No. 69568-1

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

AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C., a Washington limited liability company,

Respondent,

v.

ROSS B. HANSEN, a single person, and NORTHWEST TERRITORIAL MINT, L.L.C., a Washington limited liability company,

Appellants.

BRIEF OF AMICUS CURIAE ASSOCIATION OF WASHINGTON BUSINESS

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 27 AM 11:40

TABLE OF CONTENTS

I. INTRODUCTION 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE 1

III. ISSUES OF CONCERN TO AMICUS CURIAE 3

IV. STATEMENT OF THE CASE 3

V. ARGUMENT 3

A. MTCA SHOULD NOT APPLY TO THE AUBURN/NW MIND INDUSTRIAL BUILDING...3

1. MTCA's Regulatory Scheme. 3

2. The Auburn/NW Mint Building. 5

B. WASHINGTON BUSINESSES SHOULD BE ABLE TO RELY UPON DEPARTMENT OF ECOLOGY DECISIONS THAT A PUTATIVE CLEANUP SITE DOES NOT REQUIRE MTCA REMEDIATION. 8

VI. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Asarco v. Dept. of Ecology, 145 Wn.2d 750, 43 P.3d 471 (2002) 4

BCW Associates Ltd. v. Occidental Chemical Corp., 1988 WL 102641 (E.D.Pa. 1988) 6

Jensen v. Dept. of Ecology, 102 Wn.2d 109, 685 P.2d 1068 (1984) 9

Peterson v. Dept. of Ecology, 92 Wn.2d 306, 596 P.2d 285 (1979) 9

Statutes & Regulations

42 U.S.C. §§ 9601 *et seq* 3

RCW ch. 70.105D 3

RCW 70.105D.010 .... 3, 4

RCW 70.105D.020 .... 5, 7

RCW 70.105D.030 .... 8, 9

RCW 70.105D.040 4

WAC ch. 173-340 4

WAC 173-340-740 6

WAC 173-340-200 7

I. INTRODUCTION

This brief is filed by the Association of Washington Business ("AWB"), Washington's chamber of commerce and principal institutional representative of the state's regulated business community, to address two issues raised in this appeal. First, AWB is concerned about the judicial extension of the Model Toxics Control Act, RCW ch. 70.105D ("MTCA"), to the interior, roof, and loading dock of a leased industrial building left "broom clean" in accordance with lease provisions. Second, AWB is concerned about the imposition of MTCA liability in a private cause of action after the state Department of Ecology, the regulatory body charged with interpretation and enforcement responsibility over MTCA has, through its responsible officials, determined that the subject property is not a MTCA cleanup site. For the legal and public policy reasons discussed below, AWB believes the trial court should be reversed in both respects.[1]

II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB is the state's largest general business membership organization, representing over 8,250 employers from every major industry sector and geographical region of the state. AWB members range

[1] For purposes of the discussion which follows and adopting the convention of the parties, Defendant/Appellant Ross Hansen and Northwest Territorial Mint, LLC will be referred to collectively as "NW Mint," and Plaintiff/Respondent Auburn Valley Industrial Capital LLC will be referred to as "Auburn."

from large, highly visible, multi-national corporations to very small businesses and sole proprietors. Collectively, they employ over 750,000 people in Washington, approximately one third of the state's workforce. AWB is also an umbrella organization which represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in the appellate courts as amicus curiae on issues of substantial interest to its statewide membership.

MTCA interpretation, enforcement, and liability is a key issue for AWB members. AWB maintains an active committee of its membership dedicated to MTCA law and policy issues, which includes professional engineers, environmental firms, legal professionals, and representatives of industries regulated by the state's MTCA standards and taxed under the state's MTCA-funding Hazardous Substances Tax. Such committee members often participate in MTCA remediation both as potentially responsible parties and cleanup professionals. Committee members routinely serve as stakeholders in the development of Department of Ecology remediation standards and enforcement regulations, and participate in the legislative process, including most recently, in landmark 2013 MTCA amendments.

III. ISSUES OF CONCERN TO AMICUS CURIAE

1. Does MTCA apply to the industrial site at issue? *Cf. Br. of Def./App.* at 3 (Issues 2-5); *Br. of Resp't* at 2 (Issue 2).

2. Should companies be able to rely upon Department of Ecology determinations with respect to MTCA liability? *Cf. Br. of Def./App.* at 3 (Issue 1).

IV. STATEMENT OF THE CASE

For brevity's sake, AWB refers to the statement of the case set forth in NW Mint's opening brief at 3-15.

