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STATE OF WASHINGTON

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No. 64102-6-I

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

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

Appellants,

v.

The Port of Everett,

Respondent.

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REPLY BRIEF OF APPELLANTS

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ORIGINAL

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION.....	1
II. ARGUMENT.....	2
A. The Purchase and Sale Agreement Contained a Quid Pro Quo Extinguishing the Hulberts' Environmental Liability .....	2
B. The Port's Interpretation of the Contract Would Nullify Article Four of the Agreement and the Certificate .....	4
1. The Certificate limits the Hulberts' liability.....	5
2. Article Four incorporates the Certificate and evidences the parties' intent to transfer liability to the Port .....	6
C. The Port's Interpretation of the Contract Ignores the Context in Which the Agreement was Made.....	8
D. Summary Judgment was Improperly Granted.....	11
E. The Award of Attorneys' Fees to the Port was Unreasonable .....	12
F. The Hulberts Are Entitled to Attorneys' Fees.....	13
III. CONCLUSION .....	13

**WASHINGTON STATE CASES**

*Ball v. Stokely Foods*,  
37 Wn.2d 79, 221 P.2d 832 (1950).....5, 11

*Brogan & Anensen LLC v. Lamphier*,  
165 Wn.2d 773, 202 P.3d 960 (2009).....8

*Hearst Commn’s Inc. v. Seattle Times*,  
154 Wn.2d 493 (2005).....8, 9

*Nordstrom, Inc. v. Tampourlos*,  
107 Wn.2d 735, 733 P.2d 208 (1987).....12

*North Coast Electric Co. v. Selig*,  
136 Wn. App. 636, 151 P.3d 211 (2007).....13

*Wagner v. Wagner*,  
95 Wn.2d 94, 621 P.2d 1279 (1980).....4, 5

**FEDERAL CASES**

*Southland Corp. v. Ashland*,  
696 F. Supp. 994, 1002 (D. N.J. 1988).....3

**STATUTES**

RCW 4.84.330 .....13

**RULES**

RAP 18.1 .....13

## **I. INTRODUCTION**

The Port's response brief is deceptively simple. By ignoring substantial portions of the contract and admissible evidence describing the context in which the Agreement was formed, the Port oversimplifies this dispute and invites the Court to do the same. This Court should reject that invitation. Viewing the entirety of the evidence, as this Court must when reviewing a summary judgment order, it is clear that the parties intended for the Purchase and Sale Agreement for the Thirty Acres to preclude any future MTCA liability on the part of the Hulberts. As demonstrated in the Hulberts' opening brief,<sup>1</sup> the Purchase and Sale Agreement terminated the Hulberts' liability to the Port for any environmental clean-up of the Thirty Acres as of March 8, 1994. The trial court's decision to the contrary renders the express three-year limitation on the Hulberts' liability meaningless and ignores the parties' conduct before and after the execution of the Agreement. The trial court's decision should be reversed.

In the alternative, the trial court should be reversed because factual issues preclude the entry of summary judgment in this case. Furthermore, the trial court's orders granting certification of this issue and awarding the Port attorneys' fees are unsupported by law and must be reversed.

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<sup>1</sup> To the extent not specifically restated herein, the Hulberts reiterate and incorporate by reference the arguments set forth in their opening brief.

## II. ARGUMENT

### A. **The Purchase and Sale Agreement Contained a Quid Pro Quo Extinguishing the Hulberts' Environmental Liability**

The Port continues to put forth the unfounded assertion that the Agreement served merely as an indemnity to *supplement* the Port's non-contractual rights to obtain contribution from the Hulberts. Because no facts other than the Port's own self-serving declarations support this argument, the Port conveniently ignores the fact that the Purchase and Sale Agreement for the Thirty Acres contained a quid pro quo with respect to environmental liabilities. Pursuant to the Agreement, the Hulberts agreed to perform a comprehensive environmental investigation, and to deposit funding into escrow to perform that investigation and any necessary cleanup. The Port received immediate investigation and remediation activities on the site and full indemnity for three years. In exchange, the Hulberts received a time certain after which their exposure for environmental liabilities on the Thirty Acres would cease.

