Supreme Court No. 97889-1
Court of Appeals No.: 78726-8-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PORT OF ANACORTES, a Washington municipal corporation,
Respondent,
v.
FRONTIER INDUSTRIES, INC., a Washington corporation;
EINO "Mike" JOHNSON and LORIE A. JOHNSON, a married couple;
and ITOCHU INTERNATIONAL INC., a foreign corporation,
Petitioners.

JOINT PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONERS

Frontier Industries, Inc., Eino Johnson, Lorie A. Johnson, and ITOCHU International, Inc. (collectively "Petitioners") ask this Court to accept review of the Court of Appeals' decision identified in Part II.

II. COURT OF APPEALS DECISION

Petitioners seek review of the interlocutory decision issued by the Court of Appeals for Division 1 in the case of *Port of Anacortes v. Frontier Industries, et al.* ("Decision"). A copy of the Decision is in the Appendix at pages A-1 through A-12. The Court of Appeals denied Petitioners' motion for reconsideration on October 24, 2019. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at pages A-13 through A-14.

III. ISSUE PRESENTED FOR REVIEW

Wood debris is not a "hazardous substance" under Washington's Model Toxics Control Act ("MTCA") as a matter of law.

IV. STATEMENT OF THE CASE

Respondent Port of Anacortes owns Pier 2 and the adjacent "Log Pocket," an inlet constructed between Pier 2 and an earthen protrusion along the Guemes Channel, in Anacortes, Washington. CP 165, 178. The Port of Anacortes designed, used, and promoted Pier 2 and the adjacent

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Log Pocket for the handling, rafting, transfer, and transshipment of untreated logs for 50 years. CP 102.

During a portion of this time, the Port of Anacortes hired numerous businesses and individuals, including Petitioner Frontier Industries, Inc., to handle logs on the Port of Anacortes' behalf on the upland portion of the Pier 2 facility. The Port of Anacortes also hired numerous parties to arrange for and participate in the transportation and shipping of raw, untreated logs out of and around Pier 2. Petitioner ITOCHU International, Inc. is one among many parties who shipped logs from Pier 2. CP 102. The Port of Anacortes' use of its facility for log handling for 50 years resulted in the deposit of wood debris in the sediments of the Log Pocket. CP 4.

The Port of Anacortes filed suit against Petitioners under MTCA. CP 1-10. The Port of Anacortes alleges that Petitioners are liable as "former operators" under MTCA for (1) the release of wood debris itself and (2) the release of "other hazardous substances," including metals, PAHs, phenols, dioxins, and furans alleged to be present at the Log Pocket. CP 4, 6.

MTCA's former owner and operator liability standard follows: "[a]ny person who owned or operated the facility at the time of disposal or

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release of the hazardous substances" is jointly, severally, and strictly liable to the State of Washington for all costs of remediating the contaminated site. RCW 70.105D.040(1)(b).

The Port of Anacortes' complaint did not include any of the more than 20 other entities that assisted the Port of Anacortes with its log hauling operations or shipped logs using Pier 2.

Petitioners filed a Joint Motion for Summary Judgment in Skagit County Superior Court raising two distinct questions:

> **Issue 1.** Whether Respondent's MTCA claims based on the release of wood debris itself should be dismissed because wood debris is not a hazardous substance under MTCA as a matter of law.
>
> **Issue 2.** Whether Respondent's claims based on the release of "other hazardous substances" (such as metals, PAHs, phenols, dioxins, and furans alleged to be present at the Log Pocket) should be dismissed for lack of evidence.

The Superior Court denied summary judgment on both issues on June 25, 2018, but later certified the issue of whether wood debris is a hazardous substance under MTCA as a matter of law for discretionary review by the Court of Appeals pursuant to Wash. R. App. P. 2.3(b)(4). The Court of Appeals granted review of that sole issue of whether wood debris is a hazardous substance under MTCA as a matter of law. Notation Ruling of Commissioner Mary Neel Granting Review, 78726-8-I at 4

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(2018) ("the certified issue, whether wood debris is a hazardous substance under the MTCA, is a question of law.").

