COPY RECEIVED
FEB 29 2016
DELAY, CURRAN, THOMPSON,
PONTAROLO & WALKER, P.S.

No. 94087-8

FILED
FEB 29 2016
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 33615-8-III

---

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

---

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS

Plaintiffs-Appellants,

v.

SHAMROCK PAVING, INC., a WASHINGTON CORPORATION

Defendant-Respondent.

---

# BRIEF OF RESPONDENT

---

James A. McPhee, WSBA No. 26323
Workland & Witherspoon, PLLC
601 West Main, Suite 714
Spokane, WA 99201
Telephone: (509) 455-9077
Fax: (509) 624-6441
jmcphee@workwith.com

Attorneys for Respondent

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. STATEMENT OF CASE ..... 3

III. ARGUMENT ..... 9

A. Standard of Review ..... 9

B. A MTCA Private Right of Action ..... 12

C. The Substantial Evidence Presented At Trial Including Expert Testimony And Test Results Demonstrated That There Was No Threat Or Potential Threat To Human Health Or The Environment. ..... 17

1. The reports and testimony of Douglass' own expert Jon Welge showed that there was no threat or potential threat to human health or the environment. ..... 17

2. Shamrock's expert Jeff Lambert testified that there was no threat or potential threat to human health or the environment. ..... 21

3. DOE hydro geologist Phil Leinart testified that there was no threat or potential threat to human health or the environment. ..... 22

a. The trial court was compelled, not confused, by Phil Leinart's testimony. ..... 23

4. Other testimony and evidence demonstrated that Shamrock did not release a hazardous substance that posed a threat or potential threat to human health or the environment. .....24

D. The Definition Of "Remedial Action" Is Not Disjunctive And Does Not Allow Two Avenues Of Recovery As Urged By Douglass. .....27

1. A private right of action under MTCA required Douglass to prove that there was a release of lube oil, diesel, and gasoline that was a threat or potential threat to human health or the environment. .....27

2. Douglass' argument is contrary to basic principles of statutory construction and is an attempt to re-write the statute.....30

3. Douglass' argument is contrary to CERCLA, the statute upon which MTCA is patterned. .....32

4. Douglass' argument simply re-packages an unsuccessful argument presented at trial. .....33

E. The Trial Court Properly Rejected Douglass' Proposed Findings Of Fact.....35

F. Reversal Of The Trial Court's Decision Would Not Automatically Allow Douglass To Prevail Under RCW 70.105D.080.....38

G. The Trial Court Properly Awarded Attorney Fees And Costs To Shamrock. .....39

H. This Court Should Award Attorney Fees And Costs To Shamrock On Appeal.....42

IV. CONCLUSION.....43

## TABLE OF AUTHORITIES

### Cases

*Acushnet Co. v. Mohasco Corp.*,
191 F.3d 69 (1st Cir. 1999) .....20

*Akzo Coatings, Inc. v. Aigner Corp,*
909 F.Supp. 154 (N.D.Ind. 1995) .....15

*Bird-Johnson Corp. v. Dana Corp.*,
119 Wn.2d 423, 833 P.2d 375 (1992) .....29, 32

*Brown v. Scott Paper Worldwide Co.*,
143 Wn.2d 349, 20 P.3d 921 (2001) .....31

*Car Wash Enters., Inc. v. Kampanos*,
74 Wn.App. 538, 874 P.2d 868 (1994) .....15

*Carson Harbor Village v. County of Los Angeles,*
433 F.3d 1260 (9th Cir. 2006) .....32

*Carson Harbor Village, Ltd. v. Unocal Corp.,*
270 F.3d 863 (9th Cir. 2001) .....32

*City of Moses Lake v. U.S,*
458 F.Supp.2d 1198 (E.D. Wash. 2006) .....32, 33

*City of Seattle v. Washington State Department of Transportation,*
107 Wn.App. 236, 26 P.3d 1000 (2001) .....13, 41

*City of Seattle (Seattle City Light) v. Wash. State Dep't of Transp.*,
98 Wn.App. 165, 1989 P.2d 1164 (1999) 12, 13, 15, 16, 20, 28, 29, 32, 41, 42

*Dash Point Vill. Assocs. v. Exxon Corp.*,
86 Wn.App. 596, 937 P.2d 1148 (1997) .....14, 15, 38

*Davis v. Department of Labor and Industries,*
94 Wn.2d 119, 615 P.2d 1279 (1980) .....10

*Draper Mach. Works, Inc. v. Department of Natural Resources,*
117 Wn.2d 306, 815 P.2d 770 (1991) .....30

*Envtl. Transp. Sys., Inc. v. ENSCO, Inc.,*
969 F.2d 503 (7th Cir. 1992) .....15

*Gray v. Suttell & Associates,*
181 Wn.2d 329, 334 P.3d 14 (2014) .....31

*Greene v. Greene,*
97 Wn.App. 708, 986 P.2d 144 (1999) .....9, 10

*Heasley v. Riblet Tramway Co.,*
68 Wn.2d 927, 416 P.2d 331 (1966) .....37

*Hegwine v. Longview Fibre Co., Inc.,*
132 Wn.App. 546, 132 P.3d 789 (2006) .....9, 10

*Imrie v. Kelley,*
160 Wn.App. 1, 250 P.3d 1045 (2010) .....9

*In re Estate of Jones,*
152 Wn.2d 1, 8, 93 P.3d 147 (2004) ..... 9-10

*In re Marriage of Tahat,*
182 Wn.App. 655, 334 P.3d 1131 (2014) .....31

*Okeson v. City of Seattle,*
150 Wn.2d 540, 78 P.3d 1279 (2003) .....10, 11

*Organization to Preserve Agric. Lands (OPAL) v. Adams County,*
128 Wn.2d 869, 913 P.2d 793 (1996) .....9

*PacifiCorp Environmental Remediation Co. v.*
*Washington State Dept. of Transp.,*
162 Wn.App. 627, 259 P.3d 1115 (2011) .....14, 33, 34, 35

*Pacific Sound Recourses v. Burlington Northern Santa Fe Ry. Corp.,*
130 Wn.App. 926, 125 P.3d 981 (2005) .....13

*Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*,
157 Wn.App. 628, 238 P.3d 1201 (2010) .....31

*Port of Seattle v. Pollution Control Hearings Board*,
151 Wn.2d 568, 90 P.3d 659 (2004) .....11

*Riofta v. State*,
134 Wn.App. 669, 142 P.3d 193 (2006) .....31

*Sunnyside Valley Irr. Dist. v. Dickie*,
149 Wn.2d 873, 73 P.3d 369 (2003) .....10

*Taliesen Corp. v. Razore Land Co.*,
135 Wn.App. 106, 144 P.3d 1185 (2006) .....13, 14, 15, 38, 42

*Weyerhaeuser v. Tacoma-Pierce County Health Dep't*,
123 Wn.App. 59, 96 P.3d 460 (2004) .....10

**Statutes**

42 U.S.C. § 9601 .....32

42 U.S.C. § 9607(a)(1)-(4)(B) .....32

RCW 35.92.050 .....10

RCW 70.105D.020 .....13

RCW 70.105D.020(7)(a-e) .....34

RCW 70.105D.020(13)(a-e) .....34

RCW 70.105D.020(21) .....14

RCW 70.105D.020(32) .....12

RCW 70.105D.020(33) .....12, 13, 14, 27, 28, 30, 31

RCW 70.105D.040 .....12, 13, 14, 16, 29

RCW 70.105D.040(2) .....12

RCW 70.105D.080.....1, 3, 8, 12, 13, 14, 17, 27, 28, 30, 38, 39, 40, 41, 42

**Washington Administrative Code**

WAC 173-340-730(1)(a) .....18

WAC 173-340-900 (Table 740-1) .....7, 18

**Court Rules**

RAP 18.1(a) .....3, 42

RAP 18.1(b) .....42

## I. INTRODUCTION

The Respondent, Shamrock Paving, Inc. ("Shamrock"), files this brief in response to the opening brief of Harlan Douglass and Maxine Douglass ("Douglass").