Instead of recognizing this basic purpose of the Agreement, the Port contends that the expiration of the Hulberts' indemnity did not impact the Port's future statutory contribution rights under MTCA. To support this argument, the Port claims that the Hulberts have confused contribution and indemnity. Resp. Br. at 11-12. However, it is the Port

that has obscured the issue. The Hulberts and the Port identified certain environmental liabilities in the Agreement, the Port had three years within which to seek indemnity for any environmental liabilities, and then the Hulberts' obligations with respect to all such liabilities expired. The Port cannot now return to the Hulberts fifteen years later and expect the Hulberts to accept responsibility for the same environmental liabilities extinguished by the Agreement.

Finally, the Port accuses the Hulberts of "circular" reasoning concerning the lack of an express release of the Port's future MTCA liability. But as the Port concedes, MTCA contained no private right of action at the time the Agreement was executed. Accordingly, as the Port emphasizes, the parties could not have included such an express waiver. However, the lack of an express reference to MTCA contribution somehow eludes the Port where the parties clearly intended to allocate "MTCA-like" liabilities in the future. *See Southland Corp. v. Ashland*, 696 F. Supp. 994, 1002 (D. N.J. 1988) (contract could have allocated CERCLA liability even before passage of CERCLA had it specified transfer of "CERCLA-like" liabilities).

The Port's interpretation of the Agreement does not comport with the Agreement's purpose or the parties' intent. The trial court should be reversed.

**B. The Port's Interpretation of the Contract Would Nullify Article Four of the Agreement and the Certificate**

In addition to ignoring the general quid pro quo nature of the Agreement, the Port's interpretation asks this Court to overlook Article Four of the Agreement, which expressly conditioned the Port's acceptance of the Thirty Acres upon the three-year limitation on the Hulberts' liability set forth in the Certificate.<sup>2</sup> CP 1467. Neither the Port nor the Court is at liberty to write out portions of the parties' Agreement. *See Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980) ("Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.") (citations omitted). Rather, "[i]n construing a contract, every word and phrase must be presumed to have been employed with a purpose and must be given a meaning and effect whenever reasonably possible." *Ball v. Stokely Foods*, 37 Wn.2d 79,

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<sup>2</sup> The Port's cherry-picking of favorable portions of the contract is also evidenced by its consistent disregard for the provisions of the Certificate which granted the Hulberts the right to control any clean-up action on the Thirty Acres. Section Four of the Certificate required the Port to promptly notify the Hulberts of any alleged environmental liability or potential liability and provided that the Hulberts "shall have the right, but not the duty, at [the Hulberts'] expense, to challenge such alleged liability *and to control any proceeding or settlement resulting from such challenge.*" CP 1485. However, the Port began its investigation and remediation at the Thirty Acres *five years before even providing notice* to the Hulberts. The Hulberts maintain that all of their obligations relating to the property ended on March 8, 1994, but argue in the alternative that if the Port is going to read the three-year limitation on liability out of the contract, then clearly the control requirements should be given voice.

221 P.2d 832 (1950). An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective. *Wagner*, 95 Wn.2d at 102. The Port's interpretation of the Agreement would render ineffective the limitations imposed by the Certificate and Article Four of the Agreement and therefore must be rejected.

