

Supreme Court No. 94087-8

THE SUPREME COURT OF THE STATE OF WASHINGTON

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS

Petitioners

v.

SHAMROCK PAVING, INC.

Respondent

PETITIONERS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Petitioner, Harlan D. Douglass, (Plaintiff below), asks this Court to interpret the definition of *remedial action* found at 70.105D.020(33) of Washington's Model Toxics Control Act, ("MTCA"). Promulgated in 1989 as RCW 70.105D, the MTCA was intended to help protect and cleanup the state's environment. *Seattle City Light v. Washington State Department of Transportation*, 98 Wn.App. 165, 169, 989 P.2d 1164 (1999). In spending his own money to test for, and cleanup, the contamination left on his property by Shamrock Paving, Douglass was protecting and cleaning up the state's environment.

Douglass asks this Court to do three things;

1. Affirm Division III's interpretation of "remedial action" as including, in addition to cleaning up hazardous substances, the investigation of hazardous substances releases;
2. Determine the Legislature's purpose in including the words *potential threat* within the definition of remedial action and based thereon, direct the trial court to award Douglass the \$12,236.99 incurred in cleaning his property of the lube oil released by Shamrock.
3. Reject Shamrock's contention that in order for a plaintiff to be determined the prevailing party in a MTCA suit, concentrations of hazardous substances must reach a level requiring cleanup.

RCW 70.105D.020(33) provides the answer to the main issue facing this Court, i.e., whether investigation of a hazardous release

constitutes a remedial action? It also makes clear that investigating and/or cleaning up *potential threats* or *potential risks* to human health or the environment constitutes remedial action every bit as much as cleaning up releases having concentrations exceeding mandatory minimum levels classified as existential threats.

In holding that investigation of hazardous releases satisfies the requirements of RCW 70.105D.020(33) and therefore constitutes a remedial action, Division III went a long way toward clarifying the MTCA for other owners of contaminated land as well as the courts. However, in failing to hold that Douglass' efforts also qualified as a cleanup of a *potential threat* or *risk* to human health or the environment, Division III stopped short of fully clarifying that which constitutes a remedial action in accordance with its express definition.

That part of Division III's decision holding that Douglass recover from Shamrock the \$950.00 he expended in investigating Shamrock's release should be affirmed. Division III failed to address whether or not lube oil at 2,000 mg/kg constituted a *potential threat* or *potential risk* to human health or the environment. This Court should find that it did and reverse that part of Division III's decision that found that Douglass's cleanup itself did not also constitute a remedial action.

Prior briefing makes clear that Shamrock trespassed on Douglass' property for 89 days, during which it parked, fueled and serviced 16 pieces of heavy paving equipment. (FF #5; CP 732, 729). While trespassing, Shamrock released nominal quantities of gasoline and diesel but a high concentration of lube oil. (Pl Ex 13; FF #12, 13; CP 729, 730)¹. When Douglass learned of Shamrock's trespass he forced it to remove its equipment and piles of asphalt. Testing provided disturbing evidence of serious contamination from lube oil.

Lube oil tested as high as 2,000 mg/kg, the exact threshold over which DOE *requires* cleanup. (WAC 173-340-900). Testing cost Douglass \$950.00. (RP 205; 5-206; 1). Removal of 68 tons of soil to remediate the contamination cost Douglass another \$12,236.99. (FF #14; CP 730; RP 215). Douglass' brought a private right of action under RCW 70.105D.080 to recover those costs.

The trial court found Shamrock *liable* as a releaser of a hazardous substance. (CP 732, 733). However, it denied Douglass recovery for his investigation or for the cleanup. This made Shamrock, the trespasser who contaminated Douglass' property, the prevailing party which the trial court awarded nearly \$100,000 in fees and costs. (CP 734). The

¹ Initial testing on November 14, 2013 revealed concentrations of lube oil at 2,000 mg/kg. Further testing on January 24, 2014, taken from different locations, revealed concentrations of diesel at 600 mg/kg and lube oil at 800 mg/kg and 400 mg/kg.

trial court reasoned that since the release had not exceeded state guidelines mandating cleanup found at WAC 173-340-900, Douglass had not performed a remedial action. (CP 733, 734).