Douglass brought a claim against Shamrock for a private right of action under the Model Toxics Control Act ("MTCA") pursuant to RCW 70.105D.080 alleging that Shamrock had released lube oil, diesel, and gasoline on their vacant lot. In order to prevail, Douglass had the burden to prove: (1) that Shamrock was a potentially liable party, (2) that there was a release of a hazardous substance, (3) that the hazardous substance contributed to a threat or potential threat to human health or the environment, (4) that the remediation was a substantial equivalent to a Washington State Department of Ecology ("DOE") cleanup, and (5) that they were entitled to recovery of remedial action costs after the trial court considered numerous equitable factors.

After considering all of the testimony and evidence, the trial court properly concluded that Douglass could not prevail under MTCA because they failed to prove the threshold requirement that levels of lube oil, diesel, and gasoline posed a threat or potential threat to human health or

the environment. As such, Douglass was not entitled to recover remedial action costs.

Because the trial court heard the testimony at trial and was in the best position to evaluate the credibility of witnesses and evidence, the only real issues on appeal are whether the trial court's findings of fact were supported by substantial evidence viewed in a light most favorable to Shamrock, and whether its findings of fact support the trial court's conclusions of law. This appeal is not an opportunity for Douglass to re-try this case, have this Court weigh evidence, or have this Court determine the credibility of witnesses. In any event, the testimony from all expert witnesses demonstrated that there was no threat or potential threat to human health or the environment and, as such, that Douglass could not prevail.

In addition, Douglass' strained statutory interpretation attempting to create a new method of recovery within the definition of "remedial action" under MTCA should be rejected because it is unsupported by the plain language of the statute, contrary to Washington case law, and would lead to absurd and unintended results. Because the trial court's findings of fact were supported by substantial evidence, and because its conclusions

of law were supported by the findings of fact, this Court should affirm the trial court's decision.

Because the trial court properly concluded that Shamrock was the prevailing party under RCW 70.105D.080, it awarded Shamrock its attorney fees and costs incurred in defending the MTCA claim. Douglass does not assign any error to the amount of fees awarded to Shamrock. Instead, Douglass claims that they should have prevailed, that the attorney fee award should be reversed, and that they should be awarded attorney fees. Contrary to Douglass' assertions, the evidence presented at trial supports the trial court's findings of fact and conclusions of law that Shamrock was the prevailing party. The trial court's decision should be affirmed and Shamrock should be awarded its attorney fees and costs for this appeal pursuant to RAP 18.1(a).

## II. STATEMENT OF THE CASE

Douglass asserted three causes of action in this litigation: common law trespass, common law nuisance, and a claim for a private right of action under MTCA pursuant to RCW 70.105D.080. The trespass and nuisance claims were tried to a jury and the MTCA claim was tried to the trial judge as required RCW 70.105D.080. (CP 474; CP 728). After four days of trial the jury awarded Douglass $17,300 for 89 days loss of use of

the property on the trespass and nuisance claims, but wisely refused to award any cleanup costs requested by Douglass. (CP 373)

The Court heard testimony of 13 witnesses over the four day trial. Testimony regarding the MTCA claim came from three experts: Jon Welge (Douglass's expert); Phillip Leinart, a DOE hydro geologist with over 25 years of experience; and Jeff Lambert (Shamrock's expert), an environmental scientist and licensed professional engineer with over 30 years of experience. In addition, the trial court heard testimony from numerous lay witnesses regarding the subject property; Shamrock's use of the property; the alleged release of lube oil, diesel, and gasoline; and the levels of those substances pursuant to test results generated by Douglass' expert before soil was removed.

At trial, Douglass had the burden to establish: (1) that Shamrock was a potentially liable party, (2) that there was a release of a hazardous substance, (3) that the release of a hazardous substance contributed to a threat or potential threat to human health or the environment, (4) that the remediation conducted by Douglass was a substantial equivalent of a DOE remedial action, and (5) that equitable factors considered by the Court mandated recovery of remedial action costs.

After a four day trial and consideration of the written closing arguments submitted by both parties (CP 49-111, 350-383, and 441-473), the trial court issued the *Court's Decision* on March 3, 2015 which contained findings of fact and conclusions of law. (CP 474-480). On March 27, 2015, the trial court issued separate *Findings of Fact and Conclusions of Law*. (CP 728-735) The trial court found the following facts which are relevant to the appeal before this Court.

The subject property is located next to a Cenex gas station as well as a former drive-thru espresso stand and is used for ingress and egress by the public to and from that adjacent property. (CP 475, Finding of Fact ("FF") No. 2; CP 729, FF No. 2) Based on the mistaken but good faith belief that it had obtained permission to use the property, Shamrock parked equipment on the subject property while working on this award-winning[1] paving project for the State of Washington. (CP 94, ll. 5-25; CP 102-104, ll. 12-4; CP 475, FF No. 5; CP 729, FF No. 5). The trial court found that before June 1, 2013, Douglass had never tested the soil on the subject property for any hazardous substance. (CP 475. FF No. 4; CP 729,

[1] To commend quality in construction, which necessarily includes compliance with governmental regulations, the Washington State Department of Transportation ("WSDOT") gives out two awards each year, one for western Washington and one for eastern Washington. (VRP 160-161, ll. 16-5) The WSDOT awarded Shamrock the quality in construction award for eastern Washington for the project at issue in this case. (VRP 161, ll. 6-9).

FF No. 4). In the *Court's Decision*, the trial court also found there was no direct testimony proving that Shamrock released petroleum products on the subject property. (CP 475, FF No. 8) The court found that circumstantial evidence showed that Shamrock contributed "negligible amounts" of gasoline, lube oil, and diesel on the subject property. (CP 475, FF No. 8). In its *Findings of Fact and Conclusions of Law* entered on March 27, 2015, the trial court found that Shamrock contributed "unknown amounts" of gasoline, lube oil, and diesel on the property. (CP 729, FF No. 8). The trial court also found that because the property was used for parking, ingress, and egress by others, Shamrock may not have been the sole contributor to lube oil, diesel, or gasoline on the property. (CP 729, FF No. 5; CP 732).[2] None of these findings of fact or conclusions of law are in dispute in this appeal.