**1. The Certificate limits the Hulberts' liability**

As detailed in the Hulberts' Opening Brief, the Certificate and Indemnity attached to the Agreement terminated all of the Hulberts' obligations with respect to the clean-up of the Thirty Acres three years after the sale, on March 8, 1994.<sup>3</sup> In addition to the termination date, the Certificate demonstrates the parties' intent to allocate all present and future environmental liability by the inclusion of fifteen separate federal and state environmental statutes. CP 1497-98. The Port attempts to minimize this evidence of the breadth of the parties' agreement by claiming the statutes are included for "definitional purposes only," Resp. Br. at 29, but the fact is the inclusion of the statutes defines the extent to

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<sup>3</sup> Part five of the Certificate states: "the representations, warranties, and covenants of [the Hulberts] set forth in this Certificate (including without limitation the indemnity provided for in paragraph 5 above) shall continue in effect and shall remain true and correct for a period of three (3) years after the date of this certificate and shall survive the transfer of the Thirty Acres." CP 1497.

which the parties intended to encompass a broad set of potential environmental liabilities.

Finally, the Certificate expressly provides that “[t]his Certificate shall be binding upon and inure to the benefit of Buyer **and** Seller and their representatives, successors, and assigns.” CP 1498. Accordingly, the Port’s claim that the certificate only added to the Port’s remedies ignores the quid pro quo regarding environmental liability in the Agreement as a whole and is without support.

**2. Article Four incorporates the Certificate and evidences the parties’ intent to transfer liability to the Port**

Article Four explicitly incorporates the terms of the Certificate and conditions the Port’s acceptance of the Thirty Acres on the limitations listed therein.<sup>4</sup> Accordingly, the time limitation on the Hulberts’ liability was directly incorporated into the Agreement via Article Four, but the Port’s interpretation of the Agreement effectively writes this entire provision out of the contract.

Article Four also evidences the parties’ mutual intent that the Port would assume responsibility for any environmental liabilities with respect

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<sup>4</sup> Part 4.02 of the Agreement provides that the Port “inspected the physical condition of the Property and accepts such condition subject to the terms and conditions of this Agreement and the Certificate and Indemnity attached hereto as Exhibit D relating to hazardous materials investigation and clean-up, if required.” CP 1467.

to the Thirty Acres after the Hulberts complied with their obligations under the Agreement and Certificate. In Article Four, the Port acknowledges its inspection of the Thirty Acres, its knowledge of potential environmental liabilities and its acceptance of the parties' joint plan to address those potential liabilities, subject to the terms and conditions in the Certificate. By incorporating Exhibit C, Article Four sets forth the parties' plan for implementing the necessary clean-up actions, most of which would occur after the closing on the sale of the Thirty Acres. *Id.* To fund the clean-up tasks described in Exhibit C as well as any additional clean-up activities necessary to address contamination discovered as a result of those activities, \$50,000 was held back from the purchase price in an escrow account and only released to the Hulberts after the identified investigation and remediation actions were completed.

Accordingly, the Port's very acceptance of the property was conditioned upon dealing with the potential contamination on the Thirty Acres as explained in the Certificate. Because the Port accepted the property, and approved the escrow for release, it is bound by the Certificate, including the three-year limitation on the Hulberts' liability. Allowing the Port to pursue contribution from the Hulberts now, fifteen years later, would nullify the limitations in both Article Four and the

Certificate. The Port's interpretation of the Agreement cannot stand and the trial court must be reversed.

**C. The Port's Interpretation of the Contract Ignores the Context in Which the Agreement was Made**

The Port's argument entirely ignores the context in which the Agreement was drafted and executed. Under Washington law, evidence concerning the "context" of an agreement is admissible to determine the parties' intent if it sheds light on the meaning of the terms used in a contract. *Hearst Comm'n's Inc. v. Seattle Times*, 154 Wn.2d 493, 503 (2005). There is no requirement that a contract be found "ambiguous" before a court may consider extrinsic evidence. *Brogan & Anensen LLC v. Lamphier*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). The Port claims that such evidence is not admissible here because the Hulberts have failed to identify any contractual terms in need of interpretation. Resp. Br. at 21. This is plainly not the case. As the Hulberts stated in their opening brief:

The context of the Agreement is directly relevant to a proper interpretation of the three-year limitation on the indemnity in the Certificate. Understanding the context of the Agreement is also necessary to interpret the definition of "hazardous substances" in Section Six of the Certificate and to understand the inclusion of the 15 enumerated environmental statutes. Finally, evidence concerning the context in which the Agreement was made will assist the Court in interpreting Part 4.02 of the Agreement and Section Seven of the Certificate, which demonstrate the parties' intent that the conditions of the Certificate are binding on both the Port and the Hulberts.