The net result was not just to deny Douglass his minimal investigation and cleanup costs but to render him liable to Shamrock for nearly \$100,000 in attorney's fees and court costs. *Douglass v Shamrock Paving, Inc.*, ---Wn.App.---, 384 P.3d 673, 677 (Div III, 2016).

Apparently misunderstood were two key parts of the definition of remedial action which, if given effect, would have required the trial court to order Shamrock to pay Douglass the entire \$13,186.99 he had incurred and to designate him the prevailing party. (RCW 70.105D.080). Those key parts mandate that investigation of a hazardous release constitutes a remedial action and that investigating or cleaning up a potential threat or risk to human health or the environment does as well. Reprinted verbatim below, with those two key parts highlighted, is RCW 70.105D.020(33).

"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.

In failing to reverse the trial court and award Douglass his cleanup costs, Division III, as did the trial court, seemed not to give due consideration to the words *potential threat* and *potential risk*.

On remand, since Douglass will recover remedial action costs consisting of at least the cost of his investigation, Division III correctly designated Douglass the prevailing party, erasing Shamrock's nearly \$100,000 attorney fee award and ordering that all fees and costs be paid to Douglass.

ISSUES PRESENTED

Douglass asks this Court to consider the following three issues;

1. Does, as Division III concluded, "remedial action" include Investigation of releases of hazardous substances?
2. What was the legislature's purpose in including the words *potential threat* in the definition of remedial action?
3. Must the concentration of a hazardous substance reach the level requiring cleanup before a plaintiff in a MTCA action may be determined the prevailing party?

STATEMENT OF THE CASE

The Statement of the Case is adequately set forth at pages 9-10 of Douglass' Cross-Petition with an even more detailed Statement contained at pages 5-10 of his Opening Brief.

SUPPLEMENTAL ARGUMENT

1. **By including investigation in its definition of remedial action the legislature chose not to limit remedial action to cleanup**

As noted, the issues examined in this review all involve interpretation of RCW 70.105D.020(33), the section of the MTCA that defines the all-important term, *remedial action*. The definition is important because unless the Court concludes that Douglass conducted a *remedial action*, he is not entitled to recover any of the costs he incurred in investigating Shamrock's release or in remediating his property. (RCW 70.105D.080). Worse, if not entitled to any of those minimal costs, he cannot be the prevailing party, the effect of which would be to make Douglass liable to Shamrock, the guilty party, for Shamrock's attorney's fees and costs, a completely absurd result and slap in the face of justice. (*Id.*).

Correctly interpreting RCW 70.105D.020(33), Division III held that one who incurs costs investigating a release of a hazardous substance has engaged in a *remedial action*. In its unanimous decision,

Division III noted that it was required to assess the statute's *plain language* with a view toward giving effect to its purpose. (*Douglass @ 676*). There, the Court noted;

RCW 70.105D.020(33) is a broadly-worded provision. By its plain terms, it is not limited to actual cleanup efforts. Actions taken to identify and investigate the need for cleanup are also covered. Furthermore, contrary to Shamrock's position, an investigation need not reveal an actual threat to qualify as remedial.

(*Douglass @ 677*).

Division III also noted that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601, holds persuasive authority in interpreting the MTCA. *Seattle City Light*, 98 Wash.App. at 169-70, 989 P.2d 1164. Under the CERCLA, investigative costs qualify as recoverable. (*Douglass @ 677*) (see cite). In fact, Division III concluded that in considering what constitutes a remediation action, the MTCA may be interpreted even more broadly than CERCLA because the MTCA omitted the CERCLA requirement that response costs be *necessary*. (*Douglass n.7*). (CERCLA § 101(23)).

Accordingly, *Douglass*, who incurred \$950.00 in costs investigating Shamrock's release of hazardous substances onto his property engaged in a *remedial action*. Division III's reasoning and its

express and forceful rejection of Shamrock's counter arguments leave no room for a contrary interpretation. Douglass cannot improve upon that which Division III expressly determined was the proper interpretation of remedial action. Save for what is stated above, Douglass sees no purpose in simply re-stating that which was written by Justice Pennell in Division III's unanimous decision.

2. In the context of a remedial action, lube oil at concentrations of 2,000 mg/kg must, by definition, be considered a potential threat or risk to human health or the environment

Once again, Douglass invites this Court's attention to RCW 70.105D.020(33). The definition does not require that the concentration of the hazardous substance be an actual *threat* to human health or the environment in order for Plaintiff's efforts to qualify as a remedial action. All that is required is that the release be a *potential threat* or *potential risk*. Accordingly, the level of concentration of a hazardous substance cannot be required to exceed the threshold at which the State mandates cleanup.