Petitioners *did not* appeal the Superior Court's denial of Issue 2. Whether petitioners are liable for designated hazardous substances such as metals, PAHs, phenols, dioxins, and furans alleged to be present at the Log Pocket remains before the Superior Court.

Both Petitioners and Respondents briefed the Court of Appeals on the single issue certified for discretionary review: whether wood debris is a hazardous substance under MTCA as a matter of law. The Washington Department of Ecology ("Ecology") submitted an amicus brief on March 28, 2019, to which Petitioners responded.

On August 19, 2019, the Court of Appeals reached a holding on the certified question that dictated reversal of the Superior Court's decision on the certified question. Nonetheless, the Court of Appeals affirmed the Superior Court's denial of summary judgment on grounds well beyond the question certified for appeal. The Court of Appeals then denied Petitioners' joint motion for reconsideration on October 24, 2019.

Petitioners now file a timely petition asking this Court to review the Court of Appeals' August 19, 2019 interlocutory decision. RAP 13.5; *see In re Fero*, 190 Wn.2d 1, 11-13 (2018)

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V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals Decided More than the Issue on Interlocutory Review.

Discretionary review of an interlocutory decision of the Court of Appeals may be accepted by the Supreme Court when:

> The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

Wash. R. App. P. 2.3(3). Here, the Court of Appeals did precisely that. Petitioners respectfully request that the Supreme Court grant review.

In its Decision, the Court of Appeals agreed with Petitioners and Ecology that wood debris is not a hazardous substance under MTCA: "Ecology . . . essentially conced[ed] that wood debris itself does not fit into the definitions of a hazardous substance in [MTCA]. *We agree*." A-10 (emphasis added). Having resolved the only issue on appeal, the Court of Appeals should have stopped its analysis there, reversed the portion of the Superior Court's summary judgment ruling addressing this particular issue (and only this issue), and remanded the case for further proceedings.

Instead, the Court of Appeals erroneously went beyond the scope of the appeal and its role as appellate court. While recognizing that wood debris is not a hazardous substance, the Court stated that "wood debris

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decomposing in the marine environment releases designated hazardous substances under MTCA." A-10. Because such release might have "occurred during the defendants' tenure as operators of the facility," the Court concluded that Petitioners were potentially liable as former operators under RCW 70.105D.040(1)(b), and on this basis affirmed the decision of the Superior Court. A-1, A-10 – A-11. Applying a summary judgment standard, the Court of Appeals made these assumptions in the light most favorable to the non-moving party. In reaching these issues at all, however, the Court moved past the certified question and erroneously made a series of factual assumptions that can only be properly addressed on remand, *after* a proper appellate decision on the certified issue.

By resting its decision on an issue not raised on appeal or adequately briefed by the parties, the Court of Appeals departed from the accepted and usual course of judicial proceedings, which calls for the exercise of the Supreme Court's revisory jurisdiction. The Washington Rules of Appellate Procedure provide that "the appellate court will decide a case *only* on the basis of issues set forth by the parties in their briefs," with one narrow exception: "If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to

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present written argument on the issue raised by the court." RAP 12.1 (emphasis added). Here, the Court of Appeals did not notify the parties it concluded an issue not set forth in the briefs should be considered, nor did it give the parties on opportunity to present written argument on the same. Pursuant to RAP 12.1, the Court of Appeals' review was procedurally limited to deciding the case on the basis of the sole issue raised by the parties.

The sole certified issue for review to the Court of Appeals was whether wood debris itself is a hazardous substance under MTCA as a matter of law. Notation Ruling of Commissioner Mary Neel Granting Review, 78726-8-I at 4 (2018). Importantly, Petitioners are not appealing the issue of their liability for the release of clearly designated hazardous substances present at the Log Pocket. That issue remains before the Superior Court. Rather, Petitioners are seeking reversal of the decision of the Superior Court denying summary judgment on the purely legal question of whether wood debris is a "hazardous substance" under MTCA.[1] The Court of Appeals correctly answered this single certified question, concluding that wood debris is not a "hazardous substance"

[1] The Court of Appeals agreed that this is a question of law. Notation Ruling of Commissioner Mary Neel Granting Review, 78726-8-I at 4 (2018).