Shamrock vacated the subject property at Douglass' request and took steps to restore it to its original condition. (CP 475, FF No. 9; CP 729, FF No. 9) Douglass hired Jon Welge of Tetra Tech to assess the property for hazardous substances. Mr. Welge tested the soil at the subject property for lube oil, diesel, and gasoline on November 14, 2013 and

[2] Contrary to Douglass' contention, the trial court did not find that Shamrock exerted "total control" over the property.

again on January 24, 2014 before any soil was removed. As indicated in the trial court's findings of fact, those tests revealed the following:

**Lube Oil** (2,000 mg/kg allowed)

| | |
|---|---|
| November 14, 2013: | 2,000 mg/kg |
| January 24, 2014: | 400 mg/kg |
| | 800 mg/kg |

**Diesel** (2,000 mg/kg allowed)

| | |
|---|---|
| November 14, 2013: | less than 50 mg/kg |
| January 24, 2014: | 50 mg/kg |
| | 600 mg/kg |

**Gasoline** (100 mg/k/g allowed)

| | |
|---|---|
| November 14, 2013: | less than 25 mg/kg |
| January 24, 2014: | less than 25 mg/kg |

(CP 730 FF Nos. 12, 13; Plaintiff's Exhibit No. 16; VRP 299-301, ll. 3-17).

Based on the evidence presented at trial, the trial court concluded that MTCA required reporting if lube oil *exceeded* 2,000 mg/kg, if diesel *exceeded* 2,000 mg/kg, and if gasoline *exceeded* 100 mg/kg. (CP 730-731). All diesel and gasoline test results were well within allowable limits under MTCA. (CP 730-731; WAC 173-340-900 (Table 740-1)). Two of three lube oil test results were also well within allowable limits under MTCA. (CP 730-731). Douglass bases their entire appeal on a single lube oil test result at 2,000 mg/kg, an amount that is within the allowable

concentration under MTCA and which their expert concedes could have been an anomaly. (CP 730-731; VRP 349-350, ll. 18-7). Despite that fact that all test results were at or far below allowable levels, Douglass voluntarily removed 68 tons of soil from the subject property and sued Shamrock to recover cleanup costs which both the jury and the trial court refused to award. (CP 749 FF No. 14)

As discussed in detail below, each expert's testimony struck a dispositive blow to Douglass' MTCA claim and supported the trial court's conclusion that the pre-cleanup test results for lube oil, diesel, and gasoline did not create a threat or potential threat to human health or the environment. (CP 476, FF No. 16; CP 730, FF No. 16). As a result, the trial court correctly concluded that Douglass could not prevail on a claim for a private right of action under MTCA. (CP 478-479; CP 732-733).

Under MTCA, a plaintiff must establish all of the elements for a statutory claim to prevail under RCW 70.105D.080. (CP 734) Because Douglass did not establish that there was a threat or potential threat to human health or the environment as required by RCW 70.105D.080, the trial court properly concluded that Shamrock was the prevailing party and was entitled to attorney fees. (CP 734; CP 811). The trial court reviewed the fee request submitted by Shamrock, reviewed the objections filed by

Douglass, subtracted certain amounts, and awarded Shamrock $97,263.13 in attorney fees and costs. (CP 811-813; CP 838-852). Douglass does not contest the amount of attorney fees and costs, but rather contends that they should have been the prevailing party and received an award of attorney fees and costs. However, since substantial evidence supports the trial court's findings of fact which, in turn, supported its conclusions of law, this Court should affirm the trial court's decision and award Shamrock its attorney fees and costs on appeal.

## III. ARGUMENT

### A. Standard Of Review

Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports the finding of fact and, if so, whether the findings support the trial court's conclusions of law. *Imrie v. Kelley,* 160 Wn.App. 1, 6, 250 P.3d 1045 (2010) and *Greene v. Greene,* 97 Wn.App. 708, 714, 986 P.2d 144 (1999) citing *Organization to Preserve Agric. Lands (OPAL) v. Adams County,* 128 Wn.2d 869, 882, 913 P.2d 793 (1996). Substantial evidence exists where there is a sufficient quantity of evidence to persuade a fair-minded rational person that a finding is true. *Hegwine v. Longview Fibre Co, Inc.* 132 Wn.App 546, 555-556, 132 P.3d 789 (2006) citing *In re Estate of*

*Jones,* 152 Wn.2d 1, 8, 93 P.3d 147 (2004). See also *Sunnyside Valley Irr. Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Findings of fact that are not challenged will not be disturbed on appeal and are considered the facts of the case. *Davis v. Department of Labor and Industries,* 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). Conclusions of law are reviewed *de novo. Hegwine* at 556. On review, the appellate court will not substitute its judgment for the trial court even if the appellate court may have resolved a factual dispute differently, will not weigh the evidence, and will not judge the credibility of witnesses. *Greene* at 714, *Sunny Side Valley Irr. Dist.*, 149 Wn.2d at 879-880. Finally, on appeal the court must view all evidence in the light most favorable to the prevailing party and defer to the trial court regarding credibility of witnesses or conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't,* 123 Wn.App. 59, 65, 96 P.3d 460 (2004).

Douglass incorrectly contends that this Court has to interpret the meaning of a statute and, as such, at least a portion of the review here is *de novo.* However, the cases Douglass cites for that proposition are distinguishable from this case. The first case cited by Douglass, *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), dealt with the specific question of whether an ordinance or RCW 35.92.050 authorized a

municipality to incorporate expenses of city street lights within electrical rates charged to city utility customers. *Okeson,* 150 Wn.2d at 548. Because the case dealt with appeal of a summary judgment order, constitutional limitations, and statutory authority, the standard of review was *de novo*. *Id.* at 548-549. Here, there was no summary judgment order, this case does not implicate constitutional issues, and no issues involve statutory authority. The second case cited by Douglass, *Port of Seattle v. Pollution Control Hearings Board,* 151 Wn.2d 568, 90 P.3d 659 (2004) also does not apply. That case simply holds that the court interprets the meaning of a statute *de novo*, and may substitute the court's interpretation of the law for that of an agency. *Id.* at 593. In this case, the issue presented to the trial court was whether Douglass presented sufficient evidence to prove each element of a private right of action under MTCA. The trial court heard the evidence and testimony of multiple witnesses over a four day bench trial, agreed with a state agency (DOE) rather than substituting its own interpretation of a statute, and concluded that Douglass did not meet their burden to prevail in a private right of action under MTCA. (CP 733). As shown below, the trial court's findings of fact were supported by substantial evidence at trial, its conclusions of law were supported by the trial court's findings, and its decision should be affirmed on appeal.

## B. A MTCA Private Right Of Action

Douglass did not fully articulate the requirements of a private right of action under MTCA. As such, Shamrock provides the following summary of the necessary elements required to prevail in a private right of action under MTCA.

Pursuant to RCW 70.105D.080, a person may bring a private right of action against any person liable under RCW 70.105D.040 for the recovery of remedial action costs because of a "release" or "threatened release" of a hazardous substance RCW 70.105D.040(2). A "release" is defined as any intentional or unintentional entry of any "hazardous substance" into the environment. RCW 70.105D.020(32). To prove a private right of action under MTCA, Douglass had the burden to show that there was an actual "release" of a "hazardous substance" on the property. RCW 70.105D.080, RCW 70.105D.040(2).

