining this type of global, all encompassing contractual indemnification for a period of three years. Thus, the Port is

¹⁶The Hulberts' reliance on *Lynnot* is misplaced. Although that court indicated that evidence of negotiations may be considered, it reiterated the requirement that such extreme evidence is only to be used to aid in the interpretation of what is in the instrument, and not to show an intention independent of the instrument. *Lynnot v. Natural Union*, 123 Wn.2d 678, 683 (1994).

left with its current statutory claims against the Hulberts for equitable contribution. Ms. Pierce's testimony does not and cannot create a release in the Agreement that does not exist.

d. The Hulberts' Interpretation of the Agreement Defies Logic

Clearly, the Agreement contains no release, waiver, or any other express relinquishment of the Port's statutory right to seek contribution toward another party's equitable share of remedial costs that the Port has incurred. The evidence of their subjective intent offered by the Hulberts does not aid in the interpretation of any specific term within the Agreement, nor does it offer any evidence at all of mutual intent. And this evidence cannot be considered to "show an intention independent of the instrument," or to "vary, contradict or modify the written word." *Hearst*, 154 Wn.2d at 503. Further, the Hulberts' interpretation of the terms actually written in the Agreement make no sense.

Throughout the pleadings filed in the various motions before the trial court and their opening brief before this Court, the Hulberts have maintained the position that they only agreed to the broad indemnification in the Certificate because they believed they would be able to walk away after the termination of the three year period with no further risk of

liability. CP 1922-1923; Br. of Appellants, *passim*. This argument is counterintuitive. In order for the Hulberts to walk away from the property without any future liability, they would not only need the Port to release its future rights with regard to all claims related to the presence of hazardous substances, but they would also need the *Port* to indemnify the *Hulberts* against any such claims brought by other liable parties or governmental entities. Any other liable party who is required to incur remedial costs could bring an action against the Hulberts for contribution. In fact, at least one other party to the underlying MTCA litigation has already filed claims against the Hulberts for contribution at the Site. Supp. CP 1943-1965¹⁷. In addition, Ecology and the EPA are authorized under MTCA and CERCLA, respectively, to clean up contaminated properties and seek recovery from liable parties. Absent an indemnity either entity could seek all of these costs from the Hulberts. RCW 70.105D.040; 42 U.S.C. § 9607.

Further, the insistence that the Port would not have requested a 25 year indemnity period if it knew that it would retain its right to

¹⁷On December 7, 2009, the Port filed its Supplemental Designation of Clerk's Papers pursuant to RAP 9.6. Accordingly, those documents have not been assigned a CP page number by the Court. Documents contained in the Supplemental Designation will be cited in this brief as Supp. CP and numbered from 1936-1977

contribution makes no sense. Br. of Appellants 8, 10, 18, 26, 32. As stated above, a contractual indemnity is wholly distinct and much more inclusive than a right to contribution. Of course the Port would prefer to have the protection of a broad contractual indemnity for as long as possible regardless of its ability to seek equitable contribution under various environmental statutes. But, this alone does not change the fact that the Port did not release its equitable contribution claims.

The Hulberts' repeated reference to the list of environmental statutes in the Certificate as evidence of the parties' intent to waive or release future claims pursuant to these statutes is a *non sequitur* and obfuscates that document's clear, unambiguous language. The Certificate states:

'Hazardous substances' shall mean: any substance or material defined or designated as hazardous or toxic waste . . .by any federal, state or local environmental statute, regulation or ordinance presently in effect including but not limited to the statutes listed below . . .

CP 1486. The list of statutes that follows were clearly included for definitional purposes only, and not because the parties intended for the Port to waive its rights under the statutes upon the expiration of the Certificate. If this *were* the parties' intent, then they would not have listed

statutes with no potential private right to contribution such as the “Federal Insecticide, Fungicide, and Rodenticide Act.” CP 1486.

Finally, the Hulberts argue that the Port could not “reserve” its MTCA right to private contribution as this right did not exist at the time the Agreement was executed. Br. of Appellants 26. This argument is circular. The Port did not “reserve” any rights because the Port did not waive or release any rights. Without a waiver or release from which the Port could “reserve” rights, the lack of a reservation is a meaningless concept. Having never waived or released any of its rights under any environmental laws, there was nothing for the Port to reserve, and its MTCA rights survive today unaltered¹⁸.

