No. 94087-8

No. 336158

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

FILED
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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS
Plaintiffs-Appellants

v.

SHAMROCK PAVING, INC., A WASHINTON CORPORATION
Defendant-Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable John O. Cooney, Judge

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page(s)

INTRODUCTION 1

ARGUMENT 1

I. Douglass' Primary Argument is That Lube Oil at 2,000 mg/kg Constitutes at Least a Potential Threat to the Environment and Therefore Satisfies The Definition of Remedial Action 1

Shamrock's Release of Lube Oil Tested at 2,000 mg/kg 2

Phil Leinart's Testimony 3

The Trial Court Clearly Misunderstood or Misremembered Leinart's Testimony 4

II. Douglass' Second Principal Argument Involves De Novo Interpretation of the Meaning of Remedial Action Set Forth at RCW 70.105020 (33) 7

III. If This Court Determines That Douglass Performed a Remedial Action Either Because They Established a Potential Threat or Because They Incurred Cost of Investigation Following Shamrock's Release of a Hazardous Substance During its Trespass The Trial Court's Judgment Must be Reversed 10

IV. Awarding Attorney Fees to a Trespasser, Found Liable Under the MTCA, is Inequitable 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Washington Statutes

RCW 70.105D.020 (33) 1, 7

Washington Administrative Rules and Tables

WAC 173-340-740(2)(b)(i) 2

Cases

Seattle City Light v. Washington State Department of Transportation,
98 Wn.App. 165, 989 P.2d 1164 (1999) 7, 8

Thorndike v. Hesperian Orchards, Inc.,
54 Wn.2d 570, 343 P.2d 183 (1959) 6

Viking Bank v. Firgrove Commons 3, LLC,
183 Wn.App. 706, 334 P.3d 116 (2014)) 6

INTRODUCTION

Shamrock's Response Brief addresses the two main arguments made by Douglass;

1. That the release of lube oil testing at 2,000 mg/kg constitutes at least a "potential" threat to the environment, and

2. That the cost of investigation of a hazardous release sufficiently satisfies the requirement of a remedial action to the extent necessary to support an award for at least the cost of the investigation particularly when the releasor has been found to be liable under the MTCA.

ARGUMENT

I.

Douglass' Primary Argument is That Lube Oil at 2,000 mg/kg Constitutes at Least a Potential Threat to The Environment and Therefore Satisfies The Definition of Remedial Action

Douglass' appeal is based on two principal contention. Both involve the definition of "remedial action". That definition is found at RCW 70.105 D.020 (33);

> **any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance**

> **and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.**

Shamrock's Release of Lube Oil Tested at 2,000 mg/kg

Upon testing the property on November 24, 2013, TETRA TECH found lube oil at 2000 mg/kg. (Findings of Fact 12 CP 476 & 730). Douglass' primary argument was that the trial court erred in failing to find that with lube oil testing at 2,000 mg/kg the testimony of Phil Leinart of the Washington State EPA compelled a finding that Douglass had established at least a *potential threat* to the environment. Such finding would have satisfied the definition of "remedial action" which would then have compelled the trial court to move to the next area of consideration, equitable factors. Instead, the trial court's analysis stopped with a finding that Douglass had not satisfied the requirement of establishing that they had conducted a remedial action.

Shamrock failed to address Douglass' primary argument in any meaningful way. Instead, Shamrock continued to misstate Leinart's testimony in order to bolster its argument that there was substantial evidence to support the trial court's finding that Douglass had failed to complete a remedial action.

One thing that the trial court may have overlooked is that WAC 173-340-740(2)(b)(i) requires that method A soil cleanup levels shall be *at*

least as stringent as the concentrations in Table 740-1. This means that in cleaning a site like Douglass's which is contaminated with heavy oil, one is required to reduce the concentration to at least 2,000 mg/kg. That would seem to indicate that even when the concentration level of the hazardous substance equals the guideline threshold, a "potential" threat remains. The testimony of a Department of Ecology geologist actually drove home the point that the 2,000 mg/kg level is not some magic number at which the court may conclude, as a matter of law, that there is no further "potential" threat to the environment.

Phil Leinart's Testimony

According to Mr. Leinart, the "2,000 mg/kg threshold" is only a guideline. (RT 598; 16- 599; 3). It actually falls to the discretion of the DOE whether to require cleanup of a site which tests at the threshold level of 2,000 mg/kg. (RT 619; 9- 22). Further, any one of the twelve DOE employs who enjoy the same position as Leinart could very well come to a different conclusion as to whether a site testing at 2,000 mg/kg a is required to be cleaned up. (RT 619; 23- 620; 1). This supports a finding that at 2000 mg/kg a potential threat exists.

Mr. Leinart testified that the threshold guideline does not result in a "cut and dried" determination as to whether cleanup is necessary. (RT 597; 22- 598; 20). Accordingly, contamination at 2,000 mg/kg must be

considered least a potential threat to the environment. It is the Washington State DOE's ability to require cleanup of a site that constitutes a potential that makes MTCA more stringent than CERCLA in this regard.