V. ARGUMENT

A. MTCA SHOULD NOT APPLY TO THE AUBURN/NW MINT INDUSTRIAL BUILDING.

1. MTCA's Regulatory Scheme.

Approved by the voters as Initiative 97 in 1988, and adopted by the Legislature in 1989, Laws of 1989, ch. 2, MTCA, RCW ch. 70.105D, is the counterpart to the federal Comprehensive Environmental Response, Liability, and Cleanup Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, creating a comprehensive state regulatory scheme to identify, investigate, and clean up contaminated properties that are or may be a threat to human health or the environment. RCW 70.105D.010. MTCA liability is potentially severe. It is strict liability, which may run retroactively over

many decades. RCW 70.105D.040(3); *Asarco v. Dept. of Ecology*, 145 Wn.2d 750, 43 P.3d 471 (2002) (declining to hold as a matter of law that retroactive application of MTCA violates due process). Property owners who fall within the scope of MTCA are jointly and severally liable for costs associated with cleanup. RCW 70.105D.010(5); .040(2). Typically, remediation is funded by parties that are potentially liable. *Asarco*, 145 Wn.2d at 754 ("Limited state funds are raised for cleanup projects through a tax on hazardous waste, but for the most part, cleanup is paid for and performed by those public or private entities identified by Ecology as 'potentially liable persons.'"). Remediation costs can be extremely high – nearly $400,000, as in this matter, to over $78 million in *Asarco*. 145 Wn.2d at 763 n. 11. The Washington State Department of Ecology is responsible for the implementation and enforcement of MTCA, RCW 70.105D.030, and has promulgated detailed supplemental regulations, WAC ch. 173-340, as well as policy documents and technical memoranda furthering compliance with the law. *See* http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html (last visited Jan. 25, 2014).

MTCA's liability trigger is a release or threatened release of a hazardous substance that may pose a threat to human health or the environment. RCW 70.105D.040. The statute defines "release" in pertinent part as "any intentional or unintentional entry of any hazardous

substance into the environment." RCW 70.105D.020(32). The statute does not define "environment" but Ecology has interpreted the word to mean "any plant, animal, natural resource, surface water (including underlying sediments), groundwater, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington." WAC 173-340-200.

2. The Auburn/NW Mint Building.

The asserted basis for MTCA liability in this case is Auburn's environmental consultant's determination that, as a result of NW Mint's minting and metal fabrication activities, hazardous metal substances were present to some degree in small dust samples collected from interior building spaces and similar dust particulate on some external building surfaces.

It is AWB's contention, however, that MTCA was never intended to apply, and does not by its plain language and meaning apply, to dust in on the interior beams, and near-exterior areas, such as a roof or loading dock, of a building. Whether or not a hazardous substance is present in the interior/exterior building dust, such presence does not constitute a "release" into the "environment" as those terms of art or deployed with precision in the MTCA statute and regulations. Indeed, the trial court's

decision in this regard appears unprecedented. Auburn is unable to cite to any reported case applying hazardous cleanup standards to interior dust.[2] In that regard, the court's resolution of this issue is a matter of first impression in Washington.

Auburn's arguments for MTCA liability amount to a tacit acknowledgement there is no controlling authority that would bring the disputed samples within MTCA's ambit. First, Auburn points to the one spot in the MTCA regulations that the word "dust" actually appears, *Br. of Resp't* at 23; WAC 173-340-740(1)(c)(iii), but this regulation is in the context of a soil cleanup standard for land use sites with particular exposure scenarios, such as residential development sites, WAC 173-340-740(1)(a), as distinct from soil cleanup standards for industrial properties, RCW 173-340-745(1)(a). The context of both regulations is plainly soil contamination in the outside environment. Yet, Auburn points out, "site" can be defined as "facility," and a "facility" can be a "building," such as

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[2] Auburn cites to a single unreported federal district court disposition, *BCW Associates, Ltd. v. Occidental Chemical Corp.*, 188 WL 102641 (E.D.Pa. 1988) for an example of a "threatened release" regulation under CERCLA for interior lead dust. Assuming *arguendo* the appropriateness of relying on an unpublished opinion, the case is distinguishable. The linchpin of the court's "threatened release" analysis was the possibility that age-old lead dust from a prior occupant, pervasively present in the warehouse, including in its interior air, could be released into the environment on workers' clothes and shoes, and on furniture the lessee shipped to customers. "It was the activities of BCW's lessee, Knoll, that were the cause of the threatened release of the lead dust into the environment." *BCW Associates*, 1988 WL 102641 at 11. In this case, by contrast, there is no evidence of any risk that the metals sampled in the building's dust were circulating in the air, could be released into the environment on workers' clothes and shoes, or become present on any material shipped to a customer from the manufacturing space.

the space leased by NW Mint. *Br. of Resp't* at 23-24 (citing WAC 173-340-200; RCW 70.105D.020(4)). This is too facile. Reading an isolated phrase from a cleanup standard referencing soil contamination in predominately residential land use sites to apply to the interior of an industrial building, a reading heretofore adopted by no other court, takes the soil cleanup standard entirely out its fair context. Auburn falls back to MTCA's "broad remedial purpose," *Br. of Resp't* at 26-28, to justify such a reading. Yet even liberal construction mandates should have some anchor in the text and context of the statute and implementing regulations.