The Agreement and the Certificate are “subject to only one

¹⁸The Hulberts’ reliance on *Mardan* is perplexing. By their own admission, this case involves an *express release* by the party that the Hulberts claim is in the same position as the Port. This release was contained within a “Settlement Agreement and the accompanying ‘General Release and Receipt,’” no less. *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1456 (9th Cir. 1986). The court found that Mardan intended to give up all claims which it had or might have someday, which included claims yet to be enacted under the CERCLA. The court found that Mardan gave up these claims because it had entered into an agreement, the entire purpose of which was to enumerate claims that it was releasing. *Id.* at 1461. As stated above, the Port does not and has never argued that it specifically reserved MTCA claims because there was no waiver or release of claims from which to reserve these rights.

reasonable interpretation” with respect to the Port’s current MTCA claims. *Hearst*, 154 Wn.2d at 510. The contractual indemnification and all other contractual promises made by the Hulberts within the Certificate have expired. Therefore, as of March 8, 1994, it is as if the Certificate never existed. Nothing that was written in that Certificate or the Agreement affects, in any way, the Port’s current right to contribution from the Hulberts. The plain language of the Agreement makes this clear. Neither the Hulberts’ evidence of their unilateral intent, nor their strained and unreasonable interpretation of the document’s plain language change that fact.

e. Public Policy Supports the Port’s Interpretation of the Agreement

The policy objective of CERCLA and MTCA is that the cost of cleaning up contamination be borne by the parties responsible for that contamination. *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 129 S.Ct. 1870, 1874 (2009) (“[CERCLA] was designed to... ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.”)¹⁹. Here, the Hulberts operated a mill and related

¹⁹CERCLA principles have been determined to be transferable to MTCA. “Some parts of the MTCA track its federal counterpart CERCLA and, consequently, federal cases interpreting similar language in CERCLA

industrial operations at the Site for decades. Public policy dictates that they should be required to pay their fair share of those cleanup costs.

While some courts have allowed parties to *expressly* allocate environmental cleanup liability the purported allocation alleged here was *not express*, so public policy should not be frustrated by the Hulberts' *post hoc* illogical attempt to imply an allocation in the Agreement.

B. The Judgment Declaring That the Contract Is Not a Bar to MTCA Contribution Was Properly Certified

The certification of a partial judgement as final is a matter of the trial court's discretion. These decisions are reviewed for an abuse of that discretion. "While the court has discretion in making a CR 54(b) determination, the appellate court has authority to review the determination for abuse of discretion." *Lindsay Credit Corp. v. Skarperud*, 33 Wn. App. 766, 772, 657 P.2d 804 (1983). Contrary to the Hulberts' assertions, the trial court did properly certify the December 10,

are persuasive, albeit not controlling, authority." *City of Seattle (Seattle City Light) v. Washington State Dept. of Transp.*, 98 Wn. App. 165, 169-170, 989 P.2d 1164 (1999)(footnote omitted); "In assessing this argument, we are aided by reference to the [CERCLA] and [SARA]. The MTCA was heavily patterned after these two federal statutes. As such, federal cases interpreting similar language in CERCLA and SARA are persuasive, although not controlling, when interpreting the MTCA." *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992)(footnote omitted).

2007, order granting the Port's motion for summary judgment as a final judgment. The Court made all of the requisite findings, namely the express determination of no just reason for delay with written findings supporting that determination as well as an express direction for entry of the judgment. *Fluor Enter., Inc., v. Walter Constr., Ltd.*, 141 Wn. App. 761, 766-767, 172 P.3d 368 (2007). The trial court's order specifically found that: the contract claims were "separate and extricable from all remaining claims"; that the contract claims involved different legal issues and different parties than the remaining claims; that the contract claims are legally and factually distinct from the remaining claims; that an immediate appeal of the contract claims would not delay a trial on the remaining claims; and that based on these findings, there was no just reason for delay CP 23-29.

The fact that their complaint only contained their contract claims and not MTCA claims is evidence that despite their assertions otherwise, the Hulberts recognized that the contract claims are separate, distinct, and segregable from the remaining MTCA claims. As the Hulberts are also aware, the Port did not seek certification of the summary judgment order

so that it could immediately recover attorneys' fees²⁰. Rather, the Port sought CR 54(b) certification in order to ensure that any appeal of the decision that the Agreement is not a bar would be taken prior to the MTCA allocation process. This process involves multiple liable parties and will likely take place after an extended period of site investigation²¹. For the parties to complete this process only to have the Hulberts subsequently appeal the summary judgment order on the contract claims, and potentially bar any recovery from the Hulberts, would be highly prejudicial and judicially wasteful.