The Trial Court Clearly Misunderstood or Misremembered Leinart's Testimony

The trial court incorrectly remembered Leinart having testified as follows;

> **During his testimony, Plaintiffs' own expert witness, Phil Leinart, a hydro geologist with the Department of Ecology, opined that the subject property was not a site that implicated MTCA cleanup as the conditions did not pose a threat to human health or the environment.**

(CP 733).

Phil Leinart did not testify that in its pre-cleaned up state, The Property did not constitute a threat. Douglass specifically objected to the misstatement of the evidence noted above. (CP 634, line 20-28)[1].

The questions Shamrock's attorney asked Leinart inquired into the status of Douglass's Property after it had been cleaned up, not before it had been cleaned up. The trial court treated Leinart's testimony as if he

[1] Douglass pointed the trial court to pages 6-8 of the objections (CP 626-628) which showed exactly how in its closing brief, Shamrock had taken Leinart's testimony and changed it from present tense to past tense to make it look like Leinart was testifying that The Property---before it had been cleaned up----did not constitute a threat. Douglass even provided that part of the transcript that detailed Leinart's entire testimony.

were opining as to the condition of The Property before it was cleaned up. On this subject, Shamrock's attorney asked the following questions and received the following responses;

Question: **... is it your judgment that the conditions and circumstances at that site *do not* constitute a Model Toxic Control Act release of a hazardous substance?**

Answer: **That was my interpretation of the data and information that I got from the report, my conversation with Joe Delay and that I generated...**

(RT 630; 9- 19)[2]

Shamrock's attorney then asked the following question which even more explicitly referred to The Property in its cleaned up state;

Question: **I'll take it a step further. Is it, also, your judgment and your opinion that the conditions and circumstances of the site *do not* constitute a Model Toxic Control Act release of a hazardous substance *that is* a threat to human health and the environment?**

Answer: **That's correct**

(RT 630; 20-25)

In this second instance, Shamrock's attorney not only asked about the present condition of the site, ("the conditions and circumstances "do not" constitute...), but went on to further establish that the question was intended in the present tense by asking, "that is" a threat. If counsel had

[2] This exchange is attached as Appendix Exhibit 9 to AOB

meant to ask about the site as it existed prior to the cleanup he would have stated the leading question as "the conditions and circumstances "did not" constitute... (instead of "do not" constitute) and "that was" (instead of "that is").

The Trial Court's decision to deny Plaintiffs any recovery because of a finding that "Phil Leinart opined that the subject property "was not" a site that implicated MTCA cleanup as the conditions "did not" pose a threat to human health or the environment" constituted clear error since Leinart's testimony obviously does not support such finding. There is no evidence from Leinart or the DOE which supports the trial court's finding of lack of potential threat.

Determining whether the trial court's findings support its conclusions requires de novo review. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 712, 334 P.3d 116 (2014). A finding unsupported by the evidence constitutes error. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 573, 343 P.2d 183 (1959). Certainly, having established contamination at 2,000 mg/kg, Douglass did not fail to establish a potential threat to the environment.

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II.

Douglass' Second Principal Argument Involves De Novo Interpretation of the Meaning of Remedial Action Set Forth at RCW 70.105 D.020 (33)

Douglass encourages an interpretation that allows for recovery of the cost of investigating, monitoring and assessing the health effects of a release of a substance classified as hazardous whether or not the release is later determined to be a threat or potential threat to human health or the environment. Shamrock contends that the release must have been found to be a threat or potential threat to human health or the environment.

Douglass' interpretation is more in line with the purpose of the statute which is to clean up contaminated land and preserve the environment. *Seattle City Light v. Washington State Department of Transportation*, 98 Wn.App. 165, 169, 989 P.2d 1164 (1999). The definition of "remedial action" begins with the phrase, "an action or expenditure consistent with the purpose of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment…". An interpretation that allows an innocent land owner to at least recover the investigation and monitoring costs of a release of lube oil, diesel and gasoline onto his property is not unreasonable. Under such an interpretation, Douglass is entitled to the $950.00 cost of investigation and monitoring even if the

definition does not allow for the $12,226.99 incurred in removing 68 tons of contaminated soil.

In its argument against the interpretation urged by Douglass, Shamrock points to the fact that no Court has interpreted the statute in that way. Douglass now counters that there is no reported case where the Court has been asked to. In fact, there are very few reported cases even dealing with the MTCA. Interestingly, the only case Shamrock could cite on the issue was *City of Seattle*. However, *City of Seattle* addressed the cleanup costs <u>not the cost of the investigation</u>. Accordingly, there is no reported case where the interpretation urged by Douglass has been considered, let alone rejected. Where one incurs cost to investigate a release of a hazardous substance by a party eventually found to be liable as was Shamrock, a trespasser no less, that cost, if not the cleanup itself, should be recoverable under the MTCA. Here that amount is only $950.00.