Shamrock argues that the definition of remedial action be interpreted in such a narrow and restrictive manner that the plain intent of the legislature be disregarded. In other words, Shamrock demands that this Court ignore the words *potential threat* or *potential risk*. In so

arguing, Shamrock demands that this Court ignore its obligation to interpret the MTCA liberally. (RCW 70.105D.910)².

Shamrock's argument that cleanup costs cannot be awarded unless concentrations exceed the threshold stated for mandatory removal ignores the fact that by including the word *potential* the legislature intentionally inserted criteria that did not require a full blown threat or risk. In other words, it did not require that the concentration exceed the minimum threshold requiring removal. Under Shamrock's suggested interpretation, a release would be either a threat to human health or the environment or it wouldn't be. In Shamrock's world there is no room for the third alternative clearly intended by the legislature, *potential threat or risk*. (70.105D.020(33)).

If the legislature had intended that the investigation and/or cleanup had to be of an existential threat to human life or the environment it could simply not have included the additional word *potential* within the definition. Instead, the legislature affirmatively added that language modifying the words *threat* and *risk*. The language employed by the legislature must, as a matter of law, be given effect. *Pac. Topsoils, Inc. v. Department of Ecology*, 157 Wash.App. 629, 641,

² The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act.

238 P.3d 1201. The Court's goal in interpreting a statute is to ascertain and carry out the legislature's intent. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). To do so, the Court first looks to the plain language of the statute. (*Id.*) When the legislature has expressed its intent in the plain language of a statute, Courts cannot substitute their judgment for the legislature's judgment. *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn.App. 959, 972, 344 P.3d 705 (2015); (*accord Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002)) ("An unambiguous statute is not subject to judicial construction."), *cert, denied*, 538 U.S. 1057 (2003).

Inclusion of the word *potential* can only be interpreted as meaning that in instances where the release of a hazardous substance cannot be expressly classified as an actual threat to human life or the environment the release is, nevertheless, more than nominal or harmless and therefore constitutes a *potential threat or risk*. Accordingly the legislature obviously intended three levels of contamination, not just the two urged by Shamrock. And since there then must be a level at which the concentration is a *potential threat*, it must at least be at the threshold level where anything exceeding that level is a definite threat.

Since the DOE requires cleanup of concentrations of lube oil exceeding 2,000 mg/kg, a level at 2001 mg/kg must be an actual threat. With that, even Shamrock can't quarrel. The most important question Douglass might ask is; If 2,000 mg/kg is not at least a *potential threat* or *risk* what level of concentration would be?

3. **Since investigation of a release of a hazardous substance constitutes a remedial action, Plaintiff is the prevailing party whether or not the level of concentration mandated cleanup**

Ignoring the fact that the lube oil released onto Douglass' property tested at 2,000 mg/kg, which is exactly at the dividing line between mandatory cleanup and no action being required, Shamrock contends that Douglass's investigation revealed only *nominal* contamination.³ On that absurdity, Shamrock bases its contention that Douglass should not be designated the prevailing party. Though this Court does not require assistance in understanding the meaning of the word *nominal*, Douglass points out that Webster's defines it as;

existing in name only and not in reality—small—trifling

³ In its Petition for Review, to establish that Shamrock's release of lube oil onto Douglass' property was "nominal" it argued that levels of lube oil contamination immediately prior (January, 2014) to the cleanup were only 400 mg/kg and 800 mg/kg. (Shamrock Petition for Review, page 6). What Shamrock failed to disclose in that argument is that in the November, 2013 test lube oil tested at 2,000 mg/kg and that the three readings all came from distinct separate areas on Douglass' property. Accordingly, the two January results had no bearing whatsoever on the November result.

(Webster's II, 1994 ed).

If a concentration of lube oil at 2,001 mg/kg must be cleaned up, it is illogical to argue that a concentration of 2,000 mg/kg is “small”, “trifling” or “existing in name only”. To so argue is at best disingenuous and at worst challenges the credibility of the one making the argument. A concentration, at which even one more one thousandth of a milligram triggers mandatory cleanup cannot, by definition, be trifling.⁴ It has to be a potential threat or constitute a potential risk.