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under MTCA. Rather than reversing the decision of the Superior Court on this issue, as this conclusion dictates, the Court of Appeals went on to grossly depart from the certified question and proper appellate procedure by leaping to the question of how this legal conclusion might be applied in this case. The Court compounded this error by advancing a narrow speculative theory of liability that *might* apply if wood, although non-hazardous, leads to release of an actual hazardous substance, and the Petitioners otherwise qualify as "operators" after the hazardous substance is released. Based upon this sequence of speculation, the Court of Appeals ruled that "issues of fact exist" with respect to whether designated hazardous substances were released at the Log Pocket while Petitioners were allegedly "operators." A-10 – A-11. Yet this ruling is entirely immaterial to the certified question. The Court of Appeals should have limited its decision to its conclusion that wood debris is not a hazardous substance under MTCA, rather than affirming a decision of the Superior Court that the Court of Appeals found to be incorrect earlier in its decision.

Petitioners sought, and the Superior Court certified, interlocutory review of the narrow but critical question of whether wood debris itself qualifies as a hazardous substance under MTCA because the question

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relates to a host of issues other than Petitioners' liability, including the potential liability of third parties and the "equitable factors" used in allocating costs under MTCA. A clear decision limited to this precise certified issue, and only this precise certified issue, is necessary for an efficient and fair resolution of the claims before the Superior Court.

B. A Clear Ruling Limited to the Certified Question is Necessary for Resolving the Issue of Third Party Joinder and Preventing Unjust Attorney Fee Exposure

The commissioner stated in her ruling granting review by the Court of Appeals that:

> Although there were many businesses and individuals who potentially could be liable for depositing wood debris, at oral argument the Port made it clear that it does not intend to add any other defendants to the lawsuit. If the litigation were to go forward without first determining whether wood debris is a hazardous substance under the MTCA, Frontier would be placed in the position of bringing cross claims against 20 or more other defendants/potential contributors, putting it in a legally precarious position given the attorney fee provision in the MTCA, and more importantly, greatly complicating the litigation.

Notation Ruling of Commissioner Mary Neel Granting Review, 78726-8-I at 4 (2018).

The liability of other parties not yet joined in this litigation is of special importance for interlocutory review because losing parties in MTCA contribution actions must pay the opposing parties' attorney fees.

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RCW 70.105D.080 ("The prevailing party in such an action shall recover its reasonable attorneys' fees and costs."). Respondent made clear it has no intention of joining any additional potentially responsible parties. Notation Ruling of Commissioner Mary Neel Granting Review, 78726-8-I at 4 (2018). If the question of whether wood debris qualifies as a hazardous substance under MTCA is not clearly resolved on interlocutory review, Petitioners will be placed in the precarious position of needing to join third parties based on a legal theory that Petitioners themselves oppose (that wood debris is a hazardous substance under MTCA) while simultaneously being hypothetically required to pay the new parties' attorney fees if Petitioners win their own argument that wood debris is not a hazardous substance under MTCA. The issue arises from the fact that, unlike Petitioners, these third parties' liability, if any, would be fully contingent upon whether or not wood debris is a hazardous substance.[2]

By way of example, parties who are liable under RCW 70.105D.040(1)(c) or (1)(d), commonly known as arrangers and

[2] MTCA establishes five categories of liable parties in RCW 70.105D.040(1)(a)-(e). RCW 70.105D.040(1)(a) refers to the current owner, in this case the Port. RCW 70.105D.040(1)(c)-(e) impose liability on parties based on some direct interaction with a hazardous substance (arranging for disposal, transporting or selling). Only one category of liability, former owner and operator liability set forth at RCW 70.105D.040(1)(b), is based on the timing of the "release of the hazardous substances" without regard to whether the liable party actually handled the substance.

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transporters, are respectively liable only if they arranged for the transport of hazardous substances or transported hazardous substances. RCW 70.105D.040(1)(c)-(d). Whether hazardous substances were later released at the site is immaterial to their liability. Without a clear ruling limited to the wood debris issue, Petitioners will need join wood debris arrangers and transporters in this lawsuit since they might share liability for the remediation costs at the Log Pocket. Yet if Petitioners do this, these arrangers and transporters would likely assert as a full legal defense to their liability that wood debris is not a hazardous substances. Given the ambiguity of the Court of Appeals' decision, Petitioners risk paying the attorney fees of arrangers they have joined (as well as their own fees) if this argument ultimately proves successful.