Shamrock's Brief seems aimed at minimizing the fact that it was the cause of Douglass' investigation. It was established by the jury that Shamrock was a trespasser. The trial court found Shamrock liable under the MTCA for a release of lube oil testing at 2,000 mg/kg. But Shamrock's Brief focuses in large part on an attempt to minimize those

findings by insertion of irrelevant or erroneous information. Included are the following irrelevancies and errors;

--Shamrock cited the trial court's original March 3 finding that Shamrock contributed "negligible" amounts of hazardous substances even though the court had changed its finding from "negligible" to "unknown" based on Douglass's objection to the original proposed finding. (Page 6 ROB).

---Shamrock focuses on its release of gasoline and diesel which tested far lower than its release of lube oil which tested at 2,000 mg/kg and upon which Douglass' appeal is solely based. (Page 7, 17 ROB).

---Shamrock erroneously contends that interpretation of a statue does not involve de novo review. (Page 10 ROB).

---Shamrock contends that Douglass failed to establish that Shamrock "released" a hazardous substance while the trial court found that Shamrock released three different hazardous substances and specifically found Shamrock liable under the MTCA for so doing. (Page 12 ROB).

---Shamrock infers that its release of hazardous substance, including lube oil at 2,000 mg/kg is "de minimus" or constitute nothing more than "background" amounts of hazardous substances. (Page 20 ROB).

---Shamrock defends its release of cold mix, grindings and paper joints even though Douglass's appeal was not based upon any of those releases. (Page 24, 25 ROB).

---WSDOT inspected Shamrock equipment, implying that the equipment did not release lube oil despite the trial court having found that it did. (Page 26 ROB).

III.

If This Court Determines That Douglass Performed a Remedial Action Either Because They Established a Potential Threat or Because They Incurred Cost of Investigation Following Shamrock's Release of a Hazardous Substance During its Trespass The Trial Court's Judgment Must be Reversed.

While Shamrock is correct that a decision for Douglass would require a remand for further proceedings on equitable factors it would also result in a reversal of the present Judgment with the equitable factors only influencing the amount of the Douglass recovery.

IV.

Awarding Attorney Fees to a Trespasser, Found liable under the MTCA, is Inequitable.

While as the record now stands, RCW 70.105D.080 makes Shamrock "legally" entitled to attorney fees as the prevailing party. A reversal by this Court and direction to the trial court to award Douglass his $950.00 investigation fee would right a clear wrong, i.e., the large attorney

fee awarded to the trespasser would be struck. It is just wrong that a paving company, after trespassing on an innocent owner's land, releasing gasoline, diesel and lube oil on the land and being found by the trial court to be a "liable party" under the MTCA, walks away with a near $97,263.13 attorney fee and cost award.

CONCLUSION

There was sufficient evidence from which the trial court should have found that the release of lube oil by Shamrock constituted a potential threat to the environment. Conversely, there was insufficient evidence that it did not. That a trespasser, found by the court to be liable under the MTCA for a release of lube oil testing at the threshold level of 2,000 mg/kg, be allowed to escape even the $950.00 cost of investigation is unconscionable. In addition to having satisfied the requirement of remedial action by cleaning up a potential threat to the environment, Douglass' payment for the investigation of the release itself satisfied the requirement of remedial action. This Court is asked to reverse the Judgment of the trial court and remand for further proceedings to review equitable factors.

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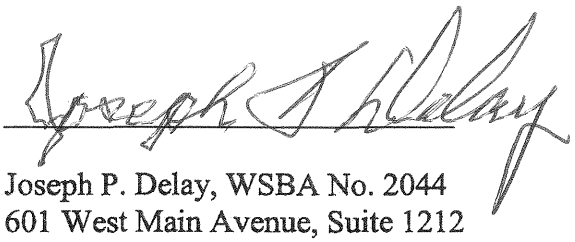
Respectfully submitted on the 28th day of April, 2016 by



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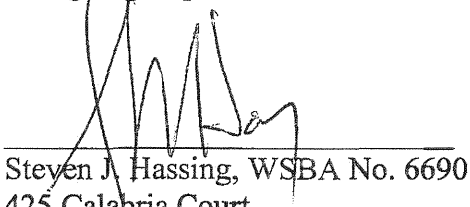

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the APPELLANTS' REPLY BRIEF, on the 28th day of April, 2016, by personally serving the following:

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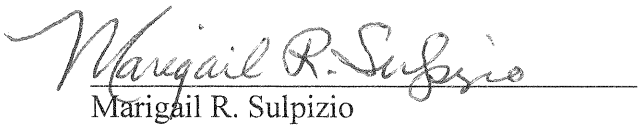
I declare under penalty of perjury under the laws of the State of Washington and the State of California that the foregoing is true and correct.

Signed at Spokane, Washington, this 28th day of April, 2016.



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