Op. Brief at 29.

While the declarations submitted in support of the Hulberts' motion provide compelling and admissible evidence of the parties' intent, they are not the only evidence that the Court should consider in interpreting the Agreement's terms.<sup>5</sup> Rather, and as set forth in the Hulberts' Opening Brief, the Court should consider the subject matter and objective of the Agreement, the circumstances at execution and the subsequent acts of the parties, all of which evidences the parties' intent to preclude a future MTCA contribution action by the Port. *See Hearst Commn's*, 154 Wn.2d at 502.

The Port fails to address each of these important factors. First, as explained above, the subject matter and objective of the Agreement pertains to environmental liabilities then known on the Thirty Acres as well as liabilities that may arise in the future. The goal of the Agreement was to provide the Port with an expansive, but time-limited indemnity period in which the Hulberts would be responsible for all environmental liabilities. CP 1397, 1403. After that point, the parties intended that the

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<sup>5</sup> The Port goes to great lengths to disparage each of the declarations in support of the Hulberts' motion, but fails to set forth any valid legal reason as to why the Court should discount them. While the Port spends several pages of its brief noting its disagreement with the facts contained in the Hulberts' declarations, the Port's opinions regarding those facts do not change them.

Hulberts' liability would cease, as demonstrated by the Port's release of the escrowed funds to the Hulberts.<sup>6</sup>

The Port also neglects to address the circumstances surrounding the Agreement's execution and the parties' subsequent acts, which further demonstrate this intent. Specifically, at the time the Agreement was executed, the parties had received the results of the Kleinfelder Report and were attempting to address the potential environmental liabilities identified therein. CP 1467. The Agreement itself demonstrates that the parties wanted to resolve the issues identified by Kleinfelder (and enumerated in Exhibit C) and provide a process for further investigation if needed. *Id.* Finally, the parties wanted to establish a mechanism for simultaneously addressing and limiting the Hulberts' future involvement in the clean-up of the Thirty Acres. These circumstances explain the numerous references to the Kleinfelder report in the Agreement and the Certificate and the escrow requirements in Article Four. *Id.* at 1467-70; 1484-86.

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<sup>6</sup> The Port's contentions regarding suits against the Hulberts by other parties is a distraction from the real issue in this appeal. Moreover, it is irrelevant. The Hulberts have always maintained that the Purchase and Sale Agreement terminated the Hulberts' liability for environmental contamination that occurred on the Thirty Acres prior to the sale and that the Port thereafter assumed that liability. Accordingly, when the allocation of clean-up costs for the Thirty Acres takes place in the MTCA action, if the Hulberts are assigned any portion of the clean-up costs in their capacity as prior owners, the Port will assume their share.

Given the context in which the Agreement was formed, the Port's interpretation of the Agreement is unreasonable. It is unfathomable that the Hulberts would agree to such a broad indemnity for three years if there was any chance that future environmental liability to the Port would remain. "It is a well-established rule that, where one construction would make a contract unreasonable or such as prudent men would not ordinarily enter into, while another, equally consistent with the language, would make it reasonable, fair, and just, the interpretation which makes it a rational and probable agreement must be adopted." *Ball*, 37 Wn.2d at 83. The Port's interpretation of the Agreement is not fair or reasonable, and completely disregards the aforementioned provisions of the Agreement and the context in which the Agreement was made. The Port's interpretation is untenable and the trial court must be reversed.