The party asserting a private right of action bears the burden of establishing both a claim under the statute and its entitlement to remedial action costs. *City of Seattle (Seattle City Light) v. Wash. State Dep't of Transp.*, 98 Wn.App. 165, 175, 989 P.2d 1164 (1999). "Remedial action"[3] is defined as any action or expenditure "...to identify, eliminate, or

[3] The definition of "remedial action" at RCW 70.105D.020(33) does not supply plaintiffs with a separate cause of action in and of itself despite Douglass' urgings.

minimize any threat or potential threat posed by hazardous substances to human health or the environment..." RCW 70.105D.020(33). Under the statute, recovery of remedial action costs is limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a DOE conducted or DOE supervised remedial action. RCW 70.105D.080.

Even if a hazardous substance is released and the entity is a liable party under RCW 70.105D.040, a plaintiff seeking contribution under RCW 70.105D.080 must still demonstrate that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment. *City of Seattle*, 98 Wn.App. at 176[4]; *Taliesen Corp. v. Razore Land Co.* 135 Wn.App. 106, 118, 144 P.3d 1185 (2006); and *Pacific Sound Recourses v. Burlington Northern Santa Fe Ry. Corp.*, 130 Wn.App. 926, 936, 125 P.3d 981 (2005). If the plaintiff fails to show that the hazardous substance was a threat or potential threat to human health or the environment, it is not a remedial action cost as defined in RCW 70.105D.020 and the defendant is not responsible for any portion of the cleanup costs. *City of Seattle* at 177. ("Accordingly, we conclude that

---

[4] See also *City of Seattle v. Washington State Department of Transportation*, 107 Wn.App. 236, 240, 26 P.3d 1000 (2001). (The Plaintiff must further prove that they identified, eliminated, or minimized any threat or potential threat posed by the hazardous substances to human health or the environment within the meaning of RCW 70.105D.020. When they failed to so prove, WSDOT prevailed on their claim, and WSDOT became entitled to reasonable attorney fees under RCW 70.105D.080.)

WSDOT is not responsible for any portion of the cleanup costs associated with disposing of the PCB-contaminated asphalt at the site, because the asphalt did not pose a threat to human health or the environment. Therefore, it was not a remedial action cost under RCW 70.105D.020(21).").[5]

MTCA further requires an additional layer of analysis by the trial court in a private right of action claim. Even if a plaintiff proves that there was a release of a hazardous substance, that the release was a threat or potential threat to human health or the environment, that the defendant is a liable person or entity under RCW 70.105D.040, and that the response actions were a substantial equivalent to a DOE action, the trial court can still nonetheless refuse to award recovery of remedial action costs based on its review of equitable factors that it deems appropriate in each case. RCW 70.105D.080, *Taliesen Corp.,* 135 Wn.App. at 118-20; *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn.App. 596, 603, 937 P.2d 1148 (1997). In any given case, a court may consider several factors, a few factors, or only one determining factor depending on the totality of the circumstances presented. *PacifiCorp Environmental Remediation Co. v. Washington State Dep. of Transp.*, 162 Wn.App. 627, 665-666. 259 P.3d 1115 (2011)

[5] The identical definition of "remedial action" cited in *City of Seattle* at RCW 70.105D.020(21) is now located at RCW 70.105D.020(33).

(citing *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503 (7th Cir. 1992)); *Taliesen Corp.*, 135 Wn.App. at 139-40. As such, a trial court is free to apply any equitable factor(s) it deems appropriate. A liable party "...may be required to pay complete response costs, or may not be required to pay any response costs, or may be required to pay some intermediate amount depending on the Court's equitable assessments." *City of* Seattle, 98 Wn.App. at 175 quoting *Akzo Coatings, Inc. v. Aigner Corp,* 909 F.Supp. 154 (N.D.Ind. 1995). See also *Taliesen Corp.*, 135 Wn.App. at 139-140. Equitable factors that have been considered by courts in MTCA cases include the cause of the contamination; the defendant's relationship to the contamination; the amount of hazardous waste involved; the degree of toxicity of the hazardous waste involved; the degree of involvement of the parties in the generation, transportation, treatment, storage or disposal of the hazardous waste; and the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished. *Dash Point Vill. Assocs.*, 86 Wn.App. at 607 n. 24 (citing *Car Wash Enters., Inc. v. Kampanos*, 74 Wn.App. 538, 549, 874 P.2d 868 (1994) and *City of Seattle*, 98 Wn.App. at 175 n. 8).

The trial court concluded that Shamrock's operations may not have been the sole contributor of lube oil, diesel, or gasoline, but rather that Shamrock contributed unknown amounts of lube oil, diesel, and gasoline and was an entity liable under RCW 70.105D.040 – like the defendant WSDOT in *City of Seattle*. (CP 729, FF No. 8, CP 732-733).

However, based on the substantial evidence presented at trial, the trial court correctly found that Shamrock prevailed and became entitled to reasonable attorney fees – like the defendant WSDOT in *City of Seattle* – because Douglass had not demonstrated that the levels of lube oil, diesel, and gasoline on the property constituted a threat or potential threat to human health or the environment. As discussed more fully below, the trial court's finding of fact on this issue was supported by the testing and testimony of Douglass' own expert Mr. Welge, the testimony of Shamrock's expert Mr. Lambert, and the testimony of DOE hydro geologist Mr. Leinart. Based on its findings, the trial court ruled in favor of Shamrock and awarded it attorney fees and costs pursuant to MTCA. Since the trial court ruled in favor of Shamrock, it did not need to move to the next stage of the analysis to consider the equitable factors present in this particular case. (CP 365-377) This is important because Douglass now urges this Court to reverse the trial court's decision and simply declare

them as the prevailing party and award attorney fees. That would be procedurally incorrect. While the trial court's decision was based on substantial evidence presented at trial and should not be reversed, should this Court do so, the only relief available is to remand this matter to the trial court and afford it the opportunity to complete its analysis by considering the equitable factors presented at trial as it is charged to do under RCW 70.105D.080.

### C. The Substantial Evidence Presented At Trial Including Expert Testimony And Test Results Demonstrated That There Was No Threat Or Potential Threat To Human Health Or The Environment.

As discussed above, in order to prevail Douglas was required to prove that the lube oil, diesel, and gasoline on their property constituted a threat or potential threat to human health or the environment. As shown below, they failed to do so.

#### 1. The reports and testimony of Douglass' own expert Jon Welge showed that there was no threat or potential threat to human health or the environment.

Douglass' expert Jon Welge tested the property for diesel, gasoline, and lube oil on November 14, 2013 and again on January 24, 2014 before soil was removed. (Plaintiff's Ex. No. 16-2 and 16-3).

**Diesel and Gasoline.** Mr. Welge testified that his test samples for diesel and gasoline were not contaminated because all were well within

allowable limits and three were even at levels that he considered "non-detectable." (Plaintiff's Ex. No. 16-2 and 16-3; VRP 314, l. 6-23). Each gasoline test result was "non-detectable" and his test results for diesel were 97.5%, 95%, and 70% *cleaner* than the highest allowable level in the state of Washington. (VRP 326, ll. 2-9; 327, ll. 10-14) Mr. Welge testified that the DOE would not require clean up of the vacant lot based on these results. (VRP 329-330, ll. 24-5; VRP 331, ll. 12-17).