By failing to conclusively address the certified question and instead basing its decision instead on the narrow, unasked question of whether liability under RCW 70.105D.040(1)(b) applies, the Court of Appeals' decision forces Petitioners into a Hobson's choice. Petitioners are forced to decide whether to join other parties and take the risk of paying their attorneys' fees if Petitioners' own argument on wood debris is successful or choose to not join other parties and thus forego the opportunity to offset remedial costs.

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C. A Clear Ruling Limited to the Certified Question is Necessary for Resolving the Issue of Equitable Factors under MTCA at Trial.

This case is an action for contribution under RCW 70.105D.080. Contribution requires a court to determine the amount recoverable in an action based on "equitable factors." RCW 70.105D.080 ("Recovery shall be based on such equitable factors as the court determines are appropriate."); *see also Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607, 937 P.2d 1148, 1155 (1997) ("In deciding the allocation issue under the MTCA, the trial court applies 'equitable factors it deem[s] appropriate' to calculate the award by taking into account the cause of the contamination, the defendant's relationship to the contamination, as well as other pertinent discretionary factors.").

What qualifies as an "equitable factor" is not defined by statute and is often a key question before the trial court. Washington recognizes that many factors may potentially be equitable factors for consideration in the discretion of the trial court. *Dash Point*, 86 Wn. App. at 607, 937 P.2d at 1155 (1997). Washington has recognized that the similar federal statute known as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") provides persuasive authority when interpreting MTCA and has specifically referred to it as a source for

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equitable factors. *See Dash Point,* 86 Wn. App. at 608 n. 24 (discussing CERCLA cases including discussion of the "Gore Factors"). Among the most common factors considered by courts in CERCLA actions are the so-called "Gore Factors," which include such considerations as "the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste." *Colorado v. Asarco, Inc.*, 608 F. Supp. 1484, 1487-88 (D. Colo. 1985) (discussing Gore Factors and legislative history); *see also United States v. Davis*, 31 F. Supp. 2d 45, 63 (D.R.I. 1998) (creating what have come to be known as the Torres Factors).

While equitable factors may vary from case to case, it is clear that one factor that is regularly considered is the source of a party's liability. Here, there is likely to be a difference between a party who knowingly transports hazardous substances to a site and a party that arranges to have non-hazardous substances such as wood debris brought to a site even if those substances lead to the presence of hazardous substances through some other (possibly natural) means.

The issue of whether wood debris is a hazardous substances under MTCA as a matter of law has serious, clear consequences for how liability will be apportioned among the litigants at trial. Yet by affirming the

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Superior Court's ruling on the *unappealled* question of liability under RCW 70.105D.040(1)(b) for designated hazardous substances such phenols alleged to be present at the site, the Court of Appeals left its holding on this critical legal issue in a place of limbo.

VI. CONCLUSION

Petitioners respectfully request that this Court reverse the Court of Appeals' August 19, 2019 Decision affirming the Superior Court's denial of summary judgment. The Court of Appeals' legal and factual conclusions were beyond the scope of the appeal and addressed factual issues that should have been addressed on remand. A decision limited to the certified question will not relieve Petitioners of potential liability, but it will significantly clarify the basis under which their liability can be asserted, as well as the potential liability of countless Washington companies and individuals that might be liable under MTCA for deposition of untreated, raw wood debris. Pursuant to RAP 13.5, the Petitioners respectfully request that this Court grant review.

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CERTIFICATE OF SERVICE

I, Erika H. Spanton, state that on the 25th day of November, 2019, I caused the copies of Joint Petition for Review to be filed in the Supreme Court of the State of Washington and a true copy of the same to be served on the following in the manner indicated below:

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APPENDIX

FILED
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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

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

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

I.
BACKGROUND

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

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

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

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

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

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

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[2] CP 287.

[3] CP 296-97.

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

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

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

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[4] CP 288.