Regardless, the Hulberts have not come close to meeting their burden of establishing that the trial court abused its discretion in certifying the summary judgment order as final, and this certification should be upheld.

C. The Attorney Fees Awarded by the Trial Court Were Reasonable

The trial court properly granted the Port's attorney fee request because the request did not include fees for any work other than defending

²⁰As of the date of this brief, the Port has not sought to execute on this judgment despite the lack of a supersedeas bond.

²¹In fact, the parties intend to negotiate an extended stay of the MTCA litigation to allow for this site investigation. CP 185.

the Hulberts' contract claims. CP 30-34. As is seen from the Port's evidence the request *did not* include any work spent prosecuting or defending the MTCA statutory claims, any other general matters in the litigation or any otherwise unproductive time. Supp. CP 1941. Further, the trial court made specific findings that the amount of time spent defending the Hulberts' contract action was reasonable given the Hulberts' litigious nature, given the overly large breadth of their discovery requests, and the circumstances surrounding the motions for summary judgment on the contract issue. CP 32-33.

1. Standard of Review

The trial court's fee award is reviewed for reasonableness and is altered only if there is an abuse of discretion. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 363, 177 P.3d 755 (2008)(“We review whether the amount of a fee award is reasonable for abuse of discretion”). A determination of an abuse of discretion is only found where the trial court's decision was not based on tenable grounds or reasons. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 858-859, 158 P.3d 1271 (2007)(citing *Taliesen Corp. v. Razole Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185 (2006)).

2. Burden of Proof

On appeal, the Hulberts bear the burden of proof that the trial court abused its discretion. “The complaining party ordinarily has the burden of proving an abuse of discretion. That is, the party asserting that the trial court abused its discretion bears the burden of showing such abuse of discretion.” 5 C.J.S. *Appeal and Error* § 908 (2009). The Hulberts have failed to establish that the trial court abused its discretion, and further, do not cite to anything in the record indicating *how* the trial court abused its discretion.

3. The Trial Court’s Determination Was Based on Tenable Grounds

Mark Nadler’s declaration in support of the Port’s motion for attorney fees (CP 92 to 182), which was reviewed, accepted and relied upon by the trial court (CP 30, paragraph 2) included detailed testimony regarding the manner in which the Port’s counsel uses commercially prepared accounting software to keep contemporaneous time records for all aspects of the work done in any legal representation. CP 93, paragraph 3. The declaration also set forth detailed testimony that the Port’s counsel segregated for inclusion in the Port’s attorney fees request, the time spent on the Hulberts’ contract claims, and excluded the time spent on the

Hulberts' MTCA claims. CP 93, paragraph 4. The testimony further states that the Port's counsel prepared the fee request using the bills actually sent to the Port, along with counsel's notes and recollections of the work. The Port's counsel removed time that might be considered excessive as well as time entries in which the majority of the work performed was unrelated to the contract claims. As Port counsel testified, he also segregated the fees spent responding to the Hulberts' MTCA related discovery, erring on the side of excluding more than was necessary:

Although all 340 hours of the time spent responding to the Hulberts' discovery is arguably properly included in this motion given the fact that no MTCA claims existed at the time the discovery was served, in order to give the Hulberts the benefit of any doubt I excluded approximately 115 hours of time that could arguably be attributable to the MTCA claims [resulting in a total request of only 225 hours for discovery related tasks].

CP 96, lines 7 - 11. Counsel went on to explain that the Hulberts' discovery requests were exceedingly broad and required review of 50 boxes of documents, 8 of which were produced. CP 95. The remaining contract claim-related time was spent defeating the Hulberts' emergency motion for a temporary restraining order based upon the contract (CP 95, paragraph 10), and in preparing and litigating the multiple motions which were required to obtain the summary judgment at issue on this appeal. CP

31 - 33.