**Lube Oil.** Mr. Welge conducted three separate tests for lube oil. (Plaintiff's Ex. No. 16-2 and 16-3). Two test results showed levels well within allowable limits and Mr. Welge acknowledged they were 80% and 60% cleaner than the highest allowable level in the state of Washington. (VRP 327, ll. 10-14). The third test result showed lube oil at an allowable 2,000 mg/kg, a level which is described by the Washington Administrative Code as "the reasonable maximum exposure expected to occur under both current and future site use conditions."[6] WAC 173-340-730(1)(a); WAC 173-340-900 (Table 740-1); (Plaintiff's Exhibit No. 16-2 and 16-3). After stating that he sometimes likes to perform more testing to prove that one result wasn't an anomaly, Mr. Welge monumentally conceded that the

[6] Douglass conceded this point in their opening brief by admitting, "[O]ne is required to reduce the concentration to at least 2,000 mg/kg." (Appellants' Opening Brief, p. 20)

single test result of 2,000 mg/kg of lube oil could actually have been an anomaly. (VRP 349-350, ll. 18-7).

It is this third lube oil test result on which Douglass bases their entire appeal, despite the fact that their own expert confirmed that they weren't required to report it or clean it up.

Regarding reporting requirements, Douglass represented to this Court in their opening brief that Mr. Welge "testified that lube oil in soil testing at 2,000 mg/kg is required to be reported to the DOE within 90 days." (Appellants' Opening Brief, p. 22). However, Douglass failed to disclose that when immediately pressed on whether reporting at 2,000 mg/kg of lube oil is actually required, Mr. Welge corrected his answer to "Maybe" just five questions later. (VRP 317-318, ll. 23-1). Even more compelling than his testimony were his actions toward his clients: Mr. Welge *never* advised Douglass that they were required to report the test results of 2,000 mg/kg of lube oil to the DOE. (VRP 372, ll. 9-17).

Regarding cleanup requirements, when asked whether the DOE would require soil at 2,000 mg/kg of lube oil be cleaned up, Mr. Welge admitted, "I don't know." (VRP 318, ll. 6-17). He did, however, acknowledge that *all* his lube oil test results complied with Washington State clean up levels, acknowledged that he consistently offered Douglass

the option of doing nothing with the soil, and confirmed that Douglass could have chosen that option and done nothing to the soil on their vacant lot. (VRP 319, ll. 13-17; 329, ll. 10-12).

As to the amount of hazardous substance involved, liability will not be imposed where a release was de minimis. *City of Seattle*, 98 Wn.App. at 177-78 (citing with approval *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 79 (1st Cir. 1999)). Similarly, if it is demonstrated that the hazardous substance deposited at a site constitutes no more than background amounts of such substances in the environment and cannot concentrate with other waste to produce higher amounts, remedial action costs will not be awarded. *Id.* at 178.

Given that Douglass' own expert conceded that <u>all</u> test result levels complied with Washington state cleanup levels, never advised Douglass that they were required to report <u>any</u> test results to the DOE, and repeatedly offered the option of "doing nothing" with their property after testing, it is clear that there was no threat or potential threat to human health or the environment.

### 2. Shamrock's expert Jeff Lambert testified that there was no threat or potential threat to human health or the environment.

Shamrock's expert witness Jeff Lambert is an environmental scientist and licensed professional engineer who started his environmental consulting company in 1988. (VRP 636-637, ll. 25-17). He has more than 30 years experience in environmental science and engineering, provides advice primarily to commercial property owners on what their environmental liabilities might be, and if identified, helps them correct those situations. (VRP 637-638, ll. 22-8). He has written approximately 2,000 environmental site assessments, or ESAs, most of which dealt with properties located in Spokane County, Washington. (VRP 638, ll. 9-24)).

Mr. Lambert did not consider the diesel or lube oil in any of Mr. Welge's tests to be a threat or potential threat to human health or the environment, while Douglass' expert remained silent on that subject. (VRP 647, ll. 20-23; 648, ll. 13-16; 649, ll. 2-5). He further testified that, as a practical matter for a landowner, there was no obligation to report the diesel or lube oil levels in this case to the DOE, and there was no requirement to perform any remedial action. (VRP 647, ll. 15-19; 648-649, ll. 23-1; 673, ll. 12-14 – juror question). Given the test results, Mr. Lambert would support a landowner's decision to take no further action.

(VRP 650-651, ll. 16-3). Mr. Lambert similarly responded to a question from the jury as follows:

> Juror Question: Even though 2,000 parts per million of lube oil is not required to be reported to the DOE, would you consider it standard or common practice to do a cleanup of a site with that reading?
>
> Lambert: No.

(VRP 672-673, ll. 25-6).

**3. DOE hydro geologist Phil Leinart testified that there was no threat or potential threat to human health or the environment.**

For over 25 years Phil Leinart has been a hydro geologist in the toxic cleanup program at the DOE who conducts conditional investigations under MTCA. (VRP 595, ll. 3-7). His job involves dealing with contamination caused by lube oil and diesel. (VRP 595, ll. 13-17). Upon a report of a release of a potentially hazardous substance, he makes a determination as to whether it is a MTCA release or not. (VRP 595, ll. 18-25; 597, ll. 18-20). If it is, he then makes another determination whether it's a threat to human health and the environment or not. (VRP 597, ll. 20-21). Based on Mr. Welge's final report which included all test results from November 14, 2013 and January 24, 2014, as well as his conversation with Douglass' attorney and Douglass' expert, Mr. Leinart formed his judgment and opinion that the conditions and circumstances at

the site did not constitute a MTCA release of a hazardous substance. (VRP 630, ll. 9-19). Mr. Leinart notified Douglass' attorney by email of the DOE's determination that it wasn't a release that was regulated under MTCA. (VRP 601, ll. 11-15). It naturally follows that if the DOE itself concludes that *there isn't even a MTCA release of a hazardous substance*, there logically cannot be a MTCA release of a hazardous substance that is a threat or potential threat to human health or the environment. Consistent with that logic, Mr. Leinart further testified that it was also his judgment and opinion that the conditions and circumstances of the site did not constitute a MTCA release of a hazardous substance that was a threat to human health and the environment. (VRP 630, ll. 20-25).

a. The trial court was compelled, not confused, by Phil Leinart's testimony.

Douglass asks this Court to disregard the crux of Mr. Leinart's testimony as well as that of the other two experts and instead focus on the tense of a single word ("do" or "did"). Douglass selectively cites to the record to support their subjective conclusion that Mr. Leinart must have been testifying exclusively about post-cleanup soil and that, as such, the trial court was simply confused. Douglass already presented this argument to the trial court to no avail. After the trial court listened to the actual and complete testimony of Mr. Leinart, Mr. Welge, Mr. Lambert, and multiple

lay witnesses, it weighed all of the evidence and properly made its *Findings of Fact and Conclusions of Law* based thereon.