[5] CP 291.

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

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

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

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

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

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

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

[9] cPAHs are carcinogenic polycyclic aromatic hydrocarbons.

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

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

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

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

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

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

II.
DISCUSSION

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

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

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

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

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

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

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

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

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

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

MTCA defines "hazardous substances" as:

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

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

RCW 70.105D.020(13).

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

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

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

the marine environment. As noted above, parties strictly liable under MTCA include, "[a]ny person who owned or operated the facility at the time of disposal or release of the hazardous substances." RCW 70.105D.040(1)(b). "'Release' means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances." RCW 70.105D.020(32).

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

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

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

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

Affirmed.

Chun, J.

WE CONCUR:

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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

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

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

RAP 2.3
DECISIONS OF THE TRIAL COURT WHICH MAY BE REVIEWED BY DISCRETIONARY REVIEW

(a) Decision of Superior Court. Unless otherwise prohibited by statute or court rule, a party may seek discretionary review of any act of the superior court not appealable as a matter of right.

(b) Considerations Governing Acceptance of Review. Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

(c) Effect of Denial of Discretionary Review. Except with regard to a decision of a superior court entered in a proceeding to review a decision of a court of limited jurisdiction, the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.

(d) Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

(e) Acceptance of Review. Upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted.

[Adopted effective July 1, 1976; Amended effective January 1, 1981; September 1, 1985; September 1, 1998; December 24, 2002.]

RAP 12.1
BASIS FOR DECISION

(a) Generally. Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.

(b) Issues Raised by the Court. If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

[Adopted effective July 1, 1976.]

RAP 13.5
DISCRETIONARY REVIEW OF INTERLOCUTORY DECISION

(a) How To Seek Review. A party seeking review by the Supreme Court of an interlocutory decision of the Court of Appeals must file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals within 30 days after the decision is filed.

(b) Considerations Governing Acceptance of Review. Discretionary review of an interlocutory decision of the Court of Appeals will be accepted by the Supreme Court only:

(1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or

(2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or

(3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

(c) Motion Procedure. The procedure for and the form of the motion for discretionary review is as provided in Title 17. A motion for discretionary review under this rule, and any response, should not exceed 20 pages double spaced, excluding appendices, title sheet, table of contents, and table of authorities.

(d) Effect of Denial. Denial of discretionary review of a decision does not affect the right of a party to obtain later review of the Court of Appeals decision or the issues pertaining to that decision.

References

Form 3, Motion for Discretionary Review.

[Adopted effective July 1, 1976; Amended effective September 1, 1990; December 8, 2015.]

RCW 70.105D.040

Standard of liability—Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

(3) The following persons are not liable under this section:

(a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by:

(i) An act of God;

(ii) An act of war; or

(iii) An act or omission of a third party (including but not limited to a trespasser) other than (A) an employee or agent of the person asserting the defense, or (B) any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting this defense to liability. This defense only applies where the person asserting the defense has exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions;

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility. This subsection (3)(b) is limited as follows:

(i) To establish that a person had no reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability. Any court interpreting this subsection (3)(b) shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection;

(ii) The defense contained in this subsection (3)(b) is not available to any person who had actual knowledge of the release or threatened release of a hazardous substance when the person owned the real property and who subsequently transferred ownership of the property without first disclosing such knowledge to the transferee;

(iii) The defense contained in this subsection (3)(b) is not available to any person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance at the facility;

(c) Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) A resident of the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor;

(d) Any person who, for the purpose of growing food crops, applies pesticides or fertilizers without negligence and in accordance with all applicable laws and regulations.

(4) There may be no settlement by the state with any person potentially liable under this chapter except in accordance with this section.

(a) The attorney general may agree to a settlement with any potentially liable person only if the department finds, after public notice and any required hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with clean-up standards under RCW **70.105D.030**(2)(e) and with any remedial orders issued by the department. Whenever practicable and in the public interest, the attorney general may expedite such a settlement with persons whose contribution is insignificant in amount and toxicity. A hearing shall be required only if at least ten persons request one or if the department determines a hearing is necessary.

(b) A settlement agreement under this section shall be entered as a consent decree issued by a court of competent jurisdiction.