The trial court specifically found that the hourly rates charged by Port counsel were reasonable (CP 31, line 25), that the amount of time spent was reasonable (CP 32), that the Port's request for attorney fees "...is based upon sufficiently detailed, contemporaneously kept time records..." (CP 32), and does not include time spent wastefully or in duplication of effort (CP 32).

The evidence presented in the declaration of Mark Nadler and accepted by the trial court established that the Port properly segregated the time spent on discovery related to the contract claims from that related to the remaining MTCA claims. The trial court went on to specifically find that the Port's counsel reasonably spent 27 hours defeating the Hulberts' motion for a temporary restraining order (which was contract related, not MTCA related) (CP 32, paragraphs 5.d and 5.e), reasonably spent 225 hours responding to the Hulberts' discovery requests propounded prior to the introduction of MTCA contribution issues to the case (also contract related as opposed to MTCA related) (CP 33, paragraphs 5.f and 5.g), and reasonably spent 272 hours on the multiple motions and hearings leading up to the instant summary judgment (contract related, not MTCA related)

(CP 33, paragraphs 5.h and 5.I).

For the Hulberts to suggest that the trial court did not segregate the attorney fees flies in the face of the declaration testimony specifically to the contrary submitted by the Port, and flies in the face of the trial court's specific findings of the amount of hours spent on the three contract related tasks referenced above.

The Hulberts made their same unfounded objections to the Port's attorney fees at the trial court level, and the trial court was unpersuaded. "The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties." *Absher Const. Co. v. Kent School Dist.*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995). The grounds that the trial court relied upon are tenable and fully supported by the record. The Hulberts offer only mere conjecture and untrue allegations regarding the segregation of the Port's attorney fees. The Hulberts reliance on *Absher Const. Co.* is misplaced, because the record indicates that, here, the Port properly segregated its fees. CP 46-50; 92-100. The Hulberts cannot and do not point to any example of how the trial court reliance on this evidence was an abuse of discretion, and therefore the trial court's award should not be disturbed.

D. The Port Should be Awarded Its Attorney Fees On Appeal

Pursuant to RAP 18.1, the Port requests the Court award its reasonable attorney fees on appeal. Attorney fees are authorized by the Agreement under which the Hulberts brought all of their original claims in this litigation. CP 1885-1894. The Agreement states:

Attorneys' Fees; Costs. In the event of the bringing of any action or suit by either party against the other arising out of this Agreement, the party in whose favor final judgment shall be entered shall be entitled to recover from the other party all costs and expenses of suit, including reasonable attorneys' fees.

CP 1473. The Port successfully defended all of the Hulberts' contract claims at the trial level and has been forced to expend even more fees to defend the Hulberts' contract claims in front of this Court. The Hulberts have unsuccessfully pursued these claims for more than three years, beginning with a motion for a temporary restraining order to enjoin the Port's remedial work. Three years and multiple hearings later, the Hulberts continue to argue the same points that have been rejected by two judges already, causing the Port to unnecessarily spend more money on attorney fees. The Port should be compensated as the Agreement intended, for all of the attorney fees spent defending their claims.

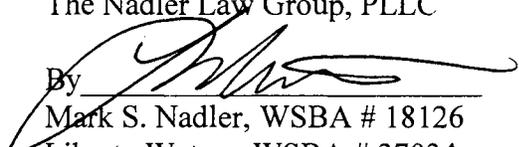
V. Conclusion

For the reasons stated above, the trial court's December 10, 2007 order granting the Port's motion for summary judgment, its July 27, 2009 certification of that order as a final judgment, and its July 27, 2009 order awarding the Port its attorney fees spent defending the Hulberts' contract claims should be upheld. Further, the Port is entitled, pursuant to the Agreement and RAP 18.1, to an award of its reasonable attorney fees on appeal.

Dated this 7th day of December, 2009.