**D. Summary Judgment was Improperly Granted**

If the Port's brief demonstrates anything, it is that material facts remain in dispute and that summary judgment was improperly granted. In the trial court, the parties' submitted conflicting declarations regarding their intent in drafting the Agreement. The Hulberts argued in the alternative that the declarations raised a genuine issue of material fact that should have precluded summary judgment. While the Hulberts maintain that the Agreement precludes the Port's contribution claims, should this

Court disagree, the appropriate action is to remand this case to the Superior Court for trial. In light of the language of the Agreement and the context in which it was made, the trial court's order must be reversed.

**E. The Award of Attorneys' Fees to the Port was Unreasonable**

The trial court improperly awarded the Port \$111,101.87 in attorneys' fees, despite the Port's inclusion of time spent on matters unrelated to the claims based on the Agreement. Specifically, the court should not have awarded full fees for time spent responding to all of the Hulberts' discovery requests or for time spent on administrative tasks and work unrelated to the Hulberts' indemnity claims.

In its brief, the Port does not dispute that only 13.3% of the Hulberts' discovery requests related to the indemnity issue, and the remainder of the discovery requests related to MTCA liability issues that remain undecided in this case. Despite this, the trial court awarded the Port over \$23,000 for responding to primarily MTCA-liability related discovery. The Hulberts maintain that the Port's discovery-related fees should have been reduced by 87.7%, or \$20,563.01.

Similarly, and as detailed in the Hulberts' opening brief, the Port should not be able to recover for matters unrelated to the indemnity issue or for purely administrative tasks. *See Op. Br. at 44-45. See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735,743, 733 P.2d 208 (1987); *North*

*Coast Electric Co. v. Selig*, 136 Wn. App. 636, 648, 151 P.3d 211 (2007).

The trial court's award of attorneys' fees constitutes an abuse of discretion and should be reversed.

**F. The Hulberts Are Entitled to Attorneys' Fees**

Pursuant to RAP 18.1 and RCW 4.84.330, the Hulberts request that this Court award the Hulberts their attorneys' fees incurred in the trial court action and in prosecuting this appeal. Under the Agreement, the Hulberts are entitled to "all costs and expenses of suit, including reasonable attorneys' fees." CP 1473. The Hulberts have incurred significant legal fees attempting to enforce their Agreement with the Port and they are contractually and statutorily entitled to reimbursement.

**III. CONCLUSION**

The Port's brief fails to acknowledge the purpose, language, or context of the Purchase and Sale Agreement for the Thirty Acres. The language of the Agreement and its context demonstrate the parties' intent to limit the Hulberts' environmental obligations with respect to the Thirty Acres in 1994. The Port's attempt to seek MTCA contribution fifteen years after the expiration of the Hulberts' indemnity is unjust, unreasonable, and unsupported by the Agreement. The trial court erred in holding that the Agreement did not preclude the Port's MTCA contribution claims. Likewise, the trial court's certification of its order

was improper and the award of attorneys' fees was an abuse of discretion.  
The trial court should be reversed and the Hulberts should be awarded  
their attorneys' fees.

Dated this 6<sup>th</sup> day of January, 2010.

Respectfully Submitted,

K&L GATES LLP

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Martin, as trustees of the William G.  
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William Hulbert Mill Co. Limited Partnership, and William G. Hulbert, III  
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v.

The Port of Everett,

Respondent.

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CERTIFICATE OF SERVICE

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I hereby certify under penalty of perjury of the laws of the State of Washington that on the 6<sup>th</sup> day of January, 2010, I caused true and correct copies of:

1. Reply Brief of Appellants; and
2. Certificate of Service

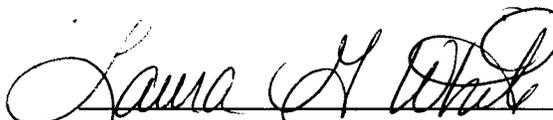
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Laura G. White, Secretary to  
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