(c) A settlement agreement may contain a covenant not to sue only of a scope commensurate with the settlement agreement in favor of any person with whom the attorney general has settled under this section. Any covenant not to sue shall contain a reopener clause which requires the court to amend the covenant not to sue if factors not known at the time of entry of the settlement agreement are discovered and present a previously unknown threat to human health or the environment.

(d) A party who has resolved its liability to the state under this section shall not be liable for claims for contribution regarding matters addressed in the settlement. The settlement does not discharge any of the other liable parties but it reduces the total potential liability of the others to the state by the amount of the settlement.

(e) If the state has entered into a consent decree with an owner or operator under this section, the state shall not enforce this chapter against any owner or operator who is a successor in interest to the settling party unless under the terms of the consent decree the state could enforce against the settling party, if:

(i) The successor owner or operator is liable with respect to the facility solely due to that person's ownership interest or operator status acquired as a successor in interest to the owner or operator with whom the state has entered into a consent decree; and

(ii) The stay of enforcement under this subsection does not apply if the consent decree was based on circumstances unique to the settling party that do not exist with regard to the successor in interest, such as financial hardship. For consent decrees entered into before July 27, 1997, at the request of a settling party or a potential successor owner or operator, the attorney general shall issue a written opinion on whether a consent decree contains such unique circumstances. For all other consent decrees, such unique circumstances shall be specified in the consent decree.

(f) Any person who is not subject to enforcement by the state under (e) of this subsection is not liable for claims for contribution regarding matters addressed in the settlement.

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a prospective purchaser, provided that:

(i) The settlement will yield substantial new resources to facilitate cleanup;

(ii) The settlement will expedite remedial action at the facility consistent with the rules adopted under this chapter; and

(iii) Based on available information, the department determines that the redevelopment or reuse of the facility is not likely to contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the facility, or increase health risks to persons at or in the vicinity of the facility.

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of brownfield property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit in addition to cleanup.

(c) A settlement entered under this subsection is governed by subsection (4) of this section.

(6) As an alternative to a settlement under subsection (5) of this section, the department may enter into an agreed order with a prospective purchaser of a property within a designated redevelopment opportunity zone. The agreed order is subject to the limitations in RCW **70.105D.020**(1), but stays enforcement by the department under this chapter regarding remedial actions required by the agreed order as long as the prospective purchaser complies with the requirements of the agreed order.

(7) Nothing in this chapter affects or modifies in any way any person's right to seek or obtain relief under other statutes or under common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a hazardous substance. No settlement by the department or remedial action ordered by a court or the department affects any person's right to obtain a remedy under common law or other statutes.

[**2013 2nd sp.s. c 1 § 7; 1997 c 406 § 4; 1994 c 254 § 4;** 1989 c 2 § 4 (Initiative Measure No. 97, approved November 8, 1988).]

NOTES:

Findings—Intent—Effective date—2013 2nd sp.s. c 1: See notes following RCW **70.105D.020**.

RCW 70.105D.080

Private right of action—Remedial action costs.

Except as provided in RCW 70.105D.040(4) (d) and (f), a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs. In the action, natural resource damages paid to the state under this chapter may also be recovered. Recovery shall be based on such equitable factors as the court determines are appropriate. Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. An action under this section may be brought after remedial action costs are incurred but must be brought within three years from the date remedial action confirms cleanup standards are met or within one year of May 12, 1993, whichever is later. The prevailing party in such an action shall recover its reasonable attorneys' fees and costs. This section applies to all causes of action regardless of when the cause of action may have arisen. To the extent a cause of action has arisen prior to May 12, 1993, this section applies retroactively, but in all other respects it applies prospectively.

[1997 c 406 § 6; 1993 c 326 § 1.]

NOTES:

Effective date—1993 c 326: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 12, 1993]." [1993 c 326 § 2.]

Severability—1993 c 326: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 326 § 3.]

BEVERIDGE & DIAMOND, PC

November 25, 2019 - 2:29 PM

Filing Petition for Review

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Appellate Court Case Title:	Port of Anacortes, Respondent v. Frontier Industries, Inc. et al, Petitioners (787268)

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