Respectfully Submitted,

The Nadler Law Group, PLLC

By 

Mark S. Nadler, WSBA # 18126

Liberty Waters, WSBA # 37034

Amber D. Schneider, WSBA #37610

Attorneys for Respondent

Port of Everett

Appendix A

CERTIFICATE AND INDEMNITY
REGARDING HAZARDOUS SUBSTANCES

In connection with and as partial consideration for the purchase of property commonly known as the Hulbert Mill Company Properties located north of 13th Street and west of Marine View Drive in Everett, Washington, and incident to that purchase and sale transaction by and between William G. Hulbert, III, Tanauan Hulbert Martin, David Francis Hulbert, the William G. Hulbert and Clare Mumford Hulbert Revocable Living Trust, as Tenants in common and William Hulbert Mill Company Limited Partnership, a Washington Limited Partnership, (hereinafter collectively "Seller") and the Port of Everett (hereinafter "Buyer") as evidenced by the Agreement of Purchase and Sale dated March _____, 1991, (the "Agreement"), Seller hereby certifies to Buyer and agrees as follows:

1. Seller has received no notice from any governmental agency or other party and except as set forth in the Kleinfelder Report (as defined in the Agreement) has no knowledge without independent investigation of (a) the presence of any "Hazardous Substances" (as defined below) on, under, above or below that certain real property situated in Snohomish County, Washington, legally described in Exhibit A attached but does not include that property which is owned by Buyer and leased to Seller, the lease to which Seller relinquished to Buyer in connection with this transaction (the "Property"), or (b) any spills, releases, discharges or disposal of Hazardous Substances that have occurred or are presently occurring on or onto the Property or any adjacent properties, or (c) any spills or disposal of Hazardous Substances that have occurred or are presently occurring off the Property as a result of any construction on or operation and use of the Property.

2. In connection with the construction on or operation and use of the Property, Seller, as of the date of this Certificate, and except as set forth in the Kleinfelder Report has received no notice from any governmental agency or other party and has no knowledge without independent investigation of any failure to comply with all applicable local, state and federal environmental laws, regulations, ordinances and administrative and judicial orders relating to the generation, recycling, reuse, sale, storage, handling, transport and disposal of any Hazardous Substances.

3. Seller represents and warrants to Buyer that it has provided to Buyer all documentation and information it has relating to investigations, testing and analysis of the present and past uses of the Property including any inquiry of the appropriate governmental agencies and offices having jurisdiction

over the Property and the laws regulating the environment, as to whether the Property or any property in the immediate vicinity of the Property is or has been the site of storage of or contamination by any Hazardous Substances. Seller further represents and warrants it has given no express release or waiver of liability that would waive any claim based on Hazardous Substances to a previous owner of the Property or to any party which may be potentially responsible for the presence of Hazardous Substances on the Property and has not made any promises of indemnification regarding Hazardous Substances to any other party. Seller will provide Buyer with a summary of its investigations and copies of all inquiries and responses.

4. Subject to the limitations set forth below, Seller agrees to indemnify and hold Buyer harmless from and against any and all claims, demands, damages, losses, liens, liabilities, penalties, fines, lawsuits and other proceedings and costs and expenses (including attorneys' fees), arising directly or indirectly from or out of, or in any way connected with (a) the inaccuracy of the information set forth in any disclosure statements or the certifications contained herein, (b) any activities on the Property during Seller's ownership, possession or control of the Property which directly or indirectly result in the Property or any other property becoming contaminated with Hazardous Substances, (c) the discovery and the clean-up of Hazardous Substances from the Property or any other properties contaminated by Hazardous Substances emanating from the Property attributable to contamination which occurred prior to the sale of the property by Seller to Buyer. Seller acknowledges that it will be solely responsible for all costs and expenses relating to the clean-up of Hazardous Substances from the Property or from any other properties which become contaminated with Hazardous Substances as a result of activities on or the contamination of the Property during Seller's ownership of the Property.

Without limiting the foregoing, Seller shall be responsible for the costs of environmental evaluations as set forth in Exhibit _____ and necessary remediation determined according to the process set forth in Section 4.03 and 4.04 of the Agreement.

Upon notification or claim of liability or potential liability with respect to a release or threatened release of hazardous substances at the Property with respect to which Buyer is entitled to indemnification by Seller hereunder, Buyer shall promptly notify Seller and Seller shall have the right, but not the duty, at Seller's expense, to challenge such alleged liability and to control any proceeding or settlement resulting from such challenge. In addition, Seller shall have the right to disclose the existence of Hazardous Substances on the Property to the appropriate governmental agency or agencies and seek the action by such agency or agencies with respect to any clean-up

requirements. In the event Seller elects, in writing, not to challenge such alleged liability, Seller shall be entitled to participate in the challenge or settlement of such liability, including the conduct of any remedial investigation or feasibility study and the selection and implementation of any remedial action.