Shamrock requests that this Court refuse Douglass's invitation to re-try the case and weigh trial testimony, determine the credibility of witnesses, and act as the trier of fact. There was substantial evidence presented to the trial court that the condition of the subject property prior to removal of soil did not constitute a threat or potential threat to human health or the environment.

**4. Other testimony and evidence demonstrated that Shamrock did not release a hazardous substance that posed a threat or potential threat to human health or the environment.**

Douglass' own expert Jon Welge testified that he could not confirm any connection between Shamrock's equipment and the releases that appeared to be on the vacant lot. (VRP 311, ll. 5-7). He also testified that he could not confirm any connection between Shamrock and the levels of diesel, lube oil, or gasoline in his test results. (VRP 312, ll. 10-22). Regarding project materials, in Mr. Lambert's professional experience neither cold mix nor asphalt grindings are a hazardous waste that requires any special handing; Douglass' expert offered no testimony or evidence to rebut this fact. (VRP 656, ll. 10-20). In fact, he offered no

testimony at all on whether he considered these to be hazardous substances.

Because this was a WSDOT project, before work began Shamrock was required to submit a list of all materials it intended to utilize on the project. (VRP 144-145, ll. 25-13). The WSDOT would then either approve or disapprove of each listed material. (VRP 145, ll. 14-19). The list of material Shamrock submitted to the WSDOT before work began on the project contained cold mix, asphalt grindings, and paper joints. (VRP 145, ll. 9-13). Shamrock also disclosed that it was going to place cold mix and asphalt grindings on staging areas. (VRP 146, ll. 3-13). The WSDOT approved of all materials and their intended uses before work began on the project. (VRP 145-146, ll. 24-2; 146, ll. 17-19).

After work began, the WSDOT had between two and seven representatives on the project each and every day. (VRP 158, ll. 10-19). These WSDOT representatives viewed Shamrock's staging areas including Douglass' vacant lot. (VRP 159-160, ll. 20-11). Shamrock never received a single complaint about the condition of, or materials on, any of its staging areas on the project including Douglass' vacant lot. (VRP 160, ll. 12-15) The WSDOT representatives inspected the project as well as the condition of the vehicles and equipment working on the

project. (VRP 158-159, ll. 20-6). If a vehicle or a piece of equipment was leaking fuel or oil, the WSDOT would have required that it be removed from the project. (VRP 159, ll. 7-10). Shamrock never received a single complaint from the WSDOT about the condition of any of its vehicles or equipment on this project and none was ever removed from the project because of any leaks. (VRP 159, ll. 11-19).

To commend quality in construction which necessarily includes compliance with governmental regulations, the WSDOT gives out two awards each year for quality in construction projects, one for western Washington and one for eastern Washington. (VRP 160-161, ll. 16-5). The WSDOT awarded Shamrock the quality in construction award for eastern Washington for the project at issue in this case. (VRP 161, ll. 6-9).

There was substantial evidence presented at trial that the condition of the subject property prior to removal of soil did not constitute a threat or potential threat to human health or the environment. Viewed in the light most favorable to Shamrock, substantial evidence supports the trial court's findings of fact which supported its conclusions of law. As a result, the trial court properly ruled that Douglass could not prevail under their private right of action under MTCA.

## D. The Definition Of "Remedial Action" Is Not Disjunctive And Does Not Allow Two Avenues Of Recovery As Urged By Douglass.

In arguments presented as "Legal Issue Number 1" and "Legal Issue Number 3,"[7] Douglass contends that the definition of "remedial action" has "two prongs" and is disjunctive and that, as a result, they can prevail under RCW 70.105.080 in two ways: (1) by taking an action to identify, eliminate or minimize substances that are proven to pose a threat or potential threat to human health or the environment, or (2) by simply investigating any potential release even if it doesn't pose a threat or potential threat to human health or the environment. Douglass bases their argument on a tortured reading of the definition of "remedial action" and is incorrect for four reasons.

### 1. A private right of action under MTCA required Douglass to prove that there was a release of lube oil, diesel, and gasoline that was a threat or potential threat to human health or the environment.

Other than their own subjective interpretation of RCW 70.105D.020(33), Douglass provides absolutely no authority to support their argument. Washington law is clear that in order to prove a claim for a private right of action under RCW 70.015D.080, the plaintiff must

[7] Appellant's Opening Brief, pp. 17-18, pp. 26-27, and pp. 33-34.

establish its entitlement to costs for a "remedial action" which is defined under MTCA as follows:

> "Remedy" or "remedial action" means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment **including** any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health. RCW 70.105D.020(33)) (emphasis added).

*See also City of Seattle*, 98 Wn.App at 175.

Consistent with a plain reading of that statute, the Court in *City of Seattle* held that although defendant WSDOT was liable under MTCA, the plaintiff was still required to demonstrate that the hazardous substance contributed to a threat or potential threat to human health or the environment in order to recover remedial action costs pursuant to RCW 70.105D.080. *Id.* at 176. The court in *City of Seattle* reasoned as follows:

> WSDOT concedes that the asphalt in the tank had to be cleaned up after it was contaminated with PCBs. But WSDOT argues that it should not be responsible for the cost of cleaning up PCBs because the asphalt that it contributed to the site did not pose a threat to human health or the environment. <u>We agree and hold that before a court may equitably allocate remedial action costs in a contribution action, the party seeking contribution under RCW 70.105D.080 must demonstrate that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment</u>. RCW 70.105D.040, .020. In this case, WSDOT's hardened

> asphalt did not contribute to a threat or potential threat to human health or the environment."

*City of Seattle*, 98 Wn.App. at 176. (emphasis added)

If a plaintiff fails to show that the hazardous substance was a threat or potential threat to human health or the environment, it is not a remedial action cost as defined in RCW 70.105D.040 and the defendant is not responsible for any portion of the cleanup costs. (*Id.* at 177). There is no authority in any statute or case law for the proposition that Douglass can prevail in a private right of action under a "second prong" by conducting an investigation or cleanup without more than a hunch, speculation, or subjective belief that there *might* be a threat or potential threat to human health or the environment – especially when that hunch later proves to be unfounded.

Douglass' subjective interpretation ignores that the trial court is required by MTCA and Washington case law to find that there was a threat or potential threat to human health or the environment, find that there was a substantial equivalent to a DOE cleanup, and analyze the equitable factors in the case. Although MTCA is to be liberally construed to effectuate its policies and purpose, the court "...will not countenance strained or unrealistic interpretation of the initiative's language." *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992)

citing *Draper Mach. Works, Inc. v. Department of Natural Resources,* 117 Wn.2d 306, 315, 815 P.2d 770 (1991). Douglass' argument is contrary to the requirements of RCW 70.105D.080 and the definition of "remedial action" in RCW 70.105D020(33), unsupported by the cases interpreting MTCA, champions a strained and unrealistic interpretation of the statute which would render it meaningless, and would yield an absurd result.

Douglass was required to prove a threat or potential threat to human health or the environment as required by the plain language of the statute and supporting case law. They failed to do so and, accordingly, Shamrock prevailed.