In sum, AWB urges the court to adopt NW Mint's argument that MTCA does not apply to the dust samples taken from the building, as any hazardous substance in the dust does not constitute a release or threatened release into the environment as required by the law. It is important that a court not, under the guise of interpreting a statute, create legislation, or add words to a statute that are not there. If MTCA were to have the application that Auburn proposes, and the trial court adopted, it is up to the Legislature to make that determination.

B. WASHINGTON BUSINESSES SHOULD BE ABLE TO RELY UPON DEPARTMENT OF ECOLOGY DECISIONS THAT A PUTATIVE CLEANUP SITE DOES NOT REQUIRE MTCA REMEDIATION.

AWB's second concern arises from NW Mint's interaction with the Department of Ecology, the state agency charged with the official regulatory interpretation and enforcement of MTCA. RCW 70.105D.030. Twice NW Mint applied for Ecology's Voluntary Cleanup Program ("VCP") for independent site remediation under RCW 70.105D.030(1)(i). Twice Ecology rejected the application, based upon a responsible official's determination that MTCA did not apply to the site. The Ecology official acting upon NW Mint's VCP application reasoned that MTCA did not apply to the site because, as discussed above, there was no release into the environment of a hazardous substance and that the metal dust at the site did not enter the "environment" as the agency understands the term. *Br. of Def./App.* at 13-14 (citing testimony). As such, Ecology determined that MTCA did not apply and that it did not have jurisdiction to require remediation of the property. MTCA specifically contemplates such determinations, empowering Ecology as part of this process to "prepare written opinions regarding whether the independent remedial actions or proposals for those actions meet the substantive requirements of this chapter or whether the department believes further remedial action is

necessary at the facility." RCW 70.105D.030(1)(i). This is a discretionary act on the party of Ecology that should be entitled to judicial deference absence an abuse of discretion. *Jensen v. Dept. of Ecology,* 102 Wn.2d 109, 113, 685 P.2d 1068 (1984) ("The DOE's decision is an exercise of discretion. We will not set aside a discretionary decision absent a clear showing of abuse.") (*citing Peterson v. Dept. of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979)). It is troubling that Ecology's written opinions that no remedial action was necessary at the facility did not factor into the trial court's decision over MTCA application.[3] NW Mint should have been able to rely on these determinations.

There are public policy ramifications to a court ignoring Ecology's own determination of its MTCA jurisdiction. At any one time, Ecology is supervises thousands of MTCA cleanups. The vast majority of these cleanups consist of independent remediation actions and are being supervised through the agency's VCP. The VCP affords the public a means of voluntarily remediating hazardous situations, with advice and oversight from Ecology, rather than waiting for an enforcement mandate.

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[3] Auburn seeks to discredit the Ecology official responsible for handling the NW Mint VCP applications, Russ Olsen, as either an uninquisitive low-level bureaucrat with no authority, or as duped on material facts by NW Mint's application (or both). *Br. of Resp't* at 35-36. But as NW Mint's reply briefing enumerates, Olsen's testimony shows consideration of the full details of the VCP applications. *Reply Br. of Def./App.* at 7-10. Further, as discussed above, the statute specifically contemplates Ecology issuing such written opinions, and obviously, supervisory officials like Olsen will be the responsible party issuing them on behalf of the agency.

Assuming the cleanup is performed in accordance with Ecology's directives, Ecology will "certify" compliance with MTCA. This is an efficient method of achieving private environmental cleanup, without adding burden to scarce agency resources.

Here, Ecology essentially certified—twice—that no remedial action was necessary at the building to comply with MTCA. The trial court, without explanation, overruled that determination. If the public cannot rely upon Ecology's determinations and certifications, then the VCP loses its value. If a business can be later hauled into court under MTCA's private right of action and have a judgment entered against it, with absolutely no ability to rely on a prior Ecology finding their property is not covered by MTCA, there is no incentive to participate in the VSP. Potentially liable parties need to be able to work with Ecology on MTCA coverage and remediation requirements in confidence they can rely upon the agency's guidance, without such determinations being collaterally attacked in a later judicial action. Accordingly, the court should grant deference to Ecology's VSP determinations.

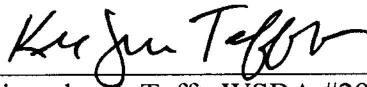
VI. CONCLUSION

This should not be a MTCA case. There is no MTCA liability as there is no release or threatened release of a hazardous substance into the environment. In two separate written opinions, the Department of Ecology

said as much, and its position is entitled to judicial deference, just as NW Mint's reliance upon it was justifiable. Responsibility between Auburn and NW Mint as lessor and lessee for the condition of the building should be determined by the terms of the agreement between them, not by MTCA.

Respectfully submitted this 27th day of January, 2014.

ASSOCIATION OF WASHINGTON BUSINESS



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