5. Except as set forth in this Certificate, Seller's obligations under this Certificate are unconditional and shall not be limited by any non-recourse or other limitations of liability provided for in any document relating to the Sale ("Sale Documents"). The representations, warranties and covenants of Seller set forth in this Certificate (including without limitation the indemnity provided for in paragraph 5 above) shall continue in effect and shall remain true and correct for a period of three (3) years after the date of this certificate and shall survive the transfer of the Property. Seller acknowledges and agrees that its covenants and obligations hereunder are separate and distinct from its obligations under the Sale and the other Sale Documents.

6. As used in this Conservation "Hazardous Substances" shall mean: any substance or material defined or designated as hazardous or toxic waste, hazardous or toxic material, a hazardous, toxic or radioactive substance, or other similar term, by any federal, state or local environmental statute, regulation, or ordinance presently in effect including but not limited to the statutes listed below:

Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6901 et seq.

Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended 42 U.S.C. Section 9601 et seq. and the Superfund Amendments and Reauthorization Act of 1986.

Federal Clean Air Act, 42 U.S.C. Sections 7401-7626.

Federal Water Pollution Control Act, Federal Clean Water Act of 1977, 33 U.S.C. Section 1251 et seq.

Federal Insecticide, Fungicide, and Rodenticide Act, Federal Pesticide Act of 1978 7 U.S.C. Paragraph 13 et seq.

Federal Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.

Federal Safe Drinking Water Act, 42 U.S.C. Section 300(f) et seq.

Washington Water Pollution Control Act, RCW Chapter 90.48.

Washington Clean Air Act, RCW Chapter 70.94.

Washington Solid Waste Management Act, RCW Chapter 70.95.

Washington Hazardous Waste Disposal Act, RCW Chapter 70.105.

Washington Hazardous Waste Regulation Act, RCW Chapter 70.105A.

Washington Clean Up Act, RCW Chapter 70.105B.

Washington Nuclear Energy and Radiation Act, RCW Chapter 98.

Washington Radioactive Waste Storage and Transportation Act, RCW Chapter 70.99.

7. This Certificate shall be binding upon and inure to the benefit of Buyer and Seller and their representatives, successors and assigns. If Seller shall change its/their form of organization or ownership of the proceeds of this sale, the responsibilities, obligations, representations and warranties herein shall survive that change in organization or ownership to the extent of any assets distributed to the undersigned receiving such assets after the date of this Certificate. The undersigned specifically represent that all necessary action has been undertaken to authorize the execution of this Certificate.

8. Any liability under this Certificate shall be apportioned among the various individuals and the entity set forth below according to the percentage allocated respectively to each:

William G. Hulbert, III	24.0321%
Tanauan Hulbert Martin	24.0341%
David Francis Hulbert	15.8341%
William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust	36.0997%

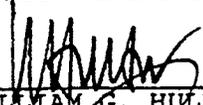
None of the Sellers shall be responsible for payment of any sums hereunder in excess of their proportionate share of such liability whether or not Buyer was able to collect sums from the other Sellers. For example, in the event of a \$100,000 claim by Buyer hereunder, William G. Hulbert III and Tanauan Hulbert Martin would each be responsible for \$24,032.10 and \$24,034.10, respectively of such liability. David Francis Hulbert would be responsible for \$15,834.10 of such liability and the trust would be responsible for \$36,099.70 of the liability.

9. This Certificate may be executed in counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and same original.

IN WITNESS WHEREOF, Seller has executed this Certificate and Indemnity this _____ day of _____, 1991.

SELLER:

WILLIAM HULBERT MILL COMPANY
LIMITED PARTNERSHIP

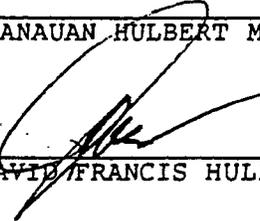
By 
WILLIAM G. HULBERT, III
General Partner

WILLIAM G. HULBERT, III

By 
DAVID FRANCIS HULBERT
General Partner

TANAUAN HULBERT MARTIN

By _____
TANAUAN HULBERT MARTIN
General Partner



DAVID FRANCIS HULBERT

By _____
WILLIAM G. HULBERT, JR.
and Clare Mumford Hulbert
Revocable Living Trust,
General Partner

WILLIAM G. HULBERT, JR. and
CLARE MUMFORD HULBERT REVOCABLE
LIVING TRUST

By _____
WILLIAM G. HULBERT, III
Trustee

By _____
William G. Hulbert, III, Trustee

By _____
BETTY RESSEGUIE, Trustee

By _____
Betty Resseguie, Trustee

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

On this day personally appeared before me William G. Hulbert, IV, individually and as a general partner of the William Hulbert Mill Mill Corporation Limited Partnership to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this _____ day
of _____ 1991.