**2. Douglass' argument is contrary to basic principles of statutory construction and is an attempt to re-write the statute.**

Douglass urges this Court to read the definition of "remedial action" in the disjunctive to allow recovery for an investigation of an ultimately unsubstantiated threat or potential threat to human health or the environment. To support this inaccurate reading, however, he removes the operative word "including" from the statute and ignores basic principles of statutory construction. (Appellants' Opening Brief, pg. 36). The court must give effect to all language in the statute, consider provisions in relation to each other, and harmonize them to ensure proper statutory

construction. *Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*, 157 Wn.App. 628, 642, 238 P.3d 1201 (2010). The court must avoid construing a statute in a manner that results in unlikely, absurd, or strained consequences. *Id.* Under the principal of noscitur a sociis, another basic tenet of statutory construction, the meaning of a word is evaluated by its company. *In re Marriage of Tahat,* 182 Wn.App. 655, 671, 334 P.3d 1131 (2014). In statutory construction, the term "includes" is a term of enlargement and not a disjunctive term. *Pacific Topsoils, Inc.* at 642. See also *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 358-359, 20 P.3d 921 (2001). By use of the word "including" in middle of the definition of "remediation action" at RCW 70.105D.020(33), the Legislature intended only to enlarge the preceding phrase in the statute which requires proof of a "threat or potential threat posed by hazardous substances to human health or the environment."

If the legislature had intended the statute to be read in the disjunctive, it would have utilized the word "or" which is used to separate phrases unless there a clear legislative intent to the contrary. *Riofta v. State*, 134 Wn.App. 669, 682, 142 P.3d 193 (2006). See also *Gray v. Suttell & Associates*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014).

Douglass' attempt to re-write the statute should be rejected along with their statutorily unsupported position.

### 3. Douglass' argument is contrary to CERCLA, the statute upon which MTCA is patterned.

Douglass' argument is also inconsistent with the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the federal statute on which MTCA was patterned. 42 U.S.C. § 9601, *et seq*. Because MTCA was patterned on CERCLA, federal case law interpreting similar language under CERCLA is persuasive authority for cases interpreting MTCA. *City of Seattle,* 98 Wn.App. at 169-170; *Bird-Johnson Corp.,* 119 Wn.2d at 427. Like MTCA, the purpose of CERCLA is to allow private parties in a civil action to recover necessary costs of cleanup from those actually responsible for their creation. *Carson Harbor Village, Ltd. v. Unocal Corp.,* 270 F.3d 863, 870 (9th Cir. 2001). In determining whether response costs are "necessary," the focus under CERCLA is whether there is a threat to human health or the environment and whether the response action is addressed to that threat. *City of Moses Lake v. U.S.,* 458 F.Supp.2d 1198, 1218 (E.D. Wash. 2006) citing 42 U.S.C. § 9607(a)(1)-(4)(B) and *Carson Harbor Village v. County of Los Angeles,* 433 F.3d 1260, 1265 (9th Cir. 2006). In *City of Moses Lake*, the court noted that MTCA is consistent with CERCLA because it allows

recovery of costs for a "remedial action" to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment. *City of Moses Lake* at 1218. Neither MTCA nor the federal statute on which it was patterned support Douglass' claim.

**4. Douglass' argument simply re-packages an unsuccessful argument presented at trial.**

Finally, Douglass' argument essentially re-packages an unsuccessful argument raised and rejected at trial. Douglass attempted to argue to the trial court that the case *PacifiCorp Environmental v. Washington State Department of Transportation,* 162 Wn.App. 627, 259 P.3d 1115 (2011) stands for the proposition that one asserting a private right of action does not have to show that there was a threat or potential threat to human health or the environment. (CP 73-74). Douglass argued that if there was a release of <u>any</u> petroleum on their property, it was not necessary for the trial court to find that the release actually contributed to a threat or potential threat to human health or the environment; in short, any release of any hazardous substance at any level would suffice. (CP 73-74). Douglass now presents this same argument under the guise of a subjective and unsupported interpretation of MTCA's definition of "remedial action." If Douglass attempts to revive this argument by citing

*PacifiCorp* in their reply brief, this Court should disregard it for the same reasons the trial court rejected it.

In *PacifiCorp,* the defendant was accused of releasing high molecular weight polycyclic aromatic hydrocarbons (HPAH's) into a waterway. *PacifiCorp*, 162 Wn.App. at 636 n. 12. The defendant maintained that the plaintiff had to prove that the release of HPAHs into the water created or significantly contributed to a threat to human health or the environment. *Id.* at 668. In *PacifiCorp*, the Court reviewed the definition of a "hazardous substance" as defined in former RCW 70.105D.020(7)(a-e) (2007), which is the same as the definition contained in the current version of the statute under RCW 70.105D.020(13)(a-e)). "Hazardous substance" is defined as five possible categories:

> (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.** (emphasis added)

In *PacifiCorp,* the trial court held that the plaintiff did not need to establish that the release of HPAHs was a threat or potential threat to human health or the environment because the DOE had determined by rule that it automatically presented a threat or potential threat to human health or the environment under section (e) of the statute. *Id.* at 668-669.

In this case, Douglass alleged that Shamrock released petroleum products on their property. However, because the DOE has not determined by rule that petroleum products such as lube oil, diesel, or gasoline automatically constitute an actual threat to human health or the environment, Douglass was required to prove it at trial. Neither MTCA nor *PacifiCorp* allow Douglass to prevail unless they prove that a release posed a threat or potential threat to human health or the environment. They failed to do so and, as a result, were not entitled to relief under MTCA

## E. The Trial Court Properly Rejected Douglass' Proposed Findings Of Fact.

Douglass contends that the trial court erred by not adopting their proposed Finding of Fact No. 16 (CP 625), Finding of Fact No. 22 (CP

628), and Finding of Fact No. 25 (CP 629). Based on the analysis above, the trial court properly made its findings of fact, properly rejected Douglass' proposed findings of fact, and issued accurate conclusions of law.

Douglass objected to the trial court's Finding of Fact No. 16 which correctly states that, based on pre-cleanup testing levels, the lube oil, diesel, or gasoline did not create a threat or potential threat to human health or the environment. Douglass proposed, and the trial court properly rejected, an alternate Finding of Fact No. 16 that there was insufficient evidence that the pre-cleanup condition of the property did not constitute a potential threat to human health or the environment. (CP 629). As discussed above, Douglass' proposed Finding of Fact No. 22 improperly attempted to re-write the statute to argue that their effort constituted an action or expenditure to identify, eliminate, or minimize a potential threat to human health or the environment. (CP 628). Douglass' proposed Finding of Fact No. 25 asked the trial court to find that Mr. Leinart and DOE did not determine that MTCA did not require cleanup for oil at 2,000 mg/kg despite his clear testimony to the contrary. (CP 629). All three proposed Findings of Fact were properly rejected by the trial court.

When the appellate court reviews assignment of errors pertaining to findings of fact, it will not substitute its own findings – or an appellant's proposed findings – if the findings made by the trial court are supported by substantial evidence in the record. *Heasley v. Riblet Tramway Co.,* 68 Wn.2d 927, 933, 416 P.2d 331 (1966). This is true even if the appellate court might have resolved the factual dispute in another way or made different findings of fact. *Id.*

As previously discussed, there was substantial evidence and expert testimony presented at trial by Mr. Welge, Mr. Lambert, and Mr. Leinart to support the trial court's findings of fact and conclusions of law that the levels of hazardous substances found on the property did not exceed the allowable levels under Washington law, that there was no threat or potential threat to human health or the environment, and that Douglass could not prevail on a claim for private right of action under MTCA. Douglass' proposed findings of fact were properly rejected because they were not supported by substantial evidence presented at trial. Viewed in the light most favorable to Shamrock, substantial evidence supports the trial court's findings of fact which supported its conclusions of law.