In this case, where the concentration is exceedingly high, it must be conceded that Shamrock released a hazardous substance which presented a potential threat or risk to human life or the environment.

Shamrock, of course, prefers an unrealistic alternative conclusion where Douglass, clearly the innocent party is denied all relief which would by default, make Shamrock, undeniably the wrongdoer, the prevailing party entitled to attorney's fees and costs.

⁴ Division III specifically noted that this was not a case where the amount of hazardous waste was so clearly de minimis that no action was needed to ensure lack of danger. *Douglass v Shamrock Paving, Inc.*, ---Wn.App.---, 384 P.3d 673, 677 (Div III, 2016). The amount of hazardous substance which Shamrock released being unknown, an investigation was justified. (*Id*).

CONCLUSION

This is a case in which the equities could not be clearer. Douglass did nothing but own a parcel of land. Shamrock trespassed on the land for three months. Shamrock used Douglass' land to park, fuel and service its 16 pieces of heavy paving equipment. While trespassing, Shamrock released hazardous substances onto Douglass' land, leaving the mess for Douglass to investigate and clean up.

The MTCA was promulgated to help clean and preserve the environment. It provides the mechanism to allow land owners like Douglass to recover costs spent in cleaning up hazardous substances released by corporations such as Shamrock Paving, Inc. Douglass took responsibility for testing and cleaning his own land and simply asked to be reimbursed the roughly \$13,186.99 it cost him.

To evaluate the plain language, Courts consider the text of the provision in question, the context of the statute in which the provision is found, and related statutes. *Jametsky*, 179 Wn.2d at 762. Legislative definitions in the statute control. Courts do not add language to an unambiguous statute under the guise of interpretation. *In re Estate of Mower*, 193 Wn.2d 706, 713, 374 P.3d 180 (2016).

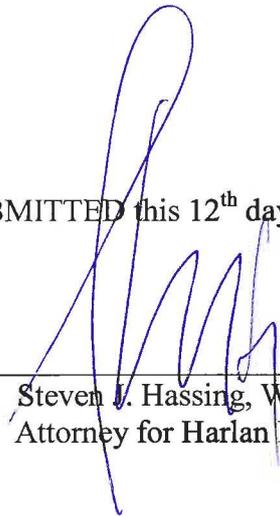
A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable." *Fraternal Order of Eagles*, 148 Wn.2d at 239-40 (quoting *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130 (2002)). A Court is not 'obliged to discern any ambiguity by imagining a variety of alternative interpretations.' (*Id* at 240) (quoting *Keller*, 143 Wn.2d at 277).

Basic interpretation of the clear language used by the legislature in defining remedial action must result in Douglass being reimbursed those minimal costs incurred in testing and removing 68 tons of dirt contaminated by Shamrock's release of hazardous substances onto Douglass' land.

Douglass asks this Court to affirm Division III's determination that Douglass's investigation constituted a remedial action and that Douglass is the prevailing party entitled to all of his attorney's fees and costs. Douglass also asks that this Court find that lube oil at 2,000 mg/kg constitutes a potential threat or risk to human health or the environment and reverse Division III's determination that Douglass is not entitled to his cleanup costs.

[Signatures on next page]

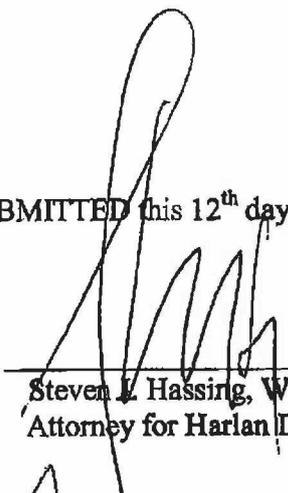
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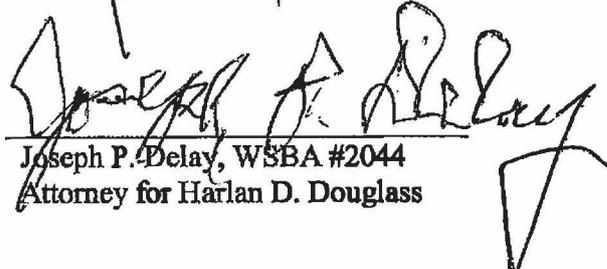
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