NOTARY PUBLIC in and for the State
of Washington, residing at _____
My commission expires: _____

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

On this day personally appeared before Tanauan Hulbet Martin individually and as general partner of the William Hulbert Mill Company Limited Partnership to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged to me that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

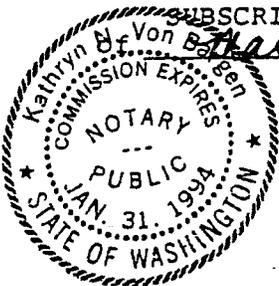
SUBSCRIBED AND SWORN to before me this 8th day
of March, 1991.

Kathleen A. Ch. Large
NOTARY PUBLIC in and for the State
of Washington, residing at Edmonds
My commission expires: 1-31-94

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

On this day personally appeared before me David Francis Hulbert, individually and as a general partner of the William Hulbert Mill Company Limited Partnership to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 8th day of March, 1991.



Kathryn N. Von Baren
NOTARY PUBLIC in and for the State
of Washington, residing at Edmonds
My commission expires: 1-31-94

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

On this day personally appeared before me William G. Hulbert III Trustee of the William G. Hulbert Jr. and Clare Mumford Hulbert Revocable Living Trust to me known to be the described in and who executed the within and foregoing instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed of said Trust for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 8th day of March, 1991.

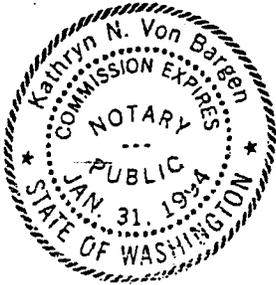


Kathryn N. Von Baren
NOTARY PUBLIC in and for the State
of Washington, residing at Edmonds
My commission expires: 1-31-94

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

On this day personally appeared before me Betty Resseguie Trustee of the William G. Hulbert Jr. and Clare Mumford Hulbert Revocable Living Trust to me known to be the described in and who executed the within and foregoing instrument, and acknowledged to me that she signed the same as her free and voluntary act and deed of said Trust for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 8th day of March, 1991.



Kathryn N. Von Bargen
NOTARY PUBLIC in and for the State
of Washington, residing at Edmonds
My commission expires: 1-31-94

My commission expires: _____

No. 64102-6-I

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

FILED
STATE OF WASHINGTON
2009 DEC -7 PM 4:31

William G. Hulbert, III; Tanauan Hulbert Martin, and David Francis
Hulbert, William Hulbert Mill Co. Limited Partnership, and William G.
Hulbert, III; and Tanauan Hulbert Martin, as trustees of the William G.
Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust,

Appellant,

v.

The Port of Everett,

Respondent.

CERTIFICATE OF SERVICE

Mark S. Nadler, WSBA No. 18126
Liberty Waters, WSBA No. 37034
Amber D. Schneider, WSBA No. 37610
Attorneys for Port of Everett, as Respondent

The Nadler Law Group PLLC
1011 Western Avenue, Suite 910
Seattle, Washington 98104
(206) 621-1433

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 7th day of December, 2009, I caused true and correct copies of :

1. Brief of Respondents; and
2. Certificate of Service

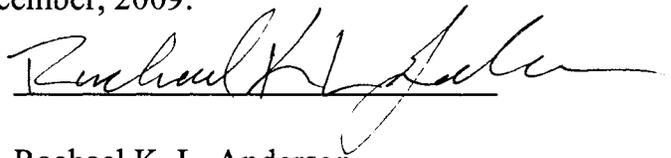
to be delivered via legal messenger to the following:

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Kimberly K. Evanson
K & L Gates
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Seattle, WA 98121-3140

Lynn Manolopoulos
Davis Wright Tremaine LLP
777 108th Ave NE, Suite 2300
Bellevue, WA 98004-5149

DATED this 7th day of December, 2009.



Rachael K. L. Anderson
Legal Assistant