### F. Reversal Of The Trial Court's Decision Would Not Automatically Allow Douglass To Prevail Under RCW 70.105D.080.

Douglass maintains that if this Court reverses the trial court's decision, they are automatically the "prevailing party" and entitled to attorney fees and costs under RCW 70.105D.080. Although there is no basis to reverse the trial court's ruling, Douglass' argument is nonetheless incorrect.

Even if one assumes for the sake of argument alone that lube oil, diesel, and gasoline were released by Shamrock in amounts that posed a threat or potential threat to human health or the environment, that isn't the end of the trial court's inquiry under MTCA. As noted above, in addition to the other requirements for a private right of action under MTCA, the trial court must also consider all equitable factors it deems appropriate in order to determine whether a plaintiff may recover remedial action costs. RCW 70.105D.080, *Taliesen Corp.*, 135 Wn.App. at 118-20; *Dash Point Vill. Assocs.*, 86 Wn.App. at 603. The trial court is free to consider equitable factors considered in other MTCA cases or any factors it deems appropriate based on the facts presented at trial.

The trial court correctly concluded that Douglass did not meet the threshold requirement to prove that Shamrock released lube oil, diesel, or

gasoline that posed a threat or potential threat to human health or the environment. As such, the trial court did not need to evaluate whether the litany of equitable factors under RCW 70.105D.080 that were briefed in written closing arguments would preclude recovery of remedial action costs. Should this Court reverse the trial court's decision – which it should not – the only relief would be to remand the case to the trial court for it to consider the numerous equitable factors presented at trial. (CP 365-377).

### G. The Trial Court Properly Awarded Attorney Fees And Costs To Shamrock.

As the prevailing party under MTCA, Shamrock requested attorney fees and costs pursuant to RCW 70.105D.080. The trial court reviewed the fee request submitted by Shamrock, reviewed the objections filed by Douglass, subtracted certain amounts, and awarded Shamrock $97,263.13 in attorney fees and costs. (CP 811-813; CP 838-852).

Douglass does not assert that the trial court miscalculated the amount of attorney fees and costs it awarded or that it was unreasonable. Douglass only argues that they are entitled to attorney fees based on four arguments, all of which are incorrect.

First, Douglass argues they should have been awarded attorney fees because Shamrock was a "trespasser." However, attorney fees cannot be recovered in a common law trespass claim. Douglass did not seek

attorney fees for his trespass claim, did not receive an award of attorney fees at trial, and did not appeal the jury's decision.

Second, Douglass argues they should have been awarded attorney fees because Shamrock was purportedly the "proximate cause" of the release of a hazardous substance. However, proximate cause does not solely form the basis for an award of attorney fees under RCW 70.105D.080 and Douglass provides no authority to the contrary. Furthermore, the trial court did not find that Shamrock was the "proximate cause" of a release of hazardous substance. In fact, the trial court actually found that: (1) the property was used for ingress and egress for an espresso stand and a gas station; (2) the property was used for parking by others; (3) there was never any testing done on the property before Shamrock used the property; (4) Shamrock contributed "unknown" amounts of gasoline, lube oil, and diesel on the subject property; and (5) there was only circumstantial evidence that Shamrock contributed negligible amounts of gasoline, lube oil, and diesel on the subject property. (CP 475, 478). It is also significant that Douglass sought damages for all its cleanup costs under their trespass and nuisance claims. The jury refused to award any cleanup costs, which means that the jury did not believe that Shamrock proximately caused the release of any hazardous substance in

the soil requiring remediation. In any event, proximate cause under Douglass' MTCA claim is immaterial because they failed to meet the threshold requirement to show a threat or potential threat to human health or the environment.

Third, Douglass argues that he was an innocent landowner, that Shamrock was "recalcitrant" because it was a trespasser, and that they should have been awarded attorney fees because a MTCA claim is based in equity. Again, Douglass ignores the elements required to prevail in a MTCA claim. A party asserting a private right of action bears the burden of proving its entitlement to contribution. *City of Seattle*, 98 Wn.App. at 175. Before a trial court even gets to the issue of whether plaintiff may equitably allocate remedial action costs in a contribution action, the party seeking contribution under RCW 70.105D.080 must demonstrate that the defendant's hazardous substance posed to a threat or potential threat to human health or the environment. *City of* Seattle, 98 Wn.App. at 176; *City of Seattle v. Washington State Department of Transportation*, 107 Wn.App. 236, 240, 26 P.3d 1000 (2001).[8] It is only after these

---

[8]This case was an appeal of *City of Seattle (Seattle City Light) v. Washington State Department of Transportation*, 98 Wn.App. 165 (1999) after remand and entry of summary judgment in favor of the WSDOT.

requirements are met that the trial court determines whether recovery of remedial action costs is warranted based on a review of all equitable factors that it deems appropriate. RCW 70.105D.080, *Taliesen Corp.*, 135 Wn.App. at 118-120. As discussed above, the trial court did not reach these equitable considerations and Douglass is not entitled to his attorney fees from trial or on appeal based on their version of the equities in this case. The trial court correctly determined that Douglass was not the prevailing party and, as a result, never analyzed equitable issues which do not now support a claim for attorney fees.

## H. This Court Should Award Attorney Fees And Costs To Shamrock On Appeal.

The trial court properly awarded attorney fees to Shamrock because Douglass did not meet the threshold requirement showing a threat or potential threat to human health or the environment. *City of Seattle,* 107 Wn.App. at 239. If the trial court's decision is affirmed on appeal, Shamrock is also entitled to its attorney fees and costs reasonably incurred on appeal. *Id.* at 240; RAP 18.1(a) and (b).

## IV. CONCLUSION

Based on the foregoing, Shamrock respectfully requests that this Court affirm the trial court's decision and award Shamrock its attorney fees and costs on appeal.

Respectfully submitted on the 29th day of February, 2016.

WORKLAND & WITHERSPOON, PLLC

By:_____
James A. McPhee, WSBA No. 26323
Attorneys for Respondent

## CERTIFICATE OF SERVICE

I, James A. McPhee hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 29th day of February, 2016.

| | |
|---|---|
| ☐ U.S. MAIL<br>☒ HAND DELIVERED<br>☐ OVERNIGHT MAIL<br>☐ TELECOPY (FAX)<br>☒ EMAIL | Joseph P. Delay<br>601 W. Main, Suite 1212<br>Spokane, WA 99201<br>marigail@dctpw.com |
| ☐ U.S. MAIL<br>☐ HAND DELIVERED<br>☒ OVERNIGHT MAIL<br>☐ TELECOPY (FAX)<br>☒ EMAIL | Steven J. Hassing<br>425 Calabria Court<br>Roseville, CA 95747<br>sjh@hassinglaw.com |

James